TRIAL OF A CONTRACT CASE

I. SUMMARY

This paper provides an overview of the issues involved in a breach of contract lawsuit, with emphasis on the jury charge and the considerations involved in putting together a proper charge that will stand up on appeal. The discussions of pre-suit considerations and other potential causes of action are intended to provide general guidance on issues commonly encountered in contract litigation. The statistics tell us that the best way to win on appeal is to win in the trial court, so the focus here is on how to prepare a charge that is designed to give the best chance of a favorable result.

II. PRE-SUIT CONSIDERATIONS

A. Forum, Venue, Choice of Law

1. Forum selection

Forum selection clauses requiring disputes to be resolved in a particular state are enforceable in most cases. The only exceptions arise when the party opposing enforcement can clearly show that (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial. In re Lyon Fin. Servs., 257 S.W.3d 228, 231-232 (Tex. 2008). The party challenging the clause has the “heavy” burden of proving the clause is invalid. In re International Profit Assocs., Inc., 286 S.W.3d 921, 924 (Tex. 2009). While the Texas Supreme Court continues to mention the possible exceptions to a forum selection clause, its opinions indicate that the exceptions are very difficult to establish.
For example, while the Court has recognized that enforcement might be denied in cases in which the selected forum would be "seriously inconvenient" for trial, this exception applies only if the inconvenience a party faces is so extreme as to effectively deny the party its day in court. The courts generally presume that by entering into an agreement containing a forum selection clause, the parties effectively represent to each other that the agreed forum is not so inconvenient that enforcing the clause will deprive either party of its day in court. Accordingly, a court might deny enforcement of a forum selection clause based on "serious inconvenience" only in rare cases in which a party shows special and unusual circumstances making trial in another forum so gravely difficult and inconvenient as to warrant disregarding the contractually specified forum. See In re Laibe Corp., 307 S.W.3d 314, 317 (Tex. 2010) (party did not show that it would be deprived of its day in court); In re ADM Investor Services, Inc., 304 S.W.3d 371 (Tex. 2010) (party failed to establish that enforcing forum selection clause would be unreasonable, unjust, or seriously inconvenient merely because of existence of another defendant who was not subject to clause).

The best practice for a party seeking dismissal based on a forum selection clause is to file a motion to dismiss at the earliest opportunity. The courts have not prescribed a specific procedure for such a motion but it appears the courts have adopted the same procedures used in determining enforceability of arbitration clauses (discussed infra). However, counsel should not lose much sleep over potential waiver of the clause by participating in some litigation in the forum because the courts have made it very difficult to waive a forum selection clause. In contrast to the usual venue situation, a party waives a forum selection clause only by substantially invoking the judicial process to the other party's detriment or prejudice, and there is a strong presumption against waiver. See In re ADM, 304 S.W.3d at 374 (simultaneously filing
answer and motion to transfer venue with motion to dismiss based on forum selection clause did not substantially invoke judicial process to opposing party's detriment or prejudice; *In re Automated Collection Techs., Inc.*, 156 S.W.3d 557, 559-560 (Tex. 2004) (defendant did not waive forum selection clause by filing answer with counterclaims and serving substantial discovery requests before filing its motion to dismiss); *In re AIU Ins. Co.*, 148 S.W.3d 109, 120-121 (Tex. 2004) (party did not waive clause by delaying five months before seeking enforcement, filing general denial, requesting jury trial, and paying jury fee).

2. **Venue selection clauses**

While the courts routinely enforce forum selection clauses requiring litigation in a particular state, intrastate venue selection clauses will not be enforced if those clauses are contrary to the statutory venue scheme. The Texas Supreme Court explained the matter as follows:

We are convinced that it is utterly against public policy to permit bargaining in this state about depriving courts of jurisdiction, expressly conferred by statute, over particular causes of action and defenses. It follows that the stipulation for exclusive venue in Dallas county will not be enforced.

*International Travelers' Assoc. v. Branum*, 212 S.W. 630, 632 (1919); see also *In re Great Lakes Dredge & Dock Co. L.L.C.*, 251 S.W.3d 68, 72-79 (Tex. App.—Corpus Christi 2008, orig. proceeding) (trial court properly refused to enforce agreement contracting away mandatory venue). An intrastate venue clause is not enforceable unless it is consistent with the statutory venue scheme, but it still must be timely challenged by the objecting party. See Tex. R. Civ. P. 86 (“An objection to improper venue is waived if not made by written motion filed prior to or concurrently with any other plea, pleading or motion except a special appearance motion provided for in Rule 120a.”)

a. **Exception — major transactions**
By statute, intrastate venue selection clauses are enforceable if they arise out of certain transactions that qualify as "major transactions." Major transactions are defined as those involving a value of $1 million or more. See TEX. CIV. PRAC. & REM. CODE § 15.020. However, the statute explicitly does not affect venue or jurisdiction in an action arising from a transaction that is not a major transaction See § 15.020(e).


(a) In this section, "major transaction" means a transaction evidenced by a written agreement under which a person pays or receives, or is obligated to pay or entitled to receive, consideration with an aggregate stated value equal to or greater than $1 million. The term does not include a transaction entered into primarily for personal, family, or household purposes, or to settle a personal injury or wrongful death claim, without regard to the aggregate value.

(b) An action arising from a major transaction shall be brought in a county if the party against whom the action is brought has agreed in writing that a suit arising from the transaction may be brought in that county.

(c) Notwithstanding any other provision of this title, an action arising from a major transaction may not be brought in a county if:

(1) the party bringing the action has agreed in writing that an action arising from the transaction may not be brought in that county, and the action may be brought in another county of this state or in another jurisdiction; or

(2) the party bringing the action has agreed in writing that an action arising from the transaction must be brought in another county of this state or in another jurisdiction, and the action may be brought in that other county, under this section or otherwise, or in that other jurisdiction.

