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ARTICLE: Rescission in Texas: A Suspect Remedy

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LEXISNEXIS SUMMARY:
... Part IV summarizes key principles for remedies in equity in general and rescission in Texas, exploring how the doctrine of irreparable injury is applied with varying frequency to rescission and other equitable remedies. ... In the second group of cases, claims by vendors to rescind executory sales contracts have been denied when the plaintiffs would gain unjust enrichment by not compensating the vendee for principle payments or capital improvements or by trying to regain appreciated assets for minor breaches. ... HC sought the following alternative remedies: (1) direct or special

damages for substantial lost value or lost profits; (2) an order for Snerd to disgorge the Net Inc. stock and cumulative profits as unjust enrichment relating to both fraud and breach of fiduciary duty; (3) a forfeiture order for Snerd to forfeit the stock and accumulated profits to HC for malicious breach of fiduciary duty; and (4) rescission of the transaction. ... If liability for fraud is established, the asset must be returned to the seller in addition to compensation to the seller for the buyer's interim benefits. ... Early Texas Supreme Court opinions on rescission describe a process that resembles rescission in equity and did not generally include requirements for the claimant to provide notice or offer tender before trial as some Texas appellate courts now require. ... If the claimant discovers a series of acts or facts justifying rescission, waiver of one act does not necessarily waive later acts or discoveries of key facts. ... For example, a party seeking rescission for unilateral mistake is allowed some negligence before a claim for rescission will be denied. ... Decade 1910 1920 1930 1940 1950 1960 1970 1980 1990 2000 2010 ending January 1st All state courts "Rescission" 1,076 1,744 2,174 1,784 848 1,235 1,090 1,289 1,952 1,886 2,053 as core term (number of cases) "Adequate 42 47 57 79 42 37 51 27 73 71 97 remedy" or "irreparable injury" are also mentioned (number of cases) "Adequate 3.9% 2.7% 2.6% 4.4% 5.0% 3.0% 4.7% 2.1% 3.7% 3.8% 4.7% remedy" or "irreparable injury" are also mentioned (percent of cases) All state courts except Texas "Rescission" 1,005 1,535 1,938 1,631 782 1,163 1,038 1,216 1,895 1,821 1,969 as core term "Adequate 39 47 52 76 40 34 48 22 72 70 93 remedy" or "irreparable injury" are also mentioned "Adequate 3.9% 3.1% 2.7% 4.7% 5.1% 2.9% 4.6% 1.8% 3.8% 3.8% 4.7% remedy" or "irreparable injury" are also mentioned (percent) Texas state courts "Rescission" 71 209 236 153 66 72 52 73 57 65 84 as core term "Adequate 3 0 5 3 2 3 3 5 1 1 4 remedy" or "irreparable injury" are also mentioned "Adequate 4.2% 0.0% 2.1% 2.0% 3.0% 4.2% 5.8% 6.8% 1.8% 1.5% 4.8% remedy" or "irreparable injury" are also mentioned (percent) Table B: Specific Performance as Core Term Decade 1910 1920 1930 1940 1950 1960 1970 1980 1990 2000 2010 ending January 1st All state courts "Specific 1,479 1,810 2,394 1,397 1,625 1,633 1,366 1,982 2,559 1,852 2,969 performance" as core term (number of cases) "Adequate 128 124 159 114 178 135 108 141 177 141 211 remedy" or "irreparable injury" are also mentioned (number of cases) "Adequate 8.7% 6.9% 6.6% 8.2% 11.0% 8.3% 7.9% 7.1% 6.9% 7.6% 7.1% remedy" or "irreparable injury" are also mentioned (percent of cases) All state courts except Texas "Specific 1,423 1,687 2,251 1,320 1,536 1,550 1,292 1,834 2,411 1,783 2,840 performance" as core term (number of cases) "Adequate 124 122 154 109 175 132 102 135 170 139 199 remedy" or "irreparable injury" are also mentioned (number of cases) "Adequate 8.7% 7.2% 6.8% 8.3% 11.4% 8.5% 7.9% 7.4% 7.1% 7.8% 7.0% remedy" or "irreparable injury" are also mentioned (percent of cases) Texas state courts "Specific 56 123 143 77 89 83 74 148 148 69 129 performance" as core

term (number of cases) "Adequate 4 2 5 5 3 3 6 6 7 2 12 remedy" or "irreparable injury" are also mentioned (number of cases) "Adequate 7.1% 1.6% 3.5% 6.5% 3.4% 3.6% 8.1% 4.1% 4.7% 2.9% 9.3% remedy" or "irreparable injury" are also mentioned (percent of cases) Table C: Adequate Remedy or Irreparable Injury as Core Terms Decade 1910 1920 1930 1940 1950 1960 1970 1980 1990 2000 2010 ending January 1st All state courts "Adequate 914 971 998 1,095 876 868 872 1,286 1,996 2,558 3,428 remedy" or "irreparable injury" as core term (number of cases) "Injunction" 630 651 679 707 514 563 551 914 1,443 1,923 2,648 or "mandamus" are also mentioned (number of cases) "Injunction" 69% 67% 68% 65% 59% 65% 63% 71% 72% 75% 77% or "mandamus" are also mentioned (percent of cases) All state courts except Texas "Adequate 877 920 931 1,016 839 822 820 1,200 1,804 2,118 2,577 remedy" or "irreparable injury" as core term (number of cases) "Injunction" 599 602 615 637 477 521 501 835 1,258 1,508 1,830 or "mandamus" are also mentioned (number of cases) "Injunction" 68% 65% 66% 63% 57% 63% 61% 70% 70% 71% 71% or "mandamus" are also mentioned (percent of cases) Texas state courts "Adequate 37 51 67 79 37 46 52 86 192 440 851 remedy" or "irreparable injury" as core term (number of cases) "Injunction" 31 49 64 70 37 42 50 79 185 415 818 or "mandamus" are also mentioned (number of cases) "Injunction" 84% 96% 96% 89% 100% 91% 96% 92% 96% 94% 96% or "mandamus" are also mentioned (percent of cases) Table D: Injunction or Mandamus as Core Terms Decade 1910 1920 1930 1940 1950 1960 1970 1980 1990 2000 2010 ending January 1st All state courts "Injunction" 9,757 10,241 10,705 11,688 7,558 8,214 8,251 11,275 15,234 16,850 22,690 or "mandamus" as core term (number of cases) "Adequate 1,965 1,866 1,967 2,024 1,419 1,595 1,435 2,195 3,541 4,903 7,364 remedy" or "irreparable injury" are also mentioned in same case (number of cases) "Adequate 20% 18% 18% 17% 19% 19% 17% 19% 23% 29% 32% remedy" or "irreparable injury" are also mentioned in same case (percent of cases) All state courts except Texas "Injunction" 9,236 9,149 9,251 10,082 6,750 7,377 7,385 10,131 13,439 14,558 18,415 or "mandamus" as core term (number of cases) "Adequate 1,865 1,643 1,696 1,739 1,278 1,427 1,274 1,968 3,077 3,967 5,376 remedy" or "irreparable injury" are also mentioned in same case (number of cases) "Adequate 20% 18% 18% 17% 19% 19% 17% 19% 23% 27% 29% remedy" or "irreparable injury" are also mentioned in same case (percent of cases) Table D, continued Texas state courts "Injunction" 521 1,092 1,454 1,606 808 837 866 1,144 1,795 2,292 4,275 or "mandamus" as core term (number of cases) "Adequate 100 223 271 285 141 168 161 227 464 936 1,988 remedy" or "irreparable injury" are also mentioned in same case (number of cases) "Adequate 19% 20% 19% 18% 17% 20% 19% 20% 26% 41% 47% remedy" or "irreparable injury" are also mentioned in same case (percent of cases) Table E: Texas Cases in Which Courts Found Rescission of Executory Contract Adequate Years 1900 to 1900 to 1935 to 1970 to 2010 1935

1970 2010 Texas state courts Rescission as core term 1,171 Number of cases involving 140 85 46 10 executory contracts Number of cases involving 10 8 2 0 executory contracts where court found rescission adequate

TEXT:
[*494]

I. Introduction

"Certainty resided in the common law courts, justice in the chancellor's equity." n1

Damages strategy sometimes goes unresolved until it is too late to implement the optimal approach, to obtain the necessary discovery, or to retain the right expert. To minimize this possibility, it is worthwhile early in a case to consider some key damage issues, such as how the judgment could change under different remedies or under alternative measures of the same remedy. Frequently overlooked is consideration of the differences between remedies at law and remedies in equity, including the following:

. Do the case facts lend themselves to one of equity's unique proprietary remedies (specific restitution, rescission, constructive trust, or unjust enrichment)?

. Do changes in key data that occurred after the date of the breach or tort favor a remedy that employs ex post evidence for measuring damages?

. Is it still possible to prevent or minimize a substantial portion of future damages? n2

. Is it likely that procedural issues or unresolved case facts could preclude or impair monetary remedies at law?

The answers to these questions are important in determining whether the remedy of rescission should be considered. As a proprietary remedy in equity, rescission can offer a unique result, even a windfall, although not necessarily under ordinary circumstances.

Rescission cancels a voidable contract and restores both parties to their positions before the transaction - that is, their status [*495] quo ante. n3 Contracts can be voided, deeds can be canceled or amended, and orders to pay money to the other party can be issued. n4 Transactions can be voidable due to mistake, material breach of contract, innocent misrepresentation, intentional fraud, or breach of fiduciary duty. n5

Rescission is an equitable remedy that occasionally offers a superior outcome, like a special-purpose golf club or fishing lure. It can be helpful under a number of special procedural circumstances, but it is frequently advantageous when the underlying fi-

nancial data change favorably on an ex post basis. An easy way to recognize the right circumstances is when a party suffers from buyer's or seller's remorse - when the market subsequently moves in such an amount and direction as to cause the party to regret that she paid too much or accepted too little even without the tort or breach.

The possibility of gaining a superior outcome or windfall from rescission is widely acknowledged, and rescission is sometimes denied for fear of unjustly enriching the claimant. n6 This Article will show that the concern that claimants may be unduly opportunistic has been a key rationale for the development of the significant affirmative defenses and equitable factors that can determine the trial court's decision to grant or deny rescission.

Judicial discretion is a key characteristic of the law in equity and equitable remedies. Sitting in equity, a trial judge has greater authority to issue more forceful orders to the litigants and greater discretion to deny particular equitable remedies than for remedies at law. The resulting unpredictability and risk to the final outcome is compounded by the fact that equitable remedies are not well understood by lawyers or the judiciary, in Texas or elsewhere in the country. n7 The strategic risk of pleading rescission is minimal, [*496] however, because modern law allows rescission to be pled in the alternative n8 and the plaintiff can elect his remedy after jury findings are rendered. n9

This Article focuses on rescission as a strategic remedy in Texas. The advantages of pleading rescission, including the possibility of a windfall, are discussed in Part II, using two illustrations to highlight rescission's comparative advantages. Part III explains that contracts can be rescinded with or without court assistance, and that rescission in Texas is largely based on rescission in equity but that it occasionally resembles rescission at law. Part IV summarizes key principles for remedies in equity in general and rescission in Texas, exploring how the doctrine of irreparable injury is applied with varying frequency to rescission and other equitable remedies. This doctrine is distinguished from the questionable theory sometimes espoused in modern cases that a plaintiff must prove her equitable entitlement by actions taken before trial.

Rescission is available for a broad range of causes of action, and Part V explains how consideration of the plea for rescission can vary by cause of action. Part VI analyzes the three key steps in measuring rescission and restoring the status quo ante for both parties: (1) restoring the initial consideration; (2) measuring net enrichment to the two parties from interim benefits and expenditures; and (3) assessing possible special damages (as well as possible punitive damages). Part VII addresses the issue of equitable factors that the trial judge may consider in exercising her discretion to award or deny rescission. Part VIII explains that waiver and ratification are key af-

firmative defenses to effectively defend against rescission, and that while the affirmative defense of unclean hands can be effective, it is somewhat subjective and opaque.

A more thorough discussion of rescission would require an article too long for the indulgence of most law review editors or too detailed for the insomnia of most readers. n10 As a result, this Article does not address the aspects of rescission that relate to the Uniform [*497] Commercial Code, n11 the Texas Securities Act, n12 in pari delicto, n13 the Truth in Lending Act, n14 duress, incapacity, or the federal standard for rescission.

[*498]

II. Of Windfalls and Other Advantages

"When somebody says it's not about the money, it's about the money ... ." n15

-H. L. Mencken

As a remedy for breach of contract or fraud, rescission can be an attractive alternative under circumstances that either impair expectancy damages or enhance rescission's advantages. Pleading rescission can occasionally lead to a windfall, especially when ex post conditions change favorably. Even in stable markets, however, rescission can be attractive when otherwise replacing purchased assets would create substantial transaction costs. The equitable remedy can also appeal to plaintiffs who would have great difficulty in proving lost profits or upon whom contributory liability n16 or the statute of limitations would impinge. n17 Punitive damages and special damages are available in addition to rescission. The entire value of the asset rescinded constitutes actual damage for the purposes of measuring or limiting punitive damages. n18

The chance for windfall has two components: specific restitution and the right to postpone the election of remedies as late as after the jury findings are rendered. n19 Specific restitution results [*499] in a remedy that has the same effect as ex post valuation. Regaining or divesting the asset after the jury findings incorporates the effect of ex post changes in value or operating performance of the asset as of the date that the asset is returned. The plaintiff's right to plead for the alternative remedies of monetary damages (which are measured at the date of the breach or tort) or rescission therefore yields an option for the time between the date of the breach or tort and the date of the election. n20 As with all options, the value of the option increases with the volatility of the underlying asset and as the option period increases. Postponing the election until after the verdict also eliminates any risk that the favorable ex post change will reverse between the date of election and the date of the verdict. The claimant is free to plead rescission or damages in the alternative and then choose the

optimal remedy in light of the actual jury findings and actual changes in the relevant market or the asset's operating performance. Thus, the plaintiff has little to lose by claiming rescission and postponing the election to compare the alternatives after the jury findings are rendered.

The issue of the suitability or admissibility of ex post evidence for measuring damages is controversial and any discussion should be distinguished by the particular cause of action and purpose for the measure. n21 The Texas Supreme Court's 2002 opinion in Miga v. Jensen reveals the Court's opposition to using ex post evidence for measuring damages based on value. n22 On the other [*500] hand, there is ample earlier precedent for allowing ex post evidence of lost profits for measuring damages. n23 For the purposes of this Article, the plea for an equitable remedy such as rescission or specific performance is not an explicit application of ex post evidence; rather, such remedies simply have an ex post effect. Therefore, while Texas courts' resistance to the use of ex post evidence may be anticipated, it must also be acknowledged that Texas courts have endorsed equitable remedies like specific performance that can have the same effect. n24

Rescission returns the asset, or at least the equitable right to possession, to the claimant. Collection of an equity court's award can be easier than enforcing a judgment at law and generally includes a priority position in claiming such an asset or its proceeds from an individual or estate in distress. n25 The award of rescission [*501] can "prime" the claims of the defendant's creditors and trustees, n26 except for rescission of purchases of primary stock from corporations. n27

While it would be unethical and unprofessional to suggest to a client that a claim for rescission could be asserted merely to escape from an unhappy bargain, there is nothing inappropriate about a legitimate claimant seeking rescission and its windfall potential. In fact, the United States Supreme Court has acknowledged the legitimacy of possible windfalls in federal securities claims. n28

The potential for windfall is real enough under certain circumstances, but more important to the law of rescission is that rescission's aura of windfall opportunism can taint the plaintiff's motives as suspect, warranting closer equitable scrutiny. Various authorities and Texas case opinions have voiced a concern that the award of rescission can sometimes unjustly enrich the claimant. n29 [*502] Thus, litigators on either side of a plea for rescission should consider how their case supports or refutes the suspicion that rescission would unjustly enrich the claimant.

While the Texas judiciary's suspicion is significant, it is not necessarily widespread. Texas opinions manifesting this concern can be distinguished and limited to three groups of cases with similar facts and issues. In the first group, the Texas Su-

preme Court sought to discourage the routine availability of rescission to claimants seeking "to avoid the results of an unhappy bargain" on the basis of mutual mistake. n30 In the second group of cases, claims by vendors [*503] to rescind executory sales contracts have been denied when the plaintiffs would gain unjust enrichment by not compensating the vendee for principle payments or capital improvements or by trying to regain appreciated assets for minor breaches. n31 In the final group, claimants for fraud are sometimes examined for having waived rescission by waiting too long to assert a claim, especially when delay amounts to the claimant speculating in volatile markets. n32 This [*504] last group of cases emphasizes extended delays and volatile markets, which are two key determinants of the option value of a claim for rescission.

Rescission has other advantages also. Monetary remedies for breach of contract or fraud can prove insufficient for the purchaser of a major asset like a house or car that does not meet agreed-upon specifications. Such remedies may not necessarily provide for the full costs of replacing the asset, including sales commissions or compensation for the trouble of selling the asset and finding the right replacement. n33

Rescission will not resolve all of these problems, but it can sometimes provide a better remedy even in a stable or flat market for the asset. Consider the experience of the Estridge family. The Estridges bought their home for $ 175,000 and moved in, but they later found that the house's history of foundation problems had not been disclosed. n34 On the basis of a claim for statutory fraud under section 27.01 of the Texas Business & Commerce Code, the trial court voided the sales contract and ordered the seller to take back the house in exchange for returning the purchase price and prejudgment interest of $ 45,835.60. n35 Based on that judgment, the Estridge family would have been able to move out of the house without [*505] having to sell it first. On appeal, the judgment for rescission was reversed because the Estridges failed to introduce evidence of the interim benefits that they gained before the transaction was voided; specifically, they failed to introduce evidence or obtain a jury finding on the rental value of the house during their occupancy. n36 In reversing, the Tyler Court of Appeals rendered a verdict for the alternative cash damages of $ 2,500 to fix the specific defect in the house that commenced the cause of action. n37 Thus, the Estridges retained the house and received $ 2,500 to remediate the problem. Should the remediation prove unsuccessful or fail to conform the house to the their expectations, the Estridges would have to bear the expenses of selling the house.

In a business setting, rescission can offer a useful alternative when the plaintiff is unable to establish expected operating income to justify a claim for lost value or lost profits. If expected profits cannot be credibly proven, losses in value or lost profits may be impossible to prove. If the operation is expected to lose money, reliance

damages should be offset by the amount of the expected losses. n38 In these circumstances, the return of consideration is better than no relief at all. n39

Equitable remedies can be distinguished from damages, particularly in insurance cases involving approval or denial of insurance coverage. There are at least a few Texas cases holding that a rescission order is different from an award of damages. n40 This [*506] can be an advantage or disadvantage depending on the party and the circumstances. It seems inevitable that such a distinction will also be of issue in other areas, such as damage waivers or indemnification agreements.

To date, Texas courts have not assessed adjustment for proportionate liability against the value of assets or moneys returned to the plaintiff. The Texas proportionate liability law n41 has been applied in cases of common law and statutory fraud, n42 but no case has been found that has applied the proportionate liability to the value of the specific restitution. In one case, the specific issue was not raised, although the court adjusted only the award of special damages for contributory liability but not the amount of actual damages implied in the order for rescission. n43 This approach contrasts with the practice of including the value of the assets rescinded as actual damages for justifying punitive damages, a practice which has substantially broader support. n44

Among other possible problems, rescission has at least two disadvantages. First, rescission voids the contract as though it never existed and, therefore, precludes the possibility of reimbursement for legal fees on the basis of the contract. n45 Second, predicting a judgment for rescission is more uncertain than for monetary damages. Equitable remedies are litigated in a process that operates according to the discretion of the trial judge who has traditionally been encouraged to seek "total justice," even at the expense of [*507] operating within the normal boundaries of common law procedure or substantive law. Another source of systemic uncertainty lies in the fact that equitable remedies are not well understood by lawyers or the judiciary. n46 As a result of these sources of systemic variance, it is reasonable to expect that remedies in equity will also vary more than normal between different judges and possibly different appellate districts.

A. Illustration 1: Buying a Loser n47

The following example illustrates how rescission is a viable resolution in contract cases involving fraudulent representation.

Acquisition Corp. provided mortgage banking services for residential real estate in Las Vegas. Buyer Group (BG) acquired the stock of Acquisition from Seller on March 1, 2008, for $ 5 million in cash. On September 1, 2008, the American econo-

my sharply [*508] declined due to a crisis in the mortgage market. The annual rate of housing immediately declined thirty percent on a national basis and fifty percent in Las Vegas. The Acquisition subsidiary was forced to file for bankruptcy protection on March 1, 2009. After conducting a forensic audit prior to June 1, 2009, BG discovered that Seller misrepresented Acquisition's operating performance and that Acquisition had actually incurred losses rather than operating profits for two years prior to acquisition. On June 15, 2009, BG demanded that Seller rescind the transaction and offered to return the Acquisition stock for the $ 5 million purchase price. BG also demanded that Seller disgorge the interest earned on the $ 5 million purchase price and reimburse BG for $ 1.5 million of reliance and incidental expenses net of any operating income that BG accrued from the acquisition.

After Seller refused to rescind, BG filed a complaint seeking the alternative remedies of monetary damages or rescission. The pleadings stated that BG would face irreparable damage without rescission because of the Seller's well-documented financial distress. Despite BG's every attempt to improve Acquisition's operating performance, the subsidiary was forced to seek Chapter 7 liquidation and was not expected to fund any of its general liabilities even after BG invested another $ 1.5 million to salvage the enterprise. BG asserted that Acquisition had an expectancy value in excess of $ 5 million n48 and that BG incurred special damages of more than $ 1.5 million.

Under the paradigm outlined in Perry Equipment, BG would be entitled to the following monetary damages:

. Direct damages for the difference in the fair market value on March 1, 2008 of Acquisition (on the basis of actual [*509] operating results) and either (a) the purchase price (out-of-pocket approach) or (b) the expectancy value of Acquisition (benefit-of-the-bargain approach);

. Special damages for subsequent losses in value and other consequential and incidental damages incurred after March 1, 2008; n49 and

. Legal expenses (depending on the transaction documents and applicable statutes) and possibly punitive damages.

BG should expect a battle of experts over the expectancy value and actual value of Acquisition on March 1, 2008 and whether any subsequent losses in value were foreseeable or avoidable. Under Texas law, Seller could assert that BG was contributorily negligent in the acquisition process or its mitigation efforts. n50 Potentially, both the direct and special damages are subject to adjustment for such contributory liability. Seller could also argue that the sudden and precipitous decline in market conditions constituted an intervening event that caused some or all of the value lost in the acqui-

sition, and that under Perry Equipment, a defendant is not an insurer of the plaintiff's entire investment. n51

Assuming that BG can prove its claim for fraud, that it has no adequate remedies at law, and that the parties can be restored to the status quo ante, it has a good case for establishing damages in fact and a good chance for rescission because it has fully complied with all significant requirements for rescission. Assuming favorable jury findings, n52 the trial court could void the transaction and the [*510] acquisition agreement and order the Seller to pay to BG the purchase price of $ 5 million, plus interest earned or saved, and BG's reasonable special damages, including reliance expenditures and mitigation costs. In comparison, the standard under rescission for punitive damages would be $ 6.5 million, at least equal to the base under monetary damages. n53 Under the limited precedent available, only the special damages under rescission would be subject to adjustment for contributory liability. n54 Finally, BG would not be awarded legal fees under rescission unless BG's claims qualified under statute.

B. Illustration 2: Selling a Winner n55

Another example illustrates the use of rescission for breach of fiduciary duty. HC owned a shell subsidiary, Net Inc., that held an undeveloped domain name. HC's departing vice president of corporate development, M. Snerd, prepared a fraudulent report and made a misleading presentation to the Board that the shell subsidiary was of marginal value but offered to buy it for $ 100,000 in March of 2000. Without the knowledge of HC, Snerd had previously been contacted by a third party who offered to the buy the domain name for $ 2 million. The subsidiary was sold to Snerd on May 1, 2000.

Snerd managed Net Inc. by developing and operating the website, but most of the website's success was due to favorable changes in the market and the singular nature of the domain name. Within three years Net Inc. produced cumulative profits of $ 6 million and was earning $ 5 million per year in operating income. [*511] Conservative appraisals valued the company in 2003 at a minimum of $ 25 million.

Within a relatively short time after discovering that Snerd's report and presentation were fraudulent and determining that an offer had been made to Snerd in his capacity as vice president of corporate development, HC notified Snerd that it demanded that the sale be rescinded and offered to return the $ 100,000, plus $ 15,000 for three years of interest, in exchange for all of the stock of Net Inc. and all of its cumulative profits. Snerd declined the offer.

HC then sued Snerd for fraudulent inducement and breach of fiduciary duty. HC sought the following alternative remedies: (1) direct or special damages for substantial lost value or lost profits; (2) an order for Snerd to disgorge the Net Inc. stock and cumulative profits as unjust enrichment relating to both fraud and breach of fiduciary duty; (3) a forfeiture order for Snerd to forfeit the stock and accumulated profits to HC for malicious breach of fiduciary duty; and (4) rescission of the transaction. The complaint also stated that monetary damages, a remedy at law, would prove inadequate because Snerd is otherwise insolvent. It alleged that without Net Inc. as a financial resource, Snerd would seek bankruptcy protection or otherwise delay or hinder HC's ability to secure control of Net Inc.

The possible awards for each remedy are:

(1) Monetary damages. Liability for fraudulent inducement for damages could result in actual damages for the greater of:

a. Direct damages for lost value as of May 1, 2000 (approximately $ 2 million or possibly more) or

b. Special damages for expected lost profits. Lost profits would be estimated as of May 1, 2000 and would include expected profits after that date. Texas law allows such profits to be measured with ex post evidence for a limited period of time after May 1, 2000. n56 (For purposes of this analysis, the expected lost profits will [*512] be assumed to be $ 6 million with the acknowledgement that the jury finding could be much less or much more than $ 6 million.)

Total actual damages would approximate $ 6 million before punitive damages, and the total amount would be vulnerable to adjustment for contributory liability. Under this remedy, Snerd would be allowed to retain Net Inc.

(2) Profit disgorgement. Liability for disgorgement of profits could result in an order to pay to HC an amount equal to all profits accrued and the current value of the stock less a credit for the $ 100,000 purchase price plus HC's earned interest. Snerd may be able to argue that he added value to the enterprise and the value of the enterprise should be apportioned between his contribution of "sweat equity" and capital improvements and the value of the business that he "acquired." Total actual damages would be $ 31 million less $ 100,000 for the purposes of punitive damages before adjustments for apportionment or offsetting credits, if any. n57 Breach of fiduciary duty can be treated as a tort, and the value of the disgorgement could be subject to adjustment for contributory liability, n58 except that equitable remedies can be distinguished from monetary damages, and public policy considerations for deterring faithless fiduciaries could preclude any adjustment. Snerd would be allowed to retain

ownership of Net Inc., although it could be subject to an equitable lien for the disgorgement.

(3) Forfeiture. Liability for malicious breach of fiduciary duty could result in a forfeiture, requiring Snerd to convey his stock and accumulated profits to HC without compensation for the purchase price or the defendant's contribution to increasing the [*513] value of the assets. n59 In accordance with ERI Consulting Engineers, Inc. v. Swinnea, the value of any assets forfeited would not be included as actual damages when justifying an award of punitive damages. n60 Therefore, actual damages would be nominal. Effectively, the result would be almost the same as for profit disgorgement in the approximate financial value of the remedy, except that punitive damages would be nominal (assuming that § 41.008(b) is applicable), and it would be unlikely that Snerd would be successful in arguing for any credit for his efforts or sweat equity. No cases have been found that discuss contributory liability for forfeiture awards.

(4) Rescission. An award of rescission, supported by adequate jury findings, would require the return of the stock and $ 100,000 as specific restitution. The net unjust enrichment could credit HC with an attributed rental value for using the domain name or with the operation's accumulated profits n61 and would credit Snerd for improvements and interest on the $ 100,000. Theoretically, the value of the entire amount rescinded would qualify as actual [*514] damages and serve as the basis for calculating punitive damages, n62 but it would be excluded as damages for contributory liability. No case has been discovered that has applied these two seemingly contradictory distinctions in the same opinion.

Profit disgorgement and rescission could provide Snerd with additional credit for his improvements or sweat equity that increased the value of the website. n63 All remedies except monetary damages could require Snerd to disgorge profits and possibly any compensation that he received while in control of the divested subsidiary. n64 Finally, the actual damage base for justifying punitive damages would be much higher for profit disgorgement and rescission than for monetary damages.

III. Alternative Procedures for Rescinding a Contract

Rescission may occur with or without the assistance of a court. A review of the alternative processes will show that the process chosen can result in a different outcome for the plaintiff and the plaintiff's lawyer. Additionally, a theoretical comparison of rescission at law and rescission in equity reveals the unusual characteristics of rescission in Texas.

An unsophisticated survey of case opinions in the Appendix suggests that pleadings for rescission declined in Texas in the last one hundred years despite an increase

in the courts of other states. [*515] To estimate the relative frequency with which rescission claims are plead in Texas and the rest of the country, word searches were conducted on the LEXIS databases for Texas state cases and all state cases. The results of such a literal series of searches can only be suggestive. Table A of the Appendix shows that the number of Texas state court opinions with "rescission" as a core term peaked in the decade ending January 1, 1930 and fell thereafter. While the rate of filing has increased in recent years, it remains at a level below the peak rate early in the twentieth century. n65 Statistics for other state courts showed a similar pattern until about 1960, after which the rate of rescission-related cases recovered to a higher rate than the earlier peak. The trends over the last hundred years for specific performance cases in both Texas and non-Texas state courts resemble that for non-Texas state court pleadings for rescission. Thus, the pattern for rescission cases in Texas appears to be somewhat unusual.

A. Rescission Without Court Assistance

A party may choose to repudiate the contract by indicating that she is no longer willing to perform under the contract. n66 The party's unwillingness can be established by written or oral communication, or it can be inferred from actions taken n67 or actions not taken. n68 To constitute repudiation, "a party to a contract must have absolutely and unconditionally refused to perform the contract without just excuse." n69 Faced with a repudiation, the second party [*516] must choose between agreeing to the repudiation or continuing to perform under the terms of the contract and seeking recourse for the breach of contract. n70 If the second party accepts the repudiation, she has agreed to rescind the contract. n71 Unless there are later acts of repudiation, the party's choice to continue performing under the contract (assuming full knowledge of the repudiation) will be interpreted as a waiver of rescission but not necessarily a waiver of monetary damages for breach of contract. n72

The parties can enter into an agreement to rescind a prior agreement. n73 Such an agreement need not be in writing and can otherwise be inferred from the parties' course of conduct. n74 [*517] However, the Texas Supreme Court has chosen to depart from "virtually all of the commentators" and to forbid oral rescission of contracts that the Statute of Frauds requires to be in writing. n75 Specific provisions in the contract at issue can control how rescission should be undertaken, if at all. n76 Courts enforce existing provisions to implement rescission n77 or to exclude rescission on the basis of provisions for other specific remedies. n78 One recent Texas opinion enforced an agreement in which the parties effectively waived rescission by agreeing that injunctive relief would be the appropriate remedy for breach and that there was no adequate remedy at law. n79

Just as the non-repudiating party faces an irrevocable election to rescind or continue the contract and possibly sue for monetary damages later, it has been held that if one party rejects an offer to rescind the contract, she will be deemed to have waived rescission if she should later try to claim that remedy. n80 Presumably, this holding would not apply to rejecting the rescission strictly on the basis of inadequate additional monetary consideration.

A party to a contract can plead rescission as an affirmative defense, n81 although the history of this tactic includes parties who [*518] failed to understand the defense's limited effect. There were a number of farm equipment cases in the 1930s in which the debtor farmer apparently thought that he could rescind the contract without returning the equipment. n82 Typically, a defendant who is sued for breach of an installment contract may assert that the asset transaction underlying the installment contract was fraudulent and that the contract should be rescinded. n83 If liability for fraud is established, the asset must be returned to the seller in addition to compensation to the seller for the buyer's interim benefits. n84

The debtor who waits to claim fraud and rescission until the creditor sues for a payment default dilutes her credibility with the court. Such a debtor also risks the likelihood that the creditor would prevail on the affirmative defenses of waiver or ratification. In one recent case, an insurance company took the initiative to sue for rescission of a life insurance policy, before the deceased insured's estate filed a claim on the policy, on the basis of the policy holder's fraudulent insurance application. n85 In that case, the court provided for a split trial: the first on the company's claim for fraud and the second, if needed, for the insurance company's failure to pay the estate's claim. n86

Another case, Munoz v. Witt reveals the dangers of the repudiation-rescission process outside of court. n87 The injured party's lawyer agreed to a $ 9,500 settlement of a personal injury [*519] claim and deposited the insurance company check. n88 Before the proceeds were transmitted to the client, the lawyer discovered that the settlement did not include a hospital bill for $ 4,000. n89 The lawyer sent the insurance company a check in the amount of the settlement with a letter repudiating the settlement and demanding that the insurance company increase the settlement amount. n90 The insurance company refused to amend the settlement and deposited the lawyer's check. n91

After waiting for the insurance company to change its mind, the claimant's lawyer filed a suit against the insurance company for the underlying negligence or, alternatively, for rescission of the settlement agreement. n92 However, the trial court granted the insurance company's motion for summary judgment on both issues, holding that (1) the settlement agreement was already rescinded by the insurance company's

acceptance of the lawyer's repudiation, n93 and (2) the applicable limitations period had run because the rescission of the settlement agreement did not toll the liability for negligence. n94

In an employment law setting, there are similar pitfalls. It came as a surprise to at least one party that rescinding a contract does not erase all prior events or provide a release of all liability. n95 A former employee who agreed to rescind an employment agreement was surely surprised to find himself liable in tort for actions taken during his employment. n96

[*520]

B. Rescission at Law n97

Assume that Texas courts are split between courts in equity and courts at law. How would a party proceed if the transaction had already been rescinded by an agreement between the parties but they disputed the appropriate amount of net monetary settlement? As long as neither party needs any assistance in effecting transfers of assets or cancellation of transaction documents, the process of rescission at law could resolve the remaining dispute. n98

Dan Dobbs distinguishes between rescission at law and rescission in equity as unilateral or judicial rescission, respectively:

In equity rescission, the theory is that that the rescission does not take place until the court declares it, while rescission "at law" takes place when the plaintiff makes a proper offer to restore the defendant and demands rescission. n99

As opposed to courts in equity or courts in Texas, courts at law traditionally lacked adequate authority to make conditional orders or to void the transfer of assets and execution of documents that resulted from the transaction. n100 Therefore, the actual rescission of the assets or documents is accomplished by one or both parties [*521] before the complaint is filed. n101 The court at law basically sorts out the monetary considerations and renders judgment about the amounts owing between the parties. n102

Conditions and prerequisites are necessary in rescission at law to assure the court that rescission had already been enacted and the status quo restored except for the monetary adjustment. The party seeking rescission at law must accomplish in specie restoration or at least make an offer to do so before a common law court can settle the monetary issues. n103 Therefore, the claimant is expected to tender or offer to tender

the consideration she received in the transaction as well as any direct consequential benefit gained in the interim.

C. Rescission in Texas

In a court of equity, restoration is enacted by the trial court. The claimant generally seeks rescission in equity when she needs a document canceled or reformed, or to recover assets, especially land. n104 Given the bilateral nature of rescission, conditional orders n105 [*522] and equitable liens n106 are among the tools available in a court of equity to help ensure the mutual exchange of consideration.

Early Texas Supreme Court opinions on rescission describe a process that resembles rescission in equity and did not generally include requirements for the claimant to provide notice or offer tender before trial as some Texas appellate courts now require. The requirement to tender or offer to tender was sometimes mentioned, but not as a necessary pre-condition. n107 The Texas Supreme Court proscribed rescission in 1857, in a decision consistent with Dobbs's description of equitable rescission above:

> And in all cases of this sort, where the interposition of a Court of Equity is sought, the Court will, in granting relief, impose such terms upon the party as it deems the real justice of the case requires; and if the plaintiff refuse to comply with such terms, his bill will be dismissed. n108

Under this approach the claimant faced no prerequisites for rescission, but the trial court was free to attach conditions or terms to a judgment for rescission.

[*523] Rescission in Texas is implemented to protect the interests of both parties, and Texas courts are committed to ordering rescission for two purposes: total equity and the protection of the defendant. n109 Texas courts view the role of the trial judge as one who hears evidence from the parties and their witnesses, receives the jury's finding of facts, and then balances or adjusts the equities between the parties. n110 Texas courts separate the jury's findings of fact from the [*524] trial judge's discretion to award or deny equitable remedies. n111 The court's decision to grant rescission lies within the judge's discretion: "An appellate court may reverse a trial court for abuse of discretion only if the record shows that the trial court acted unreasonably or in an arbitrary manner or, stated differently, the court acted without reference to the applicable guiding rules or principles." n112

Some modern cases in Texas have denied rescission when the claimant failed to offer tender of initial and interim consideration to the defendant. n113 Because it is

clear that Texas courts have sufficient authority to make all orders necessary to restore the status quo ante for rescission, n114 the tender requirement is redundant with the authority of a Texas court. Furthermore, by including the notice and [*525] tender requirements, rescission in Texas begins to resemble rescission at law even though rescission is an equitable remedy. n115

IV. Equity Likes a Good Story

"The public would be astonished if it was thought that judges did not conceive it as their prime duty to do practical justice whenever possible." n116

By design and practice, courts in equity tend to be goal-seeking; they are expected to "think outside of the box" and seek equity or practical justice. The quote above is from the appellate judge in the Blake case in Great Britain. Blake was a senior employee in the British intelligence community during the Cold War, but he worked in secret for the Soviet Union. n117 His treason is said to have resulted in the deaths of more than forty British operatives and contacts. n118 He was convicted of treason and served five years before he escaped to the USSR where he wrote his memoirs. n119 When his book was published in London, the Crown sued to deprive him of his royalties. n120 The House of Lords awarded unjust enrichment to the Crown but in the process made a notable exception to contract law. n121 Writing about a somewhat similar case in the U.S. relating to an unauthorized publication of a memoir by Frank Snepp, a former CIA agent, Dobbs generalizes that "if the wrong is bad enough, even a radical remedy that captures the [*526] defendant's own property to protect the plaintiff's rights may be acceptable." n122

The second key characteristic follows from the first: unusual case facts frequently prompt courts in equity to find exceptions or variances from general rules or principles. n123 Professor Laycock's seminal work on the doctrine of irreparable injuries concludes that such court opinions are frequently covert as they tend to obscure the real criteria at issue. n124 Because the outside observer to a case cannot accurately infer the trial judge's motive, one is often left to wonder whether an exceptional opinion in equity was merely a sympathetic response to the case facts.

