Representing Brokers When Deals Go Bad

Presented by
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REPRESENTING BROKERS WHEN DEALS GO BAD

By SJ Davidson Swanson, Swanson Law Firm, PLLC, Houston, Texas; presented at the South Texas College of Law 28th Annual Real Estate Conference, June 6, 2013.

I. INTRODUCTION & SCOPE OF ARTICLE

This paper reviews the professional liability of real estate brokers and licensed salespersons (agents) under statutory regulations and the common law. Various causes of action that may be brought by or against licensees and other issues that may arise in litigation involving licensees are discussed.

A. Overview of Real Estate Profession Regulation

Real estate brokers and agents are state-licensed individuals, and are subject to an extensive series of statutory regulations and controls. *Perl v. Patrazi*, 20 S.W.3d 76, 79 (Tex. App.—Texarkana 2000, pet. denied).

The Texas Real Estate Commission's ("TREC") powers and duties include the administration of the Texas Real Estate License Act, adopting rules and establishing standards of conduct and ethics for real estate licensees, and maintaining a registry of certificate/license holders. The Texas Real Estate License Act ("TRELA" or "RELA", Tex. Occ. Code §1101.001, et seq.) and the Rules (the Rules of the Texas Real Estate Commission, found at Title 22 of the Texas Administrative Code §§531.1 – 535.191) require that a person or company be licensed in order to engage in the business of real estate brokerage.

TRELA and the Rules set out in detail the parameters within which real estate licensees are to conduct their business. Tex. Occ. Code § 1101.001, et seq.; 22 Tex. Admin. Code §§ 531.1 – 535.191.

Under TRELA, "Broker" (A) means a person who, in exchange for a commission or other valuable consideration or with the expectation of receiving commission or other valuable consideration, performs for another person one of the following acts:

(i) sells, exchanges, purchases or leases real estate;
(ii) offers to sell, exchange, purchase or lease real estate;
(iii) negotiates or attempts to negotiate the listing, sale, exchange, purchase, or lease of real estate;
(iv) lists or offers, attempts, or agrees to list real estate for sale, lease, or exchange;
(v) auctions or offers, attempts or agrees to auction real estate;
(vi) deals in options on real estate, including buying, selling, or offering to buy or sell options on real estate;
(vii) aids or offers or attempts to aid in locating or obtaining real estate for purchase or lease;
(viii) procures or assists in procuring a prospect to effect the sale, exchange, or lease of real estate;
(ix) procures or assists in procuring property to effect the sale, exchange, or lease of real estate;
(x) controls the acceptance or deposit or rent from a resident of a single-family residential real property unit; or
(xi) provides a written analysis, opinion, or conclusion relating to the estimated price of real property if the analysis, opinion, or conclusion:
  a. is not referred to as an appraisal;
  b. is provided in the ordinary course of the person's business; and
  c. is related to the actual or potential management, acquisition, disposition, or encumbrance of an interest in real property; and

(B) includes a person who:

(i) is employed by or for an owner of real estate to sell any portion of the real estate; or

(ii) engages in the business of charging an advance fee or contracting to collect a fee under a contract that requires the person primarily to promote the sale of real estate by:

  a. listing the real estate in a publication primarily used for listing real estate; or

b. referring information about the real estate to brokers.

Tex. Occ. Code § 1101.002 (1).

"Salesperson" means a person who is associated with a licensed broker for the purpose of performing an act described [above in the definition of Broker]. Tex. Occ. Code § 1101.002 (7). A person acts as a broker or salesperson if the person, with the expectation of receiving valuable consideration, directly or indirectly performs or offers, attempts, or agrees to perform for another person any act described [above in the definition of Broker]. Tex. Occ. Code § 1101.004. However, an attorney licensed in Texas, an attorney-in-fact acting under a power of attorney, a public official engaging in official duties, a licensed auctioneer, a person conducting a real estate transaction under court order or authority of a will or written trust instrument, and certain other owner's representatives are not subject to TRELA and can engage in certain brokerage acts without a license. Tex. Occ. Code § 1101.005.

1. The Real Estate License Act

The Texas Real Estate License Act is now codified in Tex. Occ. Code §1101.001, et seq. (previously Vernon's Texas Civil Statutes Article 6573a; *see* Act of May 22, 2001, 77th Leg., R.S., ch. 1421, § 13, 2001 Tex. Gen. Laws 4570, 5020). TRELA has been revised and amended often, with the most recent amendments effective September 1, 2012. The Real Estate License Act is available on TREC's website at http://www.trec.texas.gov/formslawscontracts/default.asp.

Several Texas courts of appeal have repeatedly held that the courts should not impose further duties on real estate licensees than TRELA has, and have recognized that imposing such duties is the province of the Legislature. *See Kubinsky v. Van Zant Realtors*, 811 S.W.2d 711, 715 (Tex. App.—Fort Worth 1991, writ denied); *Sherman v. Elkowitz*, 130 S.W.3d 316, 324 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *White v. Rick Canup Realtors, Inc.*, No. 07-99-0381-CV, 2000 WL 621263, *3+ (Tex. App.—Amarillo May 15, 2000, no pet.) (not designated for publication); *Wyrick v. Tillman & Tillman Realty, Inc.*, 03-00-00061-CV, 2001 WL 123877, *4 (Tex. App.—Austin Feb. 15, 2001, no pet.) (not designated for publication).

2. The TREC Rules

Rules set out by an administrative agency (such as TREC) at the direction of the Legislature, have the same force and effect as legislation, and are therefore construed like statutes. *Lewis v. Jacksonville Bldg. and Loan Ass'n*, 540 S.W.2d 307, 310 (Tex. 1976); *see also Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999).

TREC's general powers and duties include administration of the Real Estate License Act, to adopt and enforce rules necessary to administer TRELA and establish standards of conduct and ethics for licensees, collect fees, approve contract forms, restrict advertising and competitive bidding, etc. Tex. Occ. Code. §§1101.151(b), 1101.152 – 1101.156, et seq. TREC's Rules are found at Title 22 of the Texas Administrative Code, 22 Tex. Admin. Code §§531.1 – 535.191) and are on TREC's website, http://www.trec.texas.gov/formslawscontracts/default.asp.

II. TYPICAL CONTRACTS WITH BROKERS

As public records, the contract forms adopted by TREC are available to any person, however; TREC does not currently promulgate listing or buyer representation agreements, property management contracts, forms for commercial property, or residential leases. The form contracts TREC does provide are available on TREC's website at http://www.trec.state.tx.us/formslawscontracts/forms/forms-contracts.asp.

A. Listing Agreements

Listing contracts cover the agreement between a real estate broker (and usually the salesperson who procured the listing) and a property owner to list and market a particular piece of property for sale or lease.

There are any number of "form" listing agreements in use, including the Texas Association of Realtors® exclusive right to sell/lease listing agreements, TAR form Nos. TAR-1101 (residential sale), TAR-1102 (residential lease), TAR-1201 (farm and ranch sale), TAR-1301 (commercial sale), TAR-1302 (commercial lease), and TAR-1303 (commercial sublease). TAR contracts are proprietary and only officially available to TAR members.

Regardless of whether a form contract is used or not, the agreement should include the major terms of what property is being listed (preferably including a legal description), the length of time of the listing, the price the property will be listed for sale or lease. The listing agreement should include the compensation the broker will receive, and may include the amount of that commission to be split with a selling broker or buyer's agent who brings a property buyer to the table.

See the further discussion below concerning commission agreements.

B. Buyer/Tenant Representation Agreements

As with the listing agreement, a buyer/tenant representation agreement binds a real estate broker to represent the interests of a potential real estate buyer or tenant. The agreements should spell out the major terms including length of representation, geographic area, and broker compensation.

C. Intermediary Status

Sometimes a situation arises where a broker who has listed a certain property also represents a buyer or tenant who is interested in purchasing or leasing the property. The broker may represent both parties to the transaction when authorized by them to act as "intermediary". Note: the *broker* may act as an intermediary – but not a salesperson/agent. Usually, the broker will appoint another license holder associated with the broker to work with the other party if one of the broker's other agents is working with one of the parties, but this is not mandatory.

An "intermediary" means a broker who is employed to negotiate a transaction between the parties to a transaction and for that purpose may act as an agent of the parties. "Party" means a prospective buyer, seller, landlord, or tenant or an authorized representative of a buyer, seller, landlord, or tenant, including a trustee, guardian, executor, administrator, receiver, or attorney—in-fact. The term does not include a license holder who represents a party. Tex. Opp. Code § 1101.551 (definitions of intermediary and party).

TRELA's "intermediary statute" provides that a broker may act as an intermediary between parties to a real estate transaction if the broker obtains written consent from each party, and the written consent states the source of any expected compensation to the broker, and includes in conspicuous print a mandatory statement describing certain prohibited conduct for intermediaries (disclosing ceiling or floor pricing or other confidential information, dishonesty, or violations of TRELA). Tex. Occ. Code §§ 1101.559 – 1101.561, 1101.651(d).

D. Commission Agreements

Simply put, if a real estate commission agreement is not in writing, it is not enforceable.

As with other matters concerning real estate licensees, start with the license Act! TRELA mandates that "a person may not maintain an action in this state to recover a commission for sale or purchase of real estate unless the promise or agreement on which the action is based, or a memorandum, is in writing and signed by the party against whom the action is brought or by a person authorized by that party to sign the document." Tex. Occ. Code §1101.806(c); *see Trammel Crow Co. No. 60 v. Harkinson*, 944 S.W.2d 631, 633 (Tex. 1997).

The TRELA requirement dovetails with the general Texas Statute of Frauds that requires certain promises or agreements (or a memorandum of them), to be in writing and signed by the person or a lawfully authorized agent to be charged with the promise or agreement. Tex. Bus. & Com. Code § 26.01(a).

E. Contracts for Broker Price Opinion

Brokers, and salespersons through their sponsoring broker, may provide broker price opinions (BPOs) and comparative market analyses (CMAs) to clients and potential real estate purchasers and charge for that service, with some limitations. Texas law allows brokers to formulate opinions as to estimated sale or purchase price, but not as to "value". Unless a broker is also a licensed appraiser, the broker cannot provide an "appraisal". TREC Rule 535.17, 22 Tex. Admin. Code § 535.17.

The BPO must contain the following statement verbatim, "THIS IS A BROKER PRICE OPINION OR COMPARATIVE MARKET ANALYSIS AND SHOULD NOT BE CONSIDERED AN APPRAISAL. In making any decision that relies upon my work, you should know that I have not followed the guidelines for development of an appraisal or analysis contained in the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation." TREC Rule 535.17, 22 Tex. Admin. Code § 535.17.

III. CLAIMS INVOLVING REAL ESTATE BROKERS

A. Contract Causes of Action

1. Breach of Contract

The elements of a breach of contract cause of action include:

1. the existence of a valid contract;
2. performance or tendered performance by plaintiff;
3. breach of the contract by defendant; and
4. damages to the plaintiff resulting from that breach.

Abraxas Petroleum Corp. v. Hornburg, 20 S.W.3d 741, 758 (Tex. App.—El Paso 2000, no pet.).

As discussed above, there are a multitude of contracts that real estate brokers could be parties to, however, the basic breach of contract cause of action elements apply in each.

B. Common Law Causes of Action

1. Negligence Causes of Action

a. "Garden-Variety" Negligence

The common law doctrine of negligence consists of three elements:

1. a legal duty owed by one person to another;
2. a breach of that duty; and
3. damages proximately resulting from that breach.

Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 347, 523, 525 (Tex. 1991).

Like anyone else, real estate brokers and agents have a duty to use care in their dealings with other people. However, real estate licensees are held to the standard of care a professional real estate broker or agent is expected to use, rather than that of an ordinary prudent person. The professional standard of care is that degree of skill and care that is commensurate with the requirements of his or her profession. *Ryan v. Morgan Spear Associates, Inc.*, 546 S.W.2d 678, 681 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); *Ling v. BDA&K Bus. Servs., Inc.*, 261 S.W.3d 341, 357 (Tex. App.—Dallas 2008, no pet.); s*ee* Lee A. Collins, *Broker Liability Issues*, A-1, South Texas College of Law 24th Annual Real Estate Law Conference (2009).