(d) This section does not apply to an action if:

(1) the agreement described by this section was unconscionable at the time that it was made;

(2) the agreement regarding venue is voidable under Chapter 272, Business & Commerce Code; or

(3) venue is established under a statute of this state other than this title.
(e) This section does not affect venue and jurisdiction in an action arising from a transaction that is not a major transaction.

b. Exception - Contract in Writing

Section 15.035 of the Civil Practice and Remedies Code provides as follows:

(a) Except as provided by Subsection (b), if a person has contracted in writing to perform an obligation in a particular county, expressly naming the county or a definite place in that county by that writing, suit on or by reason of the obligation may be brought against him either in that county or in the county in which the defendant has his domicile.

(b) In an action founded on a contractual obligation of the defendant to pay money arising out of or based on a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household, or agricultural use, suit by a creditor on or by reason of the obligation may be brought against the defendant either in the county in which the defendant in fact signed the contract or in the county in which the defendant resides when the action is commenced. No term or statement contained in an obligation described in this section shall constitute a waiver of these provisions.

Section (b) is consistent with the Deceptive Trade Practices Act and the federal Fair Debt Collection Practices Act (discussed infra), which require suits against consumers for personal or family use to be brought in the county where the defendant resides or where the defendant actually signed the contract. For business transactions, a party may effectively require venue in a particular county by expressly naming that county as the place of payment. The contractual place of payment provisions should prevail even if the parties are domiciled in other counties and substantial performance took place in other counties. See e.g. Auto Excel Lube Center, Inc. v. Midstate Environmental Services, LLC, 2008 Tex. App. Lexis 6493 (Tex. App.—Corpus Christi 2008, no pet.) (venue upheld in Nueces county based on contract provision requiring payments to be sent to Nueces county even though parties were domiciled elsewhere).

c. Deceptive Trade and Debt Collection venue provisions
The federal Fair Debt Collection Practices Act requires collection suits to be brought in one of two judicial districts or counties: (1) where the contract sued upon was signed, or (2) where the consumer lives when the collection action is initiated. 15 U.S.C. § 1692i(a)(2). Under the Texas Debt Collection Practices Act (DCPA), venue is controlled by the general venue statute, which provides that venue is proper in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred, in the county of the defendant's residence at the time the cause of action accrued or, if the defendant is not a natural person, in the county of the defendant's principal office in Texas. However, a creditor can be subject to liability under the Deceptive Trade Practices Act for:

(23) filing suit founded upon a written contractual obligation of and signed by the defendant to pay money arising out of or based on a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household, or agricultural use in any county other than in the county in which the defendant resides at the time of the commencement of the action or in the county in which the defendant in fact signed the contract; provided, however, that a violation of this subsection shall not occur where it is shown by the person filing such suit he neither knew or had reason to know that the county in which such suit was filed was neither the county in which the defendant resides at the commencement of the suit nor the county in which the defendant in fact signed the contract;


3. Choice of law

Contracts frequently contain provisions specifying the law of a particular state to govern any dispute. Texas follows the party autonomy approach, whereby the parties’ choice of law
will be upheld unless the chosen law has no relation to the parties or the agreement, or their choice would offend the public policy of the state whose laws otherwise ought to apply. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677-678 (Tex. 1990). The parties' choice will generally be enforced unless one of the following situations exist:

1. The chosen state has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the parties' choice; or

2. Application of the law of the chosen state would be contrary to a fundamental policy of a state that has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of Restatement [Second] Section 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

In the *DeSantis* case, the Court followed these principles to invalidate a choice of law clause in a noncompetition agreement, even though the parties had some connection with the state selected, because (1) the enforceability of a noncompetition covenant was not a matter the parties could resolve by a contract provision; (2) Texas had a materially greater interest than the other state in determining the validity of the noncompetition agreement; (3) Texas law would control the enforceability of the covenant in the absence of an enforceable choice of law provision; and (4) application of the law of another state to determine the validity of a noncompetition agreement to be performed in Texas would be contrary to fundamental policy of Texas. 793 S.W.2d 670, 679-681.

In cases governed by the UCC, a choice of law provision will be upheld where the chosen forum bears a reasonable relationship to the transaction. *Tex. Bus. & Com. Code* § 1.301(a). This is true even if the purpose of the choice is to avoid the law, such as the usury law, of another state that also has a reasonable relationship to the transaction. See e.g. *Woods-Tucker*
Leasing Corp., v. Hutcheson-Ingram Dev. Co., 642 F.2d 744, 752-753 (5th Cir. 1981) (choice of Mississippi law was enforceable when this was the location of the home office of the lender and the place where the loan was approved, even though the lender had an office in Texas and made the loan there to a Texas partnership, with property in Texas as security).

B. Arbitration

1. Procedure

If the party opposing arbitration denies the existence of the agreement to arbitrate, the court must proceed summarily to determine whether an agreement within the statute exists. Tex. Civ. Prac. & Rem. Code § 171.021(b). The court should determine the issue expeditiously. See e.g. In re Houston Pipe Line Company, 311 S.W.3d 449 (Tex. 2009) (trial court abused discretion by permitting discovery on damage calculations and other potential defendants, instead of deciding motion to compel arbitration); In re MHI Partnership., 7 S.W.3d 918, 921-923 (Tex. App.--Houston [1st Dist.] 1999, no pet.) (abuse of discretion to delay decision until after discovery on the merits has been completed); In re Heritage Bldg. Sys., Inc., 185 S.W.3d 539, 542-543 (Tex. App.--Beaumont 2006, no pet.) (court may not defer a ruling on arbitration until after the parties mediate their dispute).