Compared to common law courts, courts in equity emphasize case facts over legal principles or established procedure. This approach would logically require opinions in equity to confirm that the fact scenario of a cited precedent is consistent with the case facts underlying the case at hand. Applying this requirement to contract cases after Blake should not restrict British judges in equity to awarding unjust enrichment only against traitors or defendants liable for the deaths of dozens of innocents, but it should at least restrict such exceptions to willful breaches of contract that violate

public policy. This sort of contextual consistency sometimes eludes courts in equity. n125

Historically, the Chancery Court, the English court of equity, was sponsored, developed, and appointed by the Crown to handle cases and matters of justice that common law courts, generally [*527] associated with Parliament, could not remedy. n126 Driven by the maxim that "no right shall be left without a remedy," n127 the Chancery Court had authority to act against the person rather than just the property, and it operated under the mandate to pursue justice as moral conscience and, if necessary, to ignore legal formalities. n128

The British legal system evolved in part from competition between courts at law and courts in equity. Until the middle of the nineteenth century, the majority of an English trial judge's income was derived from his court's fee income, and the two court systems' range of causes of action and remedies evolved and overlapped from the inevitable competition. n129 The claim for fraud was originally recognized only by courts in equity and only gradually thereafter by courts at law. n130 According to O'Sullivan, English common law courts did not recognize a cause of action for rescission, rescission at law, until the beginning of the nineteenth century, when the remedy at law evolved up until the advent of the "judicature reforms" in the middle of the century. n131

The competition between the two court systems in England occasionally flared into dysfunctional jurisprudence when a court at law and a court in equity would hear the same case and award conflicting remedies or orders. The conflict came to a head in 1616 [*528] when King James I intervened by establishing a boundary between each court's jurisdiction. n132 He dictated to the judiciary that common law courts would enjoy presumptive jurisdiction and courts in equity would supplement the common law courts only when the latter could not adequately remedy the dispute. n133 Not one to admit defeat for "his" court, however, the King ordered that the equity courts would decide if the common law courts could adequately remedy the issue. n134 Thus, the doctrine of irreparable injury (the Doctrine) was imposed to solve a real problem, but in a manner befitting the last English monarch who died of natural causes espousing the "Divine Right of Kings." n135

Courts in equity are known for their authority, their concern for public policy, and their equitable discretion. The courts' discretion begins with equity's discretion to grant jurisdiction under the Doctrine. n136 Originally, in England, if the equity court denied jurisdiction, the plaintiff would have to file her claim in a common law court, which might be in a different building or different part of the city. Laycock's study of the application of the Doctrine reinforces the thesis that American courts in equity have similarly exercised broad discretion in deciding jurisdiction. n137 Equity's

[*529] mandate to pursue justice and, if necessary, ignore standard common law substance or procedure expands the court's discretion. n138

Based on the conclusion that a party otherwise lacks an adequate remedy, a court sitting in equity has the power to order injunctive relief, which includes the authority to order a party to change or transfer title to an asset (supported by the court's authority to jail disobedient parties). n139 By comparison, a court at law has the authority to order the sheriff to seize the assets of either party and sell them for monetary relief, or, for some claims like ejectment or replevin, to seize the asset and deliver it to an individual who maintained legal title. n140

A. Texas Equity

"We simply do not think recovery would be equitable under the circumstances. That, after all, remains the test." n141

The history and practices of courts in equity might first appear to be of limited relevance because Texas has never authorized a separate court in equity. The Texas Constitution provides for courts of general jurisdiction, without distinction for courts at law or courts of equity. n142 However, the Texas Republic adopted the English common law in 1840, which has precedential value, except as those precedents conflict with Texas statutes or subsequent court [*530] opinions. n143 Texas's unique "blend" of common law and equity combines the causes of action and remedies of both court systems, but it also observes the figurative boundaries and limitations of those systems. For example, Texas courts actively apply the Doctrine to pleas for injunctions or writs of mandamus. n144 Even though courts in equity are not native to Texas, her courts seem to have taken quickly to the discretion and flexibility of equitable remedies. n145

Even though Texas was one of the first states to combine the courts of law and equity n146 (the federal courts and all but a few states have since merged the two courts), not much progress has been made in combining the actual operation of the two systems by one judge. n147 O'Sullivan describes the results of fusion in British courts, n148 and others describe the results of the merger of American federal courts similarly n149: the courts have been merged without much success in combining the two bodies of law. For example, in [*531] Texas n150 and most other states, n151 the affirmative defense of unclean hands generally has jurisdiction only for issues in equity.

B. The Doctrine of Irreparable Injury

"Covert tools are never reliable tools." n152

Texas courts of general jurisdiction represent a paradox for the Doctrine, which is usually justified by the need to maintain the role of a court in equity as supplementary to that of common law courts n153 or the need to preserve the defendant's right to a jury trial. n154 Neither justification applies in Texas, which does not have courts with split jurisdiction and provides juries for claims in equity. (The role of juries during the Republic of Texas was even stronger, as the jury had the discretion to award rescission.) n155

Despite the fact that the Texas legal system has always been less in need of the Doctrine than other jurisdictions, Texas courts [*532] have applied the Doctrine as a structural principle of jurisdiction. Texas courts continue to maintain that equitable remedies should not be granted when adequate remedies at law are available. However, the courts also state that "the inadequacies of the remedy at law are both the foundation of and conversely a limitation on equity jurisdiction." n156 This phrase was originally borrowed from a Corpus Juris Secundum (C.J.S.) section on equity in general n157 but was challenged and modified for failing to acknowledge the preeminence of the Texas Constitution over the Doctrine. n158

Aside from the judiciary, most authorities now reject the Doctrine or minimize its relevance. Both the Restatement of Torts n159 and the Restatement (Third) of Restitution and Unjust Enrichment n160 have withdrawn support for the Doctrine. Other authorities on equitable remedies deny its importance or assert that a court's discussion of adequate remedies tends to be a subterfuge for other reasons that are less visible in the opinion. n161

[*533] In 1990, Professor Douglas Laycock published a landmark study on the modern role of the irreparable injury rule in American courts, concluding that:

These real reasons for denying equitable remedies are not derived from the adequacy of the legal remedy or from any general preference for damages... . Sometimes there are good reasons to deny legal relief and grant equitable relief instead. But there is no general presumption against equitable remedies. n162

Laycock found that the issue of jurisdiction in equity is frequently determined by criteria that are left unmentioned and unrelated to the Doctrine. n163 He concluded that these covert rules of decision may not be wrong, but they are unreliable because they are not contested openly in the litigation process. n164

Laycock's study has received widespread academic praise and recognition n165 and was instrumental in the Restatement (Third) of Restitution and Unjust Enrich-

ment, which rejected the Doctrine. n166 However, the study remains somewhat ignored in the opinions of most state courts. After twenty years in circulation, the article has been cited in only five state court cases and sixteen federal cases. n167 This slight reaction in case opinions suggests that courts in equity want to maintain their discretion and opaque rationale.

Consider an example in Texas case law. In the 1920s the Texas Supreme Court reversed the San Antonio Court of Appeals [*534] strictly on the issue of irreparable injury, even though neither opinion provided any discussion to support their applications of the Doctrine. n168 The plaintiff was seeking to rescind an executory contract for land for which the defendant had made no payments and did not perform all of the required improvements. n169 The Court of Appeals seemed to take exception to the vendor's testimony that he was "tickled" with the fact that the defendant defaulted and that he was anxious to regain the land. n170 The court denied rescission on the basis that the plaintiff had adequate remedies at law, but did so without any explanation. n171 The Texas Supreme Court adopted the Commission of Appeals reversal, holding that an executory contract in default is presumed to be entitled to rescission. n172 It was a strong statement on executory contracts, but the court did not hold that rescission for executory contracts was exempt from the Doctrine. n173

In a more general sense, all Texas case opinions that relate to the Doctrine substantiate Laycock's thesis because the traditional rationales for the Doctrine do not apply. Laycock's key point is not [*535] that courts have stopped invoking the Doctrine, but rather that the Doctrine is being applied as a cover for other rationales.

The Texas rationale for applying the Doctrine is rarely discussed in case opinions. However there is some discussion that suggests that the judiciary is reluctant to implement equitable remedies. n174 The remedies are described as applications of the power of a court in equity that must be carefully controlled to avoid excessive interference in the administration of the state. Justice Cornyn's opinion in State v. Morales explained why a district court's application of its equity powers should be limited in relation to matters of state criminal statutes (in that case, the Texas sodomy law). n175 One of his arguments addresses the need for jurisdiction in equity to be limited even more than it is otherwise limited by the Doctrine. n176 He supports his arguments not with case law but with references to major nineteenth century authorities, such as Story and Pomeroy, who urge restraint on the use of a court in equity's unlimited authority:

Such unlimited authority, over time, became circumscribed by rules of procedure and limitations on jurisdiction. If an equity court's jurisdiction was limited only by its

reach, experience demonstrated that the arbitrary exercise of that power was certain to result. n177

There is a variation of the Doctrine that receives little notice but makes sense for a court in equity. Occasionally, the Texas Supreme Court has denied an equitable remedy on the basis that a [*536] less intrusive or disruptive equitable remedy would suffice. As the lesser remedy is also an equitable remedy, the criterion is less one of jurisdiction in equity and more one of which remedy requires the least exertion of the Court's power. n178

The surmise that Texas courts are reluctant to exercise their equitable authority is further supported by some indications that the Doctrine has been applied with different frequency over time and between different equitable remedies. The Texas Supreme Court regularly applied the Doctrine to injunction and mandamus actions by 1846, n179 but only gradually applied it to other equitable remedies. Between 1840 and 1865, case opinions reflect that the Texas Supreme Court was actively awarding or denying remedies in equity, including rescission. n180 According to one opinion, rescission was normally awarded under Spanish law for fraud. n181 Through 1900, however, there were few applications of the Doctrine to rescission and specific performance. n182

[*537] The results summarized in the Appendix Tables suggest that the frequency at which the Doctrine is mentioned or discussed in Texas and other state courts varies with the different remedies in equity. In light of the fact that the data is based on word searches without any adjustment for how the terms were used in the case opinions (except for distinguishing between mere mention of the term and use of it as a core term), the results must be qualified and conditioned. However, the process, while unsophisticated, does have the attribute of objectivity; the data used is not based on any subjective adjustment or interpretation. Furthermore, the magnitude of the distinctions and similarities suggest some correlation.

Table C suggests that the number of case opinions that used either "adequate remedy" or "irreparable injury" (Doctrine Phrases) as a core term substantially increased from 1900 to 2010 in both Texas and other states. However, for equitable remedies, such as rescission or specific performance, Table A suggests that neither Doctrine Phrase was mentioned very frequently. In Texas cases which applied "rescission" as a core term, less than seven percent even mention "adequate remedy" or "irreparable injury" for any purpose. n183 Outside of Texas, the combination of other state court cases reflect the same low frequency. n184

Table D suggests that the Doctrine Phrases are mainly used in relation to injunction and mandamus. Of the Texas cases that use the Doctrine Phrases as core terms,

more than ninety percent mention "injunction" or "mandamus"; for non-Texas state court cases, "injunction" or "mandamus" are mentioned in sixty-five to seventy percent of the cases. Similarly, Table D suggests that a substantial portion of Texas and non-Texas cases using "injunction" or "mandamus" as core terms also mention "adequate remedy" or "irreparable injury." That portion has been remarkably stable and [*538] similar for Texas and non-Texas cases from 1900 to 1980, at seventeen to twenty percent. Since 1980, the portion for both groups has increased, but the portion for Texas cases has increased much more than non-Texas cases.

Overall, the data in the Appendix suggests that the doctrine of irreparable injury is actively mentioned in cases related to injunctions and writs of mandamus. As those cases have grown in number over the last 110 years, so have opinions related to the Doctrine. On the other hand, the Doctrine has fallen into relative disuse for equitable remedies such as rescission, specific performance, constructive trust, and unjust enrichment. n185 In Texas, disuse does not mean disrepute, as the Doctrine is sometimes applied to deny a plea for rescission, but such cases occur infrequently. n186

[*539] The mechanics of applying the Doctrine to claims for rescission are fairly straightforward but can vary with the cause of action. The plaintiff must plead and prove irreparable injury (that the plaintiff has no adequate remedy at law). n187 In Texas courts, the Doctrine is applied less formally n188 and as a relative standard: "An adequate remedy at law is one that is as complete, practical, and efficient to the prompt administration of justice as is equitable relief." n189

Few equitable remedy case opinions offer detailed analyses of how the Doctrine applies to the case facts, and most of those explicit cases relate to injunctive relief. Some opinions reject the remedy because the plaintiff either neglected to plead or prove that [*540] she did not have an adequate remedy at law. n190 Specific reasons for approving or denying equitable remedies include the following: the defendant is insolvent n191 or illiquid; n192 the plaintiff's damages cannot be adequately measured; n193 the cause of action relates to a unique asset such as real estate, n194 special personal property, n195 or special assets such as trained animals. n196

[*541] For the purposes of the Doctrine, the law is indifferent to the equitable remedy's ability to prevent future damages if those future damages could otherwise be measured and awarded to the plaintiff. n197 More recent opinions relating to business entities seem more willing to overcome this indifference and approve remedies in equity when the remedy could reduce substantial damage to the firm's goodwill n198 or avoid the demise of the plaintiff's business operation. n199 Such concern, frequently explained as a variation on immeasurable damages, such as damage to future goodwill n200 or to the viability of the firm, n201 is difficult to measure, but it also seems fair to infer a concern for the viability of the business operation itself. n202 However,

justifying rescission rather than injunctive relief on immeasurable damages poses a significant risk for the claimant [*542] who must prove monetary damages in the event that rescission is denied.

As always, equitable considerations sometimes intervene for fairness or public policy concerns. Thus, it has been held to be unfair to a defendant contractor to rescind a contract to build a house that had been substantially completed even if the actual construction was significantly different from the contract. n203 Public policy concerns can also relate to the physical safety of the community, although it generally relates to reinforcing existing law or rejecting illegal contracts. n204

Texas courts resist awarding equitable remedies for breaches of contract. n205 Part of this resistance is likely due to the fact that contract damages are well established and easily adjudicated under most fact patterns. The case law relating to claims for rescission for [*543] breach of contract emphasize that the breach must be either a "total breach" or one that relates to an essential aspect of the agreement, such as a repudiation. n206 Rescission for mere delay in making payment or rendering consideration is rarely granted. n207 Adding to the inclination against awarding rescission for breach of contract is the principle that in the absence of specific agreement or statute, a buyer of goods is not entitled to return purchases because of partial dissatisfaction. n208 Thus, whatever is purchased either needs to be worthless, or the proposed or foreseeable use of the product must be "something other than what was purchased" to qualify for rescission. n209 A product that works in any fashion, albeit not as effectively as expected, is not generally a candidate for rescission. n210

Early Texas cases state that Spanish law permitted rescission of a contract that resulted from willful misrepresentations but not for innocent misrepresentations. n211 Perhaps owing either to Spanish [*544] tradition or to the long-held British common law view that fraud vitiates contracts, n212 Texas case law did not actively apply the Doctrine at the appellate level until the 1920s and 1930s.

Claims relating to trusts and fiduciaries are normally entitled to original jurisdiction in equity and are therefore exempt from the Doctrine. n213 Occasionally, Texas courts forget or ignore this tradition and either challenge n214 or reject n215 an equitable remedy [*545] relating to a trustee or fiduciary. As practically all of these fiduciary cases relate to injunctive relief, they offer further proof that the application of the Doctrine is not about jurisdiction and that the Doctrine is applied disproportionately to injunctive relief.

[*546]

C. Must the Claimant Prove Equitable Entitlement?

"In order to satisfy the demands of justice, courts of equity will indulge in presumptions and even pure fiction." n216

Because courts in equity were established to resolve exceptional cases and authorized to stress justice over traditional jurisprudence, it seems reasonable to expect that the law in equity would change in leaps or hops rather than a linear or continuous path. Serious problems can develop, however, when case opinions in equity apply prior holdings without ensuring that the exceptional circumstances justifying the exceptions are equally present in the new case. This is perhaps the simplest explanation for how some Texas appellate courts have reached the questionable conclusion that claimants who seek rescission must first establish their equitable entitlement (other than under the Doctrine) prior to the rescission order, n217 a concept without traditional support in the law in equity.

The established group of exceptions relates to cases in which the claimant seeks rescission for breach of an executory sales contract. Historically, executory contracts for land sales have been the subject of many rescission opinions in Texas and account for part of the surge in rescission cases between 1910 and 1940. n218 Other sources of dispute include settlement agreements and transactions for [*547] farm equipment, n219 livestock, n220 cars, n221 and tragically, even slaves before 1865. n222

Through the present day, a substantial number of executory contract disputes relate to a vendor seeking to clear title, cancel a deed, or regain possession of the land after the vendee defaulted on an interest or principal payment. It has generally been held that, unless special factors apply, if the vendee defaults, the vendor is legally entitled to rescission. n223 A court in equity normally applies its equitable powers to take whatever action is required to rescind the [*548] transaction. However, Texas courts have generally refused to grant rescission if the vendee would be deprived of restitution for payments and compensation for permanent improvements, n224 even when a written contract provides for the vendee to forfeit any restitution for principle payments or improvements upon default. n225 In recent years, the Texas legislature has established some additional statutory protection for vendees in such executory contracts. n226

The recent case of Reeder v. Curry provides some exceptions and even a warning to those who would apply a "cookie cutter" approach to unilateral rescission. n227 The executory contract for a mining property specifically provided for the seller to unilaterally cancel the contract for deed and to retain all principle payments in the event of a payment default. n228 The buyer had made payments for eight years and paid all but $ 50,000 of the $ 650,000 contract n229 but then failed to make two payments, whereupon the seller canceled the [*549] contract and re-sold the prop-

erty for $ 245,000. n230 The buyer sued the seller for breach of contract, while the subsequent buyer sued the initial buyer for waste to the property. n231

The trial court granted summary judgment for the seller but was reversed by the court of appeals. n232 On remand, the trial court was ordered to allow a jury finding on whether the cancellation was equitable and whether the failure of the buyer to perform was reasonable. n233 The trial judge's discretion to grant rescission seems to have been impinged upon in this case. Furthermore, if the rescission is reversed, the rescinding seller may face liability to either the initial or subsequent buyer or both.

It is not unusual for vendors in executory contracts to be denied rescission due to equitable considerations. n234 These cases echo the opinion that rescission under these circumstances is harsh or disfavored and will be denied for the "slightest circumstance." n235 Without compensating the defendant for payments or permanent improvements, the claim for rescission is seen as abusive for a breach of contract. n236 Furthermore, it is held that the vendee may cure the default at any point in the litigation to prevent forfeiture. n237 [*550] The circumstance that has generally been deemed sufficient to reject rescission is the vendor's failure to make or offer tender of restitution for the vendee's payments and improvements. n238 The cases hold that rescission will not be granted without restoring both parties to the status quo ante, which is consistent with the goal of rescission for mutual restoration and the traditional mandate for courts in equity to protect the defendant and render total justice. n239

In recent years, this group of exceptions has been cited and enlarged to promote a doctrine akin to equitable entitlement, expanding the exceptions beyond their context. The key connection between the executory contract cases and doctrinal cases was made in the 1936 opinion in Powell v. Rockow. n240 In that case, the plaintiffs bought the lease, furniture, and equipment of a hotel with installment notes and leased the hotel. n241 The plaintiffs claimed that the profitability of the hotel was misrepresented and they notified the seller of their demand for rescission and offered to return ownership of the personal property in exchange for the notes. n242

The trial court awarded rescission, and the defendant appealed, arguing that the plaintiff waived her right to rescission by continuing to operate the hotel through the date of trial, and that the plaintiff introduced insufficient evidence to restore both parties to their ex ante positions. n243 The court of appeals affirmed the trial court on the basis that the defendant bore the burden of alleging and proving that the plaintiff was not entitled to the equitable relief of rescission, and a general denial in the lower court did not preserve [*551] the issue for appeal. n244 The Supreme Court reversed the lower courts, holding that the claimant's failure to secure adequate jury findings on consideration and interim benefits was sufficient to reverse the trial court.

n245 Furthermore, the Court held that sufficient evidence was introduced at trial that the plaintiff waived her claim for rescission as a matter of law. n246

The Court's justification for the first holding was that claimants must bear the burden of proof that they are equitably entitled to rescission by securing sufficient jury findings. n247 This assertion was supported with a citation to Maverick v. Perez, which was an example of an egregious executory contract case, in which the vendee had paid 90 percent of the contract price and the value of the land with improvements had increased by over 600 percent. n248

The reference to Maverick is questionable and unnecessary. Rockow's holding on jury findings needed no support from Maverick. Rockow stands for the proposition that sufficient jury findings are a necessary condition for rescission that can otherwise be denied as a matter of law. The two cases' holdings on notice and tender are not similar: in Maverick, an unsympathetic claimant was [*552] denied rescission for failing to provide notice and tender, n249 but in Rockow, the claimant gave notice and offered tender but was denied rescission for failing to secure sufficient jury findings on interim benefits or for waiving the remedy. n250

It also seems an odd coincidence that neither Rockow nor almost any subsequent cases on equitable entitlement mention the Doctrine, which requires the plaintiff to prove her entitlement to jurisdiction in equity. n251 As exemplified by the Rockow opinion, Texas courts were slow to apply the Doctrine to claims for rescission based on fraud in the first half of the twentieth century. The outcomes in Rockow, Maverick, and Adams are consistent with the Doctrine because the claimants in each of those cases had adequate remedies at law.

Thirty years after Rockow, a modern group of cases began to appear that initially relied on Rockow. The opinion in Mathis Equipment v. Rosson n252 and subsequent cases (the Mathis Cases) n253 denied pleas for rescission. To the extent that the holdings in these cases are limited to requiring jury findings on the claimant's benefits from the transaction, the holdings are well-founded.

In the process of denying rescission, however, the Mathis Cases espouse a doctrine that is contrary to traditional procedure for courts in equity and to Texas precedent for comparable case facts. This doctrine would require plaintiffs to prove equitable entitlement to rescission:

Before a buyer can avail himself of the right of rescission, (assuming that he has proper grounds for the same), he must proceed to give timely notice to the seller that the contract is being rescinded and either return, or, at least offer to return, the prop-

erty he has received and the value of any benefit he may have derived from its possession. The rule requiring [*553] the buyer desiring to rescind to take such action is based on the view that before a rescission can be granted, the parties must be placed in status quo, and on the maxim "He who seeks equity must do equity." The burden of proof is on the party seeking rescission to establish that he is entitled equitably to such relief. n254

Mathis relies on two sources to support this opinion: Rockow n255 and the maxim that "he who seeks equity must do equity." n256

[*554] Rockow provides little support for Mathis except on matters related to jury findings or waiver. n257 Similarly, the precedent of Maverick offers little support for a general requirement that the claimant to rescission must first prove her equitable entitlement. The claimant in Mathis was a vendee who sought rescission of a contract to purchase a cotton picker that did not operate effectively. n258 Subsequent claimants in the Mathis Cases purchased a boat, n259 purchased a car, n260 sold commercial real estate, n261 bought a home, n262 and contracted to have a home treated for mold. n263 None of these cases include facts reminiscent of the typical scenario of a vendor attempting to reclaim an asset without compensating the vendee for improvements or prior payments. n264 What they have in common is a [*555] claimant seeking rescission who failed to obtain adequate jury findings on the claimant's consideration and interim benefits.

As demonstrated above, the Mathis Cases misstate the process of granting rescission in Texas and confuse notifying, tendering, and doing equity with securing jury findings about the consideration and interim benefits received by both sides. Contrary to these opinions, the parties are not restored to their status quo ante before rescission is granted, as restoration occurs only as a result of the court's rescission orders that accompany such a judgment. n265 [*556] Procedural prerequisites are more in keeping with rescission at law than rescission in equity or rescission as applied in Texas. n266

The assumption that a claimant for an equitable remedy must first prove her equitable entitlement runs counter to the burden of proof requirement imposed on a defendant to prove a plaintiff's "unclean hands." n267 The claimant is presumed to have clean hands unless the defendant can establish the requisite evidence to shift the burden of proof. n268 Furthermore, even if the notice and tender requirements were valid and necessary pre-conditions to rescission, the claimant's failure to comply would warrant holding only that she did not introduce sufficient evidence to establish her claim for the remedy. Equitable entitlement should be distinguished from complying with the proscribed process and limited to the Doctrine.

Similarly, the Mathis Cases are based on a minority interpretation of the maxim that "he who seeks equity must do equity." There is limited support for the Mathis interpretation of the [*557] maxim, including the 1860 opinion in Thomas v. Beaton, n269 but most of the Texas Supreme Court opinions in that era interpreted the maxim as saying that a court in equity will award equitable relief subject to certain conditions that largely relate to complying with the court's orders to assure equity for the defendant as well. n270 Nor does the concept that the seeker of an equitable remedy must first establish his entitlement have any support from the traditional British interpretation of the maxim:

Hence arises the extensive and beneficial rule of this Court, that he who asks for equity must do equity, that is, this Court refuses its aid to give to the Plaintiff ... without imposing upon him conditions which the Court considers he ought to comply with, although the subject of the condition should be one which this Court would not otherwise enforce. n271

To comply with this interpretation of the maxim, the seeker of rescission does not need to establish her equitable bona fides [*558] before filing the complaint or before the judgment is rendered; she only needs to comply with the conditions of the judgment.

Given the necessity for jury findings under Rockow, notice and tender provide no additional information or assistance for the trial court to enact restoration. At most, tender reassures the court that the complainant can fulfill her part in the contemplated rescission or that the complainant actually tried to rescind the transaction privately with the defendant without the assistance of the court. n272

The problem with quoting maxims as precedent is that there is no way to necessarily resolve conflicting interpretations. More than 170 years after Texas adopted the British common law, Texas courts are clearly free to apply their own interpretation of the maxim, but the Mathis interpretation is not consistent with the actual procedure of enacting rescission in Texas. The Mathis Cases would reverse the maxim to "you must first do equity if you seek equity." n273

Finally, a court in equity is not forced to deny rescission even when the claimant has failed to secure adequate evidence to grant such a request as in Rockow. In two recent cases the court chose to remand the case to obtain the additional evidence necessary to ensure an equitable remedy. n274

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V. Causes of Action for Rescission

Rescission is available for a broad range of causes of action, including several under various statutory provisions. n275 Texas courts have held that a plaintiff seeking rescission must plead for rescission in writing. n276 Similarly, a defendant must plead the affirmative defense of rescission in her pleadings or it will be waived. n277 A plea for rescission can be evaluated differently, and the equitable factors can be applied differently, for different causes of action.

In general, there is less resistance to rescission as the cause of action varies from mistake or breach of contract to fraud and breach of fiduciary duty. n278 The Restatement (Third) of Restitution and Unjust Enrichment also acknowledges distinctions in courts' resistance to rescission by cause of action and states that courts resist rescission for breach of contract. n279 While no Texas case has been [*560] found that states such a generalization, it seems clear that Texas law imposes higher standards in general for mistake n280 and breach of contract. n281 Furthermore, the concern of Texas courts in fraud cases on unwarranted delay may have less to do with the nature of rescission and more with the inequitable nature of the claimant's actions after the fraud was discovered.

A. Principles Generally Applicable

Traditionally, Texas courts allow the claimant to elect between rescission or monetary damages. While the opportunity to choose has not been in serious dispute, the point in time at which the claimant must make her election has been contested. Published opinions approving the postponement of the election until after the jury verdict date back at least to 1856. n282 There were a few cases subsequent to 1856 in which the claimant was bound to his election upon initial notice, n283 but modern opinions have held that the [*561] claimant can wait until after the jury verdict n284 or that the claimant can plead alternative remedies and elect one of the alternatives after the jury findings are returned. n285 Texas Rule of Civil Procedure 48 allows broad latitude for pleading such inconsistent remedies. n286 In the absence of an election, the trial court must select the remedy with the largest recovery. n287

[*562] Claimants in Texas for rescission are required to plead and prove damages in fact as for most causes of action. n288 Like many other jurisdictions, Texas courts are more tolerant of uncertainty as to the amount of damages than the fact any damages were incurred. n289 For claims of breach of fiduciary duty, the damages in fact requirement applies only to pleas for monetary or punitive damages n290 but not to equitable remedies. n291

[*563] Some authorities dispute the damages in fact requirement, especially in relation to claims for fraud, n292 and early case law suggests that proof of fraud was sufficient to warrant rescission, without proving irreparable injury or damages in fact. n293 No damages in fact for fraud are required when the buyer receives property that is significantly different from that which she contracted to buy, if the seller knows of the buyer's intended use for the purchase and the seller represented that the property was suitable for that purpose but was substantially unfit for such use. n294 While some exceptions have been acknowledged, the requirement remains. n295

In contract cases, an equitable variation of this doctrine is sometimes applied to reject claims that are effectively remedied after the date that the complaint is filed; claims for rescission are [*564] sometimes denied because the plaintiff's principal complaint was remedied at no cost to the plaintiff. n296

Texas courts are reluctant to grant partial rescission, i.e., to rescind part but not all of a contract or agreement. n297 The courts' disapproval of partial rescission is not absolute and partial rescission is subject to the standard it is sometimes necessary to ensure full justice for a cause of action. n298 Partial rescission is also sometimes granted if the contract to be canceled is considered adequately divisible. n299

Trial courts enjoy no discretion, however, to rescind a contract when all interested parties are not included in the litigation. The issue of necessary parties is closely related to partial rescission. The Texas Supreme Court made it clear in 1940 that Texas courts have no jurisdiction to void a contract unless all necessary parties participate in the action, and that courts in equity lack jurisdiction to cancel contracts in the absence of necessary parties because of equity's aversion to granting only partial relief. n300

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B. Mistake, Breach of Contract, Fraud, and Breach of Fiduciary Duty

The first group of causes of action in which rescission is available includes mutual mistake and unilateral mistake. The doctrine of mutual mistake is intended to be applied rarely to preserve the finality of contract and to discourage the routine use of the doctrine to avoid the effects of an unhappy bargain. n301 The standard for mutual mistake excludes mistakes in judgment, n302 most mistakes about the law, n303 mistakes about future facts, n304 and assumed risks, including "as is" clauses. n305

According to § 152 of the Restatement of Contracts (Second), the party seeking rescission on the grounds of mutual mistake must show:

(1) a mistake of fact, n306

[*566] (2) held mutually by the parties, n307

(3) which materially affects the agreed-upon exchange. n308

The evidence to support these elements must be objective, not merely conclusory testimony. n309 On the other hand, proof of the defendant's fault or mere negligence is not necessarily sufficient to deny the claim. n310

[*567] Unilateral mistake claims are basically pleas for mercy when the effect of an understandable error would be disproportionately harmful in light of the good faith and care that the mistaken party demonstrated. n311 A successful plea to rescind a contract for unilateral mistake is generally one in which the claimant can demonstrate her good faith both in the events leading up to the execution of the contract n312 and in trying to correct the contract thereafter. n313

In cases of unilateral mistake, contracts are canceled and property is returned on the basis that the non-claimant should not [*568] incur out-of-pocket losses in the process. n314 A service contract would be rescinded by compensating the service renderer for out-of-pocket expenses for services rendered, but not for lost profit expectancies. n315 A property transaction is reversed but generally without restitution for interest earned, attributed profits, or actual profits.

Texas courts are generally opposed to equitable remedies for breaches of contract, and rescission is rare. n316 Texas only awards rescission in cases with fact patterns that constitute material or "total breaches," such as when the product or asset is totally worthless to the claimant or the defendant has made no payments on an executory contract. n317 Given the well-developed nature of contract remedies, a defendant's claim that common law remedies offer an adequate remedy is most likely a response to a prayer for rescission.

Despite its Spanish legacy n318 and the common law tradition that fraud vitiates a contract, n319 and even though most prominent [*569] authorities argue that neither element should be required, n320 Texas courts have applied the Doctrine and required proof of damages in fact. n321 Rescission is also available for innocent and negligent misrepresentation, depending on the materiality of the misrepresentation to the transaction or contract. n322

Rescission has been held to be an appropriate remedy for claims of statutory fraud under either the Texas Deceptive Trade Practices Act (DTPA) n323 or Texas fraud statutes. n324 These statutes generally provide an alternative standard for establishing liability for which rescission is available.

A recent Texas Supreme Court opinion acknowledges the controversy of whether the restoration provisions of the DTPA incorporate the common law provisions for rescission. n325 The opinion holds that restoration under the DTPA includes many but not [*570] all of the provisions for rescission under common law; there was no

wholesale adoption of all common law requirements. n326 Previously, the Austin Court of Appeals had noted in dicta that the DTPA restoration provisions may provide an independent ground for rescission. n327 However, the Houston Court of Appeals had indicated that rescission under the DTPA was not subject to the common law standards and conditions for rescission. n328 In that case, the court affirmed an award of damages for fraud against a franchisor for loss of expectancy damages up to the date of trial, and it also affirmed the award of rescission to avoid future damages based on the general provisions of section 17.50 (b)(4). n329 So far, this approach has attracted no known supporters.

Andrew's Restoration is interesting because it addresses rescission as an affirmative defense for non-payment of a services contract. In that case, a contractor sued to collect under a contract for remediation services for mold infestation in a residence. n330 The homeowner pled rescission as a defense, claiming that the plaintiffs [*571] triggered the DTPA by violating the Texas Property Code. n331 In that case, the Texas Supreme Court stated that if the defendant's actions were sufficiently in default, the plaintiff can obtain rescission of a partially completed services contract by rendering the interim benefit of the value of the defendant's services, even though both parties cannot be strictly restored to their ex ante positions (as recommended in the Restatement (Third) of Restitution and Unjust Enrichment § 54(3)(b)). n332

While claims for breach of fiduciary duty have not been frequently used to support a plea for rescission, Texas courts do award rescission for this cause of action. n333 Sizable punitive damages may be awarded, and the opinions acknowledge interest in creatively structuring remedies to deter breaches. n334 Texas courts [*572] have consistently held that fiduciaries should be deprived of any undisclosed profits. n335 Transactions between the principal and agent have been rescinded when they were found to be unfair to the principal n336 or when the fiduciary could not prove that she paid fair value in the transaction. n337 Transactions between lawyers and their clients for either reason have been rescinded. n338 The remedies of rescission and constructive trust have been combined for added protection for the claimant. n339

More extreme than rescission, forfeiture of assets was recently affirmed as a possible remedy for malicious breach of fiduciary duty and should be distinguished from forfeiture of fees, which has been a traditional remedy for disgorging unjust enrichment. n340 In a recent case of malicious breach of fiduciary duty, the Texas Supreme Court affirmed a forfeiture judgment that ordered a willful, errant partner to disgorge the proceeds from the fraudulent sale of his partnership interest. n341 Under the forfeiture order, the partner had to restore the proceeds but was not entitled to receive his business interest back. n342 The opinion failed to [*573] acknowledge the significant difference between forfeiting revenues and forfeiting assets.