Thus, Texas courts may look to the requirements of the real estate profession and its governing agencies for the standard of care measurement for the degree of skill and care that is commensurate with the profession. Collins, *supra*, at A-1, A-2. Courts have noted that TRELA's training and testing requirements define the areas of expertise expected of a licensed real estate broker or salesperson which include titles, conveyances, deeds, contracts, appraisal, finance, mortgage loans, government programs, negotiations, property management, leases, closing procedures and real estate mathematics. *Id.; United Home Rentals v. Tex. Real Estate Comm'n*, 548 F. Supp. 566, 572 (N.D. Tex. 1982*), rev'd on other grounds*, 716 F.2d 324 (5th Cir. 1983). License holders are subject to continuing education requirements, which mandate a certain minimum number of continuing education hours and certain mandatory topics. Tex. Occ. Code §§ 1101.455; 1101.458. Conduct that falls below the standard of care and measurements found in TRELA and

TREC's Rules and other applicable standards is negligence per se.

In addition to TRELA and TREC's Rules, licensees who are also members of other professional associations will be held to the standards and requirements of those organizations. Many real estate licensees are members of the National Association of Realtors®, either directly or through a local trade association, such as the Houston Association of Realtors. NAR members are subject to NAR's Code of Ethics and Standards of Practice. These requirements set out duties to clients and customers and standards of practice that further regulate member's real estate practice, and may provide fodder and additional support for claims of negligence per se.

The current Code of Ethics and Standards of Practice are available on NAR's website, http://www.realtor.org/governance/governing-documents/code-of-ethics.

The Texas Real Estate Commission may suspend or revoke a broker's or salesperson's license, or take other disciplinary action if the license holder acts negligently or incompetently while acting as a broker or salesperson. Tex. Occ. Code § 1101.652(b)(1). The Cannons of Professional Ethics and Conduct for Real Estate Licensees demand competency, stating, "It is the obligation of a real estate agent to be knowledgeable as a real estate brokerage practitioner. The agent should be informed on market conditions affecting the real estate business and pledged to continuing education in the intricacies involved in marketing real estate for others; be informed on national, state, and local issues and developments in the real estate industry; and exercise judgment and skill in the performance of the work." 22 Tex. Admin. Code § 531.3.

b. Negligent Misrepresentation

The elements of negligent misrepresentation are:

1. a defendant provides information in the course of his business, or in a transaction in which he has a pecuniary interest;
2. the information supplied is false;
3. the defendant did not exercise reasonable care or competence in obtaining or communicating the information;
4. the plaintiff justifiably relies on the information; and
5. the plaintiff suffers damages proximately caused by the reliance.

Steptoe v. True, 38 S.W.3d 213, 219 (Tex. App.—Houston [14th Dist.] 2001, no writ); *Federal Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991).

In order to prove negligence or negligent misrepresentation, the plaintiff must – as a threshold matter – prove that the defendant actually owed plaintiff a duty. *Steptoe v. True*, 38 S.W.3d 213, 219 (Tex. App.—Houston [14th Dist.] 2001, no writ). Second, the plaintiff must show the defendant actually provided plaintiff with false information. *Id.; Hagans v. Woodruff*, 830 S.W.2d 732, 736 (Tex. App.—Houston [14th Dist.] 1992, no writ).

The Cannons of Professional Ethics and Conduct for Real Estate Licensees require integrity, stating "A real estate broker or salesperson has a special obligation to exercise integrity in the discharge of the licensee's responsibilities, including employment of prudence and caution so as to avoid misrepresentation, in any wise, by acts of commission or omission." 22 Tex. Admin. Code § 531.2.

Unlike common law fraud, negligent misrepresentation does not require knowledge of the falsity or reckless disregard of the truth or falsity of the representation at the time it was made. *See Milestone Properties, Inc. v. Federated Metals Corp.*, 867 S.W.2d 113, 119 (Tex. App.—Austin 1993, no writ); *Larson v. Carlene Langford & Assocs., Inc*., 41 S.W.3d 245, 250 (Tex. App.—Waco, pet. denied).

To prevail on a claim for negligence or negligent misrepresentation, the plaintiff must prove that the defendant's misrepresentation was a proximate cause of his damages. *Larson v. Carlene Langford*., 41 S.W.3d at 250.

Proximate cause has two elements: cause in fact and foreseeability. *Western Investments, Inc. v. Urena*, 162 S.W.3d 547, 551 (Tex. 2005), *citing Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992). "Cause in fact" means that the act or omission was substantial factor in bringing about the injury, and without it harm would not have occurred. *Travis v. City of Mesquite*, 830 S.W.2d at 98. "These elements cannot be established by mere conjecture, guess, or speculation." *Doe v. Boys Club of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995). The test for cause in fact is whether the act or omission was a substantial factor in causing the injury without which the harm would not have occurred. *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003). If the defendant's negligence merely furnished a condition that made the injuries possible, there can be no cause in fact. *See IHS Cedars Treatment Ctr. of Desoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 799 (Tex. 2004).

c. Negligent Failure to Disclose

As a general rule, a failure to disclose information does not constitute fraud unless there is a duty to disclose the information; thus, silence may be equivalent to a false representation only when the particular circumstances impose a duty on the party to speak and he deliberately remains silent. *Webb v. Stockford*, 331 S.W.3d 169, 174 (Tex. App.—Dallas 2011, pet. denied). Whether such a duty exists is a question of law. *Id.*

The burden is on the plaintiff to prove the existence and violation of a legal duty owed by the defendant in order to establish tort liability. *Coleman v. Hudson Gas & Oil Corp.*, 455 S.W.2d 701, 702 (Tex. 1970). Lack of duty is not an affirmative defense (that must be pled and proved by the defendant) because duty is an essential element of plaintiff's case. *Id.*

Keep in mind that a licensee cannot fail to disclose what he does not know. Furthermore, real estate licensees have no obligation to investigate and discover information about a property or otherwise. *See Hagans v. Woodruff*, 830 S.W.2d 732, 736 (Tex. App.—Houston [14th Dist.] 1992, no writ) and its progeny.

See further discussion on this topic in the Defenses section of this paper, Lack of Duty.

d. Gross Negligence

Gross negligence consists of two elements: (1) viewed objectively from the actor's standpoint, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others. *Louisiana-Pacific Corp. v. Andrade*, 19 S.W.3d 246-47 (Tex. 1999); *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 1994).

Evidence of simple negligence is not enough to prove either the objective or subjective elements of gross negligence. *Moriel*, 879 S.W.2d at 22-23. Under the first element, "extreme risk" is not a remote possibility or even a high probability of minor harm, but rather the likelihood of serious injury to the plaintiff. *Moriel*, 879 S.W.2d at 22. Under the second element, actual awareness means the defendant knew about the peril, but its acts or omissions demonstrated it did not care. *See Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 326 (Tex. 1993). Circumstantial evidence is sufficient to prove either element. *Moriel*, 879 S.W.2d at 22-23; *Wal-Mart*, 868 S.W.2d at 327.

2. <u>Breach of Fiduciary Duty</u>

In order to prevail on a breach of fiduciary claim, a plaintiff must prove:

1. the existence of a fiduciary relationship between the plaintiff and the defendant;
2. a breach by the defendant of his/her fiduciary duty to the plaintiff; and
3. an injury to the plaintiff or benefit to the defendant as a result of the breach.

SJW Prop. Commerce, Inc. v. Southwest Pinnacle Props., Inc., 328 S.W.3d 121, 154 (Tex. App.—Corpus Christi—Edinburg 2010, pet. denied). A plaintiff bears the burden of proving each element of his breach of a fiduciary duty claim. *Id.*

A fiduciary relationship may arise as a matter of law in certain formal relationships. *Id.*; *see Meyer v. Cathey*, 167 S.W.3d 327, 330 (Tex. 2005) (per curiam). However, not every relationship involving a high degree of trust and confidence rises to the stature of a formal fiduciary relationship, the law also recognizes the existence of an informal or confidential fiduciary relationship. *Meyer*, 167 S.W.3d at 330. The relationship of a real estate licensee to his principal is a fiduciary relationship. *See* Cannon and Rule 531.1, Fidelity, 22 Tex. Admin. Code § 531.1; *Allison v. Harrison*, 156 S.W.2d. 137, 140 (Tex. 1941).

The first TREC Rule and Cannon set forth a real estate licensee's fiduciary duty. Rule 531.1, Fidelity, states that a real estate broker or salesperson, while acting as an agent for another, is a fiduciary. Special obligations are imposed when such fiduciary relationships are created, which demand the primary duty is to represent the interests of the agent's client. The agent's primary duty to his/her client should be clear to all parties; however, the agent shall treat other parties to the transaction fairly. The real estate agent must be faithful, trustworthy, and scrupulous and meticulous in performing the agent's function, and should place the client's interest above the agent's personal interest. 22 Tex. Admin. Code. § 531.1.

Other TREC Rules further describe a broker's fiduciary including Rule 535.2(b) (highest duty to principal, obligation to convey all information which agent knows and may affect principal's decision), Rule 535.2(d) (property management supervisory responsibilities), Rule 535.156 (licensee must put principal's interest above licensee's); and the license act mandates a licensee can be disciplined or lose his license for engaging in conduct that is dishonest, in bad faith, or that demonstrates untrustworthiness. Tex. Occ. Code §1101.652(b)(2).

With respect to the breach and injury prongs of the breach of fiduciary cause of action, the Edinburg Court of Appeals held that a jury was reasonable in inferring that a fiduciary relationship existed between a commercial real estate broker and its alleged client on one project, where the parties had an actual fiduciary relationship in another, ongoing project.

In *SJW Property Commerce, Inc. v. Southwest Pinnacle Properties, Inc.*, a regional developer hired a commercial real estate brokerage and development firm (SJW) to market and lease a new commercial development on land the regional developer owned in McAllen. The parties signed an exclusive leasing and sales listing agreement covering the original property. *SJW Prop. Commerce, Inc. v. Southwest Pinnacle Props., Inc.*, 328 S.W.3d 121, 130-31 (Tex. App.—Corpus Christi—Edinburg 2010, pet. denied). The regional developer soon thereafter started working on assembling parcels of land for another commercial development in the same town, and began discussing the project with SJW. The developer asked SJW to continue to act as his broker, and SJW agreed to do so, but no contract was signed to memorialize the additional agreement for the second property. *Id.* at 131-32.

At some point, the developer's contracts for the land he was assembling in the second project were terminated by the landowners, and SJW bought the properties itself. The developer sued. Witnesses testified that SJW used the confidential information it obtained from its developer client to get one of the key landowners under contract with SJW in order to tie up and block the regional developer's development of the project so SJW could develop the land itself. *Id.* at 156-57. The court held that evidence was legally sufficient to find breach of fiduciary duty when the commercial real estate broker used confidential information it learned from its client while acting in its original capacity as agent to compete with the client and develop the second project itself, cutting its client out of the deal and causing damages to the client of lost profits and project expenses. *Id.*

3. Common Law Fraud Claims

To recover on an action for fraud, a plaintiff must show the following elements:

1. a material representation was made;
2. which 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 other party acted in reliance on the representation; and
6. the party suffered injury as the result.

SJW Prop. Commerce, Inc. v. Southwest Pinnacle Props., Inc., 328 S.W.3d 121, 157 (Tex. App.—Corpus Christi—Edinburg 2010, pet. denied) *citing Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001).

A promise to do an act in the future constitutes fraud only when made with no intention of performing the promise at the time the promise was made. *SJW Prop. Commerce*, 328 S.W.3d at 157 (*citing Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998)). The mere failure to perform a contract is not evidence of fraud. *Id.* Fraudulent intent may be established by direct evidence or circumstantial evidence, and while the subsequent failure to perform the promise itself is not dispositive, that factor can be considered along with others to establish intent. *Id.*

4. Actions for Tortious Interference

Actions for tortious interference involving real estate licensees as plaintiffs and defendants may include those for interference with existing contracts and relations, interference with prospective contracts and relations, or conspiracy to interfere with either.

a. Interference with Existing Contracts

The elements of a cause of action for interference with an existing contract are:

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

ACS Invs., Inc. v. McLaughlin, 943 S.W.2d 426, 430 (Tex. 1997).

Even an unenforceable contract may serve as the basis for a tortious interference claim if the contract is not void. In other words, mere unenforceability of a contract is not a defense to an action for tortious interference with its performance. Until a contract is terminated, it is valid and subsisting, and third persons are not free to tortiously interfere with it. *Juliette Fowler Homes, Inc. v. Welch Assocs.*, 793 S.W.2d 660, 664, 666 (Tex. 1990).

Regarding the "willful and intentional interference" prong, Texas courts have held that interference with a contract is tortious only when it is intentional, and there must be some direct evidence of a willful act of interference by a party. *See Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 (Tex. 1993). A party must be more than a willing participant; he must knowingly induce one of the contracting parties to breach its obligation. *See Reyna*, 865 S.W.2d at 927; *John Paul Mitchell Sys. v. Randalls Food Mkts.*, 17 S.W.3d 721, 731 (Tex. App—Austin 2000, pet dism'd w.o.j.).