The party seeking to compel arbitration must establish the existence of an enforceable arbitration agreement, and show that the claims raised fall within the scope of that agreement. J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 227 (Tex. 2003). The court may accept documentary evidence such as affidavits, pleadings, discovery and stipulations; it is not required to conduct a full evidentiary hearing with live testimony from witnesses. Northwest Constr. Co. v. Oak Partners, L.P., 248 S.W.3d 837, 845-846 (Tex. App.--Fort Worth 2008, pet. denied). However, an evidentiary hearing should be conducted when disputes as to material facts are
created by opposing affidavits or other admissible evidence. *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 269 (Tex. 1992). Once the party establishes a claim within the arbitration agreement, the trial court must compel arbitration and stay its own proceedings. *Tex. Civ. Prac. & Rem. Code § 171.021(b).*

Nonparties to a contract containing an arbitration clause may be compelled to arbitrate a dispute arising under the contract when the nonparty is the alter ego of the corporation that is a party to the contract. See *In re Merrill Lynch Trust Co. FSB, 235 S.W.3d 185, 188 (Tex. 2007).* Whether the nonparty is in fact the corporation's alter ego should be determined by the court and not the arbitrator *Fridl v. Cook, 908 S.W.2d 507, 514 (Tex. App.--El Paso 1995, dis. w.o.j.)*.

### III. THE TRIAL

**A. Particular Claims**

1. **Fraud claims and effect of merger and integration clauses**

   Contract cases often involve claims of fraud. If a party completely fails to perform the fraud claim may be that the party never intended to honor the promise. On the other hand, the party who does not perform or who terminates the contract is likely to claim fraudulent inducement. That claim has received significant attention from the Texas Supreme court in recent years.

   Many contracts contain some form of merger or integration clause which essentially says the written document contains the parties' entire agreement. These clauses generally will not bar a fraud claim. In order to negate a fraud claim it is necessary to include a clear and specific disclaimer of reliance clause. What may seem like a sometimes artificial distinction is actually very important and can literally mean the difference between winning and losing.
The issue is discussed at length in *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of America*, 341 S.W.3d 323 (Tex. 2011). In that case, a husband and wife team with a track record of successful restaurants decided to open a new restaurant (the Italian Cowboy) in the Dallas area. The premises were plagued by a terrible sewer odor, which not surprisingly severely disrupted the restaurant operations and caused the business to shut down soon after opening. The plaintiffs sued the Landlord and the property manager (who negotiated the lease) for rescission of the lease and recovery of all out of pocket expenses related to the failed operation.

The plaintiffs presented evidence that the property manager made repeated representations to them about the quality of the premises and the absence of any problems that might interfere with a successful restaurant. Plaintiffs also called the former tenant, who also tried unsuccessfully to operate a restaurant, as a witness. He testified that the same sewer odors caused him to shut down and the issue was well known to the defendants. The trial court rendered judgment in favor of the plaintiffs for actual damages of approximately $600,000.00, plus attorneys’ fees, interest and $50,000.00 in exemplary damages.

The court of appeals reversed the trial court and rendered judgment that (1) the plaintiffs take nothing and (2) the Landlord have judgment on its counterclaim against the plaintiffs and the guarantors (the husband and wife) for breach of the lease. See *Prudential Ins. Co. of America v. Italian Cowboy Partners, Ltd.*, 270 S.W.3d 192 (Tex. App.—Eastland 2008). Among other things, the appeals court held that the contract’s merger and disclaimer-of-reliance clauses barred the plaintiffs’ misrepresentation claims; the terms of the lease negated the implied warranty of suitability; and the plaintiffs ratified the lease by continuing to operate even with the
sewer odor. *Id.* at 201 - 207. The case was then remanded to the trial court to add on defendants' attorneys' fees.

The Texas Supreme Court granted the petition and reversed, reinstating the award for the plaintiffs. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of America.*, 341 S.W.3d 323 (Tex. 2011). Most of the court's opinion related to the merger and disclaimer of reliance issues. The relevant provisions of the lease provided as follows:

14.18 Representations. Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises with respect to the Site, the Shopping Center or this Lease except as expressly set forth herein.

14.21 Entire Agreement. This lease constitutes the entire agreement between the parties hereto with respect to the subject matter hereof, and no subsequent amendment or agreement shall be binding upon either party unless it is signed by each party.

The Court rejected the idea that these provisions effectively disclaimed reliance on representations made by Prudential, which would have negated an element of Italian Cowboy's fraud claim. These provisions were held to be nothing more than "a standard merger clause, which does not disclaim reliance." *Id.* at 331. The Court went on to analyze the history of this issue in Texas, beginning with the notion that a written contract is generally subject to avoidance on the ground of fraudulent inducement. *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990); More than fifty years ago the Texas Supreme Court quoted approvingly the "sound public policy" supporting the rule on merger clauses:

The same public policy that in general sanctions the avoidance of a promise obtained by deceit strikes down all attempts to circumvent that policy by means of contractual devices. In the realm of fact it is entirely possible for a party knowingly to agree that no representations have been made to him, while at the same time believing and relying upon representations which in fact have been made and in fact are false but for which he would not have made the agreement. To deny this possibility is to ignore the frequent instances in everyday experience where parties accept, often without critical examination, and act upon agreements
containing somewhere within their four corners exculpatory clauses in one form
or another, but where they do so, nevertheless, in reliance upon the honesty of
supposed friends, the plausible and disarming statements of salesmen, or the
customary course of business. To refuse relief would result in opening the door to
a multitude of frauds and in thwarting the general policy of the law.

_Dallas Farm Mach. Co. v. Reaves, 307 S.W.2d 233, 239 (Tex. 1957)_

Forty years later the Court recognized an exception to this rule in _Schlumberger Technology
Corp. v. Swanson, 959 S.W.2d 171 (Tex. 1997)_ , and held that when sophisticated parties
represented by counsel disclaim reliance on representations about a specific matter in dispute,
such a disclaimer may be binding, conclusively negating the element of reliance in a suit for
fraudulent inducement. _Id._ at 179. In other words, fraudulent inducement is almost always
grounds to set aside a contract despite a merger clause, but in certain circumstances, it may be
possible for a contract's terms to preclude a claim for fraudulent inducement by a clear and
specific disclaimer-of-reliance clause.