Ironically, the plaintiff's judgment would have been improved if the trial court had awarded rescission rather than forfeiture of the defendant's stock. The trial court awarded punitive damages of $ 1,000,000 in addition to $ 1,020,700 in combined actual damages. n343 The value of the stock rescinded could have qualified as actual damages to justify the same punitive damage award. The Texas Supreme Court ordered the punitive damage award to be reviewed, not on the basis of the value of the stock forfeited as actual damages, but on the amount of lost profits. n344 Under rescission, the plaintiff may have had to restore the defendant's stock, which had been purchased for $ 497,500, n345 but could have retained all or most of the punitive damage award. n346

A third party to the fiduciary's breach can be subjected to rescission if the third party knew or should have known that it received property as the result of a breach of fiduciary duty. The Corpus Christi Court of Appeals approved the use of rescission against a third party who knowingly purchased an asset for ten percent of its actual value, an action the court found constituted participation in a breach of fiduciary duty. n347 Aiding and abetting a [*574] breach of fiduciary duty has sometimes resulted in joint liability n348 and sometimes it has not. n349

VI. Restoring the Status Quo Ante

"If you are fraudulently induced to buy a cake you may return it and get back the price; but you cannot both eat your cake and return your cake." n350

In demanding rescission, the plaintiff must plead and prove that it is possible to restore the parties to their status quo ante. n351 Some claimants fail to understand that their plea for equitable relief effectively requires the claimants to assist the court in realizing its commitment to total equity and its priority to protect the defendant's interests. n352 For example, in Rockow, the claimant has the obligation to secure sufficient jury findings to inform the trial court of the evidence necessary to restore the parties. n353 Restoring the status quo ante can be divided into three parts in which each party:

(1) restores property received from the other, to the extent such restoration is feasible ["specific restitution"];

[*575] (2) accounts for additional benefits obtained at the expense of the other as a result of the transaction and its subsequent avoidance, as necessary to prevent unjust enrichment ["net enrichment"]; and

(3) compensates the other for loss from related expenditure as justice may require ["special damages"]. n354

A. Specific Restitution

There has been little dispute about the fact that the seeker of rescission must return the initial consideration from the transaction to the other party. n355 In one case, the plaintiff sought to reverse the sale of an asset for $ 1,600 because he was drunk at the time of sale. n356 The Court passed over the incapacity issue and denied rescission because the claimant acknowledged that he no longer had the money to return. n357 A few of the more recent opinions hold that the feasibility of restoring the status quo ante is only one of a number of factors to consider in the decision to grant or deny rescission. n358

Much of the dispute in specific restitution relates to what is and is not an excusable variance from the status quo ante. Exact restoration has long been acknowledged as unobtainable as allowances are made for variations that are contextually reasonable n359 and subject to overall equity. n360 Black states that if the [*576] inability to achieve complete restoration lies with the fault of the claimant, the remedy should not be granted, but that if it lies with the fault, fraud, or wrongful conduct of the defendant, "such impossibility of restitution is no obstacle to the rescission of the contract." n361

Inadvertent changes in the assets that occur before the claimant has sufficient knowledge to rescind have also been excused or adjusted when measuring net enrichment. n362 Worthless assets need not be returned. n363 Alternatively, the court can sometimes offer an alternative equitable remedy that approximates the same effect. n364

[*577] Restoring the monetary equivalent for service contracts will vary in measure by cause of action. In the case of unilateral mistake, the court's concern is to avoid causing loss to the non-complainant as a result of the rescission except for loss of expectancy or profit interest. Therefore, rescinded service contracts will restore the defendant by compensating her for out-of-pocket expenses for mistake, n365 but in rescission for fraud, compensation can be further limited by the value of the service to the claimant. n366 In cases of defaulting fiduciaries, even disloyal fiduciaries can be compensated for their services but not with an award greater than the value of the benefits of those services to the principal. n367

Alternatively, under the out-of-pocket approach, the plaintiff can claim special damages on the theory that had she known the truth, she would not have executed the contract and that, therefore, her payments were lost and other special damages, such as incidental or reliance damages, adjusted for any benefit of the service, were incurred as a result. n368

[*578] There are a number of isolated cases in which courts granted monetary rescission to claimants where rescission in specie was not possible and claimants waived specie restoration. n369 In one recent case, the trial court held that it was within its discretion to grant the monetary award despite the inability of the claimant to return the business operation at issue. n370 The claimant had previously lost the business operation in foreclosure to the defendant. n371 Given the defendant's role in the foreclosure and the defendant's underlying fraud, the court asserted its discretion to reject the defendant's protests. n372 In some of these cases, constructive trusts are also sometimes added on to protect the proceeds from the sale of the asset that would otherwise be restored. n373

Specific restitution is sometimes the optimal remedy because it is the only remedy. Consider an illustration in the Restatement of Restitution (Third), which is a simplification of some substantial litigation between various oil companies and the federal government over off-shore mineral leases:

[*579]

Suppose that an oil company pays the federal government one billion dollars in lease bonus for an extended offshore mineral lease. The oil company proceeds to explore and attempt to develop the lease, incurring $ 750 million in additional expenses. Before the company establishes any meaningful production or proves any definite reserves, Congress passes a new law that bans such offshore exploration and effectively repudiates the contract for reasons unrelated to the company's activities. n374

On a simple claim for breach of contract the oil company could sue for expectancy damages except that the company's contract-to-date results would not support a claim for expected profits net of exploration costs or lease payments. Under a reliance approach, the oil company should be entitled to its total expenditures for the contract, $ 1.75 billion, except that reliance damages must be offset for any net losses reasonably expected for the project resulting from the contract. n375 If the government could prove that the company would reasonably expect a loss of $ 1.5 billion, the company's reliance damages would be limited to $ 250 million (the net of $ 1.75 of gross reliance expenditures and $ 1.5 billion of expected losses).

Compared to a nominal amount for expectancy damages and $ 250 million for reliance damages, the return of the initial billion dollar bonus payment under rescission would be comparatively attractive. That was also the basic damages rationale and result of the case underlying illustration 34. n376

[*580] In a less dramatic set of circumstances, the plaintiff faced a similar problem because he could not prove the actual damages that resulted from the breach

of a non-compete agreement. In Ennis v. Interstate Distributors, the buyer of a partner's minority interest paid a separate amount for the business interest and a thirty-month non-compete agreement. n377 Upon terminating his employment, the selling partner began to violate the agreement, with the exception of a three-month period during which time he was engaged in other business or unemployed. n378 This scenario raised the traditional defense of part performance, which would preclude rescission whenever the defendant has partially performed her obligations under the contract. n379 Because the buyer could not reasonably measure damages, rescission was awarded despite the fact that the errant partner did comply for three months of the thirty-month non-compete period under the agreement. n380 The court reasoned that the resulting flaw in restoration was an acceptable balance of the equities, and the buyer was awarded a full refund of the consideration paid for the non-compete. n381

B. Net Enrichment

A court's commitment to total equity requires consideration of reasonable restitution or compensation regardless of the willfulness or malice of the defendant's actions. n382 It should [*581] therefore come as no surprise that courts in equity and Texas courts require consideration of the interim benefits that have accrued since the date of the transaction. In Texas, one of the prominent justifications for denying rescission has been the claimant's failure to secure a jury finding on the value of the interim benefit that she gained from the transaction - either payments and interest from the sale or gains from the possession of the purchased property that she sought to return. n383

The interim benefit can be relatively small in comparison to the value of the rescission. For example, a lumber company sought rescission of a sale of lumber that was shipped to Dallas at the buyer's expense. n384 When the buyer failed to make payment, the mill sued for rescission but refused to reimburse the buyer for the shipping costs. n385 The Texas Supreme Court denied rescission for that omission. n386

Claimants who fail to secure the necessary jury findings to support a complete measure of the net enrichment can lose the benefits of rescission. The cost of compensating the defendant for the interim benefit is generally small compared to the gain of unloading the rescinded property at full price without additional expense. Indeed, an analysis of the outcome of the cases in which [*582] rescission was denied because the plaintiff failed to fully account for interim benefits shows a substantial disparity is common between the small offset of interim benefits that should have been evidenced and the overall advantage of rescinding the sale:

. In one case a cotton farmer was denied rescission of a contract for a $ 16,400 cotton picker for failing to acknowledge the rental-use value of the machine of $ 1,500; n387

. A car purchaser was stuck with a $ 10,000 car because she failed to acknowledge the benefit of driving the new car for 1,200 miles; n388

. The Estridge family lost rescission for the return of the $ 175,000 purchase price of their home plus interest for failing to acknowledge the rental value attributable to their interim use; n389

. A seller of property lost the opportunity for rescission, which would have provided it with the right to possession or a priority claim to the property rather than a claim as a general creditor to a bankrupt debtor for $ 520,000, because the seller failed to acknowledge a benefit of $ 10,000; n390 and

. A homeowner lost a judgment for a total refund of payments to a service vendor for $ 1,059,940.52 because he failed to secure a jury finding for the value of the vendor's services. n391

[*583] The plaintiff's failure to evidence interim benefits in today's litigation environment is either a short-sighted decision or an expensive mistake.

To restore both parties to the status quo ante, the court must measure the enrichment to both parties that resulted, directly or indirectly, from the transaction. The enrichment should include benefits that accrued to the holder of the asset, interest earned or saved by the party that received payment, adjustments necessary from specific restitution, and expenses incurred by the holder of the property that benefitted the property. n392

In a simple real estate transaction the following items would need to be considered:

. Fair market rental value for the use of the property (subject to actual property income, if applicable); n393

. Tax payments or payments to third-party creditors; n394

[*584] . The cost of improvements (subject to conditions and exceptions); n395

[*585] . Deterioration in the assets due to the actions or negligence of the party in possession; n396

. Interest earned or saved from the transaction proceeds; n397

Except for willful torts, there is substantial case law holding that each party's benefits should be measured in a manner similar to the traditional approach of quantum

meruit. n398 Beyond mistake and breach of contract, the Texas approach for measuring the net unjust enrichment becomes uncertain as a choice between quantum meruit and an accounting in equity. Texas courts award unjust enrichment for both fraud and breach of fiduciary duty. n399 Outside authorities suggest that the defendant's interim benefits should be measured on the basis of the greater of rental value or unjust enrichment. n400 There [*586] is some Texas precedent that may be helpful and supportive of the approach, n401 but Texas does not yet have a case fully comparable to Illustration 2 discussed above.

The Restatement (Third) of Restitution and Unjust Enrichment provides that in claims for willful torts, the defendant should be deprived of resulting profits or benefits, including the greater of market rent or actual profits. n402 In fraud and fiduciary duty cases, Texas courts have emphasized the court's priority to deprive the faithless fiduciary from retaining benefits or profits. n403 The principle to deter willful tortfeasors should tip the balance in favor of a court applying the accounting in equity approach over quantum meruit. Furthermore, claims related to fraud and fiduciary duty or trustees are traditionally related to courts in equity and equitable remedies. n404

[*587] Brooks v. Conston, a landmark case from Pennsylvania, provides a good example of some of the likely issues in a major business case. n405 The defendants acquired a retail chain in a fraudulent manner that was not discovered for a number of years. n406 In spite of the fraud, the husband and wife defendants did an excellent job of developing and growing the retail chain, which the court rescinded to the defrauded seller. n407 The issue in the case was whether the husband and wife should be compensated for their work that benefitted the chain and the claimant. n408 The court and subsequent authorities agreed that the couple warranted substantial compensation on the grounds of either the benefit to the plaintiff or basic fairness. n409 That perspective is compatible with the analysis in Burrow v. Arce. n410

C. Special Damages

Since Texas became a state, its courts have approved various forms of special damages, generally reliance n411 or incidental damages, n412 in addition to ordering rescission. Because lost profits or operating losses can only be awarded as a consequential form of [*588] expectancy damages, they cannot be awarded for a void contract. In a recent case, without any discussion, the plaintiff was awarded rescission and special damages, but no compensation for operating losses. n413

A recent Texas Supreme Court opinion further clarifies Texas law on special damages in a breach of warranty case. The court held that special damages could be established by proving the amount that would restore the claimant to its original posi-

tion. n414 In that case, damages did not include any operating losses, but the court specifically approved an accrual for the plaintiff's labor as reliance damages. n415

Subject to proof of causation and foreseeability, special damages as consequential damages can include adverse consequences to the plaintiff's assets that are unrelated to the specific transaction being rescinded. For example, in a case in which purchased livestock proved to be sick and infected, the purchaser's existing livestock, expenses to treat or destroy the purchased livestock, as well as pre-existing livestock were approved as special damages. n416

Plaintiffs should consider the tactical alternatives for pleading expenses. Some expenses or damages may be claimed as either reliance expenditures or permanent improvements in net enrichment. Expenses plead as permanent improvements can be limited by increases in the asset's value, while reliance damages can [*589] be offset by expected operating losses. n417 Similarly, special damages may not allow for operating losses, but the plaintiff may be allowed to claim individual expenses, such as wages, as reliance damages. n418

Punitive damages are awarded for cases of fraud and breach of fiduciary duty. To justify punitive damages, actual damages must include special damages and the value of the rescission. n419 By Texas statute, the plaintiff must prove malice or fraud to warrant punitive damages. n420

[*590]

VII. Equitable Factors

"A standard that asks the district judge to consider a large number of factors ... in no particular order and with no particular weighting of each factor is nondirective; it is effectively no standard." n421

It is widely agreed that a Texas court's decision to grant or deny rescission is within the judge's equitable discretion. n422 Many opinions refer to a factor test, or a test of multiple factors, to weigh the plea for rescission. n423 Such tests generally balance three factors: (1) prejudice to the defendant if the remedy is awarded; n424 (2) the prejudice to the plaintiff if the remedy is denied; n425 and (3) public policy considerations. n426 Other opinions address additional [*591] prerequisites or contingent issues, including irreparable injury and affirmative defenses. n427

There is no shortage of potential additional factors that would be relevant in the weighing of an equitable remedy. Both the Texas Supreme Court n428 and the Restatement (Third) of Restitution and Unjust Enrichment n429 adopt a vague standard for selecting applicable factors. One alternative is the test of eight factors which includes the doctrine of unclean hands and the doctrine of irreparable injuries (the Doc-

trine). n430 However, the overall effect of applying a vague standard or a long list of separate factors is to expand judicial discretion under the appearance of guidelines or judicial standards. n431

The issues of whether the claimant provided notice of her claim for rescission and whether the claimant offered to tender [*592] consideration and interim benefit are sometimes listed as equitable factors, but these are currently treated as necessary conditions for awarding rescission. n432 This Article has already shown that neither notice or tender perform any useful or necessary role in restoring the parties' status quo ante. n433

The analysis below shows that neither requirement is of much practical effect, due either to impracticality or abundant exceptions. The acts of providing notice or offering tender have the same substantive effect as reciting magic words, as they are similar to the claimant stating that she will act in an equitable manner or exhorting the court to be equitable. They sound equitable, but the remedy for serious litigation should not turn on their proper recitation.

A. Notice

The only Texas precedent for the notice requirement relates only to notice from vendors to vendees in executory contracts for which the vendee has made some partial payment. n434 Indeed, the necessity for that ruling belies a strong tradition in Texas case law otherwise for notice. n435 Furthermore, it seems clear that the notice requirement is more frequently enforced in recent cases than previously, despite the modern trends of liberalized pleading and of pleading inconsistent remedies.

The traditional rationale for requiring notice is based on concern about speculative delay - to minimize the opportunity for a plaintiff to wait and see how values change or operations prove out before she is committed to seek rescission. As explained above, the [*593] claimant's right to plead in the alternative for rescission and monetary damages has been enhanced to allow the claimant to wait until after the jury findings are rendered to choose between the remaining remedies available. n436 Therefore, a claimant's notice to the defendant is not binding. The notice would be only of the intent to file a complaint, not necessarily a claim for rescission. Some courts have held that the filing of the complaint itself is sufficient notice. n437

Dobbs explains the notice requirement as providing the defendant an opportunity to recognize the plaintiff's problem and resolve the issue without litigation, even with rescission by agreement. n438 However, he distinguishes this equity from defendants who have committed fraud or breach of contract because the defendant's duty to make

amends in some form arises as soon as his conduct is complete and without regard to notice. n439

O'Sullivan's treatise acknowledges the notice requirement in Commonwealth law, although he reports that the English legal community is moving to eliminate the practice. n440 Since 1871, the pleading has been deemed sufficient notice of the plaintiff's election to pursue rescission against the defendant. n441 Only in cases where the plaintiff pursues self-help and acts to reclaim a particular asset, is prior notice still regarded as a significant issue in British law. n442

Taken literally, the notice requirement would preclude a claim for rescission for a plaintiff that had already filed a complaint [*594] but subsequently discovers new evidence that warrants amending the complaint to include rescission. Taken literally, the notice requirement would have the plaintiff withdraw her complaint and re-file her action after notifying the defendant of the plaintiff's intent to seek rescission. The law in equity emphasizes the importance of substance over form; n443 today, there is no substance to the notice requirement.

B. Tender

On its face, the tender requirement requires the claimant to obtain a jury finding that she tendered or offered to tender the consideration as well as subsequent benefits before the trial. n444 There is no useful role for the tender requirement to play in rescission in Texas. The actual restoration is ordered by the trial court based on jury findings and the court's discretion regardless of any tender offer. Tender is only relevant when the parties try to agree to a rescission without the assistance of the court or with the assistance of a court at law. Otherwise, in a court in equity, an offer to tender is meaningless as a premature form of restoration. n445

The purpose of tender and restoration is to ensure that the defendant does not rescind without the claimant restoring all [*595] consideration and benefits that have accrued. n446 An offer to restore consideration does not achieve this goal without jury findings and a court order; however, restoration can be achieved with jury findings and a court order but without offering to restore.

Texas precedent and persuasive authorities hold that tender is not required for rescission in equity. n447 Another group of cases states that courts in equity are meant to be flexible and to apply the principle only as warranted by the facts of the case. n448 Precedent can [*596] therefore justify almost any holding on tender even before exceptions are considered.

Most courts accept an offer to tender in lieu of actual tender, n449 and some accept the alternative of the claimant's prayer for the court to make all orders necessary

to restore the status quo in an equitable manner. n450 Thus, the tender requirement is satisfied in some courts by the claimant's plea for a court in equity to do equity. Magic words indeed!

There are several significant exceptions to the tender requirement:

. Neither tender nor notice are required under the restoration remedy under § 17.50(b)(3) of the DTPA; n451

. Worthless assets do not need to be tendered; n452

[*597] . The claimant can plead that the defendant has accrued greater enrichment from accrued rentals or deterioration of the asset than the claimant would need to tender; n453

. The claimant is not required to tender assets that she is otherwise entitled to keep; n454

. The claimant does not need to tender consideration for a settlement if she can prove that she is entitled to a larger settlement; n455 and

. The claimant can withhold tender of assets pending payment for unreimbursed expenses. n456

Finally, the tender requirement is not practical. It is unclear if a tender based on inaccurate data would be considered an effective tender. If a defendant took the tender requirement seriously, she might challenge the claimant's tender on the basis of accuracy even though the net enrichment generally cannot be measured accurately without evidence of the defendant's interim benefits, evidence that is [*598] solely within the control of the defendant. n457 In the final analysis, the tender offer is no more binding than providing notice to rescind. Either action reduces to an expression of willingness to comply with the equitable spirit of the trial court and a plea that a court sitting in equity be equitable.

VIII. Defending Against Rescission

The defendant to a claim for rescission is free to assert numerous affirmative defenses including waiver, n458 ratification, n459 laches, n460 and unclean hands. n461 While the affirmative defenses are subject to acknowledged conditions and requirements, the granting or denial of such motions is frequently the result of the judge's subjective interpretation of all facts and circumstances.

A. Waiver and Ratification

It is traditionally understood that unnecessary delay on the part of the plaintiff in deciding to rescind the agreement could allow [*599] the plaintiff to exploit the

windfall and must be restricted even before consideration of laches. n462 Rescission is generally denied if the defendant can prove that the plaintiff waited too long before electing to rescind the contract to continue to enjoy the benefits of the contract after the plaintiff became aware of the evidence necessary to warrant rescission. The difference between tolerable and intolerable periods of time can vary inversely with the volatility of the underlying asset. n463

The four distinct affirmative defenses to rescission are waiver, ratification, laches, and adoption. n464 The four defenses represent an imperfect continuum of the degree of prejudice to the defendant, representing a combination of time, benefit to the claimant, and possible detrimental reliance of the defendant.

Under Texas law, the right to rescind a contract may be lost by failure to assert the right or by conduct indicating an affirmation or ratification of the contract after a party has knowledge of facts which constitute grounds for rescission. Under Texas law, the equitable doctrines of laches, estoppel, and waiver are all grounded in the principle that a party with full knowledge of facts that entitle him to rescind a contract will be barred from asserting his right where he fails to act promptly upon this right to the detriment of another. n465

[*600] Waiver is an affirmative defense under which the defendant must plead n466 and prove that the claimant, informed of the underlying cause for rescission, intentionally chose to continue the contract rather than seek rescission. n467 A strong claim for waiver is made when the defendant can show that the claimant's waiting or delay prejudiced the defendant either because the defendant reasonably relied on the claimant's inaction, or the claimant delayed for speculative purposes. n468

Significant latitude is generally allowed to a claimant who is trying to resolve the underlying issue without first seeking a court's assistance. n469 Thus, some claims of waiver are rejected when the claimant can show that she was negotiating or trying to resolve the problem. n470 The time period warranting waiver can be as short as thirty days n471 but generally exceeds two months. n472 Equally [*601] important is the nature of the benefits that the claimant continued to enjoy between the date that he knew or should have known of the triggering acts and the date that the claimant stopped enjoying the benefits under the contract. n473 The finder of fact is free to infer waiver from the claimant's actions; therefore, evidence that the claimant, after learning of the breach or tort, continued to use the asset, made additional installment payments on the asset, or made improvements to the asset are held as proof of the claimant's intent. n474 Evidence sufficient to deny rescission can be as simple as the testimony of the CEO who was aware of the defendant's misrepresentation:

When it became apparent they weren't going to honor their commitment to me, there wasn't much I could do in terms of writing a letter. I had one or two choices, to leave the building or stay there... . I felt that ... if I continued to stay there and showed my - my commitment, that they would, in turn, acquiesce eventually into dealing with us on the sign issue. n475

[*602] If the claimant discovers a series of acts or facts justifying rescission, waiver of one act does not necessarily waive later acts or discoveries of key facts. n476 Ironically, one sure way for a potential claimant to waive any future claims to rescission is to reject an offer from the other party to rescind. n477

In Fortune v. Conoco, the Supreme Court of Texas rejected the rule that ratification necessarily excludes both rescission and damages. n478 The court further distinguished between damages before the act of waiver or ratification and damages after that act. n479 A claimant can lose her right to rescission after waiver n480 or ratification. n481 A claimant can lose her right to both damages and [*603] rescission by ratifying a contract. n482 On the other hand, many claims of waiver have been rejected. n483

There is little discussion in the case law about the difference between waiver and ratification except that ratification appears to be a more deliberate form of waiver and is more likely to preclude damages as well as rescission. n484 In comparing the case opinions, waiver is more likely to be inferred from inaction or the failure to assert rescission, while ratification is more likely to be inferred when the claimant takes some action that belies the desire to rescind the contract. n485 Amending the contract in question or entering into a [*604] related agreement are frequently held to be evidence of ratification. n486

A final complication concerns how the claimant must care for the subject property in the interim period while the parties are attempting to resolve the dispute, even during litigation. A plaintiff who intends to rescind the contract must mitigate damages and undertake her duties under bailment. n487 A car or a piece of machinery can be offered back to the defendant, but upon rejection of the tender, the claimant must hold or dispose of the asset under the principles of bailment. n488 For example, if the claimant had purchased a group of producing wells and the defendant refused the tender back of the wells, the claimant may need to operate and maintain the wells until the dispute is resolved. Viewed from the defendant's perspective, the claimant might be seen as having waived rescission because the claimant continues to hold and operate the wells. In such a situation, one claimant successfully argued that he was just mitigating damages and maintaining the assets for the interest of the defendant.

n489 The case law is thin and the prudent [*605] claimant seems well advised to file a complaint early and seek court resolution of the bailment issues. n490

B. Unclean Hands

The equitable defense of unclean hands expands the trial court's equitable discretion due to the subjective nature of the standard. n491 The defense bars a party whose own conduct in connection with the transaction has been "unconcientious, unjust, or marked by a want of good faith, or one who has violated the principles of equity and righteous dealing from seeking equitable relief." n492 The act or acts constituting "unclean hands" must cause serious harm n493 to the defendant n494 and must relate to the dispute at [*606] hand. n495 Alternatively, it can relate to the enforcement of public policy principles. n496 The plaintiff can also plead unclean hands against equitable defenses. n497

The characterization of either party's behavior as negligent is treated differently by the law in different topics in this Article. For example, a party seeking rescission for unilateral mistake is allowed some negligence before a claim for rescission will be denied. n498 In the case of unclean hands, in some cases mere negligence has been held insufficient to warrant a finding, n499 but in others a kind of delay-negligence has been held sufficient. n500

[*607] Perhaps courts invoke unclean hands as a substitute for some other equitable factor that will not stand on its own. In Schenck v. Ebby Halliday Real Estate, the jury found that the plaintiff was fraudulently induced to purchase the land, but the trial court denied rescission based on unclean hands:

The jury found negligence on the part of the Schencks in this transaction. The contract signed by the Schencks clearly stated that they had 15 days to find out if the property was within a 100-year floodplain and rescind, otherwise the property would be deemed acceptable. It was more than a year later that the Schencks allegedly attempted to rescind this transaction. Their wish to rescind this real estate transaction arose after they located other property they considered to be a more desirable location for their residence and they no longer wanted this property. n501

Because the claimants waited a year before attempting to rescind, waiver appears a more appropriate holding, but nothing in the case indicates that the defendant plead that affirmative defense. Reliance on any misrepresentation seems unlikely if the claimants failed to confirm the flood zone within the fifteen-day period. The defendant could have argued that inclusion of the provision itself should have alerted the

claimants to the flood zone issue. Either factor, if properly asserted by the defendant, could have been sufficient to eliminate rescission or possibly even liability. Yet the opinion focuses on the fact that the claimant only sought rescission after finding a replacement location.

[*608]

IX. Conclusions

"To determine every particular case according to what is just, equal, and salutary, taking in all circumstances [it] is undoubtedly the idea of a court of equity in its perfection; and had we angels for judges such would be their method of proceeding without regarding any rules... ." n502

While rescission will prove advantageous only under special circumstances, it is generally worthwhile to consider the alternative of equitable remedies. A significant distinction in choosing between monetary damages and rescission is the differing impact of applying ex ante and ex post evidence to measure the remedy. Plaintiffs with cases that would improve with ex post evidence need to carefully evaluate remedies in equity.

Among other advantages, rescission in Texas can sometimes result in a windfall. Modern procedures allowing alternative pleading and delayed election enhance the possibility of windfall in Texas. The fear that rescission will be abused or result in unjust enrichment to the claimant is a traditional rationale for some of the key affirmative defenses and equitable factors that influence denial of the remedy. Therefore, an important underlying theme for opposing counsel to argue is that the remedy of rescission would unjustly enrich the plaintiff.

What remains unclear is why the use of rescission in Texas has declined over the past eighty years, contrary to the national trend. Part of the explanation lies in the declining number of disputes over executory contracts, although the rising number of state securities claims and mistake cases may have partially offset this trend. n503 Litigators who browse rescission case law could easily [*609] gain the wrong impression that Texas courts disfavor the remedy, particularly because many of the executory contract cases that speak of rescission unfavorably do so in the context of prejudicial facts.

Like most equitable remedies, rescission in Texas is not well understood by litigators or the judiciary, but is available to remedy a broad range of causes of action. The problems of pleading and measuring rescission vary by cause of action, particularly between willful and non-willful claims. The key defenses of waiver, adequate remedy, and unclean hands can be effective, but they can also be anticipated.

This Article suggests that Texas courts, like most courts in equity, tend to obscure much of their reasoning for their opinions in equity. At best, the proof for this suggestion is circumstantial and anecdotal. The Article provides no systematic analysis, akin to that of Professor Laycock in his work on irreparable injury. n504 However, the key issue is not the opaque nature of these opinions, but the resulting variability. Pleading a case in equity carries additional risk, not because the opinions are generated in a covert or sub rosa process, but because the process is not necessarily intelligible beforehand - the process is less certain and less predictable. Fortunately, this risk is mitigated by the consideration that rescission can be plead in the alternative to monetary damages.

The irony of rescission in Texas is that Texas was one of the first jurisdictions to offer a blended system of common law and equity. Yet as more jurisdictions have fused their court systems, Texas courts have chosen to encumber rescission in Texas with unnecessary pleadings and recitals, such as the notice and tender requirements. Even though the Texas Supreme Court mastered the essence of equitable rescission from the start, today Texas emulates practices that other jurisdictions discontinued.

[*610]

X. Appendix

Summary of Word Search Data

As an adjunct to the legal analysis, a number of word searches were conducted on the LEXIS databases to estimate trends in the frequency that rescission was discussed or mentioned in Texas and other state opinions. The searches were strictly literal in that they were based on searches for the literal word rescission as either a core term or just a word mentioned in the case opinion. Cases that mentioned the word fifty times were deemed the same as cases that mentioned the word once. The results were not adjusted for context; cases that mentioned the word as part of a quote from another case were deemed the same as a case in which the opinion analyzed the issues surrounding the term. Similarly, literal word searches were conducted to determine the frequency with which the doctrine of irreparable injury was mentioned in state court opinions. The terms adequate remedy and irreparable injury were used as proxies for the doctrine of irreparable injury.

For any one remedy in any one period, the number of times a term is mentioned or applied as a core term would be ambiguous at best because the mention of a term does not mean that it was significant to the case or important to the legal analysis. However, comparisons between time periods for the same remedy or between different remedies for the same time period could eliminate some of this bias and "noise" to

suggest interesting comparisons, albeit of unknown precision. One of the redeeming qualities of this approach is that it is objective; it relies on no subjective interpretation or reasonable inference.

The logical and statistical imprecision is such that the results can be suggestive only. Biases would include that mentioning either a remedy or the term adequate remedy does not mean that such issues were seriously considered. Also, the absence of such terms does not necessarily imply that the issues would not have been considered if they were raised by the defendant or that the Doctrine of Irreparable Injury was ignored rather than just unnecessary in that case.

Some patterns do emerge. The rate at which "rescission" is used as a core term in Texas cases appears to have declined after 1940, contrary to increased cases in the American state courts [*611] generally and contrary to the increasing pattern for specific performance. Less than seven percent of Texas cases in any decade since 1910 that use "rescission" as a core term mention "adequate remedy" or "irreparable injury." However, these latter phrases are mentioned in about twenty percent of the cases that apply "injunction" or "mandamus" as core terms.

[*612]

Table A: Rescission as Core Term

Note: All searches for "rescission" as a core term excluded cases that applied "injunction" or "mandamus" as a core term.

Decade ending January 1st	1910	1920	1930	1940	1950	1960	1970	1980	1990	2000	2010
All state courts "Rescission" as core term (number of cases)	1,076	1,744	2,174	1,784	848	1,235	1,090	1,289	1,952	1,886	2,053
"Adequate remedy" or "irreparable injury" are also mentioned (number of cases)	42	47	57	79	42	37	51	27	73	71	97
"Adequate remedy" or "irreparable	3.9%	2.7%	2.6%	4.4%	5.0%	3.0%	4.7%	2.1%	3.7%	3.8%	4.7%

injury" are also mentioned (percent of cases)											
All state courts except Texas											
"Rescission" as core term	1,005	1,535	1,938	1,631	782	1,163	1,038	1,216	1,895	1,821	1,969
"Adequate remedy" or "irreparable injury" are also mentioned	39	47	52	76	40	34	48	22	72	70	93
"Adequate remedy" or "irreparable injury" are also mentioned (percent)	3.9%	3.1%	2.7%	4.7%	5.1%	2.9%	4.6%	1.8%	3.8%	3.8%	4.7%
Texas state courts											
"Rescission" as core term	71	209	236	153	66	72	52	73	57	65	84
"Adequate remedy" or "irreparable injury" are also mentioned	3	0	5	3	2	3	3	5	1	1	4
"Adequate remedy" or "irreparable injury" are also mentioned (percent)	4.2%	0.0%	2.1%	2.0%	3.0%	4.2%	5.8%	6.8%	1.8%	1.5%	4.8%

[*613]

Table B: Specific Performance as Core Term

Decade	1910	1920	1930	1940	1950	1960	1970	1980	1990	2000	2010

ending January 1st											
All state courts											
"Specific performance" as core term (number of cases)	1,479	1,810	2,394	1,397	1,625	1,633	1,366	1,982	2,559	1,852	2,969
"Adequate remedy" or "irreparable injury" are also mentioned (number of cases)	128	124	159	114	178	135	108	141	177	141	211
"Adequate remedy" or "irreparable injury" are also mentioned (percent of cases)	8.7%	6.9%	6.6%	8.2%	11.0%	8.3%	7.9%	7.1%	6.9%	7.6%	7.1%
All state courts except Texas											
"Specific performance" as core term (number of cases)	1,423	1,687	2,251	1,320	1,536	1,550	1,292	1,834	2,411	1,783	2,840
"Adequate remedy" or "irreparable injury" are also mentioned (number of cases)	124	122	154	109	175	132	102	135	170	139	199
"Adequate remedy" or "irreparable injury" are also mentioned	8.7%	7.2%	6.8%	8.3%	11.4%	8.5%	7.9%	7.4%	7.1%	7.8%	7.0%

(percent of cases) Texas state courts											
"Specific performance" as core term (number of cases)	56	123	143	77	89	83	74	148	148	69	129
"Adequate remedy" or "irreparable injury" are also mentioned (number of cases)	4	2	5	5	3	3	6	6	7	2	12
"Adequate remedy" or "irreparable injury" are also mentioned (percent of cases)	7.1%	1.6%	3.5%	6.5%	3.4%	3.6%	8.1%	4.1%	4.7%	2.9%	9.3%

[*614]

Table C: Adequate Remedy or Irreparable Injury as Core Terms

Decade ending January 1st	1910	1920	1930	1940	1950	1960	1970	1980	1990	2000	2010
All state courts											
"Adequate remedy" or "irreparable injury" as core term (number of cases)	914	971	998	1,095	876	868	872	1,286	1,996	2,558	3,428
"Injunction" or "mandamus" are also	630	651	679	707	514	563	551	914	1,443	1,923	2,648

mentioned (number of cases)											
"Injunction" or "mandamus" are also mentioned (percent of cases)	69%	67%	68%	65%	59%	65%	63%	71%	72%	75%	77%
All state courts except Texas											
"Adequate remedy" or "irreparable injury" as core term (number of cases)	877	920	931	1,016	839	822	820	1,200	1,804	2,118	2,577
"Injunction" or "mandamus" are also mentioned (number of cases)	599	602	615	637	477	521	501	835	1,258	1,508	1,830
"Injunction" or "mandamus" are also mentioned (percent of cases)	68%	65%	66%	63%	57%	63%	61%	70%	70%	71%	71%
Texas state courts											
"Adequate remedy" or "irreparable injury" as core term (number of cases)	37	51	67	79	37	46	52	86	192	440	851
"Injunction" or "mandamus" are also mentioned (number	31	49	64	70	37	42	50	79	185	415	818

of cases)											
"Injunction" or "mandamus" are also mentioned (percent of cases)	84%	96%	96%	89%	100%	91%	96%	92%	96%	94%	96%

[*615]

Table D: Injunction or Mandamus as Core Terms

Decade ending January 1st	1910	1920	1930	1940	1950	1960	1970	1980	1990	2000	2010
All state courts											
"Injunction" or "mandamus" as core term (number of cases)	9,757	10,241	10,705	11,688	7,558	8,214	8,251	11,275	15,234	16,850	22,690
"Adequate remedy" or "irreparable injury" are also mentioned in same case (number of cases)	1,965	1,866	1,967	2,024	1,419	1,595	1,435	2,195	3,541	4,903	7,364
"Adequate remedy" or "irreparable injury" are also mentioned in same case (percent of cases)	20%	18%	18%	17%	19%	19%	17%	19%	23%	29%	32%
All state courts except Texas											
"Injunction" or	9,236	9,149	9,251	10,082	6,750	7,377	7,385	10,131	13,439	14,558	18,415

"mandamus" as core term (number of cases)											
"Adequate remedy" or "irreparable injury" are also mentioned in same case (number of cases)	1,865	1,643	1,696	1,739	1,278	1,427	1,274	1,968	3,077	3,967	5,376
"Adequate remedy" or "irreparable injury" are also mentioned in same case (percent of cases)	20%	18%	18%	17%	19%	19%	17%	19%	23%	27%	29%

[*616]

Table D, continued

Texas state courts											
"Injunction" or "mandamus" as core term (number of cases)	521	1,092	1,454	1,606	808	837	866	1,144	1,795	2,292	4,275
"Adequate remedy" or "irreparable injury" are also mentioned in same case (number of cases)	100	223	271	285	141	168	161	227	464	936	1,988
"Adequate remedy" or "irreparable injury" are also	19%	20%	19%	18%	17%	20%	19%	20%	26%	41%	47%

mentioned in same case (percent of cases)				

Table E: Texas Cases in Which Courts Found Rescission of Executory Contract Adequate

Years	1900 to 2010	1900 to 1935	1935 to 1970	1970 to 2010
Texas state courts				
Rescission as core term	1,171			
Number of cases involving executory contracts	140	85	46	10
Number of cases involving executory contracts where court found rescission adequate	10	8	2	0

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureRemediesGeneral OverviewGovernmentsFiduciary Responsibilities

FOOTNOTES:

n1. Doug Rendleman, The Trial Judge's Equitable Discretion Following eBay v. MercExchange, 27 Rev. Litig. 63, 68 (2007) (quoting S.F.C. Milsom, Historical Foundations of the Common Law 94 (2d ed. 1981)).

n2. 3 J. Pomeroy, Equity Jurisprudence § 1357 (1st ed. 1887) ("Judges have been brought to see and to acknowledge ... that a remedy which prevents a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it ... ." (emphasis in original)).

n3. Black's Law Dictionary 1420-21 (9th ed. 2009).

n4. Restatement (Third) of Restitution and Unjust Enrichment: Restitution to Claimant § 54 (2011).

n5. Suitable voidable contracts can also be the result of duress or a party's incapacity, but these issues will not be included in this Article.

n6. Richard A. Posner, The Law and Economics of Contract Interpretation, 83 Tex. L. Rev. 1581, 1591 n.20 (2005) (noting that "rescission should not be ordered if the consequence is a windfall to one of the parties").

n7. Andrew Kull, Rationalizing Restitution, 83 Cal. L. Rev. 1191, 1195 (1995) (discussing lawyers' and judges' lack of understanding of the equitable remedy of restitution).

n8. See, e.g., Smith v. Nat'l Resort Communities, Inc., 585 S.W.2d 655, 656 (1977); Acevedo v. Stiles, No. 04-02-00077-CV, 2003 Tex. App. LEXIS 3854, at 32 (Tex. App. - San Antonio May 7, 2003, pet. denied) (mem. op.).

n9. Dall. Farm Mach. Co. v. Reaves, 307 S.W.2d 233, 239 (Tex. 1957).

n10. For an authoritative discussion of rescission that emphasizes British Commonwealth law and that requires neither indulgence nor insomnia, see generally Dominic O'Sullivan, The Law of Rescission (2008).