Merely entering into a contract with a party with the knowledge of that party's contractual obligations to someone else is not the same as inducing a breach. It is necessary that there by some act of interference or persuading a party to breach, for example by offering better terms or incentives, for tort liability to arise. *SJW Prop. Commerce*, 328 S.W.3d at 152 n20; *John Paul Mitchell Sys.*, 17 S.W.3d at 731.

Liability for tortious interference can only be had against third parties. A real estate broker could not recover against a property management company for tortious interference with the broker's listing agreement with the property's owner, when the property management company and the company that owned the building were each owned by the same investment company. *WesTex Abilene Associates, L.P. v. Franco*, 3 S.W.3d 45, 49 (Tex. App.—Eastland 1999, no pet.) In other words, a party to a contract cannot interfere "with itself" with respect to that same contract.

A court of appeals recently found that sufficient evidence existed of a real estate broker's tortious interference with a developer's contracts interactions with a group of landowners who the broker knew were already under contract to sell their land in the following conduct:
- broker's visits to the elderly landowners,
- visit follow-up letters thanking landowners for their time and noting broker was not aware landowners were still under contract before visit,
- providing cancelation language for the landowners to use to send nearly identically-worded letters to developer notifying that their earnest money contracts were "*terminated*" and "*null and void*." (emphasis in original),
- broker's offering a key landowner a much higher price than developer had agreed to pay for property to be used by the developer as an essential access easement, so as to put financial pressure on developer to convey project to broker. *SJW Prop. Commerce, Inc. v. Southwest Pinnacle Props., Inc.*, 328 S.W.3d 121, 153-54 (Tex. App.—Corpus Christi—Edinburg 2010, pet. denied).

b. Interference with Prospective Contracts/Business Relations

The elements of tortious interference with prospective business relations are: (1) a reasonable probability that the plaintiff would have entered into a contractual relationship; (2) and independently tortious or unlawful act by the defendant that prevented the relationship from occurring; (3) the defendant did the act with conscious desire to prevent the relationship from occurring or with knowledge that the interference was certain or substantially certain to occur as a result of his conduct; and (4) the plaintiff suffered actual harm or damage as a result of the interference. *Ash v. Hack Branch Distrib. Co.*, 54 S.W.3d 401, 414-15 (Tex. App.—Waco 2001, pet. denied).

The TREC Rules also speak to a broker's interference with another broker's contracts. Rule 535.153 states that, "[a]lthough a licensee, including one acting as agent for a prospective buyer or prospective tenant, may not attempt to negotiate a sale, exchange, lease, or rental of property under exclusive listing with another broker, §1101.652(b)(22) [the disciplinary prohibitions] of the Act does not prohibit a licensee from soliciting a listing from the owner while the owner's property is subject to an exclusive listing with another broker. In other words, a broker violates the Rule if he tries to negotiate a deal with the property owner if the property is listed by another broker. However, a broker does not violate the Rule if he tries to get a listing agreement with the owner while the property is already listed with another broker.

5. <u>Civil Conspiracy (to commit any tort)</u>

The necessary elements of a civil conspiracy are:
1. two or more persons
2. an object to be accomplished;
3. a meeting of the minds on the object or course of action;
4. one or more unlawful, overt acts; and
5. damages as a proximate result.

Tri v. J.T.T., 162 S.W.3d 552, 556 (Tex. 2005).

Liability for civil conspiracy depends on participation in an underlying tort (or an attempt to do so) for which the plaintiff seeks to hold at least one of the defendants liable. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). In other words, proof of one of the defendants/co-conspirators committing or attempting to commit the underlying tort is an element of the conspiracy cause of action, and a defendant may be found liable of conspiracy, even if he himself did not actually participate in the underlying tort, but participated in the conspiracy to commit the tort. *See Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co*., 51 S.W.3d 573, 583 (Tex. 2001) (failure of claim for fraud necessarily defeated dependant conspiracy and aiding and abetting claims).

The Supreme Court of Texas has consistently held that one cannot conspire to commit negligence. *Tri v. J.T.T.*, 162 S.W.3d 552, 557 (Tex. 2005). Merely proving the intent to engage in the joint conduct that resulted in the injury is not sufficient – it is the intent to cause injury that must be proven. *Id.* Because negligence by definition is not an intentional wrong, one cannot agree to conspire to be negligent. *Id.* at 557 n.10.

6. Contribution and Indemnity (against joint tortfeasors)

Contribution is the payment by a joint tortfeasor of its proportionate share of the plaintiff's damages to any other tortfeasor who has previously paid more than his proportional share. *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 859 (Tex. 1977); Tex. Civ. Prac. & Rem. Code Chapter 32. Contribution claims are generally handled in a separate question after the jury apportions responsibilities between the plaintiff, defendant(s), settling parties, and responsible third parties; however, creation of the responsible third party practice eliminates most instances when a traditional contribution submission is necessary.

While contribution is sharing a loss in proportion to each tortfeaser's level of fault or culpability, indemnity is the shifting of the entire liability from one party to another.

The comparative negligence statute has "abolished the common law doctrine of indemnity between joint tortfeasors even though the statue does not expressly mention that doctrine", and there are very few remaining vestiges of "common law indemnity" (basically pure vicarious liability or innocent product retailer). *SSP Partners v. Gladstrong Investments (USA) Corp.*, 275 S.W.3d 444, 447 (Tex. 2008) (*citing Aviation Office of America, Inc. v. Alexander & Alexander of Texas, Inc.*, 751 S.W.2d 179, 180 (Tex. 1980) (per curiam)).

Contractual indemnity, on the other hand, is alive and well. In the real estate broker context, indemnity clauses are often included in the terms of property listing agreements and buyer representation agreements. Since most of those agreements are prepared by or for brokers and their agents, the indemnity often runs in favor of the broker vs. the broker's client, although sometimes they run both ways.

For example, the Texas Association of Realtors® Residential Real Estate Listing Agreement Exclusive Right to Sell current iteration contains a clause 7.D, Liability and Indemnification which states, "except for a loss caused by Broker, Seller will indemnify and hold Broker Harmless from any claim for personal injury, property damage, or other loss." , and a clause 14.C. which states, "Seller agrees to protect, defend, indemnify, and hold Broker harmless from any damage, costs, attorney's fees, and expenses that: (1) are caused by Seller, negligently or otherwise; (2) arise from Seller's failure to disclose any material or relevant information about the property; or (3) are caused by Seller giving any incorrect information to any person." *See* TAR form No. TAR-1101. The current TAR commercial and farm and ranch listing agreements contain similar sections. *See* TAR form No. TAR-1201 (farm and ranch listing) and TAR-1301 (commercial listing for sale).

There is also an indemnity section of the DTPA, which provides that a person defendant a DTPA action may seek contribution or indemnity from one who, under the statute law or at common law, may have liability of the damaging event of which the consumer complains. If successful, the defendant seeking indemnity may recover all sums required to be paid (the judgment or settlement), as well as his reasonable attorneys' fees and costs. Tex. Bus. & Com. Code § 17.555.

C. Statutory Causes of Action

1. **Statutory Fraud In a Real Estate Transaction**

Statutory fraud in a transaction involving real estate consists of:

1. a false representation of a past or existing material fact, when the false representation is (A) made to a person with the purpose of inducing that person to enter into a contract; and (B) relied on by that person in entering into that contract, or
2. a false promise to do an act, when the false promise is (A) material; (B) made with the intention of not fulfilling it; (C) made to a person for the purpose of inducing that person to enter a contract; and (D) relied on by that person in entering the contract.

Tex. Bus. & Com. Code §27.01(a).

A person who commits statutory fraud is liable to the defrauded person for actual damages. Tex. Bus. & Com. Code §27.01(b). If the fraud is committed with actual awareness of the falsity is also liable for exemplary damages. Actual awareness may be inferred where objective manifestations indicate the fraudfeasor acted with actual awareness. Tex. Bus. & Com. Code §27.01(c).

Of particular interest in real estate broker is the "benefiting bystander" section of the statute which provides: A person who (1) has actual awareness of the falsity of a representation or promise made by another person and (2) fails to disclose the falsity of the representation or promise to the person defrauded, and (3) benefits from the false representation or promise commits statutory fraud and is liable to the person defrauded for exemplary damages. Actual awareness may be inferred where objective manifestations indicate the person acted with actual awareness. Tex. Bus. & Com. Code §27.01(d).

An example of when this section would apply follows: A property owner knows that the foundation of his commercial building had previous foundation work. The real estate broker who lists the property for sale also knows that prior foundation work has been done (either because the owner told the broker, or because the broker saw evidence of the foundation work such as concrete patches around or through the slab, or perhaps knew about the work from a prior owner). A prospective buyer or tenant is touring the property with the broker and asks the owner, who happens to be on the property during the tour, if there was any prior foundation work. The owner says no. If the broker stands by silently and does not step in to correct the misrepresentation, the broker would be subject to statutory fraud claims, too, even though the broker did not make any false representation himself.

One of the main distinctions between a statutory fraud cause of action and a common law fraud claim – and of notable benefit to plaintiffs – is that attorneys' fees are recoverable in a successful statutory fraud cause of action, as are expert witness fees, deposition copy costs, and court costs. Tex. Bus. & Com. Code §27.01(d).

The statutory fraud cause of action applies only when the transaction in question includes the actual conveyance of real estate between the parties, and not when the transaction at issue between the parties merely "involves" real estate. *See Greenway Bank & Trust v. Smith*, 679 S.W.2d 592, 596 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (holding Section 27.01 does not apply to a party who merely loaned money for the purchase of real estate); conf *Powell v. BAC Home Loan Servicing, LP*, No. 4:11-CV-80, 2011 WL 5837250 slip op. at *7 E.D Tex. Nov. 21, 2011); *see also Texas Commerce Bank Reagan v. Lebco Constructors, Inc.*, 865 S.W.2d 68, 82 (Tex. App.—Corpus Christi 1993, writ denied), *overruled on other grounds*, *Johnson & Higgins, Inc. v. Kenneco Energy*, 962 S.W.2d 507 (Tex. 1998) (land acquisition, development and construction loans involve real estate only indirectly and do not fall within the scope of section 27.01); *Satterwhite v. Safeco Land Title of Tarrant*, 853 S.W.2d 202, 204 (Tex. App.—Fort Worth, writ denied) (title insurance transactions). The statute's language presents little wiggle room to argue that a real estate licensee who either makes a representation or fails to speak up when his principal makes a false representation that induced a party into real estate transaction should not be liable for statutory fraud. However, these cases that directly or effectively hold that *only the parties to the real estate contract* can be liable under the statute may provide some traction for the practitioner who seeks to argue that a real estate broker – who is not actually a party to the sale contract – is not subject to such claims.

2. Deceptive Trade Practices Consumer Protection Act Violations

The DTPA was designed to "protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches or warranty and to provide efficient and economical procedures to secure such

protection." Tex. Bus. & Com. Code § 17.44(a). Its provisions are to be liberally construed. *Id.*

The big DTPA news in the real estate broker community is the statutory exemption of licensees from DTPA claims – in some part. "Nothing in this subchapter shall apply to a claim against a person licensed as a broker or salesperson under Chapter 1101, Occupations Code, arising from an act or omission by the person while acting as a broker or salesperson." Tex. Bus. & Com. Code § 17.49(i) (West 2011), *amended by* Act of May 28, 2011, 82nd Leg., R.S., ch. 189, § 17.49, 2011 Tex. Sess. Law Serv. (West). Of course, there are exceptions to the exemption.

"This exemption does not apply to:

(1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion;
(2) a failure to disclose information in violation of Section 17.46 (b) (24); or
(3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion.

Id.

So, it is not actionable for a real estate licensee to give advice or opinions about the price of a property, the desirability of a certain location, etc. However, it is still actionable for the licensee to misrepresent a material condition of the property or fail to disclose such a condition of which the licensee has actual knowledge. The statute and the Legislature's intent is clearer in that the statute, as amended in 2011, now specifically states that real estate licensees are "professionals" exempted for the professional advice and opinions, but in this writer's opinion, there is not much real difference in the protections afforded to licensees, or the roadblocks to plaintiff's claims against them for misrepresentations or nondisclosures. See further discussion in this paper in the DTPA defenses section.

Generally, to prevail on their DTPA claim, the plaintiff must establish that the defendant violated a specific provision of the DTPA and that such violation was a producing cause of their injury. Tex. Bus & Com. Code § 17.46; *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 649 (Tex. 1996).