The Court followed _Schlumberger_ in _Forest Oil Corp. v. McAllen, 268 S.W.3d 51 (Tex.
2008)_ , holding that "a freely negotiated agreement to settle present disputes and arbitrate future
ones" was enforceable. _Id._ The agreement at issue contained an "all-embracing disclaimer of any
and all representations," which the Court found to clearly show the parties' intent." _Id._ However,
_Forest Oil_ did not render every disclaimer-of-reliance clause automatically enforceable:

_Today's holding should not be construed to mean that mere disclaimer standing
alone will forgive intentional lies regardless of context. We decline to adopt a _per
se_ rule that a disclaimer automatically precludes a fraudulent-inducement claim,
but we hold today, as in _Schlumberger_, that "on this record," the disclaimer of
reliance refutes the required element of reliance._

_Id._ at 61.

The question of whether an adequate disclaimer of reliance exists is a matter of law. _See
_Schlumberger, 959 S.W.2d_ at 181._ Prudential argued in _Italian Cowboy_ that the fraud claim was
barred based on the lease provision (section 14.18 quoted above) acknowledging that Prudential did not make any representations outside the agreement. According to Prudential, Italian Cowboy impliedly agreed it was not relying on any external representations because it agreed that no external representations were made. The Court, perhaps recognizing substance over form, rejected this argument. "There is a significant difference between a party disclaiming its reliance on certain representations, and therefore potentially relinquishing the right to pursue any claim for which reliance is an element, and disclaiming the fact that no other representations were made." Id. at 335. While that may seem an arbitrary distinction to some, the Court was clearly influenced by the factual setting in Italian Cowboy compared to the factual settings in Schlumberger and Forest Oil where such clauses related to release agreements were upheld. "A lease agreement, as here, which is the initiation of a business relationship, should be all the more clear and unequivocal in effectively disclaiming reliance and precluding a claim for fraudulent inducement, lest we "forgive intentional lies regardless of context." Id., citing Forest Oil, 268 S.W.3d at 61. The Court went so far as to include the following chart in its opinion, comparing the terms of the clauses in its recent decisions on the subject.

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\textit{Italian Cowboy}, at p. 336.

2. The “as-is” clause

The “as-is” clause is commonly used in asset purchase contracts. In \textit{Prudential Ins. Co. of America v. Jefferson Associates, Ltd.}, 896 S.W.2d 156 (Tex. 1995), the Texas Supreme Court considered an appeal of a fraud judgment in a case where the plaintiff purchased a building from the defendant that was later found to contain asbestos. The purchase agreement contained the following clause:

As a material part of the consideration for this Agreement, Seller and Purchaser agree that Purchaser is taking the Property "AS IS" with any and all latent and patent defects and that there is no warranty by Seller that the Property is fit for a particular purpose. Purchaser acknowledges that it is not relying upon any representation, statement or other assertion with respect to the Property condition, but is relying upon its examination of the Property. Purchaser takes the Property under the express understanding there are no express or implied warranties (except for limited warranties of title set forth in the closing documents). Provisions of this Section 15 shall survive the Closing.

Id. at 160.

Surprisingly, the parties agreed to present the jury one simple question on liability: "Do you find from a preponderance of the evidence that the Plaintiffs should be entitled to recover damages from the Defendant as the result of any wrongful conduct by the Defendant?" The jury said “yes” and the Plaintiff recovered a judgment against the Defendant for more than $25 million for a building that was purchased for approximately $7 million. The Texas Supreme
Court likely could have found that the defendant waived any objection to the sufficiency of the evidence based on the language of the agreed jury question, but instead it examined the evidence for legal sufficiency as to each cause of action. In so doing the Court came down squarely on the side of the as-is clause:

Goldman's "as is" agreement negates his claim that any action by Prudential caused his injury. His contractual disavowal of reliance upon any representation by Prudential was an important element of their arm's-length transaction and is binding on Goldman unless set aside. The "as is" agreement negates causation essential to recovery on all the theories Goldman asserts -- DTPA violations, fraud (excluding, of course, fraud in the inducement of the "as is" agreement, which Goldman does not assert), negligence, and breach of the duty of good faith and fair dealing. Thus, Goldman's injury could not have been caused by Prudential.

Id. at 161. The Court was certainly influenced by the lack of evidence showing that the defendants had knowledge of the asbestos at the time of the sale, and despite the resounding affirmance of the as-is clause in this case, the Court recognized that its holding would not necessarily apply in other as-is cases.

By our holding today we do not suggest that an "as is" agreement can have this determinative effect in every circumstance. A buyer is not bound by an agreement to purchase something "as is" that he is induced to make because of a fraudulent representation or concealment of information by the seller. Weitzel v. Barnes, 691 S.W.2d 598, 601 (Tex. 1985); Dallas Farm Mach. Co. v. Reaves, 158 Tex. 1, 307 S.W.2d 233, 240 (Tex. 1957); see Cockburn v. Mercantile Petroleum, Inc., 296 S.W.2d 316, 326 (Tex. Civ. App.—Dallas 1956, writ ref'd n.r.e.). A seller cannot have it both ways: he cannot assure the buyer of the condition of a thing to obtain the buyer's agreement to purchase "as is", and then disavow the assurance which procured the "as is" agreement. Also, a buyer is not bound by an "as is" agreement if he is entitled to inspect the condition of what is being sold but is impaired by the seller's conduct. A seller cannot obstruct an inspection for defects in his property and still insist that the buyer take it "as is". In circumstances such as these an "as is" agreement does not bar recovery against the seller.

Id. at 162.

