The Rules Have Changed: Recent Developments that Impact the Landscape of Business Litigation

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DEVELOPMENTS TO COVER

1. Jurisdiction over Non-resident Defendants
2. Rule 91a Motions to Dismiss
3. Anti-SLAPP Motions to Dismiss
4. State of Shareholder Oppression Claims
5. Changes Surrounding Evidence Spoliation
6. Recovery of Attorneys’ Fees
7. Covenants Not to Compete
8. The Specificity of Requested Injunctive Relief
WHO CAN BE SUED IN TEXAS?

Pennoyer and Int’l Shoe - the historical standards…

- *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878)
  - A tribunal’s jurisdiction over persons reaches no farther than the geographic bounds of the forum

  - A State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has certain minimum contacts with [the State] such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice”
**JURISDICTION OVER NON-RESIDENT DEFENDANTS**


- Argentine plaintiffs sued German corporation (Daimler) in California for events that took place in Argentina
- Daimler’s only connection to California was that its indirect subsidiary, MBUSA, conducted business in California
- District Court and Ninth Circuit held that Daimler had sufficient contacts with California through MBUSA’s business operations to have general jurisdiction over Daimler
- SCOTUS reverses, holding that general jurisdiction may only be asserted over corporate defendants that are “essentially at home in the forum state” - meaning incorporated or headquartered there

**DEVELOPMENT 1**

*Moncrief Oil Int'l, Inc. v. OAO Gazprom*, 414 S.W.3d 142 (Tex. 2013)

- Specific jurisdiction requires courts to analyze jurisdictional contacts on a claim-by-claim basis
- Therefore, a plaintiff bringing multiple claims that arise out of different forum contacts of the defendant must establish specific jurisdiction for each claim
- The Texas Supreme Court held that the defendants’ contacts supported jurisdiction over the plaintiff’s misappropriation of trade secrets claim but not the plaintiff’s tortious interference claim
DEVELOPMENT 1

JURISDICTION OVER NON-RESIDENT DEFENDANTS

Why should this matter to you?

- The ability to be sued outside of your home state has become more difficult
  - The concept of general jurisdiction, which allowed a party to sue a defendant based on the concepts of minimum contacts and "traditional notions of fair play and substantial justice" has been replaced
  - Thus, the ability to sue a defendant in Texas based on general jurisdiction has been now significantly narrowed
  - Also, a trial court can now have personal jurisdiction over a defendant as to some claims, but not others

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DEVELOPMENT 2

RULE 91A MOTIONS TO DISMISS

CAN I ASK A TEXAS STATE COURT TO DISMISS A BASELESS LAWSUIT?
THE BASICS

- Under Rule 91a, a party may move to dismiss a cause of action that has "no basis in law or fact"
  - A claim has no basis in law if the allegations, taken as true, together with any reasonable inference, "do not entitle the claimant to relief"
  - A claim has no basis in fact if "no reasonable person could believe the facts pleaded"
- The court must decide the motion on the pleadings (i.e., no evidence may be considered)
- By filing a Rule 91a Motion to Dismiss, a party does not waive a special appearance or motion to transfer venue

TIMING IS CRITICAL

- Must file the motion to dismiss within 60 days after the first pleading is filed and at least 21 days before the hearing on the motion
- If the non-movant amends the cause of action at issue at least 3 days before the hearing, the movant may withdraw or amend the motion to dismiss
- If the non-movant nonsuits the challenged cause of action at least 3 days before the hearing, the court may not rule on the motion
- The court must rule on the motion within 45 days of the motion's filing
PREVAILING PARTY GETS ITS FEES

- The prevailing party must be awarded all its costs and reasonable/necessary attorneys’ fees incurred in connection with the motion
- The Court must consider evidence regarding costs in deciding the amount of the mandatory fee award

RULE 91A MOTIONS TO DISMISS

Why should this matter to you?

- Texas now offers a 12(b)(6)-type motion to address frivolous lawsuits

BUT…

- The mandate to award attorneys’ fees to the prevailing party may act as a disincentive to file such motions
ARE THERE OTHER AVAILABLE EARLY-CASE MOTIONS TO DISMISS?