The elements of a DTPA action are:

1. the plaintiff is a consumer (a person who seeks or acquires goods or services by purchase or lease);
2. the defendant engaged in false, misleading, or deceptive act or practice specifically enumerated in section 17.46 (the laundry list) upon which the consumer relied to his detriment; a breach of express or implied warranty; or any unconscionable action or course of action; and
3. the act constituted a producing case of the consumer's damages

Tex. Bus. & Com. Code § 17.50(a). *See also* Tex. Bus. & Com. Code § 17.46(b); *Doe v. Boys Clubs of Greater Dallas*, 907 S.W.2d 472, 478 (Tex. 1995).

A consumer who prevails may obtain economic damages and be awarded court costs and reasonable and necessary attorneys' fees. If the defendant's conduct is found to have been committed knowingly or intentionally, the consumer may recover mental anguish damages and treble damages. Tex. Bus. & Com. Code § 17.50(b).

The most common DTPA claims against real estate brokers are certain "laundry list" violations, including representing that goods or service:

- (5) have sponsorship, approval, characteristics, . . . benefits, or qualities they do not have;
- (7) representing good or services are of a particular standard, quality, or grade . . . if of another;
- (13) knowingly making false or misleading statements of fact concerning the need for . . . replacement or repair service;
- (22) representing that work or services have been performed on, or parts replaced in, goods when the work or services were not performed or parts not replaced;
- (24) failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose was intended to induce the consumer into a

transaction which the consumer would not have entered had the information been disclosed;
- Committing an unconscionable act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience or capacity of the consumer to a grossly unfair degree.
Tex. Bus. & Com. Code §§ 17.45(5); 17.46(b)(5), (7), (13), (22) (24); 17.50(a)(3); *Head v. U.S. Inspect. DFW, Inc.*, 159 S.W.3d 731, 744 (Tex. App.—Fort Worth 2005, no pet.); *Arlington Home, Inc. v. Peak Environmental Consultants, Inc.*, 361 S.W.3d 773, 781 (Tex. App.—Houston [14th Dist.] 2012, pet. filed Apr. 11, 2012).

3. Cause of Action for Violation of the Real Estate License Act

TRELA itself only provides one private cause of action, which is for a claim against an unlicensed person who collected a commission for brokerage services. This private cause of action provides that the unlicensed broker or salesperson is liable to the aggrieved person for a penalty of not less than the commission amount, and up to three times that amount. Tex. Occ. Code § 1101.754.

4. Discrimination Claims

a. Fair Housing Violations

Real estate brokers can be liable for violations of the state and federal fair housing acts and disability acts. *See* the Federal Fair Housing Act, 42 U.S.C. § 3613, et seq.; Americans with Disabilities Act, 42 U.S.C. § 12205; Texas Fair Housing Act, Tex. Prop. Code §301.001, et seq. Federal and state claims can be brought in tandem, as neither limit enforcement of the other. 42 U.S.C. § 3615.

Title VII of the Civil Rights Act of 1968 – the federal Fair Housing Act, and the Texas Fair Housing Act, are intended to insure that no person shall be subjected to discrimination because of race, color, religion, sex, handicap, familial status or national origin in the sale, rental, or advertising of dwellings, in the provisions of brokerage services, or in the availability of residential real estate-related transactions. 42 U.S.C. §§ 3604, 3605, et seq.; Tex. Prop. Code §301.001, et seq.; *see generally*, J. Richard Hargis, *Fair Housing Act Reminders from attorney Dick Hargis*, Legal Network articles, Houston Realtors® Information Service, Inc., (April 2003). The Acts provides for a private cause of action (42 U.S.C. § 3613; Tex. Prop. Code 301.151), as well as enforcement by the Secretary of Housing and Urban Development, and/or the U.S. Attorney General (42 U.S.C. §§ 3612, 3614) and Texas Workforce Commission Civil Rights Division and/or the Texas Attorney General (Tex. Prop. Code 301.115, 301.131).

Some Texas property owners and small landlords are exempt from the Acts' non-discrimination requirements. For example, religious organizations and private clubs may limit the sale, rental, or occupancy of housing to members; certain housing for older persons not subject to familial status provisions; and owners of no more than three single family rental houses are exempt unless the services of broker are used. *See* 42 U.S.C. §§ 3603(b), 3607; Tex. Prop. Code §§ 301.041-301.043.

However, ***persons in the business of selling or renting dwellings, including licensed real estate brokers and agents, are specifically not exempt from the discrimination laws***, even if representing an exempt owner in the transaction. *See* 42 U.S.C. § 3603(c); Tex. Prop. Code § 301.026.

One example of a situation where real estate professionals could get into trouble is by including restrictions or conditions on offers in their real estate listings, such as "No HOH/HOC offers" which seek to avoid offers from buyers obtaining assistance through Housing Opportunities of Houston ("HOH") or Housing Opportunities of Montgomery County ("HOC"), some similar other local program which provides financial assistance to low and moderate income families for down payments and closing costs. J. Richard Hargis, *Submitting all Offers Averts Trouble for Brokers*, Legal Network articles, Houston Realtors® Information Service, Inc., (April 2003).

The federal Fair Housing Act also provides protections to real estate brokers and agents

themselves from discrimination in their business dealings, mandating, "it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3606. The Texas Fair Housing Acts includes an identical section. Tex. Prop. Code § 301.027.

In addition to providing for recovery of actual damages, attorneys' fees, and injunctive relief, the fair housing laws also provide statutory penalties for violations. *See* 42 U.S.C. § 3613; Tex. Prop. Code §§ 301.112, 301.153. For example, in a HUD administrative proceeding, the administrative law judge can impose civil penalties on a principal broker or firm in amounts not to exceed $10,000 for the first violation. Subsequent violations can result in higher penalties. *See* 42 U.S.C. § 3603(c); Tex. Prop. Code § 301.132. If the charges are brought in court, a judge or jury can impose punitive as well as civil damages. *See* 42 U.S.C. § 3603(c); Tex. Prop. Code § 301.153.

b. TREC Anti-Discrimination Rules

In addition to the Fair Housing Acts, the Rules of the Texas Real Estate Commission's Canons of Professional Ethics and Conduct for Real Estate Licensees require that

> No licensee shall inquire about, respond to or facilitate inquiries about, or make a disclosure which indicates or is intended to indicate any preference, limitation or discrimination based on the following: race, color, religion, sex, national origin, ancestry, familial status, or handicap of an owner, previous or current occupant, potential purchase, lessor, or potential lessee of real property. For the purpose of this section, handicap includes a person who had, may have had, has, or may have AIDS, HIV-related illnesses, or HIV infection as defined by the Centers for Disease Control of the United States Public Health Service.

22 Tex. Admin. Code § 531.19.

Further, TRELA provides that the Commission may suspend or revoke a license or take other disciplinary action against a license holder who discriminates against an owner, potential buyer, landlord, or potential tenant on the basis of race, color, religion, sex, disability, familial status, national origin, or ancestry, including directing a prospective buyer or tenant interest in equivalent properties to a different area based on the race, color, religion, sex, disability, familial status, national origin, or ancestry of the potential owner or tenant. Tex. Occ. Code § 1101.652 (b)(32).

5. TREC Complaints – Administrative Actions Against Licensees

As mentioned previously in this paper, there is only one private cause of action available under TRELA.

Persons aggrieved by real estate licenses acting in their professional capacity can file complaints with the Texas Real Estate Commission, who will investigate the claims and bring administrative actions against the licensee, if warranted. TREC can discipline licensees, suspend their licenses or impose probation, or assess fines on licensees who have violated TREC's requirements of the Rules. These fines got to the Commission, and not to the person who filed the complaint. *See generally* Tex. Occ. Code §§ 1101.202 – 1101.206. Complaint instructions are also available on TREC's website: http://www.trec.state.tx.us/complaintsconsumer/complaint_instructions.asp.

However, TREC maintains a real estate recovery trust account ("RERTA") to reimburse aggrieved persons who suffer actual damages caused by an act described in certain sections of TRELA (prohibited acts) committed by license holders or their employees. *See* Tex. Occ. Code §§ 1101.601 – 1101.602. See also Tex. Occ. Code §§ 1101.605 – 1101.615 (setting out deadlines and procedures for filing a RERTA claim with

TREC), and the RERTA section of this paper below in Section V. Damages/Recovery Issues.

IV. DEFENSES TO CLAIMS BY/AGAINST BROKERS

A. General Defenses

1. Statutes of Limitation

"Statutes of limitations are intended to compel plaintiffs to assert their claims 'within a reasonable period of time while the evidence is fresh in the minds of the parties and witnesses.'" *Wagner & Brown, Ltd. v. Hornwood*, 58 S.W.3d 732, 734 (Tex. 2001). As a general rule, the statute of limitations begins to run when facts come into existence that authorize a party to seek a judicial remedy. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003).

a. Limitations Periods for Various Claims

Most of the limitations periods for common law causes of action are listed in Chapter 16 of the Civil Practice & Remedies Code.

- breach of contract – four years (but can be less by agreement down to two years). Tex. Civ. Prac. & Rem. Code §§ 16.004, 16.070
- breach of fiduciary duty - four years. Tex. Civ. Prac. & Rem. Code § 16.004(a)(5)
- common law fraud – four years. Tex. Civ. Prac. & Rem. Code § 16.004(a)(4)
- statutory fraud – four years. Tex. Bus. & Com. Code §27.01; Tex. Civ. Prac. & Rem. Code §16.051; *see also Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 216 (Tex. 2011)
- negligence, gross negligence, negligent misrepresentation - Tex. Civ. Prac. & Rem. Code § 16.003(a); *Millan v. Dean Witter Reynolds, Inc.*, 90 S.W.3d 760, 764 (Tex. App.—San Antonio, pet. denied); *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 885 (Tex. 1998)
- tortious interference with an existing contract and prospective business relation - two years. Tex. Civ. Prac. & Rem. Code § 16.003(Vernon Supp. 2009)
- trespass, conversion – two years - Tex. Civ. Prac. & Rem. Code § 16.003(a)
- DTPA claims – two years. Tex. Bus. & Com. Code § 17.565.
- TRELA claims – two years. Tex. Occ. Code §1101.605
- federal and state Fair Housing Act claims – two years – 42 U.S.C. § 3613(a)(1)(A); Tex. Prop. Code § 301.151

b. Relation-Back Doctrine For Supplemental Pleadings

The relation-back doctrine, as outlined in section 16.068 of the Civil Practices and Remedies Code provides that,

> If a filed pleading relates to a cause of action, cross action, counterclaim, or defense that is not subject to a plea of limitation when the pleading is filed, a subsequent amendment to the pleading that changes the facts or grounds of liability or defense is not subject to the plea of limitation unless the amendment or supplement is wholly based on a new, distinct, or different transaction or occurrence.

Tex. Civ. Prac. & Rem. Code § 16.068; *see SJW Prop. Commerce, Inc. v. Southwest Pinnacle Props., Inc.*, 328 S.W.3d 121, 145 (Tex. App.—Corpus Christi—Edinburg 2010, pet. denied). Section 16.068 is a tolling statute that stops the clock at the time the original petition is filed, if filed within the limitations period, but cannot toll a time period already expired. *SJW Prop. Commerce*, 328 S.W.3d at 145. This section is designed to protect litigants from loss of their claims by plea of limitations in cases where that would otherwise occur, and therefore, should be liberally construed. *Id.*, *Milestone Props., Inc. v. Federated Metals Corp.*, 867 S.W.2d 113, 116 (Tex. App.—Austin 1993, no writ). "The relation-back doctrine originated as an equitable remedy designed to effectuate justice. *SJW Prop. Commerce*, 328 S.W.3d at 145; *Lovato v. Austin Nursing Ctr., Inc.*, 113 S.W.3d 45, 55 (Tex. App.—Austin 2003), *aff'd*, 171 S.W.3d 845 (Tex. 2005).

c. Counterclaim & Cross Claim Limitations

Section 16.069 of the Civil Practices and Remedies Code provides:

> (a) If a counterclaim or cross claim arises out of the same transaction or occurrence that is the basis of an

> action, a party to the action may file a counterclaim or cross claim even though as a separate action it would be barred by limitation on the date the party's answer is required.
>
> (b) the counterclaim or cross claim must be filed not later than the 30th day after the date on which the party's answer is required.

Tex. Civ. Prac. & Rem. Code § 16.069. The purpose of section 16.069 is to prevent a plaintiff from waiting until the adversary's valid claim arising from the same transaction was barred by limitations before asserting his own claim. *SJW Prop. Commerce, Inc. v. Southwest Pinnacle Props., Inc.*, 328 S.W.3d 121, 146 (Tex. App.—Corpus Christi—Edinburg 2010, pet. denied).