An as-is clause was found not to bar the purchaser's recovery in San Antonio Properties, L.P. v. PSRA Investments, Inc., 255 S.W.3d 255 (Tex. App.—San Antonio 2008, pet. granted,
judgment vacated by agreement). In that case, the plaintiff (PSRA) contracted to purchase an apartment complex from the defendant (SAP). The defendant provided certain information, including financial reports relating to the operation of the complex. The financial reports were shown to be false. Following a jury verdict, the court rendered judgment for the plaintiff. On appeal, SAP contended, among other things, that the language of the contract precluded the buyer from asserting fraud claims.

The purchase agreement included the following clause: "Buyer agrees to -- . . . [a]ccept the Property in its present condition 'AS IS,' after having inspected the Property to Buyer's satisfaction." The contract also contains a merger clause that states: "This contract, including any attached exhibits, is the entire agreement of the parties, and there are no oral representations, express or implied warranties, agreements, or promises pertaining to this contract not incorporated in writing in this contract."

First, the court had little trouble in finding the as-is clause would not bar the plaintiff's claim given the compelling evidence of the false information provided by the defendants. SAP argued on appeal -- seemingly influenced by a statement made in *Prudential v. Jefferson* -- that the focus should be whether the as-is clause itself was fraudulently induced, while PSRA argued the focus should be on whether the sale of the property was fraudulently induced thereby invalidating the entire agreement. Id. at 258. The court agreed with PSRA. In order to pursue a fraud claim when the contract contains an as-is clause, a buyer must prove that "but for" the representations of the seller regarding the condition of the property, the buyer would not have agreed to a contract that contained an as-is clause. Id., citing *Prudential*, 896 S.W.2d at 162. The buyer is not required to show that the as-is clause, by itself, was fraudulently induced.
The contract in PSRA also contained a merger clause, which the defendants contended should bar the fraud claims. This case predates *Italian Cowboy*, discussed above, but reaches a similar result along similar reasoning. A "merger clause" is not the same as a disclaimer of reliance clause; it is a contractual provision to the effect that the written terms of the contract may not be varied by prior agreements because all such agreements have been merged into the written document. *Id.* at 260, citing *IKON Office Solutions, Inc. v. Eifert*, 125 S.W.3d 113, 125 n.6 (Tex. App.--Houston [14th Dist.] 2003, pet. denied). Here, the obligation to provide the information that turned out to be false arose from prior agreements and was not referenced in the final document executed by the parties. SAP contended that this clause in the final agreement therefore barred the fraud claims. *Id.* at 261.

In rejecting the claim, the court noted that the merger language appeared to be boiler-plate because it was included in a section entitled, "Buyer and Seller Agree to the following" and was one of among eighteen miscellaneous provisions such as payment of attorney's fees, where and to whom notices should be sent, and venue. Unlike the circumstances in *Schlumberger*, and very much like the lease in *Italian Cowboy*, the Contract for Deed in PSRA represented the beginning of the parties' relationship and not its end. Also unlike in *Schlumberger*, the merger clause did not specifically and expressly disclaim reliance on any representations regarding the subject-matter of the Contract for Deed. The court therefore found the as-is and merger clauses did not bar the fraud claim and affirmed the judgment. *Id* at 262.

3. Time is of the essence

pet.). The parties can certainly write to contract to make it so, but just using the words “time is of the essence” may not be enough. "Although a contract which in express terms declares that time is of the essence, it is not necessarily so unless the parties intended it to be." *Langley v. Norris*, 167 S.W.2d 603, 612 (Tex. App.—Eastland 1942, aff’d on other grounds, 173 S.W.2d 454 (Tex. 1943).

In *MHI Partnership, Ltd. v. DH Real Estate Inv. Co.*, 2008 Tex. App. LEXIS 6462 (Tex. App. Austin Aug. 20, 2008), MHI terminated a contract based on the other party’s failure to deliver documents within a designated time. The contract expressly stated that time was of the essence. Nevertheless, the jury found that DH had not committed a material breach and the court rendered judgment for DH. On appeal MHI relied heavily on the “time is of the essence” clause, essentially arguing that when such a clause is present any missed deadline is material as a matter of law. The court of appeals rejected that argument:

In this case, we conclude that “the ‘boilerplate’ nature of the clause and the totality of the circumstances surrounding the contract meant that the parties did not intend the time is of the essence clause to apply to this particular deadline. The contract had numerous deadlines, many of them involving the exchange of information, rather than the actual closing of the sale of the improved lots, the purpose of the contract. See *Williams*, 95 S.W.2d at 1295 (time not necessarily of the essence with respect to all provisions and all parties). In contrast to the specific language used in *Mustang Pipeline*, in which the clause said that "all time limits stated in the Contract are of the essence to the Contract," 134 S.W.3d at 195 (emphasis added), the clause in this case simply said that time was of the essence to the contract. Finally, the clause in the current case was a stock, "boilerplate," clause of the kind that the Restatement comment notes does not necessarily have the effect of making time of the essence, but is just one consideration in determining whether it is. *MHI*, at p. 13-14.

**B. The Jury Charge**

Parties are often surprised by the relative simplicity of the broad-form submission of a contract case to a jury. In the most simplistic case with no affirmative defenses and no
counterclaims, the jury is asked this simple question:

**PJC 101.2 Basic Question—Compliance**

**QUESTION ______**

Did *Don Davis* fail to comply with *the agreement*?

Answer “Yes” or “No.”

Answer: ________________

Of course, contract cases that don’t involve affirmative defenses and counterclaims are rare. The more common situation involves competing claims of breach and the all-important “who breached first” issue. Positioning the case to get favorable responses to that question is critical.