n11. See Neal v. SMC Corp., 99 S.W.3d 813, 817 n.4 (Tex. App. - Dallas 2003, no pet.) ("The results of a revocation under the UCC are, in certain instances, indistinguishable from that of common law rescission."); Bank One, Texas, N.A. v. Stewart, 967 S.W.2d 419, 456 (Tex. App. - Houston [14th Dist.] 1998, pet. denied) ("Notwithstanding the availability of rescission prior to the adoption of the Uniform Commercial Code and in other areas of the common law, we decline to impose an equitable remedy where the Code provides an adequate legal remedy and at the same time permits additional claims giving rise to equitable remedies as long as the claims do not conflict with the provisions of the Code.").

n12. See Covenant Capital Partners v. Soil Savers, Inc., No. 3:06-CV-0399-O, 2008 U.S. Dist. LEXIS 57688, at 29 (N.D. Tex. July 30, 2008) ("The Court's finding that Plaintiffs were entitled to rescission under the

Texas Securities Act is based on the factual findings that Defendants knowingly and intentionally made material misrepresentations and omissions regarding Soil Savers' patented technology, services performed, value of the company, and actual business conducted.").

n13. See Lewis v. Davis, 199 S.W.2d 146, 148-49 (Tex. 1947) (""A contract to do a thing which cannot be performed without violation of the law violates public policy and is void.'" (quoting Tex. Emp'rs Ins. Ass'n v. Tabor, 283 S.W. 779, 780 (Tex. Comm'n App. 1926))). See also Lewis, 199 S.W.2d at 151 (stating that purpose behind this rule is not to protect or punish either party to the contract, but to benefit and protect the public).

n14. See Val-Com Acquisitions Trust v. BAC Home Loans Servicing, LP, No. 4:10-CV-316, 2010 U.S. Dist. LEXIS 128032, at 2 (E.D. Tex. Oct. 27, 2010) (noting that claim for rescission under TILA must be asserted within three years of consummation of transaction or sale of property, whichever occurs first).

n15. See, e.g., Frederick Lawrence, Declaring Innocence: Use of Declaratory Judgments to Vindicate the Wrongly Convicted, 18 B.U. Pub. Int. L.J. 391, 391 (2009) (attributing quote to American essayist and satirist H. L. Mencken); Ted Koppel, Will Fight for Oil, N.Y. Times, Feb. 24, 2006, at A23 (same).

n16. See Holt v. Robertson, No. 07-06-0220-CV. 2008 Tex. App. LEXIS 3735, at 20 (Tex. App. - Amarillo May 21, 2008, pet. denied) (upholding trial court rescission order in spite of jury finding of contributory negligence on the part of claimant).

n17. See Williams v. Khalaf, 802 S.W.2d 651, 658 (Tex. 1990) (indicating that a plaintiff seeking rescission of a contract could trigger a residual four-year statute of limitations rather than the typical two-year limitations period).

n18. Nabours v. Longview Sav. & Loan Ass'n, 700 S.W.2d 901, 904 (Tex. 1985) ("As in other cases where equity requires the return of property, this "recovery of consideration paid as a result of fraud constitutes actual damages and will serve as a basis for the recovery of exemplary damages.'" (quoting Int'l Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 568 (Tex. 1963))).

n19. See Sharp v. Smith, No. 12-07-00219-CV, 2008 Tex. App. LEXIS 666, at 9-10 (Tex. App. - Tyler Jan. 31, 2008, no pet.) (discussing and applying doctrine of election of remedies).

n20. See Horizon Offshore Contractors, Inc. v. Aon Risk Servs. of Tex., Inc., 283 S.W.3d 53, 59-60 (Tex. App. - Houston [14th Dist.] 2009, pet. denied) (suggesting that Texas Rule of Civil Procedure 48 allows broad latitude for pleading such inconsistent remedies).

n21. See Konrad Bonsack, Damages Assessment, Janis Joplin's Yearbook, and the Pie-Powder Court, 13 Geo. Mason L. Rev. 1, 2 (1990) (discussing controversy surrounding use of hindsight as evidence of damages); Tyler J. Bowles, Hindsight in Commercial Damages Analysis, 14 J. of Legal Econ. 1, 2 (2008) ("Courts appear willing to accept, and perhaps prefer, damages analysis based on ex post data ... ."); Franklin M. Fisher & Craig R. Romaine, Janis Joplin's Yearbook and the Theory of Damages, 1 J. of Acct. Auditing & Fin. 145, 153 (1990) (discussing problems of assessing damages using hindsight); George P. Roach, Correcting Uncertain Prophecies: An Analysis of Business Consequential Damages, 22 Rev. Litig. 43-53 (2003) (showing that ex post data is normally admissible in most jurisdictions for measuring lost profits while admissibility is disputed for lost value).

n22. 96 S.W.3d 207, 215 (Tex. 2002) ("Because Jensen breached the contract on the same day Miga attempted to exercise his option, the correct measure of damages for Jensen's failure to perform on his promise is the traditional one: "the difference between the price contracted to be paid and the value of the article at the time when it should [have been] delivered ... ."" (quoting Randon v. Barton, 4 Tex. 289, 293 (1849))). But see Allen v. Devon Energy Holdings, L.L.C., No. 01-09-00643-CV, 2011 Tex. App. LEXIS 5854, at 137-39 (Tex. App. - Houston [1st Dist.] July 28, 2011, no pet.) ("We do not interpret Miga as adopting a per se rule that investors can never recover as damages the post-transaction profits received by a defrauding buyer ... .").

n23. See, e.g., Pace Corp. v. Jackson, 284 S.W.2d 340, 348-49 (Tex. 1955) (measuring lost profits on the basis of ex post data for breach of contract); Signal Peak Enters. of Tex., Inc. v. Bettina Invs., Inc., 138 S.W.3d 915, 924-25

(Tex. App. - Dallas 2004, pet. struck) (upholding trial court's calculation of lost profits that were calculated after the fact); Pena v. Ludwig, 766 S.W.2d 298, 301-03 (Tex. App. - Waco 1989, no writ) ("Lost profits are usually proved by comparing the business done by the plaintiff's established concern during a not-too-remote comparable base period with the business done by plaintiff's concern during the comparable period for which recovery is sought.").

n24. See Miga, 96 S.W.3d at 217 ("When a closely held corporation's stock has no ascertainable market value, one could seek specific performance to enforce a stock purchase agreement and thereby gain the hoped for benefits, but as well incur the risks."). See also Scott v. Sebree, 986 S.W.2d 364, 369 (Tex. App. - Austin 1999, pet. denied) ("The record shows that the value of the property in issue increased significantly from the date the parties signed the Lease and the date the option expired. Because of the increase in value, Scott's loss includes the lost profits he would have realized had he not been precluded from exercising his option by Sebree's fraud. However, we believe that simply allowing Scott to recover damages in the form of lost profits would not make Scott whole and would not effectuate a just result.").

n25. See Dan Dobbs, Law of Remedies 595 (2d ed. 1993) [hereinafter Dobbs, Law of Remedies] ("The legal remedy is clearly not adequate compared to the equitable remedy whenever the trust or lien would give the plaintiff a priority, or when the trust would give the plaintiff a return of specific unique property not reachable at law, but in such cases there is a question whether the more effective equitable remedy appropriately protects the interests of third-party creditors."). See also Andrew Kull, Restitution in Bankruptcy: Reclamation and Constructive Trust, 72 Am. Bankr. L.J. 265, 290 (1998) ("The truth about constructive trust and bankruptcy is that only in bankruptcy does constructive trust really matter.").

n26. Anthony Duggan, Proprietary Remedies in Insolvency: A Comparison of the Restatement (Third) of Restitution & Unjust Enrichment with English and Commonwealth Law, 68 Wash. & Lee L. Rev. 1229, 1247-48 (2011).

n27. SeaQuest Diving, LP v. S&J Diving, Inc., 579 F.3d 411, 417 (5th Cir. 2009).

n28. Randall v. Loftsgaarden, 478 U.S. 647, 659 (1986) ("Congress shifted the risk of an intervening decline in the value of the security to defendants, whether or not that decline was actually caused by the fraud."). See also Farnsworth v. Feller, 471 P.2d 792, 797 (Or. 1970) ("In any event, the fact that one who has been defrauded may also have some other reason to desire the rescission of a transaction is not a defense in a suit for rescission if all of the required elements have been established, as in this case."); Dobbs, Law of Remedies, supra note 25, at 583 ("A number of cases have permitted the plaintiff to rescind for a misrepresentation, and thus to avoid all losses associated with the transactions, including those losses not resulting from the misrepresentation.").

n29. See Tex. Co. v. State, 281 S.W.2d 83, 87 (Tex. 1955) (refusing to completely cancel instruments conveying mineral interests in public school lands in fee simple absolute, and stating that "the State has received substantially the same amount of money it would have received if the instruments had been in the form of an "ordinary' oil and gas lease, and that a recovery of the value of all oil and gas produced, less the cost of production, may well be in the nature of a "windfall' for The State"); Restatement (Third) of Restitution and Unjust Enrichment: Restitution to Claimant § 54 cmt. f (2011) ("The fact that rescission permits the claimant to escape from an unfavorable bargain does not by itself make rescission inequitable, but rescission will be denied if its effect would be the unjust enrichment of the claimant at the expense of the other party. The potential for unjust enrichment is obvious when one party seeks rescission to pursue opportunistic gain, or as a means of speculating at the other's expense."). See also id. illus. 15 (demonstrating the Restatement's rule). Note that restrictions on the strategic use of rescission are generally enforced by the recognition of equitable defenses; id. § 54 cmt. k (referring to prejudicial or speculative delay as an equitable defense to rescission).

n30. Williams v. Glash, 789 S.W.2d 261, 265 (Tex. 1990) ("The doctrine of mutual mistake must not routinely be available to avoid the results of an unhappy bargain. Parties should be able to rely on the finality of freely bargained agreements. However, in narrow circumstances a party may raise a fact issue for the trier of fact to set aside a release under the doctrine of mutual mistake."). See also Smith-Gilbard v. Perry, 332 S.W.3d 709, 714 (Tex. App. - Dallas Feb. 7, 2011, no pet.); Grayson v. Grayson Armature Large Motor Div., Inc., No. 14-09-00748-CV, 2010 Tex. App. LEXIS 4465, at 13 (Tex. App. - Houston [14th Dist.] June 15, 2010, pet. denied); Pollard v. Fine, No. 04-08-00745-CV, 2009 Tex. App. LEXIS 7096, at 12 (Tex. App. - San Antonio Sept. 9, 2009, no

pet.); Johnson v. Conner, 260 S.W.3d 575, 581 (Tex. App. - Tyler 2008, no pet.); City of The Colony v. N. Tex. Mun. Water Dist., 272 S.W.3d 699, 735 (Tex. App. - Fort Worth 2008, pet. filed); Smith v. Lagerstam, No. 03-05-00275-CV, 2007 Tex. App. LEXIS 5722, at 10 (Tex. App. - Austin July 19, 2007, no pet.); Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., 177 S.W.3d 605, 618 (Tex. App. - Houston [1st Dist.] 2005, no pet.); Barker v. Roelke, 105 S.W.3d 75, 83 (Tex.App. - Eastland 2003, pet. denied); Wallerstein v. Spirt, 8 S.W.3d 774, 781 (Tex. App. - Austin 1999, no pet.); Smith v. Smith, 794 S.W.2d 823, 827 (Tex. App. - Dallas 1990, no writ). See also Zytax, Inc. v. Green Plains Renewable Energy, Inc., No. H-09-2582, 2010 U.S. Dist. LEXIS 119459, at 20 (S.D. Tex. Nov. 10, 2010); Addicks Servs. v. GGP-Bridgeland, L.P., 2008 U.S. Dist. LEXIS 89950, at 21 (S.D. Tex. Oct. 27, 2008); Whitney Nat'l Bank v. Med. Plaza Surgical Ctr., L.L.P., 2007 U.S. Dist. LEXIS 79145, at 24 (S.D. Tex. Oct. 25, 2007); Hitachi Capital Am. Corp. v. Med. Plaza Surgical Ctr., LLP, 2007 U.S. Dist. LEXIS 69601, at 24 (S.D. Tex. Sept. 20, 2007); Contractor Tech., Ltd. v. Hirschfeld Steel Co., 376 B.R. 156, 159 (S.D. Tex. 2007); Sherwin Alumina L.P. v. AluChem, Inc., 512 F. Supp. 2d 957, 972 (S.D. Tex. 2007); Johnson v. Lubbock Cnty., 2001 U.S. Dist. LEXIS 15045, at 18 (N.D. Tex. July 31, 2001); Byrne v. Broadview Int'l, LLC, 2000 U.S. Dist. LEXIS 12230, at 14 (N.D. Tex. Aug. 23, 2000); Matlock v. Nat'l Union Fire Ins. Co., 925 F. Supp. 468, 474 (E.D. Tex. 1996).

n31. See Maverick v. Perez, 228 S.W. 148, 151 (Tex. Comm'n App. 1921) ("The grantor must, in order to invoke the aid of a court of equity to cancel a deed and rescind a contract of sale, offer to pay back the purchase money and place the vendee, or those claiming under him, in status quo."); McDaniel v. Samford, 116 S.W.2d 1092, 1094 (Tex. Civ. App. - Beaumont 1938, no pet.) (denying rescission to appellant after payment was "a few days" late on contract for sale of otherwise ordinary land that had since increased in value); Hausler v. Harding-Gill Co., 6 S.W.2d 445, 446 (Tex. Civ. App. - San Antonio 1928), rev'd, 15 S.W.2d 548 (Tex. Comm'n App. 1929, judgm't adopted) (denying rescission to appellant who "was not seeking protection, but was seeking to destroy a contract that had been a burden to him since he executed it" and who was "tickled ... when he thought he had discovered an opening for a suit to rescind a contract which had been for months galling and uncomfortable to him." (internal quotation marks omitted)); Minchew v. Morris, 241 S.W. 215, 219 (Tex. Civ. App. - Dallas 1922, no writ) ("While the law imposes the requirement of reasonable promptness in all cases to avoid laches, it requires greater diligence and activity in seeking to rescind transactions ... ."); Gustafson v. Am. Land Co.,

234 S.W. 244, 246 (Tex. Civ. App. - San Antonio 1921), aff'd, 249 S.W. 189 (Tex. Comm'n App. 1923) ("If [the purchaser] seeks a rescission of the contract because of the fraud of the vendor, he must, as appellant did here, tender a re-conveyance of the property to the vendor. If [the purchaser] seeks to retain the property, he must tender the unpaid balance of the contract price ... .").

n32. See Rutherford v. Exxon Co., 855 F.2d 1141, 1145 (5th Cir. 1988) ("The diligence requirement also applies to contract actions in equity ... . The rule has aged antecedents in Texas law. "[A] party seeking to rescind a contract for fraud cannot speculate on the situation, but must act promptly after discovering the fraud ... .'" (quoting Barr v. McCauley, 240 S.W. 961, 963 (Tex. Civ. App. - El Paso 1922, no writ)) (other internal citations omitted)); Ryan v. Collins, 496 S.W.2d 205, 209 (Tex. Civ. App. - Tyler 1973, writ ref'd n.r.e.) ("In the equitable action of rescission, plaintiff must allege that he acted with due diligence and promptly rescinded the contract, especially where the property involved is likely to fluctuate in value."); Gustafson, 234 S.W. at 246-47 ("In order to avail himself of the right to rescind a contract because of the fraud of the vendor, the vendee must act promptly upon the discovery of the fraud and disaffirm. He will not be permitted to speculate upon the outcome of his venture, or to accept the benefits and exercise the privileges given him by the contract, and at the same time retain the right to rescind."). See also Dawson v. Sparks, 1 Posey 735, 759 (Tex. Comm'n App. 1881) (not precedential) ("For, it is settled as a sound rule of equity jurisprudence, that a party asking for the rescission of a contract deliberately entered into must make his election with all due promptness. He must take his stand at once, and at the time. Neither law nor equity permits him to alternate and see-saw from one side of the fence to the other, speculating upon contingencies to determine which of the two to choose.").

n33. See City of The Colony v. N. Tex. Mun. Water Dist., 272 S.W.3d 699, 732 (Tex. App. - Fort Worth 2008, pet. filed) ("Rescission is thus an "undoing' of the contract and generally used as a substitute for monetary damages when such damages would not be adequate.").

n34. Davis v. Estridge, 85 S.W.3d 308, 309-10 (Tex. App. - Tyler 2001, pet. denied).

n35. Id. at 310.

n36. Id. at 311-12.

n37. Id. at 312.

n38. See Mistletoe Express Serv. v. Locke, 762 S.W.2d 637, 639 (Tex. App. - Texarkana 1988, no writ) ("Moreover, Mistletoe is not entitled to have Locke's losses deducted from the recovery, because Mistletoe had the burden to prove that amount, if any, and it did not do so."); Restatement (Second) of Contracts § 349 (1981) ("The injured party has a right to damages based on his reliance interest ... less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.").

n39. See infra notes 374-376 and accompanying text for a billion dollar example.

n40. See Mustang Tractor and Equip. Co. v. Liberty Mut. Ins. Co., No. H-91-2523, 1993 U.S. Dist. LEXIS 21277, at 26-27 (S.D. Tex. Oct. 8, 1993) (holding that insurer was not liable for toxic clean-up because policy covered only money damages and not equitable relief). But see Snyder General Corp. v. Century Indem. Co., 113 F.3d 536, 539 (5th Cir. 1997) (cleanup costs imposed on an insured by CERCLA were damages). See also George P. Roach, How Restitution and Unjust Enrichment Can Improve Your Corporate Claim, 26 Rev. Litig. 265, 312-14 (2007) [hereinafter Roach, Restitution and Unjust Enrichment] (reviewing the distinction between damages and remedies in equity in various jurisdictions).

n41. Tex. Civ. Prac. & Rem. Code Ann. § 33.001 (West 2006).

n42. See Galle Inc. v. Pool, 262 S.W.3d 564, 570-72 (Tex. App. - Austin 2008, pet. denied) (applying Chapter 33 to a claim under the Texas Deceptive Trade Practices Act); Davis v. Estridge, 85 S.W.3d 308, 310 (Tex. App. - Tyler 2001, pet. denied) (holding that contributory liability does not apply to the Deceptive Trade Practices Act).

n43. Holt v. Robertson, No. 07-06-0220-CV, 2008 Tex. App. LEXIS 3735, at 3-4 (Tex. App. - Amarillo May 21, 2008, pet. denied).

n44. See Nabours v. Longview Sav. & Loan Ass'n, 700 S.W.2d 901, 904 (Tex. 1985) ("As in other cases where equity requires the return of property, this recovery of the consideration paid as a result of fraud constitutes actual damages and will serve as a basis for the recovery of exemplary damages." (internal citation omitted)).

n45. Am. Apparel Prods. v. Brabs, Inc., 880 S.W.2d 267, 270 (Tex. App. - Houston [14th Dist.] 1994, no writ); Ferguson v. DRG/Colony N., Ltd., 764 S.W.2d 874, 887 (Tex. App. - Austin 1989, writ denied).

n46. See Doug Rendleman, Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?, 33 Ga. L. Rev. 847, 892 (1999) ("Restitution is becoming a lost art, observes Professor Kull: "Confusion over the content of restitution carries significant adverse consequences. To put it bluntly, American lawyers today (judges and law professors included) do not know what restitution is ... . The technical competence of published opinions in straightforward restitution cases has noticeably declined; judges and lawyers sometimes fail to grasp the rudiments of the doctrine even when they know where to find it." (quoting Andrew Kull, Rationalizing Restitution, 83 Cal. L. Rev. 1191, 1195 (1995))). See also Douglas Laycock, The Scope and Significance of Restitution, 67 Tex. L. Rev. 1277, 1277 (1989) ("Despite its importance, restitution is a relatively neglected and underdeveloped part of the law. In the mental map of most lawyers, restitution consists largely of blank spaces with undefined borders and only scattered patches of familiar ground. Few law schools teach a separate course in restitution, no restitution casebook is in print, and scholarship in the field is largely devoted to specific applications.").

n47. This example was modeled after the Texas Supreme Court opinion in Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 814-16 (Tex. 1997), which was a claim for fraudulent inducement under the Texas Deceptive Trade Practices Act. That opinion reversed the lower court because it failed to distinguish between direct damages (loss in value as of the date of the tort) and consequential damages (further loss in value after the date of the tort and incidental or reliance damages). Note that the Perry Equip. opinion is based on the out-of-pocket approach and not expectancy damages. For a more detailed description of the Perry Equip. case by the author, see George P. Roach, Measur-

ing Business Damages in Fraudulent Inducement Cases, 11 Hous. Bus. & Tax L.J. 1, 22 (2011).

n48. An asset's expectancy value can exceed its purchase price. See Citizens State Bank of Dickinson v. Bowles, 663 S.W.2d 845, 849 (Tex. App. - Houston [14th Dist.] 1983, writ dism'd) (upholding jury award for amount more that what plaintiff paid). See also Carrel v. Lux, 101 Ariz. 430, 441; 420 P.2d 564, 575 (Ariz. 1966) ("The fact that plaintiffs may have negotiated a very advantageous purchase price ... should have no bearing on their right to recover damages."); Robert L. Dunn, Recovery of Damages for Fraud 216 (3d ed. 2004); J. F. Rydstrom, "Out of Pocket" or "Benefit of Bargain" as Proper Rule of Damages for Fraudulent Representations, 13 A.L.R. 3d 875 § 3[d] (1967) (explaining that "benefit of the bargain" rule allows defrauded party to recover further despite instances where property value exceeds price paid).

n49. A claim for lost profits would be an alternative to direct damages for lost value but is unlikely to exceed lost value in this case.

n50. Tex. Civ. Prac. & Rem. Code Ann. § 33.001 (West 2006).

n51. See Perry Equip., 945 S.W.2d at 817 (Tex. 1997) ("The basis of a misrepresentation claim is that the defendant's false statement induced the plaintiff to assume a risk he would not have taken had the truth been known. But to allow the plaintiff to transfer the entire risk of loss associated with his investment, even risks that the plaintiff accepted knowingly or losses that occurred through no fault of the defendant, would unfairly transform the defendant into an insurer of the plaintiff's entire investment.").

n52. At the risk of otherwise losing the rescission alternative as a matter of law, BG should secure jury findings about the consideration that BG accrued in the transaction; the amount, if any, of interim benefits gained by BG from the acquisition; and the amount of BG's special damages. BG should also secure jury findings that it provided notice to Seller of its intent to file a claim for rescission and that BG offered to tender the initial consideration and interim benefits of the transaction back to Seller. It would also improve BG's damages claim to secure a jury finding on the amount of interest that Seller saved or earned in the interim from the purchase price.

n53. Actual damages under the monetary damages alternative would be less than actual damages under rescission, unless the jury found lost-value damages equal to Acquisition's full expectancy value.

n54. Holt v. Robertson, No. 07-06-0220-CV, 2008 Tex. App. LEXIS 3735, at 3-4 (Tex. App. - Amarillo May 21, 2008, pet. denied).

n55. This illustration is based on the Kremen v. Cohen litigation described in Kremen v. Network Solutions, Inc., 337 F.3d 1024, 1026-28 (9th Cir. 2003), and Kremen v. Cohen, 325 F.3d 1035, 1037-39 (9th Cir. 2003). For a more detailed analysis, see Roach, Restitution and Unjust Enrichment, supra note 40, at 269 (describing controversy between Kremen and Cohen).

n56. See Pace Corp. v. Jackson, 284 S.W.2d 340, 348-49 (Tex. 1955) (measuring lost profits on basis of ex post data for breach of contract); Signal Peak Enters. of Tex., Inc. v. Bettina Invs., Inc., 138 S.W.3d 915, 924-25 (Tex. App. - Dallas 2004, pet. struck) (holding that a projection of lost net profits based on projected revenues minus projected operating expenses was a sufficient damages calculation); Pena v. Ludwig, 766 S.W.2d 298, 301-03 (Tex. App. - Waco 1989, no writ) (holding that lost profits can be recovered if they are the natural and probable consequences of wrongful conduct).

n57. See Nabours v. Longview Sav. & Loan Ass'n, 700 S.W.2d 901, 904 (Tex. 1985) ("As in other cases where equity requires the return of property, this recovery of the consideration paid as a result of fraud constitutes actual damages and will serve as a basis for the recovery of exemplary damages." (internal citation omitted)).

n58. Tex. Civ. Prac. & Rem. Code Ann. § 33.001 (West 2006) (providing that "a claimant may not recover damages if his percentage of responsibility is greater than 50 percent").

n59. See ERI Consulting Eng'rs, Inc. v. Swinnea, 318 S.W.3d 867, 873 (Tex. 2010) ("Courts may disgorge all ill-gotten profits from a fiduciary when a fiduciary agent usurps an opportunity properly belonging to a principal, or competes with a principal.").

n60. See id. at 880 (stating that because there was "clear and convincing evidence establishing that [defendant] willfully, maliciously, and intentionally caused injury" in the form of lost profits, punitive damages were recoverable for defendant's breach of his fiduciary duty) (citing Tex. Civ. Prac. & Rem. Code Ann. § 41.003 (West 2006))). Note, however, that Texas restrictions on punitive damages under Tex. Civ. Prac. & Rem. Code Ann. § 41.008(b) (West Supp. 2011) are inapplicable under § 41.008(c) if the plaintiff can show that the defendant's conduct constitutes a felony under the seventeen different sections listed in that statute. Swinnea v. ERI Consulting Eng'rs, Inc., No. 12-05-00428-CV, 2012 Tex. App. LEXIS 2632, at 7-8 (Tex. App. - Tyler Mar. 30, 2012, no pet. h.).

n61. For a breach of contract, the net enrichment would be measured as quantum meruit. There is little to no precedent in Texas for measuring the net enrichment for claims of fraud or breach of fiduciary duty. Outside authorities suggest that net enrichment for cases of intentional torts should be measured similarly to an accounting in equity as for disgorgement of profits. See infra notes 398-404 and accompanying text (discussing Texas courts' varying approaches to measurement of interim benefits in contract cases).

n62. Supra note 57.

n63. See George P. Roach, Counter-Restitution for Monetary Remedies in Equity, **68 Wash. & Lee L. Rev. 1271, 1273-74 (2011)** [hereinafter Roach, Counter-Restitution] (arguing that plaintiff's counter-restitution, offsetting credit for revenue apportionment and defendant's beneficial expenses, is an essential consideration to measure defendant's unjust enrichment). See also Stoffela v. Nugent, 217 U.S. 499, 501-02 (1910) (holding that the plaintiff seeking rescission of deeds for land "must restore the [breaching] defendant to the condition in which he stood before the rescinded deeds were made").

n64. See Burrow v. Arce, 997 S.W.2d 229, 238 (Tex. 1999) ("Pragmatically, the possibility of forfeiture of compensation discourages an agent from taking personal advantage of his position of trust in every situation no matter the circumstances, whether the principal may be injured or not."). But see Brooks v. Conston, 72 A.2d 75, 79 (Pa. 1950) ("The allowances made by the court for

compensation to Conston and his wife for services rendered during defendants' operation of the stores should not be disturbed.").

n65. Note that the rate of civil case filings in state courts is widely acknowledged to have increased dramatically over the twentieth century. The count of filings in the Appendix is based on an absolute count and is not adjusted for the upsurge in civil court filings that is generally believed to have occurred over the last one hundred years.

n66. City of The Colony v. N. Tex. Mun. Water Dist., 272 S.W.3d 699, 738 (Tex. App. - Fort Worth 2008, pet. dism'd) ("Repudiation consists of words or actions by a contracting party that indicate he is not going to perform his contract in the future.").

n67. Restatement (Second) of Contracts § 250 (1981).

n68. Jenkins v. Jenkins, 991 S.W.2d 440, 448 (Tex. App. - Fort Worth 1999, pet. denied) (upholding trial court finding that failure to make scheduled alimony payments constituted repudiation of divorce agreement).

n69. El Paso Prod. Co. v. Valence Operating Co., 112 S.W.3d 616, 621 (Tex. App. - Houston [1st Dist.] 2003, pet. denied). See also The Colony, 272 S.W.3d at 738 ("Repudiation consists of words or actions by a contracting party that indicate he is not going to perform his contract in the future."); El Paso Natural Gas Co. v. Lea Partners, L.P., No. 08-01-00310-CV, 2003 Tex. App. LEXIS 7003, at 14 (Tex. App. - El Paso Aug. 14, 2003, pet. denied) (mem. op.) ("In order for a statement to be deemed repudiation, "a party's language must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform.'" (citing Restatement (Second) of Contracts § 250 cmt. b (1981))). A repudiation can be withdrawn if timely. Lehigh, Inc. v. Xerox Bus. Servs., No. 05-95-00026-CV, 1996 Tex. App. LEXIS 1266, at 12-13 (Tex. App. - Dallas Mar. 28, 1996, no pet.) ("Finally, if the nonrepudiating party has not materially changed its position in reliance on the default, the repudiation may be retracted ... .").

n70. Ingersoll-Rand Co. v. Valero Energy Corp., 997 S.W.2d 203, 211 (Tex. 1999); Munoz v. Witt, No. 10-07-00010-CV, 2008 Tex. App. LEXIS 7296, at

9-10 (Tex. App. - Waco Aug. 27, 2008, no pet.) (mem. op.); Bumb v. Inter-Comp Technologies, L.L.C., 64 S.W.3d 123, 125 (Tex. App. - Houston [14th Dist.] 2001, no pet.).

n71. Santa Fe Petroleum, L.L.C. v. Star Canyon Corp., 156 S.W.3d 630, 638 (Tex. App. - Tyler 2004, no pet.). See also Smart v. Am. Bank & Trust Co., 70 S.W.2d 299, 304 (Tex. Civ. App. - Fort Worth 1934, writ dism'd) ("For his return of the goods is an offer to rescission, and the acceptance and retention of them by the seller is an acceptance of that offer, and thereupon a rescission is effected, not necessarily for legally sufficient cause, but by the mutual consent of the parties." (quoting Henry Campbell Black, A Treatise on the Rescission of Contracts and Cancellation of Written Instruments § 531 (1916))).

n72. Shafer v. Gulliver, No. 14-09-00646-CV, 2010 Tex. App. LEXIS 9021, at 23 n.6 (Tex. App. - Houston [14th Dist.] Nov. 12, 2010, no pet.).

n73. Scenic Galveston, Inc. v. Infinity Outdoor, Inc., 161 F. Supp. 2d 755, 757 (S.D. Tex. 2001); Tex. Gas Utils. Co. v. Barrett, 460 S.W.2d 409, 414 (Tex. 1970); Am. Heritage, Inc. v. Nev. Gold & Casino, Inc., 259 S.W.3d 816, 822 (Tex. App. - Houston [1st Dist.] 2008, no pet.).

n74. Tex. Gas Utils. Co., 460 S.W.2d at 414; Am. Heritage, Inc., 259 S.W.3d at 822; J.R. Gray Co. v. Ritchey Flying Serv., Inc., 358 S.W.2d 396, 402-03 (Tex. Civ. App. - Waco 1962, writ ref'd n.r.e.); Lynch Davidson & Co. v. Denman Lumber Co., 270 S.W. 225, 228 (Tex. Civ. App. - Texarkana 1925, writ dism'd); Black, Rescission of Contracts, supra note 71, at 526.

n75. Givens v. Dougherty, 671 S.W.2d 877, 878 (Tex. 1984). But see Saikowski v. Manning, 720 S.W.2d 275, 277 (Tex. App. - Fort Worth 1986, no writ) ("An oral contract within the Statute of Frauds may be enforced if its non-enforcement would plainly amount to fraud.").

n76. Cheek v. Metzer, 291 S.W. 860, 863-64 (Tex. 1927).

n77. See Oil Workers Int'l Union v. Texoma Natural Gas Co., 146 F.2d 62, 64-65 n.2 (5th Cir. 1944) ("Where a contract reserves to one of the parties the right to rescind it, and also prescribes the mode in which such right shall be ex-

ercised, or provides that certain specified acts shall be done by that party as a condition upon his right to rescind, it must be strictly followed, and the party cannot rescind in any other mode nor without complying with the conditions." (quoting Henry Campbell Black, Black on Rescission and Cancellation § 513 (2d ed. 1929))).

n78. Cheek, 291 S.W. at 863.

n79. Wright v. Sport Supply Grp., Inc., 137 S.W.3d 289, 293-94 (Tex. App. - Beaumont 2004, no pet.).

n80. Payne v. Baldock, 287 S.W.2d 507, 509 (Tex. Civ. App. - Eastland 1956, writ ref'd n.r.e.).

n81. See 9029 Gateway S. Joint Venture v. Eller Media Co., 159 S.W.3d 183, 186 (Tex. App. - El Paso 2004, no pet.) ("Rescission and cancellation are affirmative defenses that must be specifically plead.").

n82. See, e.g., J. I. Case Co. v. Fry, 125 S.W.2d 395, 398 (Tex. Civ. App. - Amarillo 1939, no writ) (describing trial court's error in awarding damages because appellee used the goods); see also Minneapolis-Moline Co. v. Purser, 361 S.W.2d 239, 246 (Tex. Civ. App. - Dallas 1962, writ ref'd n.r.e.) ("A buyer desiring to rescind his contract must return the goods he has received."). For a non-equipment case relating to "double-dipping," see Bayou Terrace Investment Corporation v. Lyles, 881 S.W.2d 810, 817 (Tex. App. - Houston [1st Dist.] 1994, no writ) (holding that plaintiffs were not entitled to both the return of their residence upon rescission of contract and award of monetary damages for breach of contract).

n83. U.C.C.§§2-612, 2-712 (2003).

n84. Mathis Equip. v. Rosson, 386 S.W.2d 854, 869-70 (Tex. Civ. App. - Corpus Christi 1964, writ ref'd n.r.e.); Minneapolis-Moline, 361 S.W.2d at 246.

n85. In re Myers, No. 07-06-0050-CV, 2006 Tex. App. LEXIS 1128, at 1-2, 6 (Tex. App. - Amarillo Feb. 9, 2006, no pet.).

n86. Id.

n87. Munoz v. Witt, No. 10-07-00010-CV, 2008 Tex. App. LEXIS 7296, at 6 (Tex. App. - Waco Aug. 27, 2008, no pet.) (mem. op.).

n88. Id. at 1.

n89. Id.

n90. Id.

n91. Id.

n92. Id.

n93. Id. at 3.

n94. Id. at 9.

n95. Baty v. ProTech Ins. Agency, 63 S.W.3d 841, 856 (Tex. App. - Houston [14th Dist.] 2001, pet. denied).

n96. See id. ("Had the parties intended to release claims sounding in tort as well as claims sounding in contract, they easily could have included language to that effect in the settlement agreement ... .").

n97. Texas courts do not generally recognize a cause of action for rescission at law, as Texas courts are courts of general jurisdiction, which have ample authority to make any orders necessary to enact the rescission. The discussion in this section is offered as a hypothetical comparison to rescission in equity.

n98. Dan B. Dobbs, Pressing Problems for the Plaintiff's Lawyer in Rescission: Election of Remedies and Restoration of Consideration, 26 Ark. L. Rev. 322, 341-42 (1972) [hereinafter Dobbs, Pressing Problems].

n99. Dobbs, Law of Remedies, supra note 25, at§§4.3(6), 4.3(7).

n100. See Gould v. Cayoga Cnty. Nat'l Bank, 86 N.Y. 75, 83-84 (1881) ("The defrauded party need not rescind and sue in an action at law for the consideration parted with upon the fraudulent contract. He may bring an action in equity to rescind the contract, and in that action may have full relief. Such an action does not proceed as upon a rescission, but proceeds for a rescission... . If this had been an action in equity to rescind the contract, the court could have done equity between the parties and so moulded its judgment as to accomplish that result... . The difference between an action to rescind a contract and one brought, not to rescind it, but based upon the theory that it has already been rescinded, is as broad as a gulf. They depend upon different principles and require different judgments.").

n101. See State v. Snyder, 18 S.W. 106, 108 (Tex. 1886) ("Recovery is based upon the fact of such rescission, and could not have been granted unless the rescission has taken place." (quoting 1 John Pomeroy, Pomeroy's Equity Jurisprudence § 110 (1st ed. 1881))); Guion v. Guion, 475 S.W.2d 865, 869 (Tex. Civ. App. - Dallas 1971, writ ref'd n.r.e.) ("Until restoration or offer to make restoration is made, there is ordinarily at law no rescission." (quoting Samuel Williston, Williston on Contracts § 1460 (3d ed. 1972))); Dobbs, Law of Remedies, supra note 25, at § 4.3(6) ("Rescission "at law' takes place when the plaintiff makes a proper offer to restore the defendant and demands rescission.").

n102. Dobbs, Law of Remedies, supra note 25, at § 4.3(6).

n103. Black, Rescission of Contracts, supra note 71, § 625, at 1443 ("This is both because a court of law has no power to adjust the equities between the parties and require such restoration from the plaintiff as a condition to granting him relief, and because a rescission of a contract by the act of the parties cannot be treated as an accomplished fact until there has been such restoration or at least an offer of it.").

n104. See, e.g., Acevedo v. Stiles, No. 04-02-00077-CV, 2003 Tex. App. LEXIS 3854, at 2 (Tex. App. - San Antonio May 7, 2003, pet. denied) (mem. op.) (ordering that, because an attorney and his wife breached their fiduciary duty to client by transferring client's home to themselves, (1) warranty deed conveying property to the wife be set aside and declared void; (2) quitclaim deed that the client signed in favor of the wife also be set aside; (3) title be quieted in the client's favor; and (4) the attorney and his wife vacate the property).

n105. See, e.g., Ehrlich v. United States, 252 F.2d 772, 776 (5th Cir. 1958) ("The party seeking rescission must undertake to perform whatever conditions the Court may decide to be equitable, if it eventually declares the right of rescission."); State v. Snyder, 18 S.W. 106, 108 (Tex. 1886) ("The plaintiff will be required, as a condition to his obtaining the relief which he asks, to acknowledge, admit, provide for, secure, or allow whatever equitable rights, if any, the defendant may have ... ."); McCarty v. Moorer, 50 Tex. 287, 291 (1878) (explaining that trial court "should have directed that no writ of possession should issue on the judgment in appellee's favor until the amount adjudged the appellant should be deposited with the clerk"); Teas v. McDonald, 13 Tex. 349, 356-57 (1855) ("It is, in general, true that a Court of Equity will not set aside a sale and restore the property to the owner without requiring him to refund the purchase-money which he has received.").

n106. See, e.g., Billups v. Gallant, 37 S.W.2d 770, 773 (Tex. Civ. App. - Austin 1931, writ ref'd) (holding it was not error to award appellees equitable lien on land in order to secure repayment of money paid by them under contract for purchase of the land).

n107. See infra Part VII.B. (discussing the distinction between tender and restoration).

n108. Hatch v. De la Garza, 7 Tex. 60, 64-65 (1851).

n109. See Johnson v. Cherry, 726 S.W.2d 4, 8 (Tex. 1987) ("The equitable power of the court exists to do fairness and is flexible and adaptable to particular exigencies, "so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other.'" (quoting Warren v. Osborne, 154 S.W.2d 944, 946 (Tex. Civ.