2. <u>Sovereign Immunity</u>

Brokers who deal with government entities (and their counsel) need to keep in mind the unique pitfalls of sovereign immunity that can arise to block enforcement of otherwise enforceable contracts and tort claims.

Sovereign immunity deprives a trial court of subject matter jurisdiction for lawsuits in which the state or certain governmental units have been sued unless the state consents to suit. *Benefit Realty Corporation v. City of Carrolton*, 141 S.W.3d 346, 349 (Tex. App.—Dallas 2004, pet. denied) (citing *Tex. Dep't. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004).

The Dallas Court of Appeals found that a city's acts in acquiring property for street construction were governmental, not proprietary, and thus, the city had sovereign immunity under the Texas Tort Claims Act from a real estate company's intentional tort claims against the city (conversion, common law fraud, tortious interference with contractual relations and prospective contract, and civil conspiracy) based on the loss of the realty company's right of first refusal to purchase the subject property. *Benefit Realty Corporation v. City of Carrolton*, 141 S.W.3d 346, 349 (Tex. App.—Dallas 2004, pet. denied). *See also* Tex. Civ. Prac. & Rem. Code §§101.001 – 101.009, 101.057(2).

In a recent real estate commission case against a charter school, the Texas Supreme Court held that an open enrollment charter school was a "governmental unit" as defined in Section 101.001(3)(D) of the Tort Claims Act for purposes of taking an interlocutory appeal from the trial court's denial of its plea to the jurisdiction. *LTTS Charter School, Inc. v. Palasota*, 344 S.W.3d 378 (Tex. 2011) (per curiam); *see* Tex. Civ. Prac. & Rem. Code § 101.001(3)(D); Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). Importantly, the Court did not decide whether underlying issue of whether the charter school possesses immunity from suit – but focused only on whether it was a "governmental unit" entitled to bring the interlocutory appeal. *Id.*

The Court remanded the case to the Court of Appeals in Dallas, who issued its new opinion holding that the charter school was in fact a governmental unit entitled to the protections of sovereign immunity from the real estate broker's tort claims. The appeals court also held that the statutory waiver of sovereign immunity to suit concerning contracts likewise did not apply to the broker's breach of the real estate commission agreement. *LTTS Charter School, Inc. v. Palasota*, 362 S.W.3d 202, 209-211 (Tex. App.—Dallas 2012, no pet.). *See* Tex. Loc. Gov't Code §§ 271.151.

"A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of contract." Tex. Loc. Gov't Code § 271.152. A "contract subject to this subchapter" is defined as "a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity." Tex. Loc. Gov't Code § 271.151(2). "Essential terms" have been characterized as, *inter alia,* 'the time of performance, the price to be paid . . . [and] the service to be rendered.' *Kirby Lake Dev. Ltd. v. Clear Lake City Water Authority,* 320 S.W.3d 829, 838 (Tex. 2010).

Although the *LTTS Charter School* case looks bad for brokers trying to enforce contracts against governmental units, the old adage of 'bad facts made bad law' comes into play here since the listing and commission agreement at issue do not contain the commission rate or method of calculation in the listing agreement itself, but refer to an attachment which was not admitted with the listing into evidence. *Id.* Under different circumstances where a listing or commission agreement was fully documented and self-contained with all terms included, the result should be different. *See* Tex. Loc. Gov't Code §§ 271.151-271.160 titled "Adjudication of Claims Arising Under Written Contracts With Local Government Entities".

In any event, the wise practitioner dealing with a governmental unit or potential governmental unit should review the sovereign immunity statutes carefully.

3. Is the Opposing Entity in Good Standing? How About Your Client?

PRACTICE TIP: In every case involving an opposing party that is a corporate or other fictitious entity, review the company's standing either through the Texas Secretary of State's office or, in most instances for LLCs, corporations, etc., for free on the Texas Comptroller's taxable entity search webpage https://ourcpa.cpa.state.tx.us/coa/Index.html.

If the company has forfeited its corporate privileges, or is a foreign entity that failed to register in Texas, it cannot legally pursue claims or causes of action, although a company may defend against a claim during this period. Tex. Tax. Code. § 171.251(1); Tex. Bus. Org. Code § 9.051 (foreign entity); *see also Humble Oil & Ref. Co. v. Blankenburg*, 235 S.W.2d 891, 894 (Tex. 1951) (when corporate charter is forfeited, stockholders may defend actions to protect their property rights); *El T. Mexican Rests., Inc. v. Bacon*, 921 S.W.2d 247, 252-53 (Tex. App.—Houston [1st Dist.] 1995, writ denied). In a suit against an entity who's right to sue was forfeited for nonpayment of taxes, the plaintiff should name the corporation and all of its stockholders (or if an LLC, its members). *See Humble Oil*, 235 S.W.2d at 894. Forfeiture of an entity's status does not affect the validity of any contract to which the entity is a party. Tex. Bus. Org. Code §§ 9.251.

A person or business entity doing business under an assumed name must file an assumed-name certificate. Tex. Bus & Com. Code §§ 36.10, 36.11; *Sixth RMA Partners v. Sibley*, 111 S.W.3d 46, 55 (Tex. 2003). The court may abate an action until the certificate is filed. *Sibley*, 111 S.W.3d at 55.

The defendant's answer pleading that the opposing entity has no standing to sue or recover must be verified. Tex. R. Civ. P. 93.

4. Unclean Hands

One who seeks equity must do equity and must come to court with clean hands. *See Dunnagan v. Watson*, 204 S.W.3d 30, 41 (Tex. App.—Fort Worth 2006, pet. denied); Flores v. Flores, 116 S.W.3d 870, 876 (Tex. App.—Corpus Christi 2003, no pet). Whether equitable relief should be denied based on unclean hands is left to the discretion of the trial court. *Dunnagan*, 204 S.W.3d at 41; *Flores*, 116 S.W.3d at 876.

B. Contract Defenses

1. Statute of Frauds

a. Overview

The statute of fraud requires certain types of contracts to be in writing to be enforceable. Tex. Bus. & Com. Code § 26.01 (a)(1) (written contract or memorandum of contract required). The memorandum must be complete within itself in every material detail and contain all essential elements, so that oral testimony is not required to establish the existence of the contract. *Hartford Fire Ins. Co. v. C. Springs 300, Ltd.*, 287 S.W.3d 771, 777 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

If not subject to the statute of frauds, a contract is enforceable despite being unsigned, or oral. *See, e.g. Tabrizi v. Daz-Rez Corp*. 153 S.W.3d 63, 66-67 Tex. App.—San Antonio 2004, no pet.). Whether a contract is subject to the statute of frauds is a question of law. *Bratcher v. Dozier*, 246 S.W. 2d 795, 796 (Tex. 1961).

The purpose of the statute of frauds is to safeguard the integrity of contracts and to prevent fraud and perjury when those contracts are brought into court. *Moritz v. Bueche*, 980 S.W.2d 849, 856 (Tex. App.—San Antonio 1998, no pet.). A contract subject to the statute of frauds is enforceable against a party only if the contract is in writing and is signed by that party. *Nagle v. Nagle*, 613 S.W.2d 796, 798 (Tex. 1998). A contract that violates the statute is not void, but is voidable and unenforceable. Tex. R. Civ. P. 94; *Troxel v. Bishop*, 201 S.W.3d 290, 300 (Tex. App.—Dallas 2006, no pet.).

The elements of the defense of the statute of frauds are 1) the contract sought to be enforced is subject to the statute of frauds, and 2) the contract was not in writing, and not signed by the defendant. Tex. Bus. & Com. Code §§ 2.201 (UCC sales - covering sale of goods), 26.01; *Haase v. Glazner*, 62 S.W.3d 795, 797 (Tex. 2001).

The statute of frauds is an affirmative defense that must be pleaded, or it is waived. *Adams v. H & H Meat Prods.*, 41 S.W.3d 762, 776 (Tex. App.—Corpus Christi 2001, no pet.).

b. Contracts subject to SOF

Some contracts subject to the statute of frauds in the real estate arena include:

1. Contracts that cannot be performed in one year. Tex. Bus. & Com. Code § 26.01(b)(6). This includes contracts where performance begins after some period of time after the contract is made, and then continues for a year. For example, a listing agreement for one year that begins on a date two weeks after the listing agreement is signed.

2. Real estate transactions. A contract involving a real estate transaction is subject to the statute of frauds. Tex. Bus. & Com. Code § 26.01(b)(4) (sale of real estate); Tex. Bus. & Com. Code § 26.01 (b)(5) (lease of real estate for more than one year). However, the statute of frauds does not apply when the contract is only incidentally related to real estate. *E.g., Mangum v. Turner*, 255 S.W.3d 223,227 (Tex. App.—Waco 2008, pet. denied) (oral settlement agreement of dispute over property); *see e.g., Ganim v. Alattar*, --- S.W.3d ---, 2011 WL 2517140 (Tex. 2011) (opinion withdrawn Mar. 30, 2012 upon dismissal by agreement of parties) (agreement of partners for one of them to buy land in the future for partnership).

3. Transfer of oil, gas or minerals interest. *Long Trusts v. Griffin*, 222 S.W.3d 412, 416 (Tex. 2006) (gas well operator's acceptance of performance under investor's agreements to pay part of drilling and operating costs in exchange for an assignment of part of the working interest in producing wells did not preclude operators from raising statute of frauds defense as to future performance).

4. Real estate loan commitment. Because the loan is secured by title to real estate, a real estate loan commitment is subject to the statute of frauds. *Farah v. Mafridge & Kormanik, P.C.*, 927 S.W.2d 663, 679 (Tex. App.—Houston [1st Dist.] 1996, no writ).

5. Suretyship contracts. A contract by one person to answer for another's debt must comply with the statute of frauds. Tex. Bus. & Com. Code § 26.01 (b)(2).

6. Real estate commission. Tex. Occ. Code § 1101.806(c); *Northborough Corporate L.P. v. Cushman & Wakefield*, 162 S.W.3d 816, 821 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *see Trammell Crow Co. v. Harkinson*, 944 S.W.2d 631, 633 (Tex. 1997) (interpreting predecessor statute). A memorandum of a contract to pay a real estate commission must identify the amount of the commission and sufficiently describe the real estate conveyed. *See Texas Builders v. Keller*, 928 S.W.2d 479, 481 (Tex. 1996). The Texas Supreme Court has recently held that to sufficiently describe the real estate is a fairly low threshold. *SJW Prop. Commerce, Inc. v. Southwest Pinnacle Props., Inc.*, 328 S.W.3d 121, 169-71 (Tex. 2012) (holding a description consisting of property located at the intersection of two specific cross roads in a specific town sufficient).

2. First Material Breach, Excuse, Anticipatory Repudiation

a. First Material Breach/Excuse

Default by one contracting party excuses performance by the other, so the plaintiff's first material breach of the subject contract is a defense to the plaintiff's claim for breach of contract. *Mead v. Johnson Group, Inc.* 615 S.W.2d 685, 689 (Tex. 1981). Prior material breach can be pled as both an affirmative defense and as a counterclaim, so care should be taken to assure the jury questions are clear. *VingCard A.S. v. Merrimac Hospitality Systems, Inc.*, 59 S.W.3d 847, 865 (Tex. App.—Fort Worth 2001, pet. denied).

This might arise in a situation involving a listing agreement where the broker does not perform the services the owner hired the broker to do (such as list the property on the multiple listing service and show the property to potential purchasers), but the broker claims the owner's failure to provide required information (such as a seller's disclosure notice or existing, recent environmental reports) preceded its failure/refusal to continue providing services under the property listing agreement.

b. Anticipatory Breach/Repudiation

It has long been the law in Texas that when one party repudiates the agreement and refuses to be bound by material obligations, the other party may accept such repudiation as final and is not required to further regard the obligations imposed on him thereby. *Pollack v. Pollack,* 39 S.W.2d 853, 855 (Tex. Comm'n App. 1931, holding approved). The doctrine of anticipatory breach is only available where there is an unequivocal renunciation of the contract by the defaulting party. *McKenzie v. Farr*, 541 S.W.2d 879, 882 (Tex. App.—Beaumont 1976, writ ref'd n.r.e.).

A plaintiff purchaser under contract for the purchase of real estate triggered an anticipatory breach by his conduct, which including making invalid title objections upon which he predicated his termination of the contract. This undermined his claims against the defendant seller for breach of the contract by failing to return his earnest money, and supporting the seller's claims for against plaintiff for breach. *Dunham & Ross Co. v. Stevens*, 538 S.W.3d 212, 216-17 (Tex. Civ. App.—Waco 1976, no writ).