THE BASICS

- On June 17, 2011, Governor Perry signed the Texas Citizens Participation Act (TCPA) into law, effective immediately.
- The purpose of the Anti-SLAPP Act in Texas was to encourage “citizen participation” which includes “commenting on the quality of a business”. House Comm. On Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82nd Leg., R.S. at p. 1 (2011), (“Bill Analysis”)
- In enacting the new law, the Texas Legislature acknowledged that “the Internet age has created a more permanent and searchable record of public participation”, but that as a result, “abuses of the legal system, aimed at silencing these critics, have also grown”, (see Bill Analysis at p1)
- The TCPA allows a judge to dismiss frivolous lawsuits filed against one who speaks out about a “matter of public concern” within the first 60 days.
- “Matter of public concern” is expansively defined.
MATTER OF PUBLIC CONCERN

- “[E]xercise of the right to free speech”
  - “[A] communication made in connection with a matter of public concern”

- “[E]xercise of the right of association”
  - “[A] communication between individuals who join together to collectively express, promote, pursue, or defend common interests”

- “[E]xercise of the right to petition”
  - “[A] communication in or pertaining to (i) a judicial proceeding…”

HOW DOES IT WORK?

- The initial burden is on the movant to show the lawsuit was filed in response to the movant’s exercise of First Amendment Rights

- Then the burden shifts to the non-movant to establish by “clear and specific” evidence a prima facie case for each essential element of non-movant’s claim
  - Forces the non-movant to produce evidence before discovery has been conducted

- Immediate right to expedited appeal if motion is denied

- TCPA applies to counterclaims that implicate the movant’s First Amendment rights
WHO GETS THEIR FEES?

- Movant
  - Mandatory fee shifting when a TCPA movant prevails on their motion to dismiss
- Non-Movant
  - Discretionary fee award if the trial court finds the TCPA motion was frivolous or brought solely for the purpose of delaying the proceedings

**Schlumberger: A sword or a shield?**

- Rutherford, a former general counsel of Schlumberger, left to join Acacia Research Corporation. Dynamic 3D, a subsidiary of Acacia, had sued Schlumberger alleging patent infringement
- Schlumberger, who claimed Acacia was a patent troll, asserted claims against Rutherford, alleging she had misappropriated Schlumberger’s confidential information
- The issue was whether Schlumberger suit constituted an attempt to stifle Rutherford’s constitutional rights of association and petition and, as such, fell under the protections of the Anti-SLAPP statute
- The trial court granted Rutherford’s Anti-SLAPP motion to dismiss and awarded her $350,000 in attorneys’ fees and $250,000 in sanctions
- Schlumberger has appealed on the grounds, in part, that the Texas Anti-SLAPP law was intended to apply to acts and interests that are more public than those involved in the Rutherford case
Why should this matter to you?

- A statute designed to quickly defeat meritless suits filed to stifle free speech and thwart legitimate filings with courts and government agencies has now been successfully used in a civil misappropriation case.
- Yet this tool, which was intended to allow for the early dismissal of litigation before the commencement of costly fact discovery, cost the defendant $350,000 in legal fees in the Schlumberger case.
- The full impact of the Schlumberger ruling (and subsequent appeals) is not yet known, but litigators are certainly looking for new ways to employ the Anti-SLAPP statute.

Update -

- Law360, Houston (December 04, 2014, 4:00 PM ET) -- An ambiguous Texas anti-SLAPP statute led an appeals court to wrongly dismiss most of a Range Resources Corp. defamation suit against two homeowners who alleged fracking contaminated their water, the company told the Texas high court on Thursday.
- The Texas Supreme Court heard oral arguments on December 4th regarding the largely undefined “clear and specific” standard.
- One key question during oral argument, by Justice Phil Johnson, was whether the statute demanded a higher standard upfront than it did during trial.
IS THERE A COMMON LAW CLAIM FOR SHAREHOLDER OPPRESSION?