App. - Texarkana 1941, writ ref'd))); State v. Snyder, 18 S.W. 106, 108 (Tex. 1886) ("It may be regarded as a universal rule governing the court of equity in the administration of its remedies that, whatever may be the nature of the relief sought by the plaintiff, the equitable rights of the defendant growing out of or intimately connected with the subject of the controversy in question will be protected; and for this purpose the plaintiff will be required, as a condition to his obtaining the relief which he asks, to acknowledge, admit, provide for, secure, or allow whatever equitable rights, if any, the defendant may have, and to that end the court will, by its affirmative decree, award to the defendant whatever reliefs may be necessary in order to protect and enforce those rights." (quoting 1 John Pomeroy, Pomeroy's Equity Jurisprudence § 388 (1st ed. 1881))); Casualty Reciprocal Exch. v. Bryan, 101 S.W.2d 895, 899 (Tex. Civ. App. - Eastland 1937, no writ) ("It is also true that courts with equity powers will protect the equitable rights of the defendant arising upon his answer, regardless of the nature of the relief sought by the plaintiff, and will make all necessary orders to that end, and may require a tender for that purpose.") (quoting Oriental v. Barclay, 41 S.W. 117, 126-27 (Tex. Civ. App. - Dallas 1897, no writ); Bush v. Gaffney, 84 S.W.2d 759, 764 (Tex. Civ. App. - San Antonio 1935, no writ) ("There is no impediment to prevent a court of equity from decreeing full and exact justice to all parties."); Wisdom v. Peek, 220 S.W. 210, 214 (Tex. Civ. App. - San Antonio 1920, writ dism'd) ("When a court of equity has obtained jurisdiction of a bill for rescission ... it will retain jurisdiction for the purpose of adjusting all the rights and claims of the parties, growing out of the transaction and complained of, so as to do complete equity and leave nothing for future litigation, which it can dispose of in the exercise of its equitable powers upon the parties before it.").

n110. See Byram v. Scott, No. 03-07-00741-CV, 2009 Tex. App. LEXIS 5105, at 12-13 (Tex. App. - Austin July 1, 2009, pet. denied) (mem. op.) ("A trial court has broad discretion in balancing the equities to fashion ... a remedy." (internal citation omitted)); Edwards v. Mid-Continent Office Distribs., L.P., 252 S.W.3d 833, 836 (Tex. App. - Dallas 2008, pet. denied) ("[A] trial court exercises broad discretion in balancing the equities involved in a case seeking equitable relief.").

n111. See Wagner & Brown, Ltd. v. Sheppard, 282 S.W.3d 419, 428-29 (Tex. 2008) ("As with other equitable actions, a jury may have to settle disputed issues about what happened, but "the expediency, necessity, or propriety of equitable relief' is for the trial court ... ." (quoting State v. Tex. Pet Foods, Inc.,

591 S.W.2d 800, 803 (Tex. 1979))); Burrow v. Arce, 997 S.W.2d 229, 245 (Tex. 1999) (stating that forfeiture of attorney's fee is an equitable decision for trial court); Meadows v. Bierschwale, 516 S.W.2d 125, 131 (Tex. 1974) (holding that equitable remedy of constructive trust was issue for trial court); Tex. Capital Secs., Inc. v. Sandefer, 58 S.W.3d 760, 774 (Tex. App. - Houston [1st Dist.] 2001, pet. denied) ("The decision to grant an equitable remedy such as rescission is within the discretion of the trial court.").

n112. Turner v. Turner, No. 09-06-570-CV, 2008 Tex. App. LEXIS 4720, at 8 (Tex. App - Beaumont June 26, 2008, pet. denied). See also In re Colonial Pipeline Co., 968 S.W.2d 938, 941 (Tex. 1998) (stating that trial court abuses its discretion when it acts "in an unreasonable or arbitrary manner or, stated differently, when it acts without reference to guiding rules and principles").

n113. E.g., Guion v. Guion, 475 S.W.2d 865, 869 (Tex. Civ. App. - Dallas 1971, writ ref'd n.r.e.). See also Cruz v. Andrews Restoration, Inc., No. 10-0995, 2012 Tex. LEXIS 341, at 17 (Tex. Apr. 20, 2012) ("At common law, rescission also generally requires notice and tender; that is, a plaintiff seeking to rescind a contract must give timely notice to the defendant that the contract is being rescinded and either return or offer to return the property he has received and the value of any benefit he may have derived from its possession." (citing Tex. Emp'rs Ins. Ass'n v. Kennedy, 143 S.W.2d 583, 585 (Tex. 1940); David McDavid Pontiac, Inc. v. Nix, 681 S.W.2d 831, 836 (Tex. App. - Dallas 1984, writ ref'd n.r.e.))).

n114. Dobbs, Law of Remedies, supra note 25, at 11 ("Most courts of general jurisdiction now have both law and equity powers, so the court, even in a "law' case, could arrange appropriate restoration by judicial decree, and the pre-suit tender or restoration should no longer present a problem.").

n115. Nabours v. Longview Sav. & Loan Ass'n, 700 S.W.2d 901, 911 (Tex. 1985) (Kilgarlin, J., dissenting).

n116. HM Att'y Gen. v. Blake, [2000] UKHL 45, [2001] 1 A.C. 268 (U.K.).

n117. Id.

n118. Id.

n119. Id.

n120. Id.

n121. Id. See also Jeffrey Berryman, The Compensation Principle in Private Law, 42 Loy. L.A. L. Rev. 91, 113-14 (2008) ("In Blake, even though the availability of disgorgement was limited to those occasions where the plaintiff had a "legitimate interest in preventing the defendant's profit-making activity,' the court's holding amounts to a frontal assault on the efficiency theory of contract law and the supremacy of the compensation principle." (quoting Blake, [2001] 1 A.C. at 285)).

n122. Dobbs, Law of Remedies, supra note 25, at § 4.1(3) (citing Snepp v. United States, 444 U.S. 507 (1980)).

n123. See Henry Lacey McClintock, Handbook of the Principles of Equity § 24 (2d ed. 1948) ("Equity is a system for the correction of the defects in the law."); C.C. Langdell, A Brief Survey of Equity Jurisdiction, 1 Harv. L. Rev. 111, 116 (1887) ("The object of equity, in assuming jurisdiction over legal rights, is to promote justice by supplying defects in the remedies which the courts of law afford."); Doug Rendleman, The Trial Judge's Equitable Discretion, supra note 1, at 68 ("In the realm of equity ... no formulation is absolute and no rule is without exception." (quoting Dlug v. Woolridge, 538 P.2d 883, 885 (Colo. 1975))).

n124. Douglas Laycock, The Death of the Irreparable Injury Rule, 103 Harv. L. Rev. 687, 770 (1990).

n125. See infra Part IV.C. (discussing whether it is necessary for the claimant to prove equitable entitlement for a rescission claim).

n126. See Kuechler v. Wright, 40 Tex. 600, 682 (1874) (explaining that the English court of equity "filled up the vacuum wherever there was a deficiency in the execution of the laws"); Earl of Oxford's Case, (1615) 21 Eng. Rep. 485, 486

(Ch.) ("The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, that it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances. The Office of the Chancellor is ... to soften and mollify the Extremity of the Law.").

n127. The Latin legal maxim is ubi jus, ibi remedium ("where there is a right, there must be a remedy"). Black's Law Dictionary 1520 (6th ed. 1990).

n128. See Dobbs, Law of Remedies, supra note 25, at § 4.3(1) ("Equity's moral interest in conscience was coupled with an enormous power the law courts did not have, to act against the person rather than against the property. Equity courts would express the defendant's liability to recovery by calling him a constructive trustee.").

n129. Daniel M. Klerman, Jurisdictional Competition and the Evolution of the Common Law 1 (Am. Law & Econ. Ass'n Ann. Meetings, Working Paper No. 24, 2006), available at http://law.bepress.com/cgi/viewcontent.cgi?article=1657&context=alea.

n130. George E. Palmer, The Law of Restitution § 3.13 (1978).

n131. O'Sullivan, The Law of Rescission, supra note 10, at§§10.20, 10.21.

n132. Otto J. Scott, James I 351-52 (1976).

n133. Id.

n134. Id.

n135. Id. The discretion and independence of English judges has improved since the days of James I. The famous settlement of 1616 was, in effect, the result of James's assertion of divine right which, by transference, also rested in his court, the Court of Chancery. Id. Scott describes the surrounding events to include a meeting between James I and twelve judges of the common law who had supported Sir Edward Coke's pronouncement that the Court of Chancery did not have the authority to act as the king wished. Id. The twelve judges were

forced to confess their grave error while on their knees before the king and were questioned one at a time by James himself. Id. James I was not gentle in his discussion with the judges: "The absolute prerogative of the Crown is not subject for the tongue of a lawyer, nor is it lawful to be disputed. It is atheism to dispute what God can do ... so it is ... high contempt ... to dispute what a King can do." Id.

n136. See Dobbs, Law of Remedies, supra note 25, at § 2.4(7) ("Few American citizens, however, would think of themselves in court as humble petitioners, on their knees before the judge who may deny relief on grounds that cannot be stated as principles or applied even-handedly to all suitors." (quoting BASF Corp. v. Old World Trading Co., 41 F.3d 1081, 1096 (7th Cir. 1994))).

n137. Laycock, supra note 124, at 726-27 (finding that courts often decide the issue of jurisdiction in equity according to criteria that often go unmentioned).

n138. Rendleman, The Trial Judge's Equitable Discretion, supra note 1, at 68 ("Courts make extravagant statements about their discretion in administering equitable substantive standards.").

n139. See C.C. Langdell, A Brief Survey of Equity Jurisdiction, 1 Harv. L. Rev. 111, 117 (1887) ("If a court of equity decides that the defendant in a suit ought to pay money or deliver property to the plaintiff ... it commands the defendant personally to pay the money or to deliver possession of the property, and punishes him by imprisonment if he refuse or neglect to do it.").

n140. Id. at 116.

n141. Lincoln Nat'l Life Ins. Co. v. Rittman, 790 S.W.2d 791, 794 (Tex. App. - Houston [14th Dist.] 1990, no writ).

n142. Tex. Const. art. V, § 8. See also Rogers v. Daniel Oil & Royalty Co., 110 S.W.2d 891, 894 (Tex. 1937) ("Under our system law and equity are so blended as to remove all distinctions, procedural or otherwise, as between courts of law and court of equity.").

n143. Robertson v. State, 63 Tex. Crim. 216, 247-48, 142 S.W. 533, 549 (1911) (Davidson, P.J., dissenting).

n144. See infra Part IV.B. (explaining that the terms irreparable injury and adequate remedy are primarily used in relation to injunction and mandamus, particularly in Texas).

n145. See, e.g., Meadows v. Bierschwale, 516 S.W.2d 125, 128 (Tex. 1974) ("Constructive trusts, being remedial in character, have the very broad function of redressing wrong or unjust enrichment in keeping with basic principles of equity and justice. A transaction may, depending on the circumstances, provide the basis for a constructive trust where one party to that transaction holds funds which in equity and good conscience should be possessed by another. Moreover, there is no unyielding formula to which a court of equity is bound in decreeing a constructive trust, since the equity of the transaction will shape the measure of relief granted." (citations omitted)).

n146. Bennett v. Butterworth, 52 U.S. 669, 671 (1851).

n147. Rogers v. Daniel Oil & Royalty Co., 110 S.W.2d 891, 894 (Tex. 1937) ("It is a rule in this State that actions may be instituted in our courts and prosecuted to final judgment without regard as to whether they are proceedings in equity or at law. In spite of this blended system of law and equity the distinction between them is as absolute as ever, and to entitle the plaintiff to equitable relief he must show a proper case for a court of equity to exercise its equitable jurisdiction.").

n148. O'Sullivan, The Law of Rescission, supra note 10, § 10.04.

n149. See Ochoa v. Am. Oil Co., 338 F. Supp. 914, 920 (S.D. Tex. 1972) ("Although the equity side and the law side of the federal trial courts were thus fused, we are still far from the time envisioned by Maitland "when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law.'" (quoting F.W. Maitland et al., Equity 20 (1910))).

n150. Bagby Elevator Co. v. Schindler Elevator Corp., 609 F.3d 768, 774 (5th Cir. 2010); In re Francis, 186 S.W.3d 534, 551 (Tex. 2006); Steubner Re-

alty 19, Ltd. v. Cravens Rd. 88, Ltd., 817 S.W.2d 160, 165 (Tex. App. - Houston [14th Dist.] 1991, no writ).

n151. See T. Leigh Anenson, Treating Equity like Law: A Post-Merger Justification of Unclean Hands, 45 Am. Bus. L.J. 455, 458 (2008) ("Notwithstanding the merger of law and equity, a majority of courts deny the application of unclean hands in actions at law.").

n152. K.N. Llewellyn, Book Review, The Standardization of Commercial Contracts in English and Continental Law, 52 Harv. L. Rev. 700, 703 (1939).

n153. See Bank of Sw. Nat'l Ass'n v. LaGasse, 321 S.W.2d 101, 106 (Tex. Civ. App. - Houston 1959, no writ) ("In courts administering both law and equity, like ours, the rules denying injunction when there is a remedy at law should not be applied as rigidly as at common law, where the issuance of the writ in equity was to a certain extent an invasion of the jurisdiction of another tribunal." (quoting Sumner v. Crawford, 41 S.W. 994, 995 (Tex. 1897))).

n154. See Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486, 490-91 (5th Cir. 1961) ("The discretion of the trial court is "very narrowly limited and must, wherever possible, be exercised to preserve jury trial.'" (quoting Beacon Theatres v. Westover, 359 U.S. 500, 510 (1959))); Ochoa v. Am. Oil Co., 338 F. Supp. 914, 920 n.4 (S.D. Tex. 1972) ("The Congress was careful to assure that the unification [of the courts] would not dilute the right to jury trial.").

n155. Edwards v. Peoples, Dallam 359, 360 (Tex. 1840) ("The jury in this case have not thought proper to rescind the sale, but to award to the plaintiff what they considered equitable damages. This court will never interfere with the verdict of a jury unless manifestly contrary to law and evidence.").

n156. Sisco v. Hereford, 694 S.W.2d 3, 7 (Tex. App. - San Antonio 1984, writ ref'd n.r.e.).

n157. See Burford v. Sun Oil Co., 186 S.W.2d 306, 314 (Tex. Civ. App. - Austin 1944, writ ref'd w.o.m.) (noting that the C.J.S. section on equity states

that, "as a general rule, the inadequacy of the remedy at law is both the foundation of, and conversely a limitation on, equity jurisdiction.").

n158. See Texas v. Morales, 869 S.W.2d 941, 942 (Tex. 1994) ("Equity jurisdiction does not flow merely from the alleged inadequacy of a remedy at law, nor can it originate solely from a court's good intentions to do what seems "just' or "right;' the jurisdiction of Texas courts - the very authority to decide cases - is conferred solely by the constitution and the statutes of the state."). See also Pope v. Ferguson, 445 S.W.2d 950, 952 (Tex. 1969) ("This court was created by the Constitution of the State of Texas and has only such jurisdiction as is conferred upon it by the Constitution and statutes of the State.").

n159. See Laycock, The Death of the Irreparable Injury Rule, supra note 124, at 690 ("The Restatement (Second) of Torts dropped the traditional version of the rule from the black letter and condemned it as misleading").

n160. See Restatement (Third) of Restitution and Unjust Enrichment § 4(2) (2011) ("A claimant otherwise entitled to a remedy for unjust enrichment, including a remedy originating in equity, need not demonstrate the inadequacy of available remedies at law.")

n161. Dobbs, Law of Remedies, supra note 25, at § 2.5(1) ("In this setting, the adequacy rule represented some kind of accommodation between the two kinds of courts. It also represented a kind of self-serving propaganda by equity courts, the effect of which was to say they were not trespassing on the jurisdiction of the law courts. With the merger of law and equity courts into a unitary system of justice, this history offers no basis for continued use of the rule; and it remains today primarily as a convenient (but perhaps misleading and overstated) expression for entirely different policies."); Owen M. Fiss, The Civil Rights Injunction 38-85 (1978).

n162. Laycock, The Death of the Irreparable Injury Rule, supra note 124, at 692.

n163. Id. at 726-27.

n164. Id. at 770.

n165. A Lexis-Nexis "shepardization" of The Death of the Irreparable Injury Rule resulted in eighty-seven subsequent articles citing the work.

n166. See Restatement (Third) of Restitution and Unjust Enrichment § 4 cmt. e (2011) (citing Professor Laycock's article).

n167. Results of a Lexis-Nexis "shepardization" of The Death of the Irreparable Injury Rule. See, e.g., Patrick v. Thomas, No. 2-07-339-CV, 2008 Tex. App. LEXIS 3219, at 9 (Tex. App. - Fort Worth May 1, 2008, no pet.) (citing Laycock's article).

n168. Hausler v. Harding-Gill Co., 6 S.W.2d 445, 446 (Tex. Civ. App. - San Antonio 1928), rev'd 15 S.W.2d 548 (Tex. Comm'n. App. 1929, judgm't. adopted).

n169. Id.

n170. See id. ("Appellant, however, was not seeking protection, but was seeking to destroy a contract that had been a burden to him since he executed it. It "tickled' him when he thought he had discovered an opening for a suit to rescind a contract which had been for months galling and uncomfortable to him."). The opinion mentioned "tickled" three times, twice more than "adequate remedy." Id.

n171. Id.

n172. See Hausler v. Harding-Gill Co., 15 S.W.2d 548, 549 (Tex. Comm'n App. 1929, judgm't. adopted) ("As pointed out by the Court of Civil Appeals, it is not every material breach of a contract that will authorize a rescission under all circumstances, but every breach in a material respect of a contract wholly executory will authorize a rescission at the option of the injured party. Here defendant in error has breached the executory contract in a material respect in such a way as necessarily to show that injury which must always be present to authorize a rescission, and there has been no part performance by the Company that would in any wise render it inequitable to grant such relief." (citation omit-

ted)). See also Ennis v. Interstate Distribs., Inc., 598 S.W.2d 903, 906 (Tex. Civ. App. - Dallas 1980, no writ) ("Rescission is authorized if there is a breach of a contract in material part."); Cantu v. Bage, 467 S.W.2d 680, 682 (Tex. Civ. App. - Beaumont 1971, no writ) ("While the contract remained executory, defendant's material breach thereof authorized an action for rescission.").

n173. Hausler, 15 S.W.2d at 549 ("Ordinarily a rescission will be denied where the complainant has an adequate remedy affording a full relief at law.").

n174. See, e.g., State v. Morales, 869 S.W.2d 941, 942 (Tex. 1994) ("A court of equity is a happy invention to remedy the errors of common law: but this remedy must stop some where ... ." (quoting Henry Home, Principles of Equity 46 (2d ed. 1767))); State v. Patterson, 37 S.W. 478, 479 (Tex. Civ. App. - San Antonio 1896, no writ) ("Though a court of equity has the power to interfere in all cases of nuisances, yet circumstances may exist in one case which do not exist in another to induce a court to interfere or refuse its interference by injunction.").

n175. Morales, 869 S.W.2d at 942.

n176. Id.

n177. Id. at 943-44. See also Dobbs, Law of Remedies, supra note 25, at § 2.5 ("In theory, this is not a rule of discretion but a rule of policy, even a limitation on judicial power.").

n178. See Patton v. Nicholas, 279 S.W.2d 848, 857 (Tex. 1955) ("Wisdom would seem to counsel tailoring the remedy to fit the particular case ... Equity may, by a combination of lesser remedies, including ... reserving the more severe measures as a final weapon against recalcitrance, accomplish much toward avoiding recurrent mismanagement or oppression on the part of a dominant and perverse majority stockholder ... ."); W. T. Waggoner Estate v. Sigler Oil Co., 19 S.W.2d 27, 32 (Tex. 1929) ("In Grubb v. McAfee ... we pointed out that the courts could do complete justice without adjudging a lease forfeited or terminated for breach of implied obligations, relative to development, even in cases where redress was impossible under an award of damages.")

n179. See, e.g., Moore v. Torrey, 1 Tex. 42, 47 (1846) (upholding injunction on principles of equity).

n180. See Patrick v. Roach, 21 Tex. 251, 256 (1858) (awarding remedy in equity for rescission); Wintz v. Morrison, 17 Tex. 372, 373 (1856) (discussing circumstances in which a buyer can claim a rescission of contract); Kesler v. Robson, 16 Tex. 119, 119 (1856) (upholding ruling that appellant had to elect between rescission of his contract or money damages and that he could not have both); McKensie v. Hamilton, Dallam 461, 463 (Tex. 1842) (upholding rescission of property lease).

n181. Edwards v. Peoples, Dallam 359, 360 (Tex. 1840).

n182. See, e.g., Weaver v. Vandervanter, 19 S.W. 889, 889 (Tex. 1892) (applying the Doctrine to rescission); Galbreath v. Reeves, 18 S.W. 696, 697 (Tex. 1891) (applying the Doctrine to specific performance); Goggan v. Evans, 33 S.W. 891, 891 (Tex. Civ. App. - Austin 1896, no writ) (applying the Doctrine to rescission); Robinson v. Dickey, 36 S.W. 499, 500 (Tex. Civ. App. - Fort Worth 1896, no writ) (applying the Doctrine to rescission).

n183. See infra Appendix, Table A (showing that 6.8% was the percentage of such cases in the decade between 1980 and 1990 and that the percentages in other decades were often well below 6.8%).

n184. See infra Appendix, Table A (showing that the highest percentage of cases using "rescission" as a core term and also mentioning "adequate remedy" or "irreparable injury" in any decade since 1910 is 5.1%). See also Dobbs, Law of Remedies, supra note 25, § 4.3(6) ("The equitable nature of rescission does not invoke the adequacy or irreparable harm test. Rescission can be granted or denied regardless whether the plaintiff has some other adequate remedy." (quoting G. Palmer, Law of Restitution § 4.7 (1978))).

n185. See Tables A and B in the Appendix for data relating to rescission and specific performance. For Texas state opinions in the LEXIS database, there were a total of 553 opinions that used "constructive trust" as a core term in the 110 years since January 1, 1900 to 1953 in the first forty years of that period, 198 in the second forty-year period, and 302 opinions in the last thirty years. Of

those opinions, a total of twenty opinions (4%) used "constructive trust" as a core term and used "adequate remedy" or "irreparable injury" in the body of the opinion. Similarly for the first forty years, two opinions (4%) met both conditions; for the second forty-year period, six opinions (3%) met both conditions and twelve opinions (4%) for the thirty-year period ending December 31, 2009. Data for a similar series of searches of all state courts in the LEXIS data based yielded similar results. For a similar series of searches in the Texas state opinion database relating to unjust enrichment revealed a total of 305 opinions for the 110 year period with nine opinions (3%) that met both conditions for the entire period. There were no Texas state court opinions for the first forty years that used unjust enrichment as a core term but there were thirty-four opinions in the second forty-year period, and 271 in the thirty-year period ending December 31, 2009. Within these latter two groups, there was one opinion (3%) that met both conditions in the forty years ending December 31, 1979, and eight opinions (3%) in the remaining thirty years that met both conditions. Data for a similar series of searches of all state courts in the LEXIS database based yielded similar results.

n186. See, e.g., W. T. Waggoner Estate v. Sigler Oil Co., 19 S.W.2d 27, 32 (Tex. 1929) ("The courts could do complete justice without adjudging a lease forfeited or terminated for breach of implied obligations, relative to development, even in cases where redress was impossible under an award of damages."); Weaver, 19 S.W. at 889 (denying rescission for fraud because claimant had adequate remedy); Turner v. Turner, No. 09-06-570 CV, 2008 Tex. App. LEXIS 4720, at 9 (Tex. App. - Beaumont June 26, 2008, pet. denied) (denying rescission because claimant failed to prove irreparable damage in breach of contract claim); Frost Nat'l Bank v. Burge, 29 S.W.3d 580, 596 (Tex. App. - Houston [14th Dist.] August 17, 2000, no pet.) (denying rescission for plaintiff's failure to prove absence of an adequate remedy); Freyer v. Michels, 360 S.W.2d 559, 562 (Tex. Civ. App. - Dallas 1962, writ dism'd) (denying rescission for failure to show absence of an adequate remedy for breach of contract); Lanford v. Parsons, 237 S.W.2d 425, 430 (Tex. Civ. App. - Austin 1951, writ ref'd n.r.e) (finding adequate remedy in monetary damages, which are measurable).

n187. See Rogers v. Daniel Oil & Royalty Co., 110 S.W.2d 891, 893-94 (Tex. 1937) ("In order to say that [the] statute affords a complete and adequate remedy at law in this case we must say: First, that the law is valid and constitutional; and, second, that its provisions afford the Oil & Royalty Company a complete and adequate remedy in this case."); Ryan v. Collins, 496 S.W.2d 205,

209 (Tex. Civ. App. - Tyler 1973, writ ref'd n. r. e.) ("An action for rescission is an equitable proceeding, and there is no allegation that there is no adequate remedy at law ... in the equitable action of rescission, plaintiff must allege that he acted with due diligence and promptly rescinded the contract ... ."); Chenault v. Cnty. of Shelby, 320 S.W.2d 431, 433 (Tex. Civ. App. - Austin 1959, writ ref'd n.r.e.) ("It is ... essential to have pleadings and proof of facts showing that the complaining party has no adequate remedy at law, and delay is not a type of breach at contract that promises rescission and cancellation."). But see Ferguson v. DRG/Colony N., Ltd., 764 S.W.2d 874, 887 (Tex. App. - Austin 1989, writ denied) (holding that claimant's testimony was sufficient to excuse failure to plead irreparable injury).

n188. See Story v. Story, 176 S.W.2d 925, 927 (Tex. 1944) ("The rule is generally recognized in this state that the extraordinary writ of injunction will not be granted where there is a plain and adequate remedy at law. This general rule is not rigidly enforced in this state." (citations omitted)).

n189. Cardinal Health Staffing Network, Inc. v. Bowen, 106 S.W.3d 230, 235 (Tex. App. - Houston [1st Dist.] 2003, no pet.). See also Frost Nat'l Bank, 29 S.W.3d at 596 ("Equity invokes the "court of conscience,' and it applies only when "the legal remedy is not as complete as, less effective than, or less satisfactory than the equitable remedy.'" (quoting First Heights Bank, FSB v. Gutierrez, 852 S.W.2d 596, 605 (Tex. App. - Corpus Christi 1993, writ denied))).

n190. See Turner, 2008 Tex. App. LEXIS 4720, at 9 (denying husband rescission against wife for breach of contract). But see Ferguson, 764 S.W.2d at 887 (granting rescission for breach of contract even absent explicit pleading for irreparable injury).

n191. See Donaho v. Bennett, No. 01-08-00492-CV, 2008 Tex. App. LEXIS 8783, at 10 (Tex. App. - Houston [1st Dist.] Nov. 20, 2008, no pet.) (awarding injunctive relief for breach of fiduciary duty because defendant would otherwise be insolvent); Loye v. Travelhost, Inc., 156 S.W.3d 615, 621 (Tex. App. - Dallas 2004, no pet.) ("A plaintiff does not have an adequate remedy at law if defendant is insolvent."); Chevron U.S.A. Inc. v. Stoker, 666 S.W.2d 379, 382 (Tex. App. - Eastland 1984, writ dism'd) (reversing trial court's grant of injunc-

tive relief in claim for breach of contract due to failure to show that company was insolvent).

n192. Some opinions confuse illiquidity with insolvency. See, e.g., Matteson v. El Paso Cnty., No. 08-00-00095-CV, 2001 WL 898729, at 2 (Tex. App. - El Paso August 10, 2001, pet. denied) ("A debtor who is generally not paying the debtor's debts as they become due is presumed to be insolvent."). While the two conditions frequently cohabit the same company, evidence of the defendant's inability to pay its bills promptly only proves illiquidity, not necessarily insolvency.

n193. See Butnaru v. Ford Motor Co., 84 S.W.3d 198, 204 (Tex. 2002) (stating that courts may grant temporary injunction if damages cannot be measured); Ennis v. Interstate Distribs., Inc., 598 S.W.2d 903, 906 (Tex. Civ. App. - Dallas 1980, no writ) (granting rescission for breach of contract when damages could not be determined).

n194. See Butnaru, 84 S.W.3d at 211 ("[A] trial court may grant equitable relief when a dispute involves real property."); Graham Mortg. Corp. v. Hall, 307 S.W.3d 472, 482 (Tex. App. - Dallas 2010, no pet.) (granting injunctive relief for claim of fraud in a real estate transaction). See also Forrest Prop. Mgmt. v. Forrest, No. 10-09-00338-CV, 2010 Tex. App. LEXIS 5863, at 8 (Tex. App. - Waco July 21, 2010, no pet.) (denying injunctive relief because interest at issue was not one in real estate).

n195. See Laycock, The Death of the Irreparable Injury Rule, supra note 124, at 705-06 (stating that if certain goods, such as heirlooms, cannot be replaced by money, then money damages are not an adequate remedy for their loss and harm to them may be considered irreparable).

n196. See Patrick v. Thomas, No. 2-07-339-CV, 2008 Tex. App. LEXIS 3219, at 8-9 (Tex. App. - Fort Worth May 1, 2008, no pet.) ("While it is scant, Thomas's testimony about the nonmonetary value of the horses to her at least provided some evidence of substantive and probative character upon which the trial court could have determined that an irreparable injury impossible of measurement by an ascertainable pecuniary standard would result in the absence of an injunction."). See also Bueckner v. Hamel, 886 S.W.2d 368, 373 (Tex. App. -

Houston [1st Dist.] 1994, writ denied) (Andell, J., concurring) (affirming equitable relief based on value of domestic animals as companions).

n197. Victory Drilling, LLC v. Kaler Energy Corp., No. 04-07-00094-CV, 2007 Tex. App. LEXIS 4966, at 6 (Tex. App. - San Antonio June 27, 2007, no pet.) ("Generally, an adequate remedy at law exists and injunctive relief is improper where any potential harm may be "adequately cured by monetary damages.'" (quoting Ballenger v. Ballenger, 694 S.W.2d 72, 77 (Tex. App. - Corpus Christi 1985, no writ))).

n198. Frequent Flyer Depot, Inc. v. Am. Airlines, Inc., 281 S.W.3d 215, 227 (Tex. App. - Fort Worth 2009, pet. denied).

n199. ETEN, Inc. v. Coll. of the Mainland, No. 01-10-00349-CV, 2010 Tex. App. LEXIS 8354, at 15 (Tex. App. - Houston [1st Dist.] Oct. 14, 2010, no pet.).

n200. Cytogenix, Inc. v. Waldroff, 213 S.W.3d 479, 490-91 (Tex. App. - Houston [1st Dist.] 2006, pet. denied). See also Prosperity Bank v. Rogge, No. 01-07-00161-CV, 2007 Tex. App. LEXIS 5505, at 15 (Tex. App. - Houston [1st Dist.] July 12, 2007, no pet.) ("Here, we hold that the evidence is legally insufficient to support a finding that irreparable harm to Prosperity is probable or imminent. Rather, the record establishes "only a fear of possible injury,' and such a contingency "is not sufficient to support issuance of a temporary injunction.'" (quoting Reach Grp., L.L.C. v. Angelina Grp., 173 S.W.3d 834, 838 (Tex. App. - Houston [14th Dist.] 2005, no pet.))).

n201. T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc., 965 S.W.2d 18, 24 (Tex. App. - Houston [1st Dist.] 1998, no pet.).

n202. Id. at 24 (finding "potential damage to appellee's business cannot be easily calculated, therefore a legal remedy is inadequate"). Ironically, the court preceded this holding with a seemingly precise calculation of the damages in question. Id.

n203. Gentry v. Squires Constr., Inc., 188 S.W.3d 396, 410 (Tex. App. - Dallas 2006, no pet.) ("The trial court found that there was no practical or rea-

sonable way to remedy the discrepancy in the ceiling height and the Gentrys did not prove that the house was of any less value due to the variance. Rescission would result in extreme prejudice to Squires Construction.").

n204. See, e.g., Healix Infusion Therapy, Inc. v. Helix Health, LLC, 747 F. Supp. 2d 730, 740 (S.D. Tex. 2010) ("Additionally, the public interest favors settlement agreements and contracts, generally. When individuals ignore contractual obligations, particularly settlement agreements, the public is disserved. Therefore, the Court finds that a permanent injunction enforcing the terms of the Settlement Agreement also is warranted here."); Chevron U.S.A., Inc. v. Stoker, 666 S.W.2d 379, 382 (Tex. App. - Eastland 1984, writ dism'd) ("We note that the federal standard in regard to injunctions includes consideration as to whether granting the injunction is adverse to the public interest.").

n205. See, e.g., Cheek v. Metzer, 291 S.W. 860, 863 (Tex. Comm'n App. 1927) ("The general rule is well settled that the equitable relief of rescission of contract will not be granted for a mere breach thereof. The remedy in such case is ordinarily to be found in an action at law, which will afford an adequate remedy. While this is the general rule, it is nevertheless not without its limitations and qualifications."); Omega Energy Corp. v. Gulf States Petroleum Corp., No. 13-03-275-CV, 2005 Tex. App. LEXIS 3191, at 11 (Tex. App. - Corpus Christi Apr. 28, 2005, pet. denied) ("Generally a court will not enforce contractual rights in equity, because a party can rarely establish an irreparable injury and an inadequate legal remedy when damages for breach of contract are available." (citing Butnaru v. Ford Motor Co., 84 S.W.3d 198, 211 (Tex. 2005))); Freyer v. Michels, 360 S.W.2d 559, 561 (Tex. Civ. App. - Dallas 1962, writ dism'd) ("Though there are some exceptions to the rule, it is held generally that the equitable relief of rescission will not be granted for a mere breach of contract in the absence of a finding of fraud. In such cases the complaining party will be relegated to his remedy of damages." (citations omitted)).

n206. See Kessell v. Mega Life & Health Ins. Co., No. 3:03-CV-2788-N, 2005 U.S. Dist. LEXIS 2308, at 12 (N.D. Tex. Feb. 15, 2005) ("Under principles of general contract law, rescission - as opposed to damages or specific performance - is available only to a party whose counterpart has committed a material breach.").

n207. Exceptions are made, however, when time is of the essence to performance. See, e.g., Beavers v. Goose Creek Consol. I.S.D., 884 S.W.2d 932, 935 (Tex. App. - Waco 1994, writ denied) ("The school district conclusively established by Cote's affidavit that time was of the essence in the performance of the gym floor contract and that Beavers Construction breached the contract by failing to begin performance by the time specified. Thus, the summary judgment evidence conclusively established that the school district had the right to rescind the executor contract ... .").

n208. Dillard v. Clutter, 145 S.W.2d 632, 634 (Tex. Civ. App. - Amarillo 1940, writ ref'd).

n209. Id.

n210. See Minneapolis-Moline Co. v. Purser, 361 S.W.2d 239, 245 (Tex. Civ. App. - Dallas 1962, writ ref'd n.r.e.) ("Thus, if a machine is sold for a particular purpose, and it will perform none of the functions, it may be returned; but if it only performs them badly the remedy is by action for damages. The fact that some parts may be defective, or that the machine does not perform as guaranteed, does not warrant a rescission of the contract, so long as the machine is not wholly worthless."); Adams v. Bailey Transp. Co., 334 S.W.2d 591, 594 (Tex. Civ. App. - Houston 1960, writ ref'd) (holding trial court erred in "not submitting an issue inquiring as to whether the system was entirely worthless for the purpose for which it was sold.").

n211. Edwards v. Peoples, Dallam 359, 360 (Tex. 1840) ("It is clearly the doctrine of the Spanish law that all sales fraudulently made may be set aside. But if the thing sold has defects of which the vendor is not aware, the vendee may only recover the amount of damages sustained.").

n212. See Dallas Farm Mach. Co. v. Reaves, 307 S.W.2d 233, 240 (Tex. 1957) ("There can be no real assent when it is induced by fraud." (quoting 1 William Elliott, Commentaries on the Law of Contracts § 70)); State v. Snyder, 18 S.W. 106, 108 (Tex. 1886) ("If fraud, which vitiates all contracts, in fact existed, the vendor has the right to rescind it; and, if he reacquires the possession of the property in a court of law, may defend both his title and possession upon the ground that he has rescinded the contract to sell by his own act and voli-

tion."); Wintz v. Morrison, 17 Tex. 372, 383 (1856) ("Every misrepresentation with regard to anything which is a material inducement to a sale, which is made to deceive, and which actually does deceive the vendee, vitiates the contract of sale."); Dawson v. Sparks, 1 Posey 735, 744 (Tex. Comm'n App. 1881) (not precedential) ("In the application of this doctrine, the general rule is, that where the whole contract is contaminated with fraud, and the parties can be placed in statu quo, the contract may be rescinded ... ." (internal citation omitted)); Omega Energy Corp. v. Gulf States Petroleum Corp., No. 13-03-275-CV, 2005 Tex. App. LEXIS 3191, at 8 (Tex. App. - Corpus Christi Apr. 28, 2005, pet. denied) ("Claims of fraud, if substantiated, will serve to vitiate a contract; rescission is a proper remedy that can be applied to a finding of fraud."); Dobbs, Law of Remedies, supra note 25, at § 9.3(1).

n213. See Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 571 n.8 (1990) ("Both the Union and the dissent argue that the back-pay award sought here is equitable because it is closely analogous to damages awarded to beneficiaries for a trustee's breach of trust. Such damages were available only in courts of equity because those courts had exclusive jurisdiction over actions involving a trustee's breach of his fiduciary duties." (citation omitted)); Meadows v. Bierschwale, 516 S.W.2d 125, 128 (Tex. 1974) ("Actual fraud, as well as breach of a confidential relationship, justifies the imposition of a constructive trust."); Dobbs, Law of Remedies, supra note 25, § 5.18(3) ("But in some instances equity (not law) created the substantive right on which the plaintiff relies. In those instances there was no need to discuss the legal remedy at all and the adequacy test could not be invoked to bar equitable intervention. Because equity created the substantive rights against fiduciaries, equity has always taken jurisdiction in claims against them without regard to the adequacy test.").

n214. See Sumner v. Crawford, 41 S.W. 994, 995 (Tex. 1897) ("But it is contended that the trustee had an adequate remedy by suit for damages against the officer, and therefore was not entitled to an injunction. We have been cited to no authority which would have permitted him in such a suit to recover the loss the trust estate would have suffered by reason of the trustee's not being able to sell the goods not seized for as great a sum as he could have sold them for if the goods levied upon had not been taken out of the stock. It would be very difficult to estimate such loss. We do not think a court of equity should turn away the trustee seeking its aid in the execution of the trust, because of the existence of a remedy so doubtful as to its adequacy."); Fischer v. Rider, No.