A situation where anticipatory breach might arise in the real estate broker context is where a property owner lists her property for sale with a broker, but sometime during the term of the contract, states that she will not sell the property at all, for any price, and will not pay the broker a commission.

3. Ratification, Waiver and Estoppel

a. Ratification

The question of ratification of a contract is usually a mixed question of law and fact. *Sawyer v. Pierce*, 580 S.W.2d 117, 123 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.). If the evidence of ratification is uncontroverted or uncontrovertable, then the question of ratification could be determined as a matter of law. *Id.* Ratification and waiver involve the question of intent. *Id.*

If the duty on the part of the agent to fully and completely disclose all material facts know to the agent which might affect the principal has been met, the principal can be held to have ratified the transaction. . . . Nothing with defeat the principal's remedy except his own confirmation after full knowledge. *Shannon v. Marmaduke*, 14 Tex. 217 (1855).

b. Waiver

Waiver is defined as an intentional relinquishment or surrender of a known right or intentional conduct inconsistent with claiming the right. *Int'l Ins. Co. v. RSR Corp.*, 426 F.3d 281, 300 (5th Cir. 2005); *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003).

Mere silence cannot establish waiver unless the inaction shows an intent to relinquish the right. Jernigan, 111 S.W.3d at 156. A waiveable right may spring from law or from contract. *Tenneco Inc. v. Enterprise Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996). A party's express renunciation of a known right can establish waiver. *Id.* Silence or inaction, for so long a period as to

show an intention to yield the known right, is also enough to prove waiver. *Id.* Although waiver is ordinarily a question of fact, when the facts and circumstances are admitted or clearly established, the question becomes of law. *Id.*

There are few reported cases concerning waiver, but in a broker commission case, the court found waiver of breach of fiduciary duty of a real estate broker to its principal when the principal knew of the broker's misrepresentation but chose to go ahead with the transaction anyway. The broker told the property owner that the agreement to sell the property that he had procured from a buyer had been approved by the property owner's attorney, when in fact it had not. However, because the owner wanted to go ahead with the sale contract, the court held he waived the broker's breach. *Henry v. Schweitzer*, 435 S.W.2d 941, 943-44 (Tex. Civ. App.—San Antonio 1968, no writ).

c. Estoppel

In its most basic definition, the doctrine of estoppel prevents a person from taking a contrary position to a prior position of which he has enjoyed the benefits. There are several varieties of estoppel, and not all will apply in transactions with real estate.

A property seller who ratified changes to sales contract, even though originally made by broker without the seller's permission, was estopped from asserting the originally unauthorized modifications as a defense to the broker's commission claims. *Thompson v. Starr Realco*, Inc., 648 S.W.2d 25, 28 (Tex. App.—Tyler 1983, writ ref'd n.r.e.).

Promissory estoppels *cannot* be used to counter a statute of frauds defense if the agreement concerned payment of a real estate commission. *Trammell Crow Co. v. Harkinson*, 944 S.W.2d 631, 636 (Tex. 1997) (emphasis added).

C. Tort Defenses

1. Lack of Duty

a. No duty on part of real estate licensee to investigate condition of real property

A real estate agent or broker has no legal duty to inspect listed property and disclose all facts which might materially affect its value or desirability. *Sherman v. Elkowitz*, 130 S.W.3d 316, 321 (Tex. App.—Houston [14th Dist.] 2004, no pet.). Texas cases – and TRELA – are clear that real estate agents/brokers do not have a duty to ascertain the existence or non-existence of any fact relation to a subject property. *See Hagans v. Woodruff*, 830 S.W.2d 732, 736 (Tex. App.—Houston [14th Dist.] 1992, no writ) (a real estate broker has no duty to investigate or inspect the property and disclose all facts which might materially affect its value or desirability); *Steptoe v. True*, 38 S.W.3d 213, 219 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (brokers have no duty to investigate or inspect property); *Kubinsky v. Van Zant Realtors*, 811 S.W.2d 711, 715 (Tex. App.—Fort Worth 1991, writ denied); *Prudential Insurance v. Jefferson*, 896 S.W.2d 156, 162 (Tex. 1995); *Cregg v. Roman*, No. 05-99-01218-CV, 2000 WL 688264t (Tex. App.—Dallas, pet dismissed. (listing agent not under any greater obligation to further investigate the presence of drainage defects than were buyers)

Vendors' listing broker, by signing vendors' statutorily-required disclosure notice which included the statement "Listing Broker and Other Broker have relied on this notice as true and correct and have no reason to believe it to be false or inaccurate," did not adopt as their own vendors' representations regarding non-existence of defects and of prior lawsuits directly or indirectly affecting the home; thus, listing broker would have duty to come forward only if he had any reason to believe that vendors' disclosures were false or inaccurate, and the only way he could be held liable for misrepresentation was if his statement was shown to be untrue. *Sherman v. Elkowitz*, 130 S.W.3d 316, 321 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

b. Seller's Limited Duty

Since listing brokers act as agents for sellers, the seller's duties are also relevant to the discussion.

A seller has no duty to disclose facts he does not know. *Prudential Ins. Co. v. Jefferson Assoc., Ltd.*, 896 S.W.2d 156, 162 (Tex. 1995); *Robinson*

v. Preston Chrysler-Plymouth, Inc., 633 S.W.2d 500, 502 (Tex. 1982); *Pfeiffer v. Ebby Halliday Real Estate, Inc.*, 747 S.W.2d 887, 890 (Tex. App.—Dallas 1988, no writ). Nor is a seller liable for failing to disclose what he only should have known. *Prudential*, 896 S.W.2d at 162. Sellers have no greater duty to investigate the presence of drainage defects than buyers. *See Prudential*, 896 S.W.2d at 162; *see also Pfeiffer*, 747 S.W.2d at 891 (realtor had no greater responsibility to look more closely at foundation than buyer). Nor do property sellers or real estate licensees have a duty to disclose to potential property buyers any general concerns they may have had. *See Prudential*, 896 S.W.2d at 162.

2. Economic Loss Rule & "Con-Tort"

In most claims involving real estate licensees, the damages sought are most likely economic, such as for cost of repair of an undisclosed defect, lost profits in a potential sale, or a diminution of value of the property purchased – as opposed to damages for personal injuries or property damage. Texas courts have long adhered to the economic loss rule, which generally precludes recovery in tort when the only economic loss to the plaintiff is the subject matter of the contract. *Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494-95 (Tex. 1991).

Recently, the Texas Supreme Court has clarified that there is not one "economic loss rule", but several rules governing recovery of economic losses in various areas of the law. *Arlington Home, Inc. v. Peak Env't Consultants, Inc.*, 361 S.W.3d 773, 779 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); *See Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 415 (Tex. 2011). The Court traced the history of the "economic loss rule," examining several situations in which it operated to bar recovery. *Arlington Home*, 361 S.W.3d at 779*;* see *Sharyland*, 354 S.W.3d at 415-18.

Citing *Southwestern Bell Tel. Co. v. DeLanney*, the Court reiterated that when a plaintiff seeks damages for breach of a duty created under contract rather than a duty imposed by law, tort damages are precluded. *Arlington Home*, 361 S.W.3d at 779; *Sharyland*, 354 S.W.3d at 417. It further explained the nature of the injury most often determines what duty is breached: "'When the injury is only the economic loss to the subject of a contract itself the action sounds in contract alone.' ". *Id.* (quoting *DeLanne*y, 809 S.W.2d at 495). The Texas Supreme Court refines this concept: "We have applied the economic loss rule only in cases involving defective products or failure to perform a contract. In both of those situations, we held that the parties' economic losses were more appropriately addressed through statutory warranty actions or common law breach of contract suits than tort claims.

A word of caution, only negligence cause of action is affected by the economic loss doctrine. If additional claims exist, such as under the DTPA, economic damages are specifically recoverable. *See* Tex. Bus. & Com. Code §17.50.

D. DTPA Defenses

1. Licensees Generally Exempt from DTPA

The DTPA provides an exemption from liability to those who render professional services when the essence of the service is based on rendering advice, judgment, or opinion. The professional services exemption was added to the DTPA in 1995. Tex. Bus. & Com. Code §17.49(c) (West 2011), *amended by* Act of May 28, 2011, 82nd Leg., R.S., ch. 189, § 17.49, 2011 Tex. Sess. Law Serv. (West). A professional service is "one that arises out of acts particular to the individual's specialized vocation." *Nast v. State Farm Fire & Cas. Co.*, 82 S.W.3d 114, 122 (Tex. App.—San Antonio 2002, no pet.). An act is not a professional service merely because it is performed by a professional; rather, it must be necessary for the professional to use his specialized knowledge or training. *Id.*

The recent 2011 amendments to the DTPA specifically exempted real estate brokers and salespersons from certain DTPA claims. DTPA Section 17.49, Exemptions, now states in pertinent part:

(i) Nothing in this subchapter shall apply to a claim against a person licensed as a broker or a salesperson under Chapter 1101, Occupations

Code, arising from an act or omission by the person while acting as a broker or salesperson. This does not apply to:
(1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion; (2) a failure to disclose information in violation of Section17.46 (b) (24) [the nondisclosure item in the DTPA laundry list]; or an unconscionable act or course of action that cannot be characterized as advice, judgment, or opinion.
What remains are misrepresentations and failures to disclose, and unconscionable acts or courses of action that are not advice, judgment, or opinion.

As of the publication of this paper, there are no reported cases which involve the new real estate broker DTPA exemption. However, as a matter of first impression, the Waco Court of Appeals recently held that a home inspector is a "professional" and thus qualified for the general professional services exemption to liability under the DTPA found in Section 17.49(c). *Retherford v. Castro*, 378 S.W.3d 29 (Tex. App.—Waco 2012, pet. denied). The case gives a good overview of the professional serves exemption generally and walks through the history and scope of application thus far.

2. <u>Other Exemptions</u>

The DTPA also exempts certain transactions that exceed financial thresholds and other conditions (whether the consumer has counsel, and if the transaction concerns the consumer's residence), thus many commercial real estate transactions fall outside of the DTPA's scope.

"Nothing in the subchapter shall apply to a claim arising out of a written contract if:
(1) the contract relates to a transaction, a project, or a set of transactions related to the same project involving total consideration by the consumer of more than $100,000;
(2) in negotiating the contract the consumer is represented by legal counsel who is not directly or indirectly identified, suggested, or selected by the defendant or an agent of the defendant; and
(3) the contract does not involve the consumer's residence." Tex. Bus. & Com. Code §17.49(f).

Further, "Nothing in this subchapter shall apply to a cause of action arising from a transaction, a project, or a set of transactions relating to the same project, involving total consideration by the consumer of more than $500,000, other than a cause of action involving a consumer's residence." Tex. Bus. & Com. Code §17.49(g).

3. **<u>No "should have known" standard – the DTPA requires actual knowledge</u>**.

It is well established that to violate the DTPA for nondisclosure of a material fact, the defendant is required to possess *actual* knowledge of the information at issue. Liability for non-disclosure under the DTPA's laundry list for nondisclosure, §17.46(b)(24) requires evidence that the defendant had knowledge of the undisclosed information and intentionally withheld it. *Prudential Ins. Co. of Am. v. Jefferson Assocs. Ltd.*, 896 S.W.2d 156, 162 (Tex. 1995).

A defendant cannot be held liable for failing to disclose even what he *should have known*. *Prudential Ins. Co. of Am. v. Jefferson Assocs. Ltd.*, 896 S.W.2d 156, 162 (Tex. 1995). Without actual knowledge, there is no liability. *Id*. A plaintiff's reliance on a "should have known" standard under the DTPA is misguided as has been rejected previously. *See* Tex. Bus. & Com. Code § 17.46(b)(24); *Kessler v. Fanning*, 953 S.W.2d 515, 521 (Tex. App.—Fort Worth 1997, no pet.); *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 479 (Tex. 1995*); Prudential v. Jefferson*, 896 S.W.2d at 162. Furthermore, there is not even a duty to disclose general concerns a defendant might have had. *See Prudential*, 896 S.W.2d at 162.

In contrast, Under the DTPA, a seller is liable for affirmative misrepresentations, despite a lack of notice or falsity, because the law imposes a duty on the seller to know whether an affirmative statement is true. *See Kessler*, 953 S.W.2d at 518-19; *Henry S. Miller Co. v. Bynum*, 797 S.W.2d 51, 55 (Tex. App.—Houston [1st Dist.] 1990) *aff'd* 836 S.W.2d 160 (Tex. 1992); *Main Place Custom Homes, Inc. v. Honaker*, 192 S.W.3d 604, 620+ (Tex. App.—Fort Worth 2006, pet denied).