**Ritchie v. Rupe,** 443 S.W.3d 856 (Tex. 2014)

- Minority shareholder in a closely held corporation alleged the corporation's other shareholders engaged in “oppressive” actions and breached fiduciary duties by, among other things, refusing to buy her shares for fair value or meet with prospective outside buyers.
- Trial court and court of appeals ordered the corporation to buy out her shares for $7.3 million.
- Texas Supreme Court held that:
  - The conduct was not “oppressive” under Section 11.404; and
  - Section 11.404 does not authorize courts to order a corporation to buy out a minority shareholder’s interests.
- Texas Supreme Court declined to recognize or create a common-law cause of action for “minority shareholder oppression.”
Cardiac Perfusion Servs., Inc. v. Hughes, 436 S.W.3d 790 (Tex. 2014)

- Texas Supreme Court reverses another trial court’s buy-out order
- But remands the case to allow the plaintiff to seek relief under other causes of action
- Notably, unlike the plaintiff in Ritchie, the shareholders in Cardiac Perfusion entered into a Buy-Sell Agreement providing for buy-out at book value in the event of a termination

SHAREHOLDERS’ REMEDIES

- Seek appointment of a provisional director, custodian or receiver
- Sue to enforce close corporation provisions
- Contract claims based on the shareholder agreements
- Common-law actions for an accounting, breach of fiduciary duty, breach of contract, fraud and constructive fraud, conversion, fraudulent transfer, conspiracy, unjust enrichment, and quantum meruit
Why should this matter to you?

- The common law claim for shareholder oppression is gone, which means the terms of shareholder agreements, which need to fully delineate the rights and obligations of the shareholders, are critically important.
- Otherwise, a forced buy-out is no longer an available remedy because the only remedy available under 11.404 is a rehabilitative receivership.

DEVELOPMENT 5

CHANGES IN EVIDENCE SPOILIATION

WHEN IS A SPOILIATION JURY INSTRUCTION APPROPRIATE?
Brookshire Bros. v. Aldridge, 438 S.W.3d 9 (Tex. 2014)

- Spoliation analysis involves a two step process:
  - the trial court must determine, as a question of law, whether a party spoliated evidence; and
  - if spoliation occurred, the court must assess an appropriate remedy.
- Evidentiary hearing must be outside jury’s presence

When is a spoliation instruction an appropriate remedy?
- A party must intentionally spoliate evidence in order for a spoliation instruction to constitute an appropriate remedy
- Caveat: If the act of spoliation, although merely negligent, so prejudices the non-spoliating party that it is irreparably deprived of having any meaningful ability to present a claim or defense, a spoliation instruction may not be excessive
- E.g., there is no other way for a party to present their case without the spoliated evidence
- Generally, evidence of spoliation is not admissible
CHANGES IN EVIDENCE SPOILATION

**Why should this matter to you?**

- The standard for finding spoliation has heightened, with a greater focus on intent or highly-prejudicial negligence

AND...

- The remedies for spoliation must be tied directly to the spoliation and may not be excessive, so death penalty sanctions are much more unlikely

BUT...

- The obligation to preserve and produce relevant evidence or explain its nonproduction remains, so document retention policies and procedures that are both implemented and adhered to remain critical.

RECOVERY OF ATTORNEYS’ FEES

**How and from whom can you recover your attorneys’ fees?**
Dispute between law firms involved in the Fen-Phen pharmaceutical litigation over what expenses could be charged to a referring lawyer under the parties’ letter agreement

Fleming & Associates is a limited liability partnership

Trial court awarded Barton Group its attorneys’ fees under section 38.001(8)

Court of appeals reverses award of attorneys’ fees against Fleming & Associates because it is not a “individual or corporation”

A person may recover reasonable attorney’s fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for:

1. rendered services;
2. performed labor;
3. furnished material;
4. freight or express overcharges;
5. lost or damaged freight or express;
6. killed or injured stock;
7. a sworn account; or
8. an oral or written contract
"PERSON"

- Chapter 38 does not include any definitions.
- Section 1.002 of the CPRC provides that the Code Construction Act applies to the construction of each provision in the CPRC, except as otherwise expressly provided by the CPRC.
- Code Construction Act defines the term “person” to include “corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity”.