02-10-00294-CV, 2011 Tex. App. LEXIS 385, at 13 (Tex. App. - Fort Worth Jan. 13, 2011, no pet.) (evaluating irreparable injury for a plea of injunctive relief for breach of fiduciary duty); Hill v. McLane Co., No. 03-10-00293-CV, 2011 Tex. App. LEXIS 169, at 17-18 (Tex. App. - Austin Jan. 5, 2011, no pet.) (finding that, for purposes of justifying a temporary injunction, the defendants were in possession of trade secret material and that the plaintiff could not otherwise obtain an adequate remedy); Donaho v. Bennett, No. 01-08-00492-CV, 2008 Tex. App. LEXIS 8783, at 10 (Tex. App. - Houston [1st Dist.] Nov. 20, 2008, no pet.) (granting injunctive relief for case relating to breach of fiduciary duty because defendant would otherwise be insolvent); T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc., 965 S.W.2d 18, 24 (Tex. App. - Houston [1st Dist.] 1998, no pet.) (evaluating adequacy of remedies at law for claim of breach of fiduciary duty).

n215. Forrest Prop. Mgmt. v. Forrest, 2010 Tex. App. LEXIS 5863, at 8 (Tex. App. - Waco July 21, 2010) (denying injunctive relief for partnership claim for failure of plaintiff to establish that money damages would be inadequate or hard to calculate); Victory Drilling, LLC v. Kaler Energy Corp., 2007 Tex. App. LEXIS 4966, at 6 (Tex. App. - San Antonio June 27, 2007, no pet.) ("Generally, an adequate remedy at law exists and injunctive relief is improper where any potential harm may be adequately cured by monetary damages." (citation omitted)); CMNC Healthcare Props., LLC v. Medistar Corp., 2006 Tex. App. LEXIS 10676, at 20 (Tex. App. - Houston [1st Dist.] Dec. 14, 2006) (precluding requested temporary injunctive relief because of absence of proof of irreparable injury in case relating to alleged abuse of trade secrets and confidential information); Ballenger v. Ballenger, 694 S.W.2d 72, 77 (Tex. App. - Corpus Christi 1985, no writ) ("We find from the record that any damages that might ensue are capable of exact calculation. The proposed distribution of trust corpus involves a distribution of cash which can be readily replaced with other money (plus statutory interest) should it be determined that appellants, acting as trustees, abused their discretion and made an unwarranted distribution.").

n216. Magee v. Young, 198 S.W.2d 883, 885 (Tex. 1946).

n217. See infra notes 252-253 (citing cases in which courts required plaintiffs to prove that they were equitably entitled to rescission).

n218. See infra Appendix, Table E (showing that the vast majority of rescission cases in the early twentieth century arose from executory contracts).

n219. Dallas Farm Mach. Co. v. Reaves, 307 S.W.2d 233, 241 (Tex. 1957) (affirming rescission for purchase of tractor); Mathis Equip. Co. v. Rosson, 386 S.W.2d 854, 871 (Tex. Civ. App. - Corpus Christi 1964, writ ref'd n.r.e.) (denying rescission for cotton picker).

n220. Wintz v. Morrison, 17 Tex. 372 (1856) (granting rescission for the purchase of horses); Prude v. Campbell, 19 S.W. 890 (Tex. 1892).

n221. David McDavid Pontiac, Inc. v. Nix, 681 S.W.2d 831, 836-38 (Tex. App. - Dallas 1984, writ ref'd n.r.e.) (denying rescission for the purchase of an automobile); Kanaman v. Hubbard, 160 S.W. 304, 306-07 (Tex. Civ. App. - Dallas 1913, writ granted) (affirming rescission), aff'd, 222 S.W. 151 (Tex. 1920).

n222. See Scranton v. Tilley, 16 Tex. 183, 194-95 (1856) (affirming the trial court's jury instructions and measure of damages where contract rescission dispute arose over the sale of a sick slave).

n223. See Slaughter v. Qualls, 162 S.W.2d 671, 676 (Tex. 1942) ("It is ordinarily true that a vendor who has made an executory contract to convey land may rescind the contract if the vendee fails to pay the purchase money." (quoting Milligan v. Ewing, 64 Tex. 258, 260 (1885))); Lipscomb v. Fuqua, 131 S.W. 1061, 1064 (Tex. 1910) (finding that where purchaser failed to pay purchase price of land, vendor could rescind and retake the land); Tom v. Wollhoefer, 61 Tex. 277, 279 (1884) ("A vendor, by executory contract for the sale of lands, when default is made in paying the purchase money, has ordinarily the right to rescind the contract and recover the land, or convey it to a third party."); Reeder v. Curry, 294 S.W.3d 851, 856 (Tex. App. - Dallas 2009, no pet.) ("In an executory contract for the sale of land, such as the contract for deed in this case, the superior title remains with the seller until the purchaser fulfills its part of the contract. If the purchaser defaults under the contract, the seller is entitled to possession of the property."); Ennis v. Interstate Distribs., Inc., 598 S.W.2d 903, 906 (Tex. App. - Dallas 1980, no writ) ("Rescission is authorized if there is a breach of contract in a material part."); McDaniel v. Pettigrew, 536 S.W.2d 611,

617 (Tex. App. - Dallas 1976, writ ref'd n.r.e.) ("The rule remains well settled that while the contract remains wholly executory ... a partial breach of a material part thereof is sufficient to authorize an equitable action for rescission ... ."). See also Hausler v. Harding-Gill Co., 15 S.W.2d 548, 549 (Tex. Comm'n App. 1929, judgm't adopted) ("It is not every material breach of a contract that will authorize a rescission under all circumstances, but every breach in a material respect of a contract wholly executory will authorize a rescission at the option of the injured party.").

n224. See, e.g., Slaughter, 162 S.W.2d at 676 ("If there be facts which make it inequitable for the vendor to exercise [rescission], a court of equity will not enforce it, but will leave the party to his action for the purchase money." (quoting Milligan v. Ewing, 64 Tex. 258, 260 (1885))); Tom, 61 Tex. at 279 ("Moreover, there must not exist at the date of the attempted rescission any such equities in favor of a subsequent vendee or mortgagee of the purchaser as will prevent a rescission, without a saving of his rights as against the property which is the subject matter of the original sale."). See also Burkhardt v. Lieberman, 159 S.W.2d 847, 853 (Tex. 1942) ("Rescission ... is regarded as a harsh remedy and is not favored.").

n225. See Reeder v. Curry, 294 S.W.3d 851, 856 (Tex. App. - Dallas 2009, no pet.) (mem. op.) ("The seller's right to retake possession of the property under the contract's forfeiture provision may be defeated by the purchaser "pleading and proving such facts as would make it inequitable to enforce it.'" (quoting Stevenson v. Lohman, 218 S.W.2d 311, 318 (Tex. App. - Beaumont 1949, writ ref'd))).

n226. See Tex. Prop. Code § 5.066(a) (West 2010) ("If a purchaser defaults after the purchaser has paid 40 percent or more of the amount due or the equivalent of 48 monthly payments under the executory contract, the seller is granted the power to sell, through a trustee designated by the seller, the purchaser's interest in the property as provided by this section. The seller may not enforce the remedy of rescission or of forfeiture and acceleration."). See also Sharp v. Smith, No. 12-07-00219-CV, 2008 Tex. App. LEXIS 666, at 8 (Tex. App. - Tyler Jan. 31, 2008, no pet.) (mem. op.) ("The seller's failure to provide information required by [Tex. Prop. Code Ann.] Section 5.069 entitles the purchaser to cancel and rescind the executory contract and receive a full refund of all payments made to the seller.").

n227. Reeder, 294 S.W.3d at 858.

n228. Id. at 853.

n229. Id. at 858.

n230. Id. at 855.

n231. Id.

n232. Id. at 853.

n233. Id. at 858, 862.

n234. See id. at 856 (stating that rescission of a contract is not favored by the courts and "may be defeated by the purchaser pleading and proving such facts as would make it inequitable to enforce it"); T-Anchor Corp. v. Travarillo Assocs., 529 S.W.2d 622, 627 (Tex. Civ. App. - Amarillo 1975, no writ) (discussing the balance of equities between vendor and vendee to affirm denial of rescission); Little v. Kennedy, 195 S.W.2d 255, 260 (Tex. Civ. App. - Amarillo 1946, writ ref'd n.r.e.) (determining that rescission "will not be upheld unless the relative equities, when weighed, clearly favor the party seeking rescission").

n235. Tom v. Wollhoefer, 61 Tex. 277, 281 (1884) ("If the vendor goes into equity to set aside the sale he must tender the purchase money already received or he will be defeated as not offering to do equity.").

n236. See id. ("The vendor's remedy by rescission is a harsh and stringent one, especially when a part of the consideration has been paid, and it is sought to forfeit the payment and recover or resell the land. Hence slight circumstances are seized upon to protect the vendee against the forfeiture of the amount paid, or compel the vendor to seek redress by a suit for the balance due upon the purchase money.").

n237. See, e.g., Young v. Fitts, 157 S.W.2d 873, 875 (Tex. 1942) (holding that vendee's offer, at the close of trial, to tender the amount due would, if paid, defeat the claim for rescission); Moore v. Giesecke, 13 S.W. 290, 293 (Tex. 1890) ("When a suit for the recovery back of the land has been brought, where any portion of the purchase money has been paid, or where valuable and permanent improvements have been placed upon the land by the vendee, or by purchasers under him, and the defendant, when sued, brings into court, and offers to pay, the balance of the purchase money, with costs of suit, unless there exist strong countervailing equities, the money ought to be received, and a recovery of the land denied."); Waller v. Nethery, 188 S.W. 2d 736, 737-38 (Tex. Civ. App. - Dallas 1945, writ ref'd, w.o.m.) (finding that, among other things, the payment of money in a settlement offer entitled the plaintiff to legal title of the land and to defeat a claim of rescission.).

n238. See infra Part VII.B. (discussing the tender requirement).

n239. See id. (discussing the tender requirement).

n240. 92 S.W.2d 437 (Tex. 1936).

n241. Id. at 438.

n242. Id. at 437.

n243. Id. at. 438-39.

n244. Id. at 439.

n245. See id. ("As we understand the opinion of the Court of Civil Appeals, it holds that the burden was upon the sellers to allege and prove that the buyers were not entitled to the equitable relief of cancellation, and that a general denial did not put the question in issue. With that conclusion we cannot agree. The burden is upon one seeking to have a contract cancelled to establish that he is equitably entitled to that relief.").

n246. Id.

n247. Powell v. Rockow, 92 S.W.2d 437, 439 (Tex. 1936). The opinion's citation to Adams v. Hill is vague. The appellate court held in that case that the claimant was not entitled to rescission because the alleged fraud had been corrected before the claimant asserted a demand for rescission. Adams v. Hill, 149 S.W. 349, 351 (Tex. Civ. App. - Fort Worth 1912, writ ref'd).

n248. 228 S.W. 148, 151 (Tex. 1921) ("The further doctrine is announced in the above cases that in an action of this character, especially where a large part of the purchase money has been paid, the grantor must, in order to invoke the aid of a court of equity to cancel a deed and rescind a contract of sale, offer to pay back the purchase money and place the vendee, or those claiming under him, in statu quo. The evidence negatives any offer or willingness on plaintiff's part to comply with this prerequisite. We doubt whether the adjudicated cases present a state of facts demanding more strongly than does the present case an application of the maxim that "He who seeks equity must do equity.'").

n249. Id. at 150.

n250. Rockow, 92 S.W.2d at 439.

n251. See supra notes 240-250 and accompanying text (listing cases in which claimants were forced to bear the burden of proving that they were equitably entitled to rescission).

n252. 386 S.W.2d 854, 869-70 (Tex. Civ. App. - Corpus Christi 1964, writ ref'd n.r.e.).

n253. See infra note 254 (citing the Mathis Cases).

n254. Mathis, 386 S.W.2d at 869-70. See also Chubb Lloyds Ins. Co. of Tex. v. Andrew's Restoration, Inc. 323 S.W.3d 564, 581 (Tex. App. - Dallas 2010), aff'd in part and rev'd and remanded in part on other grounds, Cruz v. Andrews Restoration, Inc., No. 10-0995, 2012 Tex. LEXIS 341 (Tex. Apr. 20, 2012) (holding that homeowner "was obliged to prove and obtain a finding that he had surrendered or offered to surrender to [the mold protection services company]

the value of the services they provided at his house as a prerequisite for recovering under [the Texas Deceptive Trade Practices Act]"); Omega Energy Corp. v. Gulf States Petroleum Corp., No. 13-03-275-CV, 2005 Tex. App. LEXIS 3191, at 10 (Tex. App. - Corpus Christi Apr. 28, 2005, pet. denied) (mem. op.) ("A plaintiff requesting rescission has the burden to prove that she is deserving of equitable relief and that there is no adequate remedy at law."); Sharma v. Varani, No. 14-01-01063-CV, 2002 Tex. App. LEXIS 8011, at 11 (Tex. App. - Houston [14th Dist.] Nov. 7, 2002, no pet.) (mem. op., not designated for publication) ("To establish a right to equitable rescission, a party must (1) give timely notice to the seller that the contract is being rescinded, and (2) return or offer to return the property received and the value of any benefit derived from its possession."); Davis v. Estridge, 85 S.W.3d 308, 311 (Tex. App. - Tyler 2001, pet. denied) (repeating maxim that "he who seeks equity must do equity"); Park Forest Baptist Church v. Park Forest Ctr., No. 05-96-00188-CV, 1998 Tex. App. LEXIS 1261, at 7 (Tex. App. - Dallas Feb. 27, 1998, pet. denied) (mem. op., not designated for publication) ("Nor are we persuaded the prayer for relief in the Church's petition constitutes an offer to return the value of the benefits it received. While the Church prayed that the trial court restore the parties to their original positions, the Church did not suggest that restoration would require the Church to return anything."); Carrow v. Bayliner Marine Corp., 781 S.W.2d 691, 696 (Tex. App. - Austin 1989, no writ) ("The Carrows did not request any jury questions on notice and tender, as required to meet their burden of showing that they are entitled to rescission, and they did not establish these issues as a matter of law."); David McDavid Pontiac, Inc. v. Nix, 681 S.W.2d 831, 838 (Tex. App. - Dallas 1984, writ ref'd n.r.e.) (finding there was no evidence to support the remedy of rescission).

n255. Id. (citing Powell v. Rockow, 92 S.W.2d 437 (Tex. 1936)).

n256. Mathis, 386 S.W.2d at 869-70.

n257. See Rockow, 92 S.W.2d at 439 (reversing appellate court's ruling that the burden of proof was on the defendant to prove that plaintiff as not entitled to rescission of contract on ground of waiver and holding that "the burden is upon one seeking to have a contract canceled to establish that he is equitably entitled to that relief").

n258. Id. at 856.

n259. Carrow v. Bayliner Marine Corp., 781 S.W.2d 691, 696 (Tex. App. - Austin 1989).

n260. David McDavid Pontiac, Inc. v. Nix, 681 S.W.2d 831, 833 (Tex. App. - Dallas 1984, writ ref'd n.r.e.).

n261. Sharma v. Varani, No. 14-01-01063-CV, 2002 Tex. App. LEXIS 8011, at 11 (Tex. App. - Houston [14th Dist.] Nov. 7, 2002, no pet.) (mem. op., not designated for publication).

n262. Davis v. Estridge, 85 S.W.3d 308, 310 (Tex. App. - Tyler 2001, pet. denied).

n263. Chubb Lloyds Ins. Co. of Tex. v. Andrew's Restoration, Inc. 323 S.W.3d 564, 581 (Tex. App. - Dallas 2010), aff'd in part and rev'd and remanded in part on other grounds, Cruz v. Andrews Restoration, Inc., No. 10-0995, 2012 Tex. LEXIS 341 (Tex. Apr. 20, 2012).

n264. Most of the Mathis Cases were also claims for restoration under the Texas Deceptive Trade Practices Act (DTPA) and Tex. Bus. & Com. Code Ann. § 17.50(b)(3). However, the cases held that claims for restoration should be treated as claims for rescission under the common law. See Thomas v. State, 226 S.W.3d 697, 710 n.47 (Tex. App. - Corpus Christi 2007, pet. dism'd) ("Restoration of the consideration paid, as authorized by section 17.50(b)(3) [of the Tex. Bus. & Com. Code], is a statutory recognition of the equitable remedy of [rescission] and restitution."); Park Forest Baptist Church v. Park Forest Ctr., No. 05-96-00188-CV, 1998 Tex. App. LEXIS 1261, at 10 (Tex. App. - Dallas Feb. 27, 1998, pet. denied) (mem. op., not designated for publication) ("While there can be little dispute the DTPA as a whole is not simply a codification of the common law, it does not necessarily follow that the specific remedy provided for in section 17.50(b)(3) is anything more than mere statutory recognition of a common law remedy."); David McDavid, 681 S.W.2d at 835 ("Restoration of the consideration paid, as authorized by [§ 17.50(b)(3)], is a statutory recognition of the equitable remedy of rescission and restitution, based on the theory that the complaining party may elect to avoid the contract, surrender any benefits received, and recover that he parted with." (quoting Kinslow, 598 S.W.2d at

915)). See also Carrow, 781 S.W.2d at 696 (noting that section 17.50(b)(3) not only codifies the common law of equitable rescission, but also "provides an independent ground of recovery that permits the consumer to obtain restoration of money and property"). These holdings are now questionable in light of the Texas Supreme Court's recent decision in Cruz v. Andrews Restoration. See 2012 Tex. LEXIS 341, at 24 ("At least one court of appeals has suggested that DTPA restoration is an independent ground of recovery, requiring only that the consumer choose the remedy subject to the defendant's right to plead and prove an offset, but not incorporating common law predicates like notice and tender. [(citing Carrow v. Bayliner Marine Corp., 781 S.W.2d 691, 696 (Tex. App. - Austin 1989, no writ))]. We agree that compliance with such requirements is unnecessary under the DTPA. Instead, we adopt the Restatement approach and conclude that notice and restitution or a tender of restitution are not prerequisites to a remedy under section 17.50(b)(3), as long as the affirmative relief to the consumer can be reduced by (or made subject to) the consumer's reciprocal obligation of restitution. [(citing Restatement (Third) Of Restitution And Unjust Enrichment § 54(5) (2011))]").

n265. Black, Rescission of Contracts, supra note 71, § 625, at 1441 ("On the other hand, he may choose, or he may find it necessary (as, for instance, where he seeks the cancellation of a written instrument to bring an action for the direct and specific purpose of obtaining a rescission by decree of court). If he takes the latter course, it is not a condition precedent to his right to maintain the action that he should have offered a restoration of what he may have received under the contract, before suit brought, but it is sufficient if he offers in his complaint or bill to make such restoration or otherwise to put the defendant in statu quo."); Dobbs, Law of Remedies, supra note 25, at § 4.8 ("Since rescission is not accomplished "in equity' until the court so decrees, the plaintiff has no obligation before suit to make restitution of goods or money he received from the defendant. In the equitable rescission cases, it is sometimes said that the plaintiff should tender or offer restoration in his complaint, or show an ability to make restoration, but even this seems doubtful because of the court's capacity to protect the defendant by its decree and to condition rescission upon full restoration.").

n266. Langston v. Dep't of the Army, 102 F. App'x 693, 695 (Fed. Cir. 2004) ("Both the Board and the government are correct that, at common law, "wherever a contract is breached, ... the injured party has the right to sue for damages for the breach or it may rescind the contract; but ... it cannot rescind until it has

put the defendant in the status quo ante, or at least have offered to do so.' [quoting Aktieselskabet Dampskibsselskabet Svendborg v. United States 130 F. Supp. 363, 367 (1955)]... However, "in equity, a person suing to rescind a contract, as a rule, is not required to restore the consideration at the very outset of the litigation.' [quoting Oubre v. Entergy Operations, Inc., 522 U.S. 422, 426 (1998)]. The Restatement of Contracts notes that "the merger of law and equity and modern procedural reforms have made this distinction undesirable, and the rule stated in the Restatement (Second) of Contracts reflects the increasing criticism of the rule at law. If the court has the power to assure the required return in connection with any relief that it grants, it is not necessary that there have been a prior return or offer to return.' [quoting Restatement (Second) of Contracts § 384 cmt. b (1979)]"). See also Black, Rescission of Contracts, supra note 71, at § 625 (contrasting rescission at law and rescission at equity with respect to procedural prerequisites, such as the plaintiff's offering to restore the status quo).

n267. See infra Part VIII.B. (examining the equitable defense of unclean hands).

n268. Gripping Eyewear, Inc. v. Dietz, No. 01-09-00034-CV, 2010 Tex. App. LEXIS 3575, at 16 (Tex. App. - Houston [1st Dist.] May 6, 2010, no pet. h.) ("As asserted by Gripping Eyewear, the "unclean hands' doctrine is an affirmative defense on which Gripping Eyewear has the burden of proof."). See also Long Distance Int'l Inc. v. Telefonos de Mexico, S.A. de C.V., 49 S.W.3d 347, 350-51 (Tex. 2001) (applying general rule that party relying on affirmative defense must conclusively establish defense in summary judgment context).

n269. 25 Tex. 318, 322 (1860) ("He comes into court, therefore, invoking the interposition of its equitable powers in his behalf to make out his title. And the maxim applies in its full force, that he who seeks equity must do equity. He seeks to make his title available against the plaintiff; and, to enable him to do this, he must show that it is a good equitable title. This he has failed to do; because, while he seeks the aid of equity, he has failed to show that he had done that which equity required of him on his part to perform. To entitle him to the aid of a court of equity to rescind the contract of sale to Hogan, he must have restored or offered to restore the consideration which he had received."). But see Hatch v. De la Garza, 7 Tex. 60, 65-66 (1851) ("And in all cases of this sort, where the interposition of a Court of Equity is sought, the Court will, in granting relief, impose such terms upon the party as it deems the real justice of the case

requires; and if the plaintiff refuse to comply with such terms, his bill will be dismissed. The maxim here is emphatically applied: "He who seeks equity, must do equity.'").

n270. See supra note 109 (listing several cases where equitable relief was granted taking into account both the equity of the plaintiff and defendant).

n271. Sturgis v. Champneys, (1839) 41 Eng. Rep. 308 (Ch.) 310, 5 My. & Cr. 97, 102. See also O'Sullivan, supra note 10, at § 15.47 ("Since early times the courts have recognized that conditions are imposed pursuant to the maxim "he who seeks equity must do equity.'"); John Norton Pomeroy, Pomeroy's Equity Jurisprudence § 385 (Spencer W. Symons ed., 5th ed. 1941) ("It says, in effect, that the court will give the plaintiff the relief to which he is entitled, only upon condition that he has given, or consents to give, the defendant such corresponding rights as he also may be entitled to in respect of the subject-matter or the suit.").

n272. See Black, Rescission of Contracts, supra note 71, at § 625 ("For it may well be that if such a tender had been made, it would have been accepted, and so the necessity of bringing suit might have been obviated."). See also Hendricks v. Martin, 267 S.W. 1047, 1051 (Tex. Civ. App. - Amarillo 1924, no writ.) ("Reasons for a more strict application of this rule exist when the tender is of bonds, securities, choses in action, and other personal property of small bulk, such as certificates of stock, jewelry, etc.").

n273. For an authoritative example of applying equitable maxims, see generally Charles E. Rounds, Jr., Proponents of Extracting Slavery Reparations from Private Interests Must Contend with Equity's Maxims, 42 U. Tol. L. Rev. 673 (2011).

n274. See Johnson v. Cherry, 726 S.W.2d 4, 7 (Tex. 1987) ("We ... remand this cause to the trial court for a determination of the amount Johnson must reimburse Cherry."); Ghidoni v. Stone Oak, Inc., 966 S.W.2d 573, 588 (Tex. App. - San Antonio 1998, pet. denied) ("Contrary to Ghidoni's assertion ... the trial court's failure to address this issue does not require the reversal of the portion of the judgment granting the rescission but only requires that the cause be remanded to the trial court for consideration of the restoration issue.").

n275. See Tex. Bus. & Comm. Code Ann. § 2.209 (West 2009) (describing modification and rescission procedures for sales contracts); Tex. Fam. Code Ann. § 160.307 (West 2008) (describing the rescission procedures in paternity suits).

n276. See Burnett v. James, 564 S.W.2d 407, 409 (Tex. Civ. App - Dallas 1978, writ dism'd) (denying rescission for failure to specifically plead rescission in general pleading). But see Hannon, Inc. v. Scott, No. 02-10-00012-CV, 2011 Tex. App. LEXIS 3624, at 29 (Tex. App. - Fort Worth May 12, 2011, pet. denied) ("Moreover, when the claims and defenses are those which contemplate a particular remedy, a party may be entitled to that remedy despite a failure to specifically plead for such relief."); Omega Energy Corp. v. Gulf States Petroleum Corp., No. 13-03-275-CV, 2005 Tex. App. LEXIS 3191, at 8-9 (Tex. App. - Corpus Christi Apr. 28, 2005, pet. denied) (holding that a trial court may not grant relief to a party in the absence of pleadings to support that relief); Honaker v. Guffey Petroleum Co., 294 S.W. 259, 264 (Tex. Civ. App. - Amarillo 1927, writ ref'd) (holding that relief is limited by the pleadings); Swope v. Mo. Trust Co., 62 S.W. 947, 950 (Tex. Civ. App. - San Antonio 1901, writ ref'd) ("[The Court] grants such relief as is consistent with the issues raised by the pleadings and supported by the evidence.").

n277. 9029 Gateway S. Joint Venture v. Eller Media Co., 159 S.W.3d 183, 186 (Tex. App. - El Paso 2004, no pet.).

n278. Dobbs, Pressing Problems, supra note 98, at 351 ("If that reason is fraud, much leeway is justified in permitting substitutionary restoration. On the other hand, if the reason is basic mistake in contracting, or even simple breach of contract, care must be taken not to exert punitive rules against the defendant or to give the plaintiff a windfall.").

n279. See Restatement (Third) of Restitution and Unjust Enrichment § 54, cmt. c. (2011) ("The terms on which rescission is available may be seen to differ appreciably - although the applicable rules are usually stated in identical terms - depending on whether the ground of rescission is fraud or mistake, on the one hand, or material breach of contract, on the other. A claimant (such as a fraud victim) who has been an innocent party to a legally defective exchange will or-

dinarily be able to rescind on making restitution (in specie or in value) of any benefits conferred by the other party. Rescission is available on relatively liberal terms in such cases - especially if the defendant is a conscious wrongdoer - because the underlying exchange is ineffective to determine the parties' respective entitlements.").

n280. See supra note 30 and accompanying text (noting that courts have discouraged use of rescission in cases involving mutual mistake and citing several case examples).

n281. Cheek v. Metzer, 291 S.W. 860, 863 (Tex. 1927) ("The general rule is well settled that the equitable relief of rescission of contract will not be granted for a mere breach thereof. The remedy in such case is ordinarily to be found in an action at law, which will afford an adequate remedy. While this is the general rule, it is nevertheless not without its limitations and qualifications."). See also Kennard v. Indianapolis Life Ins. Co., 420 F. Supp. 2d 601, 612 (N.D. Tex. 2006); Freyer v. Michels, 360 S.W.2d 559, 561 (Tex. App. - Dallas 1962, writ dism'd).

n282. Kesler v. Robson, 16 Tex. 119, 120 (1856).

n283. See, e.g., Shappirio v. Goldberg, 192 U.S. 232, 242 (1904) ("Where a party desires to rescind upon the ground of misrepresentation or fraud, he must, upon discovery of the fraud, announce his purpose and adhere to it."); Dawson v. Sparks, No. 4190, 1881 Tex. LEXIS 186, at 42-43 (Tex. 1881) (holding that the party requesting a rescission does so deliberately at the time and cannot later rescind his request).

n284. See Acevedo v. Stiles, No. 04-02-00077-CV, 2003 Tex. App. LEXIS 3854, at 2 (Tex. App. - San Antonio May 7, 2003, pet. denied) ("The trial court correctly submitted the contested fact issues to the jury and considered the propriety of equitable relief after the verdict was returned."); Foley v. Parlier, 68 S.W.3d 870, 881 (Tex. App. - Fort Worth 2002, no pet.) (allowing a party to seek recovery under two alternative theories); Trinity-Universal Ins. Co. v. Maxwell, 101 S.W.2d 606, 612 (Tex. Civ. App. - Austin 1937, writ dism'd) (holding that appellee was not required to make the election [for rescission] in advance "where it could not be determined until a full hearing"); Wood v. Wil-

liams, 46 S.W.2d 332, 333 (Tex. Civ. App. - San Antonio 1932, writ dism'd) (holding that the plaintiff can elect rescission after a jury decision is made).

n285. Dall. Farm Mach. Co. v. Reaves, 307 S.W.2d 233, 239 (Tex. 1957); Russell v. Indus. Transp. Co., 258 S.W. 462, 463 (Tex. 1924); Blythe v. Speake, 23 Tex. 429, 436 (1859); Sanderson v. Smith, No. 12-08-00442-CV, 2010 Tex. App. LEXIS 5491, at 6-7 (Tex. App. - Tyler July 14, 2010, pet. denied); F.S. New Prods. v. Strong Indus., 129 S.W.3d 606, 627 n.10 (Tex. App. - Houston [1st Dist.] 2004), rev'd on other grounds, 221 S.W.3d 550 (Tex. 2006); Swink v. Alesi, 999 S.W.2d 107, 111-12 (Tex. App. - Houston [14th Dist.] 1999, no pet.).

n286. Tex. R. Civ. P. 48; Horizon Offshore Contractors, Inc. v. Aon Risk Servs. of Tex., 283 S.W.3d 53, 59 (Tex. App. - Houston [14th Dist.] 2009, pet. denied).

n287. Dean Ranch Props., Ltd. v. Bayliss, No. 10-04-00028-CV, 2005 Tex. App. LEXIS 10088, at 4 (Tex. App. - Waco 2005, pet. denied). The claimant's right to plead alternative remedies without a binding commitment should not be confused with the affirmative defense or doctrine of "election of remedies," which is a disfavored doctrine for challenging inconsistent remedies. See, e.g., Fina Supply, Inc. v. Abilene Nat'l Bank, 726 S.W.2d 537, 541 (Tex. 1987) (noting that an election of remedies prevents "a party who has obtained a specific form of remedy from obtaining a different and inconsistent remedy for the same wrong" and "does not occur where a plaintiff mistakenly pursues a remedy which does not exist as a matter of law"); Sharp v. Smith, No. 12-07-00219-CV, 2008 Tex. App. LEXIS 666, at 9 (Tex. App. - Tyler 2008, no pet h.) (noting that merely pursuing inconsistent remedies is not enough to invoke the doctrine of election); Soto v. Int'l Med. Group, No. 14-05-00956-CV, 2007 Tex. App. LEXIS 2577, at 9 (Tex. App. - Houston [14th Dist.] Apr. 3, 2007, pet. denied) (declining to extend the doctrine of election so as to affect pleading requirements).

n288. See Arisma Grp., LLC v. Trout & Zimmer, Inc., No. 3:08-CV-1268-L, 2009 U.S. Dist. LEXIS 101604, at 17 (N.D. Tex. Oct. 30, 2009) (denying rescission for failure to prove pecuniary damages); Nance v. McClellan, 89 S.W.2d 774, 778 (Tex. 1936) (ruling that a party seeking rescission must prove the contract "should have resulted, or that it will result, in some loss, damage, detriment, or injury to him." (quoting Black on Rescission and Cancellation §

36, at 81, 83-84)); Nelson v. Regions Mortg., Inc., 170 S.W.3d 858, 863 (Tex. App. - Dallas 2005, no pet.) (concluding that plaintiff did not carry his burden with respect to his claim for rescission, partly due to his failure to raise a material issue of fact regarding the injury he suffered). But see Bonanza Rests. v. Uncle Pete's, 757 S.W.2d 445, 448 (Tex. App. - Dallas 1988, writ denied) (approving rescission despite jury finding of "0" damages, stating that burden of franchise agreement operating restrictions was significant.).

n289. See ERI Consulting Eng'rs, Inc. v. Swinnea, 318 S.W.3d 867, 878 (Tex. 2010) ("Uncertainty as to the fact of legal damages is fatal to recovery, but uncertainty as to the amount will not defeat recovery." (quoting Sw. Battery Corp. v. Owen, 115 S.W.2d 1097, 1098-99 (Tex. 1938))); Russell v. Indus. Transp. Co., 258 S.W. 462, 464 (Tex. 1924) ("If any pecuniary loss is shown to have resulted, the court will not inquire into the extent of the injury; it is sufficient if the party misled has been very slightly prejudiced, if the amount is at all appreciable.").

n290. See Fisher v. Miocene Oil & Gas Ltd., 335 F. App'x 483, 487 (5th Cir. 2009) (noting that damages need not be proved for the remedy of avoidance of a fiduciary's self-dealing transactions); In re Segerstrom, 247 F.3d 218, 225 n.5 (5th Cir. 2001) ("The Texas Supreme Court has dispensed with the need to prove an actual injury and causation when a plaintiff seeks to forfeit some portion of an attorney's fees in connection with a breach of fiduciary duty."); In re Allied Physicians Grp., P.A., No. 3:04-CV-0765-G, 2004 U.S. Dist. LEXIS 25389, at 8 (N.D. Tex. Dec. 15, 2004) ("The party need not prove actual damages in order to obtain a fee forfeiture for the breach of a fiduciary duty owed to him because "it is the agent's disloyalty, not any resulting harm, that violates the fiduciary relationship and thus impairs the basis for compensation.' On the other hand, an award of actual damages, unlike a forfeiture, requires a showing of injury and causation." (quoting Burrow v. Arce, 997 S.W.2d 229, 238 (Tex. 1999))); In re Jones, No. 08-36014-SGJ-7, 2011 Bankr. LEXIS 448, at 104 (Bankr. N.D. Tex. Feb. 3, 2011) ("Murphy elaborated that malice is not required, so long as there was an intentional breach of fiduciary duty and, moreover, exemplary damages would be proper where "a fiduciary has engaged in self-dealing.'" (quoting Murphy v. Canion, 797 S.W.2d 944, 949 (Tex. App. - Houston 1990, no pet.))).

n291. Fisher, 335 Fed. App'x at 487 ("Monetary damages is not the only relief available for fiduciary's self-dealing. Another available remedy is the avoidance of the fiduciary's self-dealing transactions, a remedy for which damages simply need not be proved."); Burrow, 997 S.W.2d at 240 ("An agent's breach of fiduciary duty should be deterred even when the principal is not damaged.").

n292. See Nance, 89 S.W.2d at 778 ("Proof of pecuniary damage must be made in a suit to rescind for fraud as well as in an action for damages."). See also Dobbs, Law of Remedies, supra note 25, at § 9.3(2) ("Most courts seem to have rejected any pecuniary damages requirement as a pre-condition to restitution where the misrepresentation was clearly material even though it did not bear on economic value.").

n293. See State v. Snyder, 18 S.W. 106, 108 (Tex. 1886) ("If fraud, which vitiates all contracts, in fact existed, the vendor has the right to rescind it; and, if he re-acquires the possession of the property, in a court of law, may defend both his title and possession upon the ground that he has rescinded the contract to sell by his own act and volition."); Wintz v. Morrison, 17 Tex. 372, 383 (1856) ("Nothing can be better settled than that fraud vitiates every contract, and may consist either in misrepresentation or in concealment."); Edwards v. Peoples, Dallam 359, 383 (Tex. 1840) ("It is clearly the doctrine of the Spanish law that all sales fraudulently made may be set aside.").