4. Other Defenses & Defensive Matters

Practitioners should review DTPA sections concerning waivers of consumer rights (in writing, with counsel, *see* §17.42); definition of consumer and business consumer ($25MM assets eliminates wealthy plaintiffs, *see* §17.45(4) & (10)); DTPA claim groundless, in bad faith, harassment (defendant's attorneys' fees and court costs, *see* §17.50(c); notice and inspection (pre-suit notice or abatement, defendant may request to inspect, *see* §17.505); mandatory mediation (*see* §17.501); offers of settlement (reasonable offer limits recovery at trial and attorneys' fees, *see* §17.5052); proof of pre-transaction notice of defendant's reliance on information from others, including government records (*see* §17.506(a)-(c)); tender of damages and attorneys' fees (*see* §17.506(d); indemnity (*see* §17.555); limitations (2 years, *see* §17.565); post-judgment, plaintiff's right to receiver over defendant's business) (*see* §17.59); creditor

V. DAMAGES/RECOVERY ISSUES

A. Insurance Coverage – Is there any?

Many real estate brokers buy errors & omissions insurance policies to cover claims against them and their sponsored agents for liability arising out of negligence, omissions, and mistakes inherent to the real estate practice. However, there is no statutory or other legal requirement that individual real estate licensees maintain this form of malpractice insurance. In fact, some brokers chose to "go naked" without any coverage for cost reasons, or because they believe that the existence of an insurance policy may make them a litigation target.

However, there is a fairly recent statutory requirement effective September 1, 2011 that "licensed business entities" have at least $1 million of errors and omissions insurance for each occurrence if the designated broker for the entity owns less than 10% of the entity (a licensed business entity is a real estate brokerage entity such as a corporation, LLC, or partnership that actually holds the licensees licenses, and/or receives compensation on behalf of a license holder, and has a human designated broker in active status and good standing with TREC). *See* Tex. Occ. Code §1101.355.

1. Don't Plead Yourself Out of Coverage!

An insurer's duty to defend its insured is determined solely by the allegations in the pleadings filed against him. *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 848-49 (Tex. 1994). If a petition does not allege facts within the scope of coverage, an insurer is not legally required to defend a suit against its insured. *Id. at 849.* Commonly called the "eight corners rule", it combines the coverage limits contained within the "four corners" of the insurance contract, and the "four corners" of the pleading document. If there is overlap – i.e. policy coverage for claim in the petition – then the insurer is required to defend and cover losses from the claim.

PRACTICE TIP: A basic rule to remember when dealing with insurance is that it covers negligence, but it does not cover intentional acts. Sometimes insurance policies will cover more, such as breach of contract claims, but a basic general liability or errors and omissions policy will not. If you are plaintiff's counsel suing a real estate licensee, even if you and your client are certain that the broker's bad acts and omissions were intentional – go ahead and plead the negligence version as well. For example, the broker represented there had never been any previous foundation work on the property, when he personally knew that not to be true. If the evidence supports it, sue for common law and statutory fraud in a real estate transaction, but also include a negligent misrepresentation claim so that the broker's malpractice carrier will pick up the defense. You will then have counsel on the other side who more likely than not is experienced in these matters and who will help the opposing party and its carrier value and resolve the case (if that is possible).

PRACTICE TIP: If you represent the plaintiff, or a defendant with cross claims or third party claims, serve a Request for Disclosure with your original petition, or immediately after the defendant answers. RFDs include a request for indemnity and insuring agreements under which any person may be liable to satisfy part or all of a judgment rendered in the action or to indemnify

or reimburse for payments made to satisfy the judgment. *See* Tex. R. Civ. P. 194.2 (f). Be certain to specify in the Request that you also want any reservations of rights by the insurer, and insist on receiving a copy of the actual insurance policy (not just the declarations page) and read it!

2. Consider *Stowers* Demand

The "Stowers Doctrine" has its origins in the *G. A. Stowers Furniture Company v. American Indemnity Co.* case. *G. A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544 (Tex. Comm. App. 1929, holdings approved). Basically, if a settlement demand is made against the defendant and its insurance company that is within the insurance policy's limits and the insurer refuses to pay the demand, and a larger judgment is entered against the defendant following trial (or summary judgment), the insurer will be obligated to pay the entire judgment, even though it exceeds the policy limits. *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 848-49 (Tex. 1994). Generally, a Stowers settlement demand must propose to release the insured fully in exchange for a stated sum of money, but may substitute "the policy limits" for a sum certain. *Id. at 849*.

Under this doctrine, the insurer is required to exercise "that degree of care that and diligence that an ordinarily prudent person would exercise in the management of his own business" in evaluating the settlement demand. *Id*. at 547. An insurer's *Stowers* duty in responding to a settlement demand is activated by a settlement demand if three prerequisites are met: (1) claim against the insured is within the scope of coverage; (2) settlement demand is within policy limits; and (3) terms of demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment.

B. Proportionate Responsibility

The laws concerning proportionate responsibility and contribution are themselves the subject of entire CLEs and white papers. For these purposes, suffice it to say if there are tort claims involved in a case, the defendant should consider pleading that the plaintiff's own acts/omissions, and/or the acts/omissions of other parties, and/or non-parties not subject to the defendant's control caused or contributed to plaintiff's damages, and the liability of each of those persons should be considered and assessed. *See* Tex. Civ. Prac. & Rem. Code, Chapter 33, generally.

If appropriate to the facts in the case, a defendant can also plead that liability falls to certain a "responsible third party" ("RTP" or "R3P"), who, once designated according to the procedure, is not a party to the case and can suffer no actual liability unless the plaintiff sues the RTP in response to the designation. *See* Tex. Civ. Prac. & Rem. Code § 33.011(6). The RTP procedure formalizes the "empty chair" that the defendant can point to at trial as the one who should be assessed blame.

The RTP statutes now allow defendants to designate parties not subject to suit and who could never satisfy a judgment, including unknown "John Doe" parties (who may or may not actually exist), bankrupt entities, government units with sovereign immunity, employers protected by the Texas Workers' Compensation Act (TWCA). *See* Tex. Civ. Prac & Rem. Code §§ 33.011(6), 33.004(j) and (k).

Remember, however, that Chapter 33 does not apply to breach of contract cause of actions because they do not sound in tort. *See CBI NA-COON, Inc. v. UOP Inc.*, 961 S.W.2d 336, 341 (Tex. App.—Houston [1st Dist.] 1997, pet. denied).

PRACTICE TIP: There are deadlines for motions for leave to designate RTPs, so defense lawyers should review their cases with an eye to designating RTPs (and plaintiff's counsel for defending against RTP designations), as appropriate, from the beginning of the case. Tex. Civ. Prac & Rem. Code §§ 33.004.

For a great overview of the current proportionate responsibility statute and its affects, see Randall O. Sorrells & Brant J. Stogner, *Shifting Liability*, State Bar of Texas: 33rd Annual Advanced Estate Planning and Probate Course, Ch. 24 (2009). If

appropriate in the case, including RTPs and other parties in the proportional responsibility question may allow defendants to escape liability, or at least joint and several liability with greater frequency, especially in light of the 51% requirement needed to hold any defendant jointly and severally liable. *See Shifting Liability*, at VI.

C. Attorneys' Fees

Texas law follows the "American Rule" which prohibits recovery of attorneys' fees unless authorized by statute or contract. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310 (Tex. 2006); *KB Home Lone Star, L.P.*, 295 S.W.3d 650, 653 (Tex. 2009).

1. Plead & Prove, Designate Experts

A plaintiff is required to present evidence demonstrating its attorneys' fees are reasonable and necessary. Attorneys' fees billing statements and engagement agreement – while evidence of fees paid or incurred – are not enough, as those are no evidence of either the reasonableness or necessity of the fees. *See Pheng Investments, Inc. v. Rodriguez*, 196 S.W.3d 322, 333 (Tex. App.—Fort Worth 2006, no pet.).

Claims for attorneys' fees should be specifically pled by plaintiffs, and be brought as independent counterclaims for affirmative relief by defendants. If a defendant seeks recovery of attorneys' fees, it bears reminding that this accelerates the defendant's normal timeline for designating expert witnesses - yourself or other experienced counsel in the location – to testify as to the reasonableness and necessity of attorneys' fees. Arguably, if the only attorneys' fee recovery will come under the prevailing party language the defendant can follow the normal expert witness designation timeline.

2. Segregation of Attorneys' Fees Required

Unless all attorneys' fees are allowed under the prevailing party language, if any attorneys' fees relate solely to claims for which fees are not recoverable, a claimant must segregate recoverable from unrecoverable fees. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006). "Intertwined facts do not make tort fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated." *Id.* at 313-14. Because unsegregated fees are some evidence of what the segregated amount should be, remand for segregation of fees may be required when at least some of the fees at issue are attributable to claims for which attorneys' fees are recoverable. *Id.*

3. Prevailing Party Language in Contracts

A specific consideration in claims concerning brokers is attorneys' fees for the prevailing party as provided under the TREC promulgated earnest money contract between the buyer and seller. Section 17 of the standard One to Four Family Residential Contract (Resale) Earnest Money Contract, TREC), provides that "[t]he prevailing party in any legal proceedings related to the contract is entitled to recover reasonable attorney's fees and all costs of such proceeding incurred by the prevailing party." The contract does not (currently) specifically define the term "prevailing party".

There is a split of authority between the courts of appeal, with some appellate jurisdictions have held the standard TREC promulgated purchase money contract attorneys' fees section provides attorneys' fees to brokers/agents even thought they are not an actual party to the contract, while other courts of appeal do not. Allowing broker's/non-party's recovery of attorneys' fees via the contract as the prevailing party thus far are the Courts of Appeal sitting in Austin. *See Boehl v. Boley*, No. 07-09-0269-CV, 2011 WL 238348 (Tex. App.—Amarillo Jan. 21, 2011, pet. denied) (mem. op.) (per curium) (case from Travis County, thus in Court of Appeals of Austin's jurisdiction); *Sierra Assoc. Group, Inc. v. Hardeman*, No. 03-08-00324-CV, 2009 WL 416465, *8-10 (Tex. App.—Austin Feb. 20, 2009, no pet.) (mem. op.).

Denying recovery of attorneys' fees to non-parties to the earnest money contract are Courts of Appeals in Houston [14th Dist.], San Antonio, and Waco. *See Arlington Home, Inc. v. Peak Environmental Consultants, Inc.*, 361 S.W.3d

773, 783 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (holding broker not entitled to recover attorney's fees under terms of the TREC-promulgated earnest money contract); *Lesieur v. Fryar*, 325 S.W.3d 242, 251-253 (Tex. App.—San Antonio 2010, pet. denied); *Williamson v. Guynes*, No. 10-03-0047-CV, 2005 WL 675512, *1 (Tex. App.—Waco Mar. 23, 2005, no pet.).

Recently, the Texas Association of Realtors® and the Houston Association of Realtors both filed amicus briefs with the Texas Supreme Court on this issue, urging the Court to uphold the Court of Appeals' decision to allow brokers and others who prevail on claims to recover attorneys' fees even when the version of the contract at issue does not specifically include them in the prevailing party section. *See* Amicus Brief of Texas Association of Realtors® filed in the Supreme Court of Texas Sept. 23, 2011, *6, and Amicus Brief of Houston Association of Realtors filed September 15, 2011, *2-3, in petition for review matter, *Boehl v. Boley*, No. 07-09-0269-CV (the opinion of the Court of Appeals of Texas, Amarillo can be found at 2011 WL 238348 (Tex. App.—Amarillo Jan. 21, 2011, pet. denied) (mem. op.) (per curium).

If a party is the prevailing party, it should be able to recover all of their attorneys' fees, not just those for contractual claims. As the San Antonio Court of Appeals has held, "[a]ccording to its plain language, the attorneys' fees provision in the [standard TREC] contract applies to "any legal proceeding brought *under or with relation to this contract or this transaction*." *Fitzgerald v. Schroeder Ventures II, LLC*, 345 S.W.3d 624, 630-31 (Tex. App.—San Antonio 2011, no pet.) (emphasis in original). The court held that the claims in the case, although were tort claims, involve allegations that defendants failed to disclose information in the sales transaction which was the subject of the contract, and concluded the prevailing party attorneys' fees provision applied to the claims. *Fitzgerald v. Schroeder Ventures II, LLC*, 345 S.W.3d 624, 630-31 (Tex. App.—San Antonio 2011, no pet.); *accord Robbins v. Cappozi*, 100 S.W.3d 18, 27 (Tex. App.—Tyler 2002, no pet.).