1. **Getting from case law to jury charge**

Most lawyers who have served time as a litigation associate have encountered, and likely copied into a research memorandum, language like the following:

Generally, when one party to a contract commits a material breach, the other party is discharged or excused from further performance. *Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 196 (Tex. 2004). The non-breaching party must elect between two courses of action, either continuing performance or ceasing performance. *Gupta v. Eastern Idaho Tumor Inst., Inc.*, 140 S.W.3d 747, 756 (Tex. App.--Houston [14th Dist.] 2004, pet. denied). If the non-breaching party elects to treat the contract as continuing and insists the party in default continue performance, the previous breach constitutes no excuse for nonperformance on the part of the party not in default and the contract continues in force for the benefit of both parties. *Id.* Thus, treating a contract as continuing—after a breach—deprives the non-breaching party of any excuse for terminating its own performance. *Id. at 757.*

Although the non-breaching party must elect between continuing or ceasing performance, the election does not affect whether the non-breaching party can sue for a former or future breach. *Cal-Tex Lumber Co., Inc. v. Owens Handle Co., Inc.*, 989 S.W.2d 802, 812 (Tex. App.--Tyler 1999, no pet.). The election affects only whether the non-breaching party itself is then required to perform fully. *Gupta*, 140 S.W.3d at 757 n.7. If the non-breaching party continues performance, it obligates itself to fully perform. *Id.*
Classic Century, Inc. v. Deer Creek Estates, Inc., 2008 Tex. App. Lexis 6248 (Tex. App.--Fort Worth, Aug. 14, 2008, no pet.) Where both parties allege breach by the other, the following applies:

When a contracting party fails to perform a material obligation, the other party's subsequent failure to perform is excused. See Driver Pipeline Co., Inc., 134 S.W.3d at 199-200. In breach of contract disputes involving breach on both sides of an agreement, the fact finder must often determine not only whether the parties breached their agreement, but also who breached first. See Driver Pipeline Co., Inc., 134 S.W.3d at 199-200 (in cases where both parties are in breach of their agreement, the proper inquiry is not whether each party materially breached the agreement, but which material breach occurred first). This is because the chronology of the material breaches determines which party is released from its obligations, and which party is liable for contract damages. See id.


These principles of law seem relatively straightforward but can become difficult to put into practice, particularly in a jury charge. Classic Century was an appeal of a bench trial with written findings of fact and conclusions of law, while Brownhawk was an appeal of a summary judgment.

The leading recent case on dealing with competing claims of breach in a jury trial is Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc., 134 S.W.3d 195, 196 (Tex. 2004). The basic facts were as follows: Mustang subcontracted a pipeline project to Driver. Driver fell substantially behind schedule. The contract contained a “time is of the essence” clause. Driver terminated Mustang and brought in another contractor to finish the job. Driver then sued Mustang for breach, and Mustang counterclaimed for breach.

The case was tried to a jury. The following questions were submitted and answered by the jury:

1. Did Driver Pipeline Company fail to comply with the contract it had with Mustang Pipeline Company?
2. Was Mustang Pipeline Company justified or not justified in terminating Driver Pipeline Company?

Answer: NOT JUSTIFIED

3. What sum of money, if any, if now paid in cash would fairly and reasonably compensate Mustang Pipeline Company for its damages, if any, that resulted from such failure to comply?

Answer: $2,104,601

4. What sum of money would fairly and reasonably compensate Driver for its damages, if any, that resulted from Mustang's failure to comply with the Contract?

Answer: $2,515,958

Id. at 197. Both parties filed motions asking the court to disregard the findings in favor of the other party. The court disregarded the jury’s answer to question 3 but otherwise upheld the findings. Then, despite a finding that Driver breached the contract, it awarded a substantial judgment to Driver.

The court of appeals affirmed the trial court's judgment. See Driver Pipeline Co. v. Mustang Pipeline Co., 69 S.W.3d 779 (Tex. App.—Texarkana 2002). The court of appeals reasoned that the jury's finding of Driver's breach was relevant to Mustang's liability only if the breach was material and, absent an express jury finding, the trial court was not required to treat the breach as material as a matter of law. Id. at 790. The appeals court also affirmed the trial court’s disregard of Mustang’s damage award, concluding that Mustang did not meet its burden to show its damages were reasonable and necessary. Id. at 787.

The Texas Supreme Court first dispensed with the unusual court of appeals’ finding that Mustang was required to obtain a finding of materiality, and held that as a matter of law Driver committed a material breach. Id at 198 – 199. This material breach meant that Mustang was
thereafter discharged from its duties under the contract. See *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 692 (Tex. 1994) (it is a fundamental principle of contract law that when one party to a contract commits a material breach, the other party is discharged or excused from performing). Therefore, the trial court should have disregarded the jury’s answer to the wrongful termination question and granted Mustang judgment notwithstanding the verdict. Id. at 200. The Court then attempted to add some clarity to the problem of submitting competing claims of breach:

These problems could have been avoided had the trial court submitted the breach of contract question disjunctively ("Did Driver Pipeline Company or Mustang Pipeline Company fail to comply with the parties' contract?") accompanied by an appropriate instruction directing the jury to decide who committed the first material breach. See *TEX. R. CIV. P. 277* ("The court may submit a question disjunctively when it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists."); COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—BUSINESS, CONSUMER, EMPLOYMENT PJC 101.22 (2002). In the standard contract dispute, one party cancels the contract or refuses to pay due to alleged breaches by the other; in such circumstances, jurors will often find both parties failed to comply with the contract (as the jury did here) unless instructed that they must decide who committed the first material breach. See *Mead v. Johnson Group, Inc.*, 615 S.W.2d 685, 689, 24 Tex. Sup. Ct. J. 363 (Tex. 1981) (default by one contracting party excuses performance by the other); see also *Lake LBJ Mun. Util. Dist. v. Coulson*, 692 S.W.2d 897, 908 (Tex. App.--Austin 1985), rev’d on other grounds, 734 S.W.2d 649, 30 Tex. Sup. Ct. J. 524 (Tex. 1987) (suggesting disjunctive submission in such cases).

Id. at 200.

2. Compliance – PJC

The Texas Supreme Court’s opinion in *Mustang Pipeline* led the Pattern Jury Charge Committee to propose the following sequence of questions when both parties claim breach:

**QUESTION 1**

Did *Don Davis* fail to comply with *the agreement*?