n294. Nance v. McClellan, 89 S.W.2d 774, 778 (Tex. 1936).

n295. Arisma Grp., LLC v. Trout & Zimmer, Inc., No. 3:08-CV-1268-L, 2009 U.S. Dist. LEXIS 101604, at 16 (N.D. Tex. Oct. 30, 2009); Kennard v. Indianapolis Life Ins. Co., 420 F. Supp. 2d 601, 612 (N.D. Tex. 2006); Grundmeyer v. McFadin, 537 S.W.2d 764, 772 (Tex. Civ. App. - Tyler 1976, writ ref'd n.r.e.); Pelton v. Witcher, 319 S.W.2d 400, 403 (Tex. Civ. App. - Fort Worth 1958, writ ref'd n.r.e.).

n296. Kimball v. West, 82 U.S. 377, 378 (1873); McDaniel v. Samford, 116 S.W.2d 1092, 1094 (Tex. Civ. App. - Beaumont 1938, no writ); Adams v. Hill, 149 S.W. 349, 351 (Tex. Civ. App. - Fort Worth 1912, writ ref'd); Wiseman v. Cottingham, 141 S.W. 817, 819 (Tex. Civ. App. - San Antonio 1911), aff'd, 174

S.W. 281 (Tex. 1915) ("Appellees had the right to pay off the indebtedness against the land, no matter how long they had been in default.").

n297. See, e.g., O'Con v. Hightower, 268 S.W.2d 321, 322 (Tex. Civ. App. - San Antonio 1954, writ ref'd) ("Generally a rescission must be in toto. But in circumstances which have been described as extreme, partial rescission has been granted of an entire contract." (internal citations and quotation marks omitted)).

n298. Costley v. State Farm Fire & Cas. Co., 894 S.W.2d 380, 387 (Tex. App. - Amarillo 1994, writ denied); O'Con v. Hightower, 268 S.W.2d 321, 322 (Tex. Civ. App. - San Antonio 1954, writ ref'd) ("Generally a rescission "must be in toto.' But in circumstances which have been described as "extreme", partial rescission has been granted of an entire contract." (internal citation omitted)).

n299. Costley, S.W.2d at 387 ("A partial rescission will only be allowed if the provision sought to be rescinded is entirely divisible from the rest of the contract, or if there are extreme circumstances." (citing Hanks v. GAB Bus. Servs., Inc., 644 S.W.2d 707, 708 (Tex. 1982); Ashby v. Gibbon, 69 S.W.2d 445, 447 (Tex. Civ. App. - Amarillo 1934, no writ); O'Con, 268 S.W.2d at 322.

n300. Royal Petroleum Corp. v. McCallum, 135 S.W.2d 958, 968 (Tex. 1940) ("The absence of a necessary party in a suit for cancellation is fundamental and jurisdictional to such extent that it must be considered by this court." (quoting Sharp v. Landowners Oil Ass'n, 92 S.W.2d 435, 436 (Tex. 1936))). See also Warfield v. Marks, 190 F.2d 178, 180 (5th Cir. 1951)("If only a part of those interested in the contract are before the court, a decree of rescission must either destroy the rights of those who are absent, or leave the contract in full force as respects them, while setting it aside and restoring the contracting parties to their former condition as to those before the court.").

n301. Williams v. Glash, 789 S.W.2d 261, 264 (Tex. 1990); Smith v. Lagerstam, No. 03-05-00275-CV, 2007 Tex. App. LEXIS 5722, at 10 (Tex. App. - Austin July 19, 2007, no pet.); Barker v. Roelke, 105 S.W.3d 75, 84 (Tex. App. - Eastland 2003, pet. denied).

n302. Sherwin Alumina L.P. v. AluChem, Inc., 512 F. Supp. 2d 957, 972 (S.D. Tex. 2007) ("Sherwin Alumina cannot now claim that this dust emission issue, which it knew of prior to contracting with AluChem, constitutes a mutual mistake that excuses Sherwin Alumina from its obligations under the Supply Agreement.").

n303. Herrmann v. Lindsey, 136 S.W.3d 286, 292 (Tex. App. - San Antonio 2004, no pet.) ("A mistake of law is not a ground for rescission or cancellation of a deed.").

n304. Ledig v. Duke Energy Corp., 193 S.W.3d 167, 175-76 (Tex. App. - Houston [1st Dist.] 2006, no pet.) ("A unilateral mistake based on a future event, as opposed to an existing fact, is not the type of mistake that would typically permit a party to void a contract.").

n305. Cherry v. McCall, 138 S.W.3d 35, 40 (Tex. App. - San Antonio 2004, pet. denied) ("As discussed above, Mrs. Cherry confirmed in her deposition testimony that she "agreed to purchase the property in its current condition' and that she "accepted the risk' that the property might be deficient. Thus, the evidence confirms that a meeting of the minds did take place, i.e., though neither party knew of the hidden room when it entered into the agreement, both parties agreed to place the risk of any unknown defects on the Cherrys.").

n306. Ollie v. Plano Indep. Sch. Dist., 323 F. App'x 295, 298 (5th Cir. 2009) (finding differing views on whether time required for employee to retire with full benefits a mistake of fact required for rescission); Smith v. Lagerstam, 2007 Tex. App. LEXIS 5722, No. 03-05-00275-CV, at 19 (Tex. App. - Austin, 2007, no pet.) (holding that to be "entitled to rescind an agreement due to a mutual mistake, a party must show that there exists a mistake of fact"); N. Nat'l Gas Co. v. Chisos Joint Venture I, 142 S.W.3d 447, 456 (Tex. App. - El Paso 2004, no pet.) (stating that to use the affirmative defense of mutual mistake, the defendant must show that both parties were acting under the same misunderstanding of the same material fact). But see Sherwin Alumina, 512 F. Supp. 2d at 972 (ruling that there was no genuine issue of material fact and ordering compliance with the supply agreement).

n307. See Ollie, 323 Fed. App'x at 298 ("Since both parties intended that the leave allow Ollie to retire with full benefits, the mistake as to whether twenty months was sufficient for this purpose was mutual, not unilateral."); Lagerstam, 2007 Tex. App. LEXIS 5722, at 10 (denying rescission in part because of a finding of no mutual mistake in contract for mineral interests in land).

n308. Bolle, Inc. v. Am. Greetings Corp., 109 S.W.3d 827, 837 (Tex. App. - Dallas 2003, pet. denied) (involving mutual mistake about scope of settlement agreement); Wallerstein v. Spirt, 8 S.W.3d 774, 781 (Tex. App. - Austin 1999, no pet.) (denying application of mutual mistake doctrine where summary judgment proof did not simply and clearly differ from previous agreement to written agreement); De Monet v. PERA, 877 S.W.2d 352, 357 (Tex. App. - Dallas 1994, no writ) (contracting party alleging materiality of fact because knowledge of the fact would have precluded its entering into the litigation).

n309. Williams v. Glash, 789 S.W.2d 261, 264 (Tex. 1990) ("The question of mutual mistake is determined not by self-serving subjective statements of the parties' intent, which would necessitate trial to a jury in all such cases, but rather solely by objective circumstances surrounding execution of the release, such as the knowledge of the parties at the time of signing concerning the injury, the amount of consideration paid, the extent of negotiations and discussions as to personal injuries, and the haste or lack thereof in obtaining the release."); Sherwin Alumina L.P. v. AluChem, Inc. 512 F. Supp. 2d 957, 972 (S.D. Tex. 2007). See also Lagerstam, 2007 Tex. App. LEXIS 5722, at 10 (Tex. App. - Austin July 19, 2007, no pet.) ("A mutual mistake must be proven by "clear, exact, and satisfying evidence."' (quoting Estes v. Republic Nat'l Bank, 462 S.W.2d 273, 275 (Tex. 1970))).

n310. Ollie, 323 Fed. App'x at 299 ("A mistaken party's fault in failing to know or discover the facts before making the contract does not bar him from avoidance or reformation ... unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing." (quoting Restatement (Second) of Contracts § 157 (1981))).

n311. See Florsheim Co. v. Miller, 575 F. Supp. 84, 84-85 (E.D. Tex. 1983) (concerning a $ 1 million mistake in a construction bid); James T. Taylor & Son, Inc. v. Arlington Indep. Sch. Dist., 335 S.W.2d 371, 374 (Tex. 1960) (providing examples in which honest mistakes, such as inadvertent omission of

items in contracts, did not constitute culpable negligence and so equitable contract rescission was appropriate and proper); B.D. Holt Co. v. OCE, Inc., 971 S.W.2d 618, 620 (Tex. App. - San Antonio 1998, pet. denied) (ruling in favor of company making $ 100K typographical error in electrical subcontracting bid).

n312. See, e.g., Florsheim, 575 F. Supp. at 84-85 (holding that mistake was understandable data entry error and not result of negligent process); James T. Taylor & Son, Inc., 335 S.W.2d at 375 ("Generally it is only when negligence amounts to such carelessness or lack of good faith in calculation which violates a positive duty in making up a bid ... that equitable relief will be denied."); Ledig v. Duke Energy Corp., 193 S.W.3d 167, 175 (Tex. App. - Houston [1st Dist.] 2006, no pet.) (finding that plaintiff could not show that the enforcement of the terms of the contract would be unconscionable or that he made a mistake despite the ordinary exercise of good care); B.D. Holt Co., 971 S.W.2d at 622 ("We are not convinced equity requires the enforcement of a typographical error against a party that acted promptly to mitigate its effect."). But see Camilla Feed Mills, Inc. v. St. Paul Fire & Marine Ins. Co., 177 F.2d 746, 749 (5th Cir. 1949) ("When appellant chose to estimate rather than calculate the amount of the inventory, its mistake was made. By so doing, it assumed the risk of the estimate being wrong; and, since there was a loss, the amount of its recovery is governed by the provisions of the value-reporting clause of the policy."); In re Green Tree Servicing LLC, 275 S.W.3d 592, 599 (Tex. App. - Texarkana 2008, no pet.) (holding that claimant failed to prove that arbitration clause was a mistake strictly because he was unaware of that clause in contract).

n313. See B.D. Holt Co., 971 S.W.2d at 622 (awarding rescission where subcontractor tried to correct typographical mistake in bid three hours after submission).

n314. Monarch Marking Sys. Co. v. Reed's Photo Mart, Inc., 485 S.W.2d 905, 906-07 (Tex. 1972) ("Relief from a unilateral mistake depends upon the ability of the party mistaken to put the other party into the same situation as he was prior to the transaction in question. One of the usual prerequisites to the granting of relief for a unilateral mistake is that the parties can be placed in status quo in the equity sense, i.e., rescission must not result in prejudice to the other party except for the loss of his bargain. Relief shall be denied unless the other party is put in status quo. Whatever equity there may be in favor of one

who has made a unilateral mistake in the formation of a bilateral contract, the effect of it is confined to cases where the transaction is still wholly executory.").

n315. James T. Taylor & Son, Inc. v. Arlington Indep. Sch. Dist., 335 S.W.2d 371 (Tex. 1960).

n316. Chevron U.S.A., Inc. v. Stoker, 666 S.W.2d 379, 382 (Tex. App. - Eastland 1984, writ dism'd w.o.j.) ("Contractual rights are not enforced by writs of injunction absent exceptional circumstances, since an inadequate remedy at law and irreparable injury are rarely shown when a suit for damages for breach of contract is available.").

n317. Minneapolis-Moline Co. v. Purser, 361 S.W.2d 239, 245-46 (Tex. Civ. App. - Dallas 1962, writ ref'd n.r.e.).

n318. Edwards v. Peoples, No. IV, Dallam 359, 360, 1840 Tex. LEXIS 4, at 2 (Tex. 1840) ("It is clearly the doctrine of the Spanish law that all sales fraudulently made may be set aside.").

n319. Omega Energy Corp. v. Gulf States Petroleum Corp., No. 13-03-275-CV, 2005 Tex. App. LEXIS 3191, at 8 (Tex. App. - Corpus Christi 2005, pet. denied) (mem. op.) ("Claims of fraud, if substantiated, will serve to vitiate a contract; rescission is a proper remedy that can be applied to a finding of fraud.").

n320. Dobbs, Law of Remedies, supra note 25, § 9.3(3), at 585.

n321. Hatch v. De la Garza, 7 Tex. 60, 65-66 (1851).

n322. Liberty Ins. Co. v. Land, 397 S.W.2d 900, 904 (Tex. Civ. App. - Fort Worth 1965, writ ref'd n.r.e.); Cas. Reciprocal Exch. v. Bryan, 101 S.W. 2d 895, 899 (Tex. Civ. App. - Eastland 1937, no writ). See also Calloway v. Manion, 572 F.2d 1033, 1039 (5th Cir. 1978) ("Texas pursues the equitable rule that whether misrepresentation is intentionally or innocently made, as far as the effect is concerned it is the same, and equally avoids the contract.").

n323. Tex. Bus. & Com. Code Ann. § 17 (West 2010). See, e.g., Leifester v. Dodge Country, Ltd., No. 03-06-00044-CV, 2007 Tex. App. LEXIS 790, at 10 (Tex. App. - Austin Feb. 1, 2007, no pet.) (mem. op.) ("Rescission is one of the remedies available under a DTPA claim ... ."); Matise v. Danmarek, Inc., No. 05-94-00010-CV, 1995 Tex. App. LEXIS 3966, at 7 (Tex. App. - Dallas Mar. 30, 1995, no writ) (finding that when the DTPA was violated, a lease rescission was an appropriate remedy); Carrow v. Bayliner Marine Corp., 781 S.W.2d 691, 696 (Tex. App. - Austin 1989, no pet.) (approving rescission under section 17.50(b)(3)).

n324. Tex. Bus. & Com. Code Ann. § 27.01 (West 2010). See, e.g., Scott v. Sebree, 986 S.W.2d 364, 370 (Tex. App. - Austin 1999, pet. denied) (stating that rescission is available remedy in § 27.01 action for fraud in real property lease purchase agreement); Nat'l Resort Cmtys., Inc. v. Holleman, 594 S.W.2d 195, 196 (Tex. Civ. App. - Austin 1980, no writ) (pointing to § 27.01 as statute under which rescission is available remedy).

n325. Cruz v. Andrews Restoration, Inc., No. 10-0995, 2012 Tex. LEXIS 341, at 16 (Tex. Apr. 20, 2012) ("The DTPA authorizes trial courts to restore to any party to the suit the money or property illegally acquired. [citing Tex. Bus. & Com. Code § 17.50(b)(3) (West 2010)]. Several courts of appeals (including the court of appeals in this case) have held that this remedy incorporates the common law of rescission.").

n326. Cruz, 2012 Tex. LEXIS 341, at 18 ("Cruz correctly notes that the DTPA did not codify the common law, and that one of its primary purposes is "to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit.'" (quoting Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980))).

n327. Carrow v. Bayliner Marine Corp., 781 S.W.2d 691, 696 (Tex. App. - Austin 1989, no writ) ("There is some authority that section 17.50(b)(3) not only codifies the common law of equitable rescission and incorporates other statutes such as the UCC, but also that it is an independent ground of recovery that permits the consumer to obtain restoration of money and property." (citing Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980)); Woo v. Great Sw. Acceptance Corp., 565 S.W.2d 290, 298 (Tex. Civ. App. - Waco 1978, writ ref'd n.r.e.)

("This independent ground of recovery, if it exists, only requires the injured plaintiff to choose restoration of benefits as his remedy, subject to the right of the defendant to plead and prove a right of offset; this independent ground does not require the consumer to plead and prove predicates to recovery, such as notice and tender, not found within the statutory scheme of the DTPA." (citing Smith, 611 S.W.2d at 616)).

n328. See Bless Your Heart v. Jyrah, Inc., No. C14-92-01239-CV, 1993 WL 393799, at 4 (Tex. App. - Houston [14th Dist.] Oct. 7, 1993, writ denied) (resting its decision to affirm the awards of both expectancy damages and rescission solely on the provision in the DTPA, section 1750(b)(4), which provides that a prevailing consumer may receive "any other relief the court deems proper").

n329. Id.

n330. Andrew's Restoration, 323 S.W.3d at 569.

n331. Id. at 570. A violation of section 41.007(a) of the Texas Property Code is a false, misleading, or deceptive practice that is actionable under the DTPA. Tex. Prop. Code Ann. § 41.007(b).

n332. Cruz v. Andrews Restoration, Inc., No. 10-0995, 2012 Tex. LEXIS 341, at 21 (Tex. Apr. 20, 2012) ("Generally, rescission is an equitable remedy, and Cruz correctly asserts that fault is relevant. A defendant's wrongdoing may factor into whether he should bear an uncompensated loss in those cases in which it is impossible for a claimant to restore the defendant to the status quo ante." (citing Restatement (Third) of Restitution and Unjust Enrichment § 54(3)(b) (2011))). But, the court noted, "it does not excuse the claimant in such cases from counter-restitution when feasible - as it would be here." Cruz, 2012 Tex. LEXIS 341, at 21 (citing Restatement (Third) of Restitution and Unjust Enrichment § 54 cmt. c (2011) ("A claimant (such as a fraud victim) who has been an innocent party to a legally defective exchange will ordinarily be able to rescind on making restitution (in specie or in value) of any benefits conferred by the other party.")).

n333. Houston v. Ludwick, No. 14-09-00600-CV, 2010 Tex. App. LEXIS 8415, at 20-25 (Tex. App. - Houston [14th Dist.] Oct. 21, 2010, pet. denied);

Acevedo v. Stiles, No. 04-02-00077-CV, 2003 Tex. App. LEXIS 3854, at 2 (Tex. App. - San Antonio May 7, 2003, pet. denied) (mem. op.) ("If both rescission and damages are essential to accomplish full justice, they may both be awarded."); Snyder v. Cowell, 2003 Tex. App. LEXIS 3139, at 10 (Tex. App. - El Paso Apr. 10, 2003, no pet.) (mem. op.) (stating that if the trustee "violated his fiduciary duty not to self-deal, the beneficiary may have had a cause of action to repudiate the ... transaction or to hold the trustee personally liable").

n334. ERI Consulting Eng'rs, Inc. v. Swinnea, 318 S.W.3d 867, 874 (Tex. 2010) ("Although forfeiture of contractual consideration may have a punitive effect like forfeiture of compensation, it may nevertheless be necessary to protect fiduciary relationships." (internal citation omitted)); id. at 873 ("Courts may fashion equitable remedies such as profit disgorgement and fee forfeiture to remedy a breach of fiduciary duty."). Some cases even suggest that the proof of intentional breach of fiduciary duty is sufficient, that proof of malice or fraud is not required. See In re Jones, No. 08-36014-SGJ-7, 2011 Bankr. LEXIS 448, at 104 (Bankr. N.D. Tex. Feb. 3, 2011) ("Malice is not required, so long as there was an intentional breach of fiduciary duty and, moreover, exemplary damages would be proper where "a fiduciary has engaged in self-dealing.'" (quoting Murphy v. Canion, 797 S.W.2d 944, 949 (Tex. App. - Houston 1990, no pet.))).

n335. Int'l Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 584 (Tex. 1963); Kinzbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509, 514 (Tex. 1942); Duncan v. Lichtenberger, 671 S.W.2d 948, 951-52 (Tex. App. - Fort Worth 1984, writ ref'd n.r.e.).

n336. Miller v. Miller, 700 S.W.2d 941, 952 (Tex. App. - Dallas 1985, writ ref'd n.r.e.).

n337. Houston v. Ludwick, No. 14-09-00600-CV, 2010 Tex. App. LEXIS 8415, at 20-23 (Tex. App. - Houston [14th Dist.] Oct. 21, 2010, pet. denied) (noting that attorney must rebut presumption of unfairness in self-dealing transaction).

n338. Acevedo v. Stiles, No. 04-02-00077-CV, 2003 Tex. App. LEXIS 3854, at 2 (Tex. App. - San Antonio 2003, pet. denied) (mem. op.); Houston, 2010 Tex. App. LEXIS 8415, at 25.

n339. Cooper v. Cochran, 288 S.W.3d 522, 535 (Tex. App. - Dallas 2009, no pet.).

n340. Burrow v. Arce, 997 S.W.2d 229, 240 (Tex. 1999).

n341. ERI Consulting Eng'rs, Inc. v. Swinnea, 318 S.W.3d 867, 870 (Tex. 2010).

n342. Id. at 874.

n343. Id. at 871-72.

n344. Id. at 880.

n345. Id. at 870.

n346. Without the forfeiture, actual damages would approximate $ 178,000. Id. at 877. Note, however, that Texas restrictions on punitive damages under Tex. Civ. Prac. & Rem. Code Ann. § 41.008(b) (West Supp. 2011) are inapplicable under § 41.008(c) if the plaintiff can show that the defendant's conduct constitutes a felony under the seventeen different sections listed in that statute. Swinnea v. ERI Consulting Eng'rs, Inc., No. 12-05-00428-CV, 2012 Tex. App. LEXIS 2632, at 7-8 (Tex. App. Tyler Mar. 30, 2012, no pet. h.).

n347. Grupo v. Garcia, No. 13-98-247-CV, 1999 Tex. App. LEXIS 5845, at 27 (Tex. App. - Corpus Christi Aug. 5, 1999, pet. denied). See also Kline v. O'Quinn, 874 S.W.2d 776, 786 (Tex. App. - Houston [14th Dist.] 1994, writ denied) ("It is settled law of this state that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such.").

n348. Kinzbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509, 514 (Tex. 1942). 'Vickery v. Vickery,

n349. Cox Tex. Newspapers, L.P. v. Wootten, 59 S.W.3d 717, 721 (Tex. App. - Austin 2001, pet. denied).

n350. Clarke v. Dickson, (1858) EB & E 148, 154, 120 ER 463, 465-66 (Crompton, J.).

n351. Gentry v. Squires Const., Inc., 188 S.W.3d 396, 411 (Tex. App. - Dallas 2006, no pet.); Boyter v. MCR Constr. Co., 673 S.W.2d 938, 941 (Tex. App. - Dallas 1984, writ ref'd n.r.e.) ("To be entitled to the equitable remedy of rescission, ... a party must show ... that he and the other party are in status quo, i.e., that he is not retaining benefits received under the instrument without restoration to the other party."); Hendricks v. Martin, 267 S.W. 1047, 1050 (Tex. Civ. App. - Amarillo 1924, no writ) (noting that appellees had to make all proof necessary to place the seller in status quo ante).

n352. Meadows v. Bierschwale, 516 S.W.2d 125, 132 (Tex. 1974) ("It is axiomatic that when a party resorts to equity to obtain relief not available legally, his actions are measured by equitable standards and he may not invoke the strict letter of the law to deny equity to another who has been harmed, at least in part, by the original party's action.").

n353. Powell v. Rockow, 92 S.W.2d 437, 439 (Tex. 1936).

n354. Restatement (Third) of Restitution and Unjust Enrichment § 54(2) (2011).

n355. But see Lipscomb v. Fuqua, 131 S.W. 1061, 1064 (Tex. 1910) ("Whether the vendor who rescinds an executory contract for the sale of land shall return the purchase money paid depends upon the equities of each case. If it would be inequitable for such rescission to occur without restoration of money paid, then it must be restored."); Boegner v. Olivares, 429 S.W.2d 692, 695 (Tex. Civ. App. - San Antonio 1968, no writ) ("In determining whether the purchaser is entitled to restitution, a court must consider all relevant factors.").

n356. Stewart v. H. & T. C. R. Co., 62 Tex. 246, 248-49 (1884).

n357. Id. at 248.

n358. In re Devon Energy Prod. Co., L.P., 321 S.W.3d 778, 784 (Tex. App. - Tyler 2010, no pet.); Holt v. Robertson, No. 07-06-0220-CV, 2008 Tex. App. LEXIS 3735, at 15 (Tex. App. - Amarillo May 21, 2008, pet. denied); Gentry v. Squires Constr., Inc. 188 S.W.3d 396, 410 (Tex. App. - Dallas 2006, no pet.).

n359. Navarro Publ'g Co. v. Fishburn, No. 4191, 1882 Tex. LEXIS 317, at 12 (Tex. Comm'n App. 1882) (not precedential) ("But where the party desiring to rescind a contract has been defrauded, and it is impossible for him to reinstate the other party in precisely the same condition, it will be sufficient if he do or offer to do all that is in his power in this respect, in order to entitle him to recover his damages." (quoting William Story, A Treatise on the Law of Contracts § 977 (1856))); Restatement (Third) of Restitution and Unjust Enrichment § 54(b) (2011) ("Because a requirement of specific restitution by the claimant cannot be applied without a lengthy list of exceptions, and because restitution to the status quo ante is literally impossible in any event, the decision whether the claimant has come close enough to an unattainable standard becomes a decision about the propriety of rescission in the circumstances of the particular case.").

n360. Ford Motor Co. v. Castillo, 279 S.W.3d 656, 665 (Tex. 2009); Ennis v. Interstate Distribs., Inc., 598 S.W.2d 903, 906 (Tex. Civ. App. - Dallas 1980, no writ).

n361. Black, Rescission of Contracts, supra note 71, § 618, at 1427.

n362. Donoho v. Hunter, 242 S.W. 282, 287 (Tex. Civ. App. - San Antonio 1922), rev'd on other grounds, 287 S.W. 47 (Tex. Comm'n App. 1926, judgm't adopted) ("The right to rescind will not be denied because the parties may not be put precisely as they were when a return of all the property received is rendered impossible by reason of his having parted with a portion of the property, so received before discovery of the fraud, the requirements of justice would be satisfied by the return of the property retained, with compensation for the remainder."). See also Restatement (Third) of Restitution and Unjust Enrichment § 54(g) (2011) ("The standard requirement of two-way restitution may be an obstacle to rescission if property received by the claimant has been lost, damaged, or disposed of, or has suffered deterioration in value."); O'Sullivan, The Law of

Rescission, supra note 10, § 18.08 ("The rule should be understood to be that the defendant should not be placed in an unjustifiably worse position which include considerations of the defendant's fault, changes that occurred as a result of the defendant's actions and inherent defects in the underlying subject matter.").

n363. Brantley v. Thomas, 22 Tex. 270, 276 (1858); Wintz v. Morrison, 17 Tex. 372, 386 (1856).

n364. Wright v. Lessard, No. 03-02-00428-CV, 2003 Tex. App. LEXIS 4613, at 17 (Tex. App. - Austin May 30, 2003, no pet.) (ordering a swap of mistaken properties when subject property could not be restored).

n365. Monarch Marking Sys. Co. v. Reed's Photo Mart, Inc., 485 S.W.2d 905, 906 (Tex. 1972); James T. Taylor & Son, Inc. v. Arlington Indep. Sch. Dist., 335 S.W.2d 371, 373-74 (Tex. 1960).

n366. Cruz v. Andrews Restoration, Inc., No. 10-0995, 2012 Tex. LEXIS 341, at 21 (Tex. Apr. 20, 2012) ("Generally, rescission is an equitable remedy, and Cruz correctly asserts that fault is relevant. A defendant's wrongdoing may factor into whether he should bear an uncompensated loss in those cases in which it is impossible for a claimant to restore the defendant to the status quo ante." (citing Restatement (Third) of Restitution and Unjust Enrichment § 54(3)(b) (2011))). The court went on to note, however, that "it does not excuse the claimant in such cases from counter-restitution when feasible - as it would be here." (citing Restatement (Third) of Restitution And Unjust Enrichment § 54 cmt. c (2011) ("A claimant (such as a fraud victim) who has been an innocent party to a legally defective exchange will ordinarily be able to rescind on making restitution (in specie or in value) of any benefits conferred by the other party.")). See also Kish v. Van Note, 692 S.W.2d 463, 468 (Tex. 1985) (awarding damages based on implicit assumption that defendant's services had zero value to plaintiff).

n367. Burrow v. Arce, 997 S.W.2d 229, 237 (Tex. 1999) ("If the trustee commits a breach of trust, the court may in its discretion deny him all compensation or allow him a reduced compensation or allow him full compensation." (quoting Restatement (Second) of Trusts § 243 (1959))). See Roach, Counter-Restitution, supra note 63, at 1286-91 (explaining that if a trustee breaches

his fiduciary duty, yet in doing so benefits the trust, the trustee is generally indemnified to the extent of the benefit conferred to the trust).

n368. Van Note, 692 S.W.2d at 468. The Texas Supreme Court's opinion in Van Note is a good example in which the plaintiff had to choose between the direct damages of accepting the contract and the special damages of denying the contract. Id. at 466-67. The plaintiff made a claim under the DTPA for a contract to build a swimming pool which proved non-functional. Id. at 465. The court's damage calculation included the cost of removing the pool and restoring the backyard, all payments made, and the amount necessary to remove the defendant's lien. Id. at 468-69.

n369. Dobbs, Law of Remedies, supra note 25, at § 9.3(1) ("Restitution in specie or in money if the plaintiff is willing to accept a money substitute is usually an alternative to the damages remedy in cases of misrepresentation.").

n370. Nelson v. Najm, 127 S.W.3d 170, 177 (Tex. App. - Houston [1st Dist] 2003, pet. denied).

n371. Id. at 173.

n372. Id. at 176 ("Rather, we conclude the trial court imposed an equitable remedy, making Najm whole by returning to him the consideration he paid - $ 100,000. Nelson had already reacquired the property via foreclosure; thus a true rescission of the contract was not possible; nevertheless, this award was the functional equivalent of rescission because it restored Najm to his original position before entering into the contract."). See also Dall. Farm Mach. Co. v. Reaves, 307 S.W.2d 233, 241 (Tex. 1957) (approving award of financial equivalent of specific restitution without discussion).

n373. See, e.g., Cooper v. Cochran, 288 S.W.3d 522, 535 (Tex. App. - Dallas 2009, no pet.) (affirming a constructive trust placed on a home in response to testimony that the money was obtained by mortgaging the property given to him and used solely for personal benefit). But see Davis v. Estridge, 85 S.W.3d 308, 311 (Tex. App. - Tyler 2001, pet. denied) (finding an abuse of discretion in the trial court's grant of a constructive trust).

n374. Restatement (Third) of Restitution and Unjust Enrichment § 54, illus. 34 (2011).

n375. Restatement (Second) of Contracts § 349 cmt. a (1981). See also Mistletoe Express Serv. v. Locke, 762 S.W.2d 637, 638-39 (Tex. App. - Texarkana 1988, no writ) (citing 5 Corbin on Contracts § 992 (1964)) (noting that determining damages for breach of contract usually involves finding what additions to the injured party's wealth have been prevented by the breach and what subtractions from his wealth have been caused by the breach).

n376. Amber Res. Co. v. United States, 538 F.3d 1358, 1380-81 (Fed. Cir. 2008). See also In re Petro-Serve, Ltd., No. 88-7888 SEG, 2007 U.S. Dist. LEXIS 17307, at 7 (S.D. Miss. Mar. 9, 2007) (awarding restitution in amount paid for interest in well, even though "this action was one for breach of contract seeking restitution as damages, not rescission. "Restitution may consist of returning to the plaintiff its investment in the contract, so-called "money-back' restitution.'" (quoting Alaska Pulp Corp. v. U.S., 59 Fed. Cl. 400, 415 (Fed. Cl. 2004))).

n377. 598 S.W.2d 903, 904-905 (Tex. App. - Dallas 1980, no writ).

n378. Id. at 905.

n379. See McDaniel v. Pettigrew, 536 S.W.2d 611, 617 (Tex. Civ. App. - Dallas 1976, writ ref'd n.r.e.) (denying rescission of a contract to build a house in which the construction had been completed); Freyer v. Michels, 360 S.W.2d 559, 562 (Tex. Civ. App. - Dallas 1962, writ dism'd) (denying rescission of a lease in which the claimant had occupied the premises for two-thirds of the lease term).

n380. Ennis, 598 S.W.2d at 906.

n381. Id. ("On the other hand, our courts have treated contracts as executory in cases where one party has performed under the contract but not to such extent as would render the remedy of rescission inequitable.").

n382. See Stoffela v. Nugent, 217 U.S. 499, 501 (1910) ("It is true that the defendant acted fraudulently and knew what he was about. But a man by committing a fraud does not become an outlaw and caput lupinum. He may have no standing to rescind his transaction, but when it is rescinded by one who has the right to do so the courts will endeavor to do substantial justice so far as is consistent with adherence to law." (citations omitted)); Ehrlich v. United States, 252 F.2d 772, 776 (5th Cir. 1958) ("The harm should be undone but there is no reason to reward the victim."); Burrow v. Arce, 997 S.W.2d 229, 237 (Tex. 1999) ("If the trustee commits a breach of trust, the court may in its discretion deny him all compensation or allow him a reduced compensation or allow him full compensation." (quoting Restatement (Second) of Trusts § 243 (1959))). See also O'Sullivan, The Law of Rescission, supra note 10, at § 14.45 ("That the other party may be guilty of fraud or duress is no reason to deny him restitution." (quoting Halpern v. Halpern [2006] EWHC (Q.B.) 1728, [2007] Q.B. 88 at 93 (Eng.))); O'Sullivan, The Law of Rescission, supra note 10, at § 18.10 ("Though the defendant has been fraudulent, he must not be robbed" (quoting Spence v. Crawford [1939] 3 All E.R. 271 (H.L.) at 288)); Roach, Counter-Restitution, supra note 63, at 1286-92 (noting that the court's commitment to "total equity" requires restitution and counter-restitution regardless of whether the defendant acted willfully).

n383. See Powell v. Rockow, 92 S.W.2d 437, 439 (Tex. 1936) ("The burden is upon one seeking to have a contract canceled to establish that he is equitably entitled to that relief.").

n384. Gibson v. Lancaster, 39 S.W. 1078, 1078 (Tex. 1897).

n385. Id. at 1078-79.

n386. Id. at 1079.

n387. Mathis Equip. Co. v. Rosson, 386 S.W.2d 854, 870 (Tex. Civ. App. - Corpus Christi 1965, writ ref'd n.r.e.).

n388. David McDavid Pontiac, Inc. v. Nix, 681 S.W.2d 831, 836-38 (Tex. App. - Dallas 1984, writ ref'd n.r.e.).

n389. Davis v. Estridge, 85 S.W.3d 308, 311 (Tex. App - Tyler 2001, pet. denied).

n390. Park Forest Baptist Church v. Park Forest Ctr., No. 05-96-00188-CV, 1998 Tex. App. LEXIS 1261, at 1 (Tex. App. - Dallas Feb. 27, 1998, pet. denied).

n391. Chubb Lloyds Ins. Co. of Tex. v. Andrew's Restoration, Inc. 323 S.W.3d 564, 580 (Tex. App. - Dallas 2010), aff'd in part and rev'd and remanded in part on other grounds, Cruz v. Andrews Restoration, Inc., No. 10-0995, 2012 Tex. LEXIS 341 (Tex. Apr. 20, 2012).

n392. See Brooke Smith Realty Co. v. Graham, 258 S.W. 513, 516 (Tex. Civ. App. - Austin 1923, writ dism'd) (holding plaintiff "would be entitled in equity to recover it upon a proper accounting for the use of the premises, regardless of whether the agreement was void or only unenforceable"). See also Restatement (Third) of Restitution and Unjust Enrichment § 54(h) (2011) ("The more characteristic feature of the mutual accounting on rescission relates, however, not to money substitutes for the parties' contractual performance, but to the collateral benefits realized on either side from the parties' temporary exchange and its subsequent reversal."). The rationale for such adjustments is similar to that for specific performance. See Davis v. Luby, No. 04-09-00662-CV, 2010 Tex. App. LEXIS 6501, at 9 (Tex. App. - San Antonio Aug. 11, 2010, no pet.) ("The relief associated with specific performance may include monetary compensation in narrow circumstances - when it is deemed necessary to place the parties in the same position as if the contract had been performed in full. But, this compensation awarded is incident to a decree for specific performance and does not amount to legal damages for breach of contract. The rationale of such compensation "is that the contract is being enforced retrospectively and the equities adjusted accordingly.'" (citations omitted)).

n393. Chaney v. Coleman, 13 S.W. 850, 851 (Tex. 1890) ("The party in possession must also account for all rents received by him, and for all profits, such as moneys arising from the sale of timber, or from working mines, with interest thereon from the times of the receipt thereof. He must also pay an occupation rent for such part of the estate as may have been in his actual possession."); Davis v. Estridge, 85 S.W.3d 308, 311 (Tex. App. - Tyler 2001, pet. denied).

n394. Smith v. Nat'l Resort Communities, Inc., 585 S.W.2d 655, 660 (Tex. 1979) ("[Rescission remedy included] the payment of taxes ... and the payment of an annual maintenance fund bill ... ."); Holt v. Robertson, No. 07-06-0220-CV, 2008 Tex. App. LEXIS 3735, at 15 (Tex. App. - Amarillo May 21, 2008, pet. denied) (mem. op.) ("Where rescission of a transaction results in a return of the property, equity requires that the parties be made whole for such matters as placing valuable improvements on the property, expenditures for insurance, taxes, and repairs."); Dean v. Dean, 214 S.W. 505, 509 (Tex. Civ. App. - 1919, no writ) ("This being an equitable proceeding to set aside a deed, the appellee, if she recovers, will be required to do equity. The jury found that appellant had placed improvements on the property in good faith, and that he had spent certain sums for taxes, insurance, and repairs; also that he had received certain rents from the property.").