"INDIVIDUAL" AND "CORPORATION"

- “Individual” and “corporation” are not defined in the Code Construction Act or in Chapter 38 of the CPRC.
- The court’s research did not reveal a definition of “individual” or “corporation” that included any type of partnership.
- Section 38.001’s predecessor statute provided that “any person, corporation, partnership, or other legal entity” could recover fees from a “person or corporation”.
- “[W]hen, as here, specific provisions of a ‘non-substantive’ codification and the code as a whole are direct, unambiguous, and cannot be reconciled with prior law, the codification rather than the prior, repealed statute must be given effect.”
- Thus, under the plain language of section 38.001(8), a person may not recover attorney’s fees against a partnership.
The Griffins brought two claims that could ultimately support an attorney’s fee award.

The affidavit supporting the Griffins’ request for attorney’s fees used the lodestar method but failed to provide evidence of the time devoted to specific tasks.

Texas Supreme Court held that generalities about tasks performed provide insufficient information for the fact finder to meaningfully review whether the tasks and hours were reasonable and necessary under the lodestar method.

Sufficient evidence includes, at a minimum, evidence “of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required”.

Because the Griffins’ affidavit spoke in generalities, it was legally insufficient evidence to support the award of attorneys’ fees.

Why should this matter to you?

The means to recover attorneys’ fees just became a little more difficult because...

If the defendant in your breach of contract lawsuit is a partnership, you may no longer recover attorneys’ fees pursuant to Chapter 38.

AND...

The requirements to show the attorneys’ fees incurred were “reasonable and necessary” under the lodestar method has become more stringent.
Are there Alternatives to Non-Compete Agreements?

Exxon-Mobil v. Drennen, 2014 Tex. ____ (Tex. 2014)

- Texas Supreme Court held that a loyalty incentive plan, which allowed Exxon to declare a forfeiture under the plan if an employee left Exxon to work for a competitor, did not constitute a non-compete agreement.
- The Texas Supreme Court rejected Drennen’s argument that Exxon’s incentive plan was an unenforceable non-compete agreement.
- Texas Supreme Court concluded there is a distinction between a non-compete agreement and a loyalty incentive plan: a non-compete agreement is used to protect an employer’s investment in the employee, while a forfeiture provision conditioned on employee loyalty is used to reward the employee for his or her continued employment and loyalty.
- As a result, Drennen, who retired and went to work for one of Exxon’s competitors, lost 57,200 shares of Exxon stock.
Why should this matter to you?

- It is worthwhile to determine which is better: the carrot or the stick
- Enforcing non-competes can be difficult because departing employees (and often their new employers) seek to challenge
  - the legitimacy of the consideration (i.e., whether the information really was confidential); and
  - The reasonableness of the restrictive covenants
- Thus, loyalty incentive plans may serve as stronger motivation to stay, when compared against a non-compete
The First Court of Appeals dissolved a temporary injunction order that sought to enforce contractual non-compete and non-solicitation obligations because the order was both not specific enough and overbroad.

- The order failed to “identify, define, explain, or otherwise describe” what constituted “confidential information” that Lasser was prohibited from disclosing. Thus, these provisions did not provide adequate notice to Lasser as to what conduct he was restrained from performing and left him to speculate what conduct might satisfy or violate the order.

- The Court also found that Part (c) was impermissibly overbroad under Rule 683 because it enjoined activities that Lasser had a legal right to perform, such as deleting electronic records and files unrelated to the subject of the lawsuit.

SPECIFICITY OF Requested injunctive relief

DEVELOPMENT 8

Why should this matter to you?

- Boilerplate provisions that generally refer to “confidential information” are not useful

- So, an employer would be wise to carefully consider, before the lawsuit is filed, what documents or information are truly important and worthy of the confidentiality designation

- Identifying the confidential information, with specificity, will significantly improve the employer’s ability to enforce a non-compete and to receive the injunctive relief it wants
Questions?

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