[Insert instructions, if appropriate.]
Answer “Yes” or “No.”

Answer: ______________

**QUESTION 2**

Did *Paul Payne* fail to comply with *the agreement*?

*[Insert instructions, if appropriate.]*

Answer “Yes” or “No.”

Answer: ______________

If you answered “Yes” to both Question 1 and Question 2, then answer Question 3. Otherwise, do not answer Question 3.

**QUESTION 3**

Who failed to comply with *the agreement* first?

*Answer “Don Davis” or “Paul Payne.”*

Answer: ______________

It is often the case that a material breach by one party does not result in the other party immediately terminating the contract. As a practical matter it can be difficult, time-consuming and expensive to terminate a contract and secure the contracted services from somewhere or someone else. In a construction case, for example, a subcontractor may be in breach for a variety of material but not necessarily critical reasons, but kept on the job for at least some period of time after the initial material breach. In that case does the owner or general contractor have to continue making payments to the sub for work performed post-breach? Of course it is a breach by the owner or general contractor to not pay for work performed, but is that even relevant given that the subcontractor breached first?

adjacent to the Austin Convention Center. The relevant facts were that Eco Built, the subcontractor, persistently failed to deliver a bond as required by the contract. The construction manager (Landmark) allowed the sub to perform substantial work on the project and paid for most of the work. After some failed efforts to patch up their differences, Landmark terminated the contract and sued Eco-Built and a guarantor and refused to pay the balance of the charges. Eco Built counterclaimed for breach of contract. In a series of questions the jury found: (1) both parties materially breached the contract; (2) the breaches were not excused; both parties were damaged (Landmark’s damages were significantly greater) and (3) Eco Built breached first. Based on these findings the court disregarded the award in favor of Eco Built and rendered judgment for Landmark for the entire amount found by the jury.

On appeal, the court considered whether the jury's findings that Landmark had failed to comply with the subcontract and that Eco Built had been damaged were rendered immaterial (as determined by the trial court) by the jury's finding in Question 5 that Eco Built had breached before Landmark did. Landmark argued that because the jury found in Question 5 that Eco Built's material breach of the subcontract found in Question 1 occurred before Landmark's material breach through failure to pay Eco Built, found in Question 3, Landmark was, as a matter of law, discharged from any payment obligations under the subcontract that could have been the basis for the jury's findings of breach in Question 3. The court addressed the issue as follows:

However, the principle on which Landmark relies is subject to an important caveat, as Eco Built observes. When a contracting party commits a material breach, the non-breaching party must elect between two courses of action, either continuing performance under the contract or ceasing performance and terminating the contract. See Gupta v. Eastern Idaho Tumor Inst., Inc., 140 S.W.3d 747, 756 (Tex. App.--Houston [14th Dist.] 2004, pet. denied); World Access Telecomms. Group, Inc. v. Statewide Calling, Inc., No. 03-05-00173-CV, 2006 Tex. App. LEXIS 9061, at *18 (Tex. App.--Austin Oct. 17, 2006, no pet.) (mem. op.). If the non-breaching party elects to treat the contract as continuing and insists the party in default continue its performance, the previous breach
constitutes no excuse for nonperformance on the part of the party not in default, and the contract continues in force for the benefit of both parties. *Hanks v. GAB Bus. Servs., Inc.*, 644 S.W.2d 707, 708 (Tex. 1982); *Gupta*, 140 S.W.3d at 756.

In this case, Landmark acknowledges that it continued to treat its subcontract with Eco Built as continuing--and continued to demand performance from Eco Built--until Landmark finally terminated the contract on December 6, 2002. Consequently, Landmark was not discharged by virtue of Eco Built's material breach from any payment obligations to Eco Built that accrued under the subcontract prior to termination. See *Gupta*, 140 S.W.3d at 756; *World Access Telecomms. Group, Inc.*, No. 03-05-00173-CV, 2006 Tex. App. LEXIS 9061, at *18.* The jury's findings that Landmark breached the subcontract and that Eco Built was damaged were, therefore, not rendered immaterial by the jury's finding in Question 5 that Eco Built had materially breached first.

Id. at 18.

The Corpus Christi court of appeals dealt with a similar situation in a construction case but unfortunately omitted discussion of several issues necessary to fully understand the case. In *Fuentes v. San Anastacio Dev. Ltd.*, 2010 Tex. App. LEXIS 6055 (Tex. App.--Corpus Christi 2010), a subcontractor (San Anastacio) contracted to build a water distribution system, along with sewage and drainage improvements, in a subdivision being developed by Fuentes. San Anastacio submitted several requests for reimbursement that Fuentes failed to pay. Fuentes alleged that San Anastacio failed to complete the project (which was acknowledged) and that he spent approximately $70,000 to get another contractor to complete the work.

The jury found that: (1) both parties failed to comply with the construction contract; (2) Fuentes was the first party to fail to comply; and (3) Fuentes's failure to comply was not excused. According to the court, the jury's finding that Fuentes was the first to fail to comply excused San Anastacio from further performance. The court's opinion leaves several questions unanswered, including: (1) was Fuentes damaged by San Anastacio's breach; (2) did San Anastacio continue to perform after Fuentes' breach and insist on performance by Fuentes? The Austin court of appeals recognized in *Eco Built* the exception to the general rule that breach by one party
excuses performance by the other, but the Corpus Christi court gave no indication whether it considered the issue.

3. Defending against the "first breach"

Since it is a fundamental principle of contract law that when one party to a contract commits a material breach, the other party is discharged or excused from performing, (e.g. Hernandez v. Gulf Group Lloyds, 875 S.W.2d 691, 692 (Tex. 1994), the importance of establishing first breach is hard to overstate. In Eco Built, supra, the trial court used this principle to deny a party any compensation or even offset for work and materials delivered to the job. Though that error was mostly rectified on appeal, surely that came with considerable time, effort and expense.