In other news on the prevailing party front, the Texas Supreme Court recently held in a 6-3 decision in *Epps v. Fowler* that a defendant is a "prevailing party" with respect to contractual language entitling a prevailing party to attorneys' fees when a plaintiff nonsuits a case with prejudice. *Epps v. Fowler*, 351 S.W.3d 862, 866 (Tex. 2011). The discussed the definition of "prevailing party" in the standard promulgated TREC contract and observed, among other things, that "when a contract leaves a term undefined, we presume that the parties intended its plain, generally accepted meaning, and accordingly, we give the term its ordinary meaning". *Id.*

The Court also went so far as to say that a defendant may even be a "prevailing party" with respect to contractual language entitling the prevailing party to attorneys' fees when a plaintiff nonsuits without prejudice if the court determines, on the defendant's motion, that the nonsuit was taken to avoid an unfavorable ruling on the merits. *Id.* at 870-71. The court discusses that there could be a number of factors to support an inference that a plaintiff has nonsuited in order to avoid an unfavorable ruling. The court specifically identifies such situations including a plaintiff's unexcused failure to respond to requests for admissions or other discovery that could support entry of an adverse judgment, or where a plaintiff files a nonsuit only after a motion for summary judgment is filed, or where plaintiff failed to timely designate expert witnesses or identify other critical witnesses. *Id.* at 871. The case was remanded to the trial court to determine whether the case was dismissed by plaintiffs to avoid an unfavorable judgment.

The *Epps v. Fowler* decision created the exception to the rule that a party who obtained favorable jury findings on liability but no damages was not entitled to attorney's fees under prevailing party contractual language. *Epps*, 351 S.W.3d at 864 (discussing the Court's holding in *Intercont'l Group P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 652 (Tex. 2009)).

4. CPRC Chapter 38

Also a good idea to plead for attorneys' fees under Chapter 38 of the Civil Practice and

Remedies Code for any breach of contract claim, even if pleading for attorneys' fees pursuant to the terms of the contract itself. Section 38.001 provides that reasonable attorneys' fees may be recovered from an individual or corporation, in addition to the amount of valid claim and costs, if the claim is for: (1) rendered services; (2) performed labor; . . .or (8) an oral or written contract. Tex. Civ. Prac. & Rem. Code § 38.001. Practitioners should pay particular attention to the requirements of section 38.002, and follow the claim presentment requirements and deadlines. The "claim" arguably includes not only the damages sought, but also the attorneys' fees incurred.

PRACTICE TIP: Since the fees will increase over the life of the litigation, it's likewise a good idea to "refresh" the Chapter 38 demand during the litigation, perhaps more than once, and certainly 30 days before trial. In the final presentment, the demand should include the attorneys' fees to date, plus an estimate of additional attorneys' fees and expenses to be incurred during the last month getting the case ready for trial, and for the time spent in trial.

The Texas Supreme Court has held that "before a party is entitled to fees under section 38.001, the party must (1) prevail on a cause of action for which attorneys' fees are recoverable, and (2) recover damages." *Intercontinental Group P'ship v. KB Home Lone Star, L.P.*, 295 S.W.3d 650, 653 (Tex. 2009).

5. Statutory Rights to Attorneys' Fees

a. DTPA

Attorneys' fees are recoverable under the DTPA. *See* Tex. Bus. & Com. Code §17.50(b).

b. Statutory Fraud

Section 27.01(e) permits recovery of reasonable and necessary attorneys' fees in cases involving fraud in real estate or stock transactions, however, unlike CPRC Chapter 38.004, Section 27.01 does not provide for judicial notice of attorneys' fees. A plaintiff is required to present evidence demonstrating its attorneys' fees are reasonable and necessary. Attorneys' fees billing statements and engagement agreement are not enough, as those are no evidence of either the reasonableness or necessity of the fees. *See Pheng Investments, Inc. v. Rodriguez*, 196 S.W.3d 322, 333 (Tex. App.—Fort Worth 2006, no pet.)

c. Attorneys' Fees as Sanctions

If the case merits, defendants can seek attorneys' fees as sanctions under Chapter 10 of the Civil Practice and Remedies Code on grounds that plaintiff's claims are legally and factually frivolous or groundless.

d. Offer of Settlement Statute – Loser Pays Fees?

The "new loser-pays" law is somewhat of a misnomer. Section 42.004 of the Civil Practices & Remedies Code requires parties to consider settlement offers seriously, or suffer the imposition of limits on its recovery of attorneys' fees or be liable for the other party's, depending on who is making the offer of settlement. If a party rejects a "reasonable" settlement offer after this statute has been invoked and the recovery is significantly less favorable (defined as 80% of the rejected offer for plaintiff, or %120 of the rejected offer for defendant) the offering party has a claim for their attorneys' fees from the rejecting party from the date the rejecting party rejected the settlement.

There are some offsets and limits involved, so practitioners should review Chapter 42 as well as Rule 167 in detail to determine whether invoking the statute is good strategy in the particular case; or if it has been invoked, how to properly respond and the ramifications of offers and rejections. Again, this is a topic worthy of entire CLEs and whitepapers, and far beyond the scope if this article.

D. Real Estate Recovery Trust Account

So you sued the broker and won, but he's a "turnip" – now what? See if you can tap into the Real Estate Recovery Trust Account ("RERTA"). Again, start with the Act. The Real Estate Recovery Trust Account was created as part of the Real Estate License Act in 1975 (formerly known as the Real Estate Dealers Act). Section 1101.601 of TRELA provides that TREC shall maintain a real estate recovery trust account to

reimburse aggrieved persons who suffer actual damages caused by real estate licensees. Recovery is reserved only for public consumers, so claims from salespersons seeking commissions from their sponsoring broker will not be accepted. *See Burnett v. Foley*, 660 S.W.2d 884, 887 (Tex. App.—Fort Worth 1983, no writ).

Information about the Real Estate Recovery Trust Account is available online under the "Complaints, Consumer Info" tab of the Texas Real Estate Commission's website. http://www.trec.texas.gov/complaintsconsumer/default.asp. Under the Consumer Information heading, there is a subsection titled "Who Pays Judgments Made Against Licensees?" with a question and answer sheet about the recovery trust account that provides general information. http://www.trec.texas.gov/pdf/faq/rerf-faq.PDF.

There is a two year statute of limitations to commence suit if recovery is to be had from RERTA, regardless of the causes of action plaintiff seeks to bring against the defendant licensee. *See* Tex. Occ. Code §1101.605. Claims for payment from the trust account can be made by an aggrieved person who obtains a judgment against a licensee for an act described in TRELA as a prohibited act, the judgment is entered, execution is returned *nulla bona*, and a judgment lien has been perfected. Notice must be given to the commission and the judgment debtor/licensee, and 20 days later the aggrieved judgment creditor may apply for an order for payment from the RERTA to the court that entered the judgment. Tex. Occ. Code §1101.606; *see also Tex. Real Estate Comm. v. Bayless*, 366 S.W.3d 808, 812-13 (Tex. App.—Fort Worth 2012, pet. denied).

After notice is given, the commission in essence has the opportunity to retry the case and "may relitigate in the hearing an material and relevant issue that was determined in the action that resulting in the judgment in favor of the aggrieved person." Tex. Occ. Code § 1101.608. For example, if the licensee defendant did not mount a defense, or show up for trial and a default judgment was entered, if TREC wanted to try all of the underlying issues supporting the judgment, including liability and damages, it can.

Currently, the maximum payment from the recovery fund available per single transaction is $50,000, and $100,000 for all claims against a single licensee. The limits include amounts available for actual damages, interest, court costs, and reasonable attorneys' fees. *Texas Real Estate Comm. v. Bucurenciu*, 352 S.W.3d 828, (Tex. App.—San Antonio, 2011, no pet.). New rules that went into effect in December 2011 clarify the proration of claims in the event of multiple claims that exceed the payment limitations of $50,000 per transaction and $100,000 per licensee. 22 Tex. Admin. Code § 535.82. Now, the court must apply recovery amount first to the claimant's actual damages before considering attorneys' fees. Tex. Occ. Code. § 1101.611. The recovery can only be for actual damages (no treble or punitive damages) and attorneys' fees. *Pace v. State*, 650 S.W.2d 64 (Tex. 1983).

The Commission has subrogation rights against any subsequent recovery, and assignment of subrogation rights in the amount paid from the trust account is required for recovery. Tex. Occ. Code § 1101.612.

E. Commercial Lien for Commission

A real estate broker is entitled to a lien on a seller's ***commercial*** real estate interest (but not residential real estate) in the amount specified by the commission agreement if (1) the broker has earned a commission under a commission agreement signed by the seller and (2) a notice of lien is recorded and indexed as provided by the Texas Property Code. See Tex. Prop. Code §§ 62.001 – 62.142. For the notice of lien to be valid, it must be recorded "after the commission is earned" and "before the conveyance of the commercial real estate interest on which the broker is claiming a lien." Tex. Prop. Code § 62.041(a). Once the notice of lien is filed with the county clerk, the broker "shall mail a copy of the notice of lien" not later than one business day after the date of filing to the owner of the real estate interest. Tex. Prop. Code. §§ 62.024(b), 62.026 (a)-(b)(1).

If the broker fails to comply with the notice requirements, the "notice of lien is void," which means the broker no longer has a lien. Tex. Prop.

Code §§ 62.026(f); 62.021(a)(2). A broker whose notice of lien is void (*i.e.*, failed to comply with the notice requirements) "shall furnish to the owner a release of indebtedness and any lien claimed" no later than five days after the broker receives a written request from the owner. Tex. Prop. Code. § 62.081(a).

A property owner whose property has a commission lien filed against it may file suit against a broker to remove the lien under the provisions of Section 62.141(a), and if the owner establishes that the broker "failed to mail a copy of the notice of lien" within one business day or "failed to release a lien" within five days after a proper request, "the court shall discharge a broker's lien." Tex. Prop. Code. § 62.141(b). The owner has two years to file suit. Tex. Prop. Code. § 62.063.

A broker may also be liable to the owner for damages if: (1) the broker recorded a lien, (2) the broker failed to release a lien within five days after an owner properly requested a release, (3) the owner mailed to the broker a copy of the statute and a notice requesting the broker to release the lien no later than ten days after receipt of the request, and (4) the broker failed to comply with the owner's written notice within the prescribed period. Tex. Prop. Code § 62.141(c).

F. Damages Too Speculative

There can be no recovery for damages which are too speculative or conjectural. *Lefton v. Griffith*, 136 S.W.3d 271, 277 (Tex. App.-San Antonio 2004, no pet.).

Examples of too-speculative damages allegedly caused by misrepresentation/non-disclosure of some property condition which led to a defense summary judgment in unreported trial cases include: alleged damages for variance in tax amounts (disclosure of sale caused appraisal district valuation to be higher); estimated damages into the future for taxes, from misrepresentation/nondisclosure of the property's condition; and lost profits for a proposed hair salon that could not obtain an commercial operating permit for a residential-zoned property.

G. Settlement Credit

A plaintiff's recovery can be further reduced by any settlement credit, which is governed by Chapter 33 of the Texas Civil Practices & Remedies Code. In short, if the plaintiff settled with one defendant, the Court must reduce the amount the plaintiff can recover from a non-settling defendant. For purposes of Chapter 33, "settlement" means money or anything of value paid or promised to a plaintiff in consideration of potential liability. *See* Tex. Civ. Prac. & Rem. Code § 33.011(5) (defining "settling person").

The settlement credit is applied after: any reduction for the plaintiff's percentage of responsibility (*see Drilex Sys. v. Flores*, 1 S.W.3d 112, 122 n.9 (Tex. 1999)); statutory trebling of damages such as under the DTPA or Insurance Code (*see Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 391 (Tex. 2000)); and prejudgment interest on award of past damages (see Tex. Fin. Code § 304.104; *Battaglia v. Alexander*, 177 S.W.3d 893, 908 (Tex. 2005). However, the settlement credit is applied before any reduction under a statutory cap.

H. Plead Punitive Damage Caps

Texas courts have held that the punitive damage cap must be pleaded and proved. *See Shoreline, Inc. v. Hisel*, 115 S.W.3d 21, 25 (Tex. App.—Corpus Christi 2003, pet. denied). At a minimum, unless the court's scheduling order, etc., require earlier pleading, the exemplary damage cap must be pled at least seven days before trial. Pleadings may be amended within seven days of trial only after leave of the judge is obtained, which shall be granted unless there is a showing that such filing will operate as a surprise to the opposite party. Tex. R. Civ. P. 63.

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