A similar situation occurred in World Access Telecommunications Group, Inc. v. Statewide Calling, Inc., 2006 Tex. App. Lexis 9061 (Tex. App.—Austin 2006, no pet.). World Access was a telecommunications provider; it sued a telemarketer (Statewide) to collect for several months of unpaid services. The jury found that Statewide failed to pay for services in the amount of $64,462.76, but also found the failure was excused because World Access committed a prior material breach. The only possible breaches were (1) terminating service in May rather than in September as the parties agreed, and (2) sending some incorrect bills (which were later corrected). The jury did not find that Statewide suffered any damages; however, the trial court in Comal County relied on the finding of prior material breach and entered judgment that both parties take nothing.

The Austin Court of Appeals reversed and rendered judgment in favor of World Access. The court relied on the fundamental principle that when a non-breaching party elects to treat contract as continuing, a previous breach constitutes no excuse for nonperformance by non-
breaching party. Id. at p. 20, citing Gupta v. Eastern Idaho Tumor Inst., Inc., 140 S.W.3d 747, 756 (Tex. App.--Houston [14th Dist.] 2004, pet. denied), and the more common sense notion that where Statewide was found to have no damages, there could be no legally sufficient excuse for failing to pay for the services received.

4. Additional Instructions

The PJC Committee recommends submitting two separate breach questions and, if both are answered affirmatively, a third question asking the jury to determine who breached first. Obviously the desired answer is “no” to the breach question and “the other guy” to the third question. The following is a list of considerations to consider including in the charge as instructions to the question of whether your client breached:

Instruction on Materiality:

A failure to comply must be material. The circumstances to consider in determining whether a failure to comply is material include:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking into account the circumstances including any reasonable assurances;

Instruction on Ambiguous Provisions

It is your duty to interpret the following language of the agreement:

[Insert ambiguous language.]

You must decide its meaning by determining the intent of the parties at the time of the agreement. Consider all the facts and circumstances surrounding the
making of the agreement, the interpretation placed on the agreement by the parties, and the conduct of the parties.

**Instruction regarding meaning of particular language**

According to PJC 101.7, if the construction of a provision of the agreement is in dispute and the court resolves the dispute by interpreting the provision according to the rules of construction, the court should include that interpretation in submitting the breach question.

It may also be possible to obtain an instruction on trade custom and usage. See e.g. *Lambert v. H. Molsen & Co.*, 551 S.W.2d 151, 154 (Tex. Civ. App.—Waco 1977, writ ref’d n.r.e.) (trial court instructed the jury that if it found custom and usage actually existed, then it could be considered by the jury toward determining the parties’ contractual intent.”). *See also Tennell v. Esteve Cotton Co.*, 546 S.W.2d 346 (Tex. Civ. App.—Amarillo 1976, writ ref’d n.r.e.); *Englebrecht v. W.D. Brannan & Sons, Inc.*, 501 S.W.2d 707 (Tex. Civ. App.—Amarillo 1973, no writ) (discussing submission of instructions on custom). In a UCC case trade custom and usage are relevant in determining the meaning of an agreement.

**Instruction on Time of Compliance**

Compliance with an agreement must occur within a reasonable time under the circumstances unless the parties agreed that compliance must occur within a specified time and the parties intended compliance within such time to be an essential part of the agreement.

In determining whether the parties intended time of compliance to be an essential part of the agreement, you may consider the nature and purpose of the agreement and the facts and circumstances surrounding its making.

**C  Standard PJC Defensive Questions and Instructions**

**PJC 101.21 Defenses—Basic Question**

If you answered “Yes” to Question _____ [regarding failure to comply], then answer the following question. Otherwise, do not answer the following question.

**QUESTION _____**
Was Don Davis's failure to comply excused?

[Insert instructions; see PJC 101.22-.33.]

Answer “Yes” or “No.”

Answer: _____________

PJC 101.22 Defenses—Instruction on Plaintiff's Material Breach (Failure of Consideration)

Failure to comply by Don Davis is excused by Paul Payne's previous failure to comply with a material obligation of the same agreement.

If the alleged failure to comply by the complaining party involves timeliness of performance and if no date for completion is specified in the agreement, the following instruction should be added to PJC 101.22:

Delay in compliance beyond a reasonable period is a failure to comply.

PJC 101.23 Defenses—Instruction on Anticipatory Repudiation

Failure to comply by Don Davis is excused by Paul Payne's prior repudiation of the same agreement.

A party repudiates an agreement when he indicates, by his words or actions, that he is not going to perform his obligations under the agreement in the future, showing a fixed intention to abandon, renounce, and refuse to perform the agreement.

PJC 101.24 Defenses—Instruction on Waiver

Failure to comply by Don Davis is excused if compliance is waived by Paul Payne.

Waiver is an intentional surrender of a known right or intentional conduct inconsistent with claiming the right.

PJC 101.25 Defenses—Instruction on Equitable Estoppel

Failure to comply by Don Davis is excused if the following circumstances occurred:

1. Paul Payne
a. by words or conduct made a false representation or concealed material facts, and

b. with knowledge of the facts or with knowledge or information that would lead a reasonable person to discover the facts, and

c. with the intention that Don Davis would rely on the false representation or concealment in acting or deciding not to act; and

2. Don Davis

a. did not know and had no means of knowing the real facts; and

b. relied to his detriment on the false representation or concealment of material facts.

IV. Conclusion

A jury charge is probably the most critical, and many times the most overlooked, element of a jury trial. It should not be something that the lawyers scramble to put together while simultaneously preparing for the next day’s cross-examination; it should be prepared and updated throughout the case. The charge necessarily brings the critical issues into focus. It can serve as a roadmap for depositions, summary judgment motions and obviously the trial itself. All testimony that gets presented during the course of a trial should be presented with the goal of getting, and holding on to through appeal, favorable answers to the charge.