n395. See Wagner & Brown, Ltd. v. Sheppard, 282 S.W.3d 419, 425 (Tex. 2008) (citing the following language from a 2001 tentative draft of Restatement (Third) of Restitution and Unjust Enrichment § 10: "A person who improves the real or personal property of another, acting by mistake, has a claim in restitution as necessary to prevent unjust enrichment."); McCarty v. Moorer, 50 Tex. 287, 290 (1878) ("In case of rescission McCarty is entitled to pay for his improvements."); Patrick v. Roach, 21 Tex. 251, 255 (1858) (granting rescission for payment default but holding vendee was entitled to credit for all substantial improvements and repairs); Holt v. Robertson, No. 07-06-0220-CV, 2008 Tex. App. LEXIS 3735, at 17 (Tex. App. - Amarillo May 21, 2008, pet. denied) ("Where rescission of a transaction results in a return of the property, equity requires that the parties be made whole for such matters as placing valuable improvements on the property, expenditures for insurance, taxes, and repairs."). It is generally agreed that defendants are entitled to credit for their permanent improvements, generally on the basis of the lesser of their cost or their contribution to value. See Wagner & Brown, Ltd. v. Sheppard, 282 S.W.3d 419, 426 (Tex. 2008) ("Under Texas law, only a naked trespasser cannot recover for improvements that benefit another's land." (quoting Armstrong v. Oppenheimer, 19 S.W. 520, 521 (Tex. 1892))); Sharp v. Stacy, 535 S.W.2d 345, 351 (Tex. 1976) ("The children of Junior Stacy, having failed to secure a jury finding on the issue as to the enhancement in value of the farm by virtue of the improvements are precluded from recovering compensation for the improvements."). There have been a few exceptions depending on the defendant's good faith and which party initiated the rescission. See Wagner, 282 S.W.3d at 425 ("The principle is well established in equity that a person who in good faith makes improvements upon

property owned by another is entitled to compensation therefore."); Danny Darby Real Estate, Inc. v. Jacobs, 760 S.W.2d 711, 718 (Tex. App. - Dallas 1988, writ denied) ("Where a plaintiff seeks rescission of a contract to convey real estate induced by fraudulent misrepresentation, common law allows recovery for good faith improvements."); Tashnek v. Hefner, 282 S.W.2d 298, 303 (Tex. Civ. App. - Galveston 1955, writ ref'd n.r.e.) ("On the other hand, appellees are at most entitled only to be made whole by reason of having placed the improvements on the premises in good faith."). See also Restatement (Third) of Restitution and Unjust Enrichment § 54 , illus. 26 (2011) ("Purchaser may be credited with payments of taxes, and with the saved cost to Vendor of necessary repairs, but Purchaser has no claim in respect of unsolicited improvements.").

n396. See Chaney v. Coleman, 13 S.W. 850, 851 (Tex. 1890) ("charges for the deterioration of the property must be set off against the allowances for permanent improvements.").

n397. See Billups v. Gallant, 37 S.W.2d 770, 772 (Tex. Civ. App. - Austin 1931, writ ref'd) ("The trial court should also have allowed appellant interest on the amounts he was entitled to offset thereon for the use of said premises, from the dates these sums were due"); Black, Rescission of Contracts, supra note 71, at § 632, 1458 ("As a general rule, where money paid by one of the parties to the other under their contract is to be restored by the party receiving it, on the rescission of the contract, he is also required to tender ... legal interest on the amount from the date when he received it.").

n398. Truly v. Austin, 744 S.W.2d 934, 938 (Tex. 1988) ("Recovery in quantum meruit is based on equity. It is well-settled that a party seeking an equitable remedy must do equity and come to court with clean hands... . To justify a recovery in quantum meruit, the plaintiff must not only show that he has rendered a partial performance of value, but must also show that the defendant has been unjustly enriched and the plaintiff would be unjustly penalized if the defendant were permitted to retain the benefits of the partial performance without paying anything in return." (internal citations omitted)). But see Davidson v. Clearman, 391 S.W.2d 48, 50 (Tex. 1965) ("The right to recover on quantum meruit does not grow out of the contract, but is independent of it. It is based upon the promises implied by law to pay for beneficial services rendered and knowingly accepted." (emphasis added)).

n399. See Robertson v. ADJ P'ship, Ltd., 204 S.W.3d 484, 494-95 (Tex. App. - Beaumont 2006, pet. struck) ("Disgorgement of profits has long been recognized as an appropriate remedy for fraud and for breach of fiduciary duty." (citations omitted)).

n400. E.g., Restatement (Third) of Restitution and Unjust Enrichment § 53 (2011).

n401. See Chaney, 13 S.W. at 851 ("The party in possession must also account for all rents received by him, and for all profits, such as moneys arising from the sale of timber or from working mines, with interest thereon from the times of the receipt thereof. He must also pay an occupation rent for such part of the estate as may have been in his actual possession.").

n402. Restatement (Third) of Restitution and Unjust Enrichment § 53 (2011). See also George E. Palmer, The Law of Restitution § 3.15 (1978).

n403. See Allen v. Devon Energy Holdings, L.L.C., No. 01-09-00643-CV, 2011 Tex. App. LEXIS 5854, at 127 (Tex. App. - Houston [1st Dist.] July 28, 2011, no pet. h.) ("The disgorgement of profits is also an equitable remedy for breach of fiduciary duty claims ... ."). See also (Third) of Restitution and Unjust Enrichment: Restitution via Money Judgment § 53 cmt. b (2011) ("In the case of a conscious wrongdoer, by contrast, any question of liability for supplemental enrichment is necessarily decided so as to exclude the possibility that the defendant might retain a benefit from the underlying wrong."); Id. § 157 cmt. a ("If the recipient was consciously tortious he should fully compensate the other and should make no profit from the use. If he was an innocent converter, he should fully compensate the other but, except for the direct product, should be entitled to incidental profits made from the use." (citations omitted)).

n404. Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 585 (1990) ("Both the Union and the dissent argue that the backpay award sought here is equitable because it is closely analogous to damages awarded to beneficiaries for a trustee's breach of trust ... Such damages were available only in courts of equity because those courts had exclusive jurisdiction over actions involving a trustee's breach of his fiduciary duties."); Meadows v. Bierschwale, 516 S.W.2d 125, 128 (Tex. 1974) ("Actual fraud, as well as breach of a confi-

dential relationship, justifies the imposition of a constructive trust."); Dobbs, Law of Remedies, supra note 25, at § 5.18(3), 935 ("But in some instances equity (not law) created the substantive right on which the plaintiff relies. In those instances there was no need to discuss the legal remedy at all and the adequacy test could not be invoked to bar equitable intervention. Because equity created the substantive rights against fiduciaries, equity has always taken jurisdiction in claims against them without regard to the adequacy test.").

n405. Brooks v. Conston, 72 A.2d 75, 75 (Pa. 1950).

n406. Id. at 77-79.

n407. Id.

n408. Id. at 77-80.

n409. Id. at 79; Dobbs, Law of Remedies, supra note 25, at § 9.3(4) n.42; Restatement (Third) of Restitution and Unjust Enrichment § 51 e, illus. 24 (2011).

n410. Burrow v. Arce, 997 S.W.2d 229, 241 (Tex. 1999) ("The remedy of forfeiture must fit the circumstances presented.").

n411. See, e.g., Holland v. W. Bank & Trust Co., 118 S.W. 218, 218 (Tex. Civ. App. - Austin 1909, writ denied) (granting rescission for fraudulent inducement and special damages for "certain expenses in attempting to utilize the land before he discovered the [fraud] ... .").

n412. Smith v. Nat'l Resort Communities, Inc., 585 S.W.2d 655, 660 (Tex. 1979); Wintz v. Morrison, 17 Tex. 372, 388 (1856); Turner v. Turner, No. 09-06-570-CV, 2008 Tex. App. LEXIS 4720, at 7 (Tex. App. - Beaumont June 26, 2008, pet. denied) (mem. op.); Hackney Mfg. Co. v. Celum, 189 S.W. 988, 991 (Tex. Civ. App. - El Paso 1916), aff'd, 221 S.W. 577 (Tex. 1920); Restatement (Third) of Restitution and Unjust Enrichment § 54 illus. 32 (2011).

n413. United Enters. v. Erick Racing Enters., No. 07-01-0467-CV, 2002 Tex. App. LEXIS 9271, at 6 (Tex. App. - Amarillo Dec. 31, 2002, pet. denied) (not designated for publication).

n414. Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323, 346 (Tex. 2011) ("Thus, by electing rescission, Italian Cowboy did not need to prove that its damages were caused by the latent defect; it needed only to prove what amount would restore it to its original position.").

n415. Id. at 328. See also Tidrow v. Roth, 189 S.W.3d 408, 411 (Tex. App. - Dallas 2006, no pet.) (allowing damages for time and effort); Hannon, Inc. v. Scott, No. 02-10-00012-CV, 2011 Tex. App. LEXIS 3624, at 30 n.15 (Tex. App. - Fort Worth May 12, 2011, pet. denied) (noting that trial court awarded damages for investor's time and effort).

n416. DeKalb Hybrid Seed Co. v. Agee, 293 S.W.2d 64, 67 (Tex. Civ. App. - Beaumont 1956, writ ref'd n.r.e.) (awarding consequential damages for diseased chicks). See also Alexander v. Walker, 239 S.W. 309, 314 (Tex. Civ. App. - San Antonio 1922, writ dism'd w.o.j.) (noting that it would have been error to limit damages to only those animals diseased at time of sale).

n417. Restatement (Third) of Restitution and Unjust Enrichment § 54, illus. 33 (2011).

n418. See supra notes 414-415 and accompanying text (discussing recent Texas Supreme Court case holding to this effect).

n419. Nabours v. Longview Sav. & Loan Ass'n, 700 S.W.2d 901, 904-05 (Tex. 1985) ("As in other cases where equity requires the return of property, this "recovery of the consideration paid as a result of fraud constitutes actual damages and will serve as a basis for the recovery of exemplary damages."' (quoting Int'l Bankers Life Ins. Co. v. Halloway, 368 S.W.2d 567, 568 (Tex. 1963))); Tex. Capital Sec., Inc. v. Sandefer, 58 S.W.3d 760, 774 (Tex. App. - Houston [1st Dist.] 2001, pet. denied); Tashnek v. Hefner, 282 S.W.2d 298, 303 (Tex. Civ. App. - Galveston 1955, writ ref'd n.r.e.).

n420. Tex. Civ. Prac. & Rem. Code Ann. § 41.002(a) (West 2010). See Yeckel v. Abbott, No. 03-04-00713-CV, 2009 Tex. App. LEXIS 3881, at 30 (Tex. App. - Austin June 4, 2009, pet. denied) ("Consequently, appellees cannot recover punitive damages unless they "prove by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from (1) fraud; or (2) malice.'"). But see Mullen v. Jones (In re Jones), No. 08-36014-SGJ-7, 2011 Bankr. LEXIS 448, at 104 (Bankr. N.D. Tex. Feb. 3, 2011) ("Malice is not required, so long as there was an intentional breach of fiduciary duty.").

n421. Piper Aircraft Corp. v. Wag-Aero, Inc., 741 F.2d 925, 938 (7th Cir. 1984).

n422. See e.g. Tex. Capital Secs., Inc. v. Sandefer, 58 S.W.3d 760, 774 (Tex. App. - Houston [1st Dist.] 2001, pet. denied) ("The decision to grant an equitable remedy such as rescission is within the discretion of the trial court."). See also supra note 111 (citing Texas cases where courts have stated that equitable decisions are issues for the court rather than the jury).

n423. Flores v. ASI Computer Techs., Inc., No. L-06-CV-135, 2007 U.S. Dist. LEXIS 73170, at 11 (S.D. Tex. Sept. 28, 2007); Kennard v. Indianapolis Life Ins. Co., 420 F. Supp. 2d 601, 611 (N.D. Tex. 2006); Isaacs v. Bishop, 249 S.W.3d 100, 110 (Tex. App. - Texarkana 2008, pet. denied); Omega Energy Corp. v. Gulf States Petroleum Corp., No. 13-03-275-CV, 2005 Tex. App. LEXIS 3191, at 10 (Tex. App. - Corpus Christi Apr. 28, 2005, pet. denied); Davis v. Estridge, 85 S.W.3d 308, 310 (Tex. App. - Tyler 2001, pet. denied); Kanaman v. Hubbard, 160 S.W. 304, 306 (Tex. Civ. App. - Dallas 1913, no writ).

n424. Gentry v. Squires Constr., Inc., 188 S.W.3d 396, 410 (Tex. App. - Dallas 2006, no pet.) (denying rescission of homebuilding contract where there was no practical or reasonable way to remedy discrepancy in ceiling height; plaintiffs did not prove house was impaired in value and rescission would be of extreme prejudice to contractor).

n425. See Omega Energy, 2005 Tex. App. LEXIS 3191, at 10 ("A trial court must weigh several factors to determine if rescission should be granted, includ-

ing probability of irreparable damage to the moving party, possibility of harm to the nonmoving party, and public interest."). This would presumably include the issue of the irreparable injury that the plaintiff would otherwise suffer without equitable relief.

n426. See Healix Infusion Therapy, Inc. v. Helix Health, LLC, No. H-09-2072, 2010 U.S. Dist. LEXIS 103619, at 16-17 (S.D. Tex. Sept. 30, 2010) ("Additionally, the public interest favors settlement agreements and contracts, generally. When individuals ignore contractual obligations, particularly settlement agreements, the public is disserved."); Chevron U.S.A., Inc. v. Stoker, 666 S.W.2d 379, 382 (Tex. App. - Eastland 1984, writ dism'd) ("Finally, the temporary injunction is adverse to the public interest. The safety of lives and property of Scurry County citizens is an overriding public interest. We note that the federal standard in regard to injunctions includes consideration as to whether granting the injunction is adverse to the public interest.").

n427. Holt v. Robertson, No. 07-06-0220-CV, 2008 Tex. App. LEXIS 3735, at 15 (Tex. App. - Amarillo May 21, 2008, pet. denied) (mem. op.); Kanaman v. Hubbard, 160 S.W. 304, 306 (Tex. Civ. App. - Dallas 1913, no writ).

n428. Wagner & Brown, Ltd. v. Sheppard, 282 S.W.3d 419, 428 (Tex. 2008) ("Instead, we believe the equitable nature of such claims must turn on the equities in each case... . As with other equitable actions, a jury may have to settle disputed issues about what happened, but "the expediency, necessity, or propriety of equitable relief' is for the trial court, and its ruling is reviewed for an abuse of discretion.").

n429. Restatement (Third) of Restitution and Unjust Enrichment § 54(b) (2011) ("Factors relevant to this ultimate question are sometimes addressed directly. Elsewhere, they are implicit in a judicial conclusion that rescission would not be equitable under the circumstances, or that it is not possible to place the parties in statu quo. Courts naturally consider the circumstances of the transaction; the quality of the parties' conduct; the relative ease or difficulty of compensating the claimant's injury in damages; and the fairness of limiting the claimant to a damage remedy. On the other side of the scale, they consider the difficulty of measuring non-contractual values; the burden to the other party of being compelled to reverse a contractual exchange; and the extent of windfalls and forfeitures resulting from interim variation in the values being restored.").

n430. Holt, 2008 Tex. App. LEXIS 3735, at 15.

n431. See Piper Aircraft Corp. v. Wag-Aero, Inc., 741 F.2d 925, 938 (7th Cir. 1984) ("A standard that asks the district judge to consider a large number of factors ... in no particular order and with no particular weighting of each factor is nondirective; it is effectively no standard." (citations omitted)).

n432. See supra notes 113 & 254 (citing Texas cases stating that rescission is established only when the plaintiff gives defendant notice of her claim for rescission and offers to restore the defendant to his original position).

n433. Dobbs, Pressing Problems, supra note 98, at 341 ("In general, restoration or tender of it by the plaintiff is a prerequisite to his avoidance only when his avoidance is one "at law' than "in equity.'"). See also supra text accompanying note 272 (explaining that the necessity under Rockow for jury findings makes notice and tender unnecessary, as they provide no additional information to help the trial court enact restoration).

n434. Kennedy v. Embry, 10 S.W. 88, 89 (Tex. 1888).

n435. See, e.g., Hatch v. De la Garza, 7 Tex. 60, 64-65 (1851) (holding that claimants face no prerequisites for rescission other than special conditions, which may be imposed on a case by case basis and at the discretion of trial courts).

n436. Supra notes 8-9 and accompanying text.

n437. Perez v. Briercroft Serv. Corp., 809 S.W.2d 216, 218 (Tex. 1991); Perkins v. Terrell, 214 S.W. 551, 553 (Tex. Civ. App. - Amarillo 1919, writ ref'd) ("However, in cases of this kind, we do not think that notice and demand prior to the institution of the suit is necessary. The bringing of the suit itself, with the offer to restore to the defendant what the plaintiff had received in the transaction, is sufficient to authorize a court of equity to proceed to consider the case and determine the equities of the parties.").

n438. Dobbs, Pressing Problems, supra note 98, at 346-47.

n439. Id. at 347.

n440. O'Sullivan, The Law of Rescission, supra note 10, §§11.27-11.37.

n441. Id. at § 11.16. See Clough v. London and N. W. Ry. Co., (1871) 7 L.R. Ex. 26, 35-36 ("Neither can we see the principle or discover the authority for saying that it is necessary that there should be a declaration of this intention to rescind prior to the plea.").

n442. O'Sullivan, The Law of Rescission, supra note 10, at §§11.27-11.37.

n443. See Charles E. Rounds, Jr., Proponents of Extracting Slavery Reparations from Private Interests Must Contend with Equity's Maxims, 42 U. Tol. L. Rev., 673, 692 (2011) ("If it is appropriate for equity to intervene in a contested matter, equity will not allow form to trump substance.").

n444. See Chubb Lloyds Ins. Co. of Tex. v. Andrew's Restoration, Inc., 323 S.W.3d 564, 581 (Tex. App. - Dallas 2010), aff'd in part and rev'd and remanded in part on other grounds, Cruz v. Andrews Restoration, Inc., No. 10-0995, 2012 Tex. LEXIS 341 (Tex. Apr. 20, 2012) (holding that claimant "was obliged to prove and obtain a finding that he had surrendered or offered to surrender to Protech and Martinez the value of the services they provided at his house as a prerequisite for [rescission].").

n445. See Black, Rescission of Contracts, supra note 71, § 625, at 1442 ("It has been held that a court of equity will proceed with the action for cancellation without requiring, as a condition precedent to commencing the action, that the complaining party shall have tendered back what he had received, that an offer in his complaint to restore the same is sufficient, and if a case is made out which moves the court to grant relief, it carries into effect the maxim that he who seeks equity shall do equity.").

n446. See Ford Motor Co. v. Castillo, 279 S.W.3d 656, 664 (Tex. 2009) ("The rule is one of justice, designed to ensure that parties do not repudiate an

agreement while retaining benefits received by reason of the agreement."); Texas Co. v. State, 281 S.W.2d 83, 91 (Tex. 1955) ("It is a familiar rule of equity that "He who seeks equity must do equity.' Thus it is held that one seeking an [sic] cancellation of an instrument ... must restore the original status; he cannot repudiate the instrument and retain the benefits received thereunder. "It is necessary that a party seeking a rescission should offer or tender a restoration to the other and that the court, if appealed to, should be able to accomplish that result by its judgment or decree.'" (citations omitted)).

n447. Crayton v. Munger, 9 Tex. 285, 293 (1852). See also Oubre v. Entergy Operations, Inc., 522 U.S. 422, 426 (1998) ("And in equity, a person suing to rescind a contract, as a rule, is not required to restore the consideration at the very outset of the litigation."); Nelson v. Najm, 127 S.W.3d 170, 176 (Tex. App. - Houston [1st Dist.] 2003, pet. denied) ("Texas courts have long held ... that [a defrauded party] ... may elect the equitable remedy of rescission in lieu of damages and demand a return of any amount paid."); Hendricks v. Martin, 267 S.W. 1047, 1051 (Tex. Civ. App. - Amarillo 1924, no writ) ("The court, sitting as chancellor in the exercise of the extraordinary powers vested in a court of equity, could by his decree, adjust and settle the equities between the parties, and ... divest one party of title and vest it in the other without the actual tender in curia of a deed ... ."); Restatement (Third) of Restitution and Unjust Enrichment § 54(5) (2011) ("Restitution or a tender of restitution by the claimant is not a prerequisite of rescission if affirmative relief in favor of either party can be reduced by ... the claimant's reciprocal obligation of restitution.").

n448. Castillo, 279 S.W.3d at 664 (Tex. 2009) ("Equitable rules by necessity are flexible and adaptable."); Johnson v. Cherry, 726 S.W.2d 4, 8 (Tex. 1987) ("The equitable power of the court exists to do fairness and is flexible and adaptable to particular exigencies, "so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other.'" (quoting Warren v. Osborne, 154 S.W.2d 944, 946 (Tex. Civ. App - Texarkana 1941))); Texas Emp'rs Ins. Ass'n v. Kennedy, 143 S.W.2d 583 (Tex. 1940) (stating that the general rule requiring tender "is a rule of equity, and not a fixed rule of universal application"); Lipscomb v. Fuqua, 131 S.W. 1061, 1064 (Tex. 1910) ("Whether [tender] is required depends on the equities of each case"); Cas. Reciprocal Exch. v. Bryan, 101 S.W.2d 895, 899 (Tex. Civ. App. - Eastland 1937, no writ) ("Where such tender appears not to be necessary for the protection of all parties, the reason for its requirement ceases, and it will not be enforced by the courts.").

n449. See Texas Co. v. State, 281 S.W.2d 83, 91 (Tex. 1955) (noting that party seeking rescission must tender or offer to tender); Dawson v. Sparks, No. 4190, 1881 Tex. LEXIS 186, at 32 (Tex. 1881) (accepting tender offer in lieu of actual tender); Brantley v. Thomas, 22 Tex. 270, 275 (1858) (accepting either actual tender or offer to tender); Garza v. Scott, 24 S.W. 89, 90 (Tex. Civ. App. - San Antonio 1893, no writ) (accepting plaintiff's offer to restore to the defendant property deeded to him in lieu of actual tender in an action in equity for a rescission of a sale of land).

n450. See Proctor v. Green, 673 S.W.2d 390, 393 (Tex. App. - Houston [1st Dist.] 1984, no writ) ("An offer to restore the consideration [tender] may be made in the pleadings."); O'Loughlin v. Moran, 250 S.W. 774, 778 (Tex. Civ. App. - El Paso 1923, writ dism'd w.o.j.) ("It is sufficient to say that the plaintiff in her petition offered "to do full equity, such as may be required in the premises under the direction of this court.' This was sufficient. It then became the duty of the court to render the proper decree."). But see Park Forest Baptist Church v. Park Forest Ctr., No. 05-96-00188-CV, 1998 Tex. App. LEXIS 1261, at 7-8 (Tex. App. - Dallas Feb 27, 1998, no pet.) ("Nor are we persuaded the prayer for relief in the Church's petition constitutes an offer to return the value of the benefits it received. While the Church prayed that the trial court restore the parties to their original positions, the Church did not suggest that restoration would require the Church to return anything.").

n451. Supra note 264.

n452. Brantley v. Thomas, 22 Tex. 270, 275 (1858); Wintz v. Morrison, 17 Tex. 372, 388 (1856).

n453. Brannon v. Pac. Emp'rs Ins. Co., 224 S.W.2d 466, 468 (Tex. 1949); State v. Snyder, 18 S.W. 106, 108-109 (Tex. 1886); Terrill v. Dewitt, 20 Tex. 256, 260 (1857); Wisdom v. Peek, 220 S.W. 210, 213 (Tex. Civ. App. - San Antonio 1920, writ dism'd). See also Black, Rescission of Contracts, supra note 71, at § 672, 1525 ("And if the dealings between the parties have been such that there must be a consideration and adjustment of their relative rights and claims, it is sufficient for the plaintiff to allege in his bill that he is ready and willing "to do equity' in the premises.").

n454. Anderson v. Anderson, 40 S.W.2d 909, 910 (Tex. Civ. App. - Texarkana 1931, no writ).

n455. See Texas Emp'rs Ins. Ass'n, 143 S.W.2d at 585 ("In cases like the instant one, in order for a plaintiff to recover he must establish that he has been injured, that is, that he has a meritorious claim for compensation in an amount greater than that which he has received, and if he makes that proof, he should not be required to make a tender."); Aetna Cas. & Sur. Co. v. Moseley, 975 S.W.2d 728, 732 (Tex. App. - Corpus Christi 1998, no pet.) ("Texas Supreme Court decisions indicate that Moseley need not return the benefits to pursue a claim for rescission of a compromise settlement agreement."). But see Kessell v. Mega Life & Health Ins., No. 3:03-CV-2788-N, 2005 U.S. Dist. LEXIS 2308, at 11-12 (N.D.Tex. Feb. 15, 2005) ("[A] party seeking rescission must attempt to return the parties to the positions they held just before they entered into the agreement. Accordingly, a person who signs a release, then sues her employer for matters covered under the release, is obligated to return the consideration at the outset of the case.").

n456. Free Sewing Mach. Co. v. S. T. Atkin Furniture Co., 71 S.W.2d 604, 605 (Tex. Civ. App. - Austin 1934, no writ).

n457. Black, Rescission of Contracts, supra note 71, at § 617 ("Further, no offer of restoration is required where the money or property which should be restored has already come into the possession of the party to whom it would be offered, nor where the state of accounts between the parties is such as to require an audit and adjustment, and neither can know in advance precisely what he should tender... .").

n458. Pate v. Eversole, No. 14-03-00250-CV, 2004 Tex. App. LEXIS 2655, at 3-4 (Tex. App. - Houston [14th Dist.] Mar. 25, 2004, pet. denied) (mem. op.).

n459. Meyer Farms, Inc. v. Texaco Producing, Inc., No. 07-01-0344-CV, 2002 Tex. App. LEXIS 7239, at 4-5 (Tex. App. - Amarillo Oct. 2, 2002, pet. denied) (not designated for publication).

n460. Munoz v. Witt, No. 10-07-00010-CV, 2008 Tex. App. LEXIS 7296, at 6 (Tex. App. - Waco Aug. 27, 2008, no pet.) (mem. op.).

n461. Aegis Ins. Holding Co. v. Gaiser, No. 04-05-00938-CV, 2007 Tex. App. LEXIS 2364, at 18 (Tex. App. - San Antonio Mar. 28, 2007, pet. denied). But see Am. Network Leasing Corp. v. Corporate Funding Houston, No. 01-00-00789-CV, 2002 Tex. App. LEXIS 7267, at 15 (Tex. App. - Houston [1st Dist.] October 10, 2002, pet. dism'd) (not designated for publication) ("If the party seeking relief is not a free moral agent and the party's consent to the transaction in dispute is obtained through duress or undue influence, the clean hands doctrine will not be used to deny equitable relief to set the transaction aside." (quoting Grohn v. Marquardt, 657 S.W.2d 851, 855 (Tex. App. - San Antonio 1983, writ ref'd n.r.e.))).

n462. Minchew v. Morris, 241 S.W. 215, 219 (Tex. Civ. App. - Dallas 1922, no writ) ("Rescission, to be available, must be sought with promptness and diligence in any case; but what constitutes promptness depends upon all the facts and circumstances of each particular case. In trades involving property the value of which is fixed and free from fluctuation, the lapse of a comparatively long period of time after the discovery of the fraud may not afford any basis for the plea of estoppel by laches. In fact, the mere running of time is not of itself a determinative element of laches as it is of the legal defense of limitation. Laches is to be distinguished as consisting of negligence or omission to do, whenever it ought to be done, what the law requires to be done to protect a right which is presumed to have been abandoned because of such neglect or omission. But, while the law imposes the requirement of reasonable promptness in all cases to avoid laches, it requires greater diligence and activity in seeking to rescind transactions with reference to oil values affected by extraordinary uncertainty and fluctuation, as they are, than with reference to ordinary dealings." (internal citations omitted)).

n463. Id.

n464. Reg'l Props., Inc. v. Fin. & Real Estate Consulting Co., 752 F.2d 178, 182 (5th Cir. 1985).

n465. Id.

n466. Fed. Union Ins. Co. v. Hardin, 115 S.W.2d 1144, 1145 (Tex. Civ. App. - Amarillo 1938, no writ) ("Even though waiver can be established by proof without objection, effect cannot be given to the facts so proven in the absence of a plea of waiver." (citation omitted)).

n467. See Geis v. Colina Del Rio, LP, No. 04-09-00465-CV, 2011 Tex. App. LEXIS 3339, at 23-24 (Tex. App. - San Antonio May 4, 2011) ("The elements of waiver are (1) an existing right, benefit, or advantage; (2) knowledge of its existence; and (3) an actual intent to relinquish the right, or intentional conduct inconsistent with the right. Ordinarily, the existence of waiver is a question of fact.").

n468. See United States v. Texarkana Trawlers, 846 F.2d 297, 305 (5th Cir. 1988) ("Because Trawlers' inaction for a full year severely prejudiced the government, we believe it is no longer possible for Trawlers to return the government to the position it enjoyed before it guaranteed Trawlers' refinancing package. We hold, therefore, that Trawlers can no longer rescind the guaranty contracts.").

n469. See Corrin v. Slagle, 300 S.W.2d 657, 660 (Tex. Civ. App. - Fort Worth 1957, writ ref'd n.r.e.) ("To hold a defrauded purchaser to the necessity of bringing suit upon the first discovery of a fraudulent act, regardless of whether or not such discovery revealed the material facts of the fraud, would place him in a perilous position" and would "tend to convert trustful, confident, and peaceable citizens into distrustful, suspicious, and litigious characters." (citations omitted)).

n470. Cal-Tex Lumber Co. v. Owens Handle Co., 989 S.W.2d 802, 812 (Tex. App. - Tyler 1999, pet. denied); Vandervoort v. Sansom, 293 S.W.2d 271, 275 (Tex. Civ. App. - Fort Worth 1956, writ ref'd n.r.e.).

n471. See Hallwood Cash Register Co. v. Berry, 80 S.W. 857, 858-59 (Tex. Civ. App. - San Antonio 1904, no writ) (finding waiver in less than thirty days).

n472. See Powell v. Rockow, 92 S.W.2d 437, 439 (Tex. 1936) (finding waiver after four months); Sharma v. Varani, No. 14-01-01063-CV, 2002 Tex.

App. LEXIS 8011, at 11 (Tex. App. - Houston [14th Dist.] Nov. 7, 2002, no pet.) (not designated for publication) (finding waiver after eight months); J.R. Gray Co., Inc. v. Ritchey Flying Serv., Inc., 358 S.W.2d 396, 402-03 (Tex. Civ. App. - Waco 1962, writ ref'd n.r.e.) (finding waiver after ten months); Shaddock v. Grapette, 259 S.W.2d 231, 234 (Tex. Civ. App. - Waco 1953, no writ) (finding waiver after four and a half months).

n473. See Pate v. Eversole, No. 14-03-00250-CV, 2004 Tex. App. LEXIS 2655, at 4 (Tex. App. - Houston [14th Dist.] Mar. 25, 2004, pet. denied) (holding that because appellee received and accepted the benefits under the contract, appellee waived his right to rescind the settlement agreement as a matter of law); Leblanc v. Campbell, No. 01-93-00890-CV, 1995 Tex. App. LEXIS 76, at 18 (Tex. App. - Houston [1st Dist.] Jan. 19, 1995, writ ref'd n.r.e.) (noting that although plaintiff learned of many of the problems with the property before closing, she made no effort to rescind the contract, made payments on it, and allowed other people to live on the property, even at the time of trial); Webb Materials, Inc. v. Lacey, 364 S.W.2d 473, 475 (Tex. Civ. App. - San Antonio 1963, writ ref'd n.r.e.) (holding that plaintiff had waived his right to rescission where "for more than two years, plaintiff accepted all the benefits under the contract after he was in possession of the facts which he claims were fraudulent inducements.").

n474. S. Home Bldg. Co., et al. v. Wimbish, 112 S.W.2d 211, 218 (Tex. Civ. App. - Dallas 1937, no writ); O'Connell v. Lockhart, 86 S.W.2d 267, 269 (Tex. Civ. App. - El Paso 1935, no writ).

n475. PSB, Inc. v. LIT Indus. Tex. Ltd. P'ship, 216 S.W.3d 429, 434 (Tex. App. - Dallas 2006, no pet.). The court denied rescission, finding from the CEO's testimony evidence that the company "did not seek to rescind the contract, but continued to recognize the contract as effective and thus had ratified the contract." Id.

n476. Deaton v. Rush, 252 S.W. 1025, 1029 (Tex. 1923) ("Acts of waiver or ratification after discovery of some out of a number of fraudulent acts will not preclude a rescission upon the discovery of other acts of fraud which, in and of themselves, are sufficient ground for rescission." (quoting Black, Rescission of Contracts § 591 (1st ed. 1916))).

n477. Payne v. Baldock, 287 S.W.2d 507, 510 (Tex. Civ. App. - Eastland 1956, writ ref'd n.r.e.); Shaddock v. Grapette, 259 S.W.2d 231, 234 (Tex. Civ. App. - Waco 1953, no writ).

n478. Fortune Prod. Co. v. Conoco, Inc., 52 S.W.3d 671, 677-78 (Tex. 2000). See also Harris v. Archer, 134 S.W.3d 411, 428 (Tex. App. - Amarillo 2004, pet. denied).

n479. Id. at 679-80.

n480. Powell v. Rockow, 92 S.W.2d 437, 438 (Tex. 1936); Navarro Publ'g Co. v. Fishburn, No. 4191, 1882 Tex. LEXIS 317, at 10 (Tex. 1882); Sharma v. Varani, No. 14-01-01063-CV, 2002 Tex. App. LEXIS 8011, at 11 (Tex. App. - Houston [14th Dist.] Nov. 7, 2002, no pet.) (not designated for publication); Webb Materials, Inc. v. Lacey, 364 S.W.2d 473, 475 (Tex. Civ. App. - San Antonio 1963, writ ref'd n.r.e.); Lamoyne v. Parks, 295 S.W.2d 917, 919 (Tex. Civ. App. - Waco 1956, writ ref'd n.r.e.); S. Home Bldg. Co. v. Wimbish, 112 S.W.2d 211, 219 (Tex. Civ. App. - Dallas 1937, no writ); Hatch v. Nat'l Cash Register Corp., 105 S.W.2d 1114, 1115 (Tex. Civ. App. - San Antonio 1937, no writ); Hallwood Cash Register Co. v. Berry, 80 S.W. 857, 858-59 (Tex. Civ. App. - San Antonio 1904, no writ).

n481. Victoria Materials & Gravel Co. v. Sauerman Bros., Inc., 61 F.2d 850, 852 (5th Cir. 1932); Fortune, 52 S.W.3d at 676; In re Weeks Marine, Inc., No. 14-09-00580-CV, 2009 Tex. App. LEXIS 7868, at 8 (Tex. App. - Houston [14th Dist.] October 8, 2009, pet. granted) (mem. op.).

n482. Meyer v. Cathey, 167 S.W.3d 327, 333 (Tex. 2005); Chambers v. Equity Bank, SSB, 319 S.W.3d 892, 901 (Tex. App. - Texarkana 2010, no pet.); Harris v. Archer, 134 S.W.3d 411, 427 (Tex. App. - Amarillo 2004, pet. denied); Wise v. Pena, 552 S.W.2d 196, 199-200 (Tex. Civ. App. - Corpus Christi 1977, writ dism'd).

n483. Consol. Eng'g Co. v. S. Steel Co., 699 S.W.2d 188, 191 (Tex. 1985) ("A party may affirm a contract that has been breached in one of two ways: (1) by evidencing a conscious intent to do so; or (2) by acting so as to induce the other party's detrimental reliance, thereby creating an estoppel situation."); San-

ta Fe Petroleum, L.L.C. v. Star Canyon Corp., 156 S.W.3d 630, 636 (Tex. App. - Tyler 2004, no pet.); Cal-Tex Lumber Co. v. Owens Handle Co., 989 S.W.2d 802, 812 (Tex. App. - Tyler 1999, no pet.).

n484. See Chambers, 319 S.W.3d at 902 (Tex. App. - Texarkana 2010, no pet.) ("Once a contract has been ratified by a defrauded party, or a new agreement adjusting the original fraudulent acts has been consummated, the defrauded party waives any right of rescission or damages." (citing as example Teders v. Mercantile Nat'l Bank, 235 S.W.2d 485, 488 (Tex. Civ. App. - Dallas 1950, writ ref'd n.r.e.)); "When a party ratifies an agreement that has been induced by fraud, the ratification generally vitiates the fraud, precluding rescission or recovery of fraud damages." (citing Wise, 552 S.W.2d at 200)). See also Shaddock v. Grapette, 259 S.W.2d 231, 234 (Tex. Civ. App. - Waco 1953, no writ) ("Any delay, or any conduct inconsistent with an intention of avoiding [the agreement], has the effect of waiving the right of rescission.").

n485. See Ward v. Sherman, 192 U.S. 168, 176 (1904) ("A contract must be rescinded within a reasonable time, that is, before the lapse of a time after the true state of things is known, so long that under the circumstances of the particular case the other party may fairly infer that the right of rescission is waived."); In re Weeks Marine, 2009 Tex. App. LEXIS 7868, at 11 ("Even if the Agreement were unenforceable due to procedural unconscionability or duress, Jimenez ratified it by accepting and retaining the benefits of the Agreement."); City of The Colony v. N. Tex. Mun. Water Dist., 272 S.W.3d 699, 732 (Tex. App. - Fort Worth 2008, pet. dism'd) ("In other words, if a party by its conduct recognizes a contract as valid, having knowledge of all relevant facts, it ratifies the contract. Whether a party has ratified a contract may be determined as a matter of law if the evidence is not controverted or is incontrovertible."); Barrand, Inc. v. Whataburger, Inc., 214 S.W.3d 122, 146 (Tex. App. - Corpus Christi 2006, pet. denied) ("Ratification occurs if a party recognizes the validity of a contract by acting or performing under the contract or by otherwise affirmatively acknowledging it."); Barker v. Roelke, 105 S.W.3d 75, 84-85 (Tex. App. - Eastland 2003, pet. denied) (noting that ratification may be determined as a matter of law if the evidence is not controverted or is incontrovertible).

n486. See Meyer v. Cathey, 167 S.W.3d 327, 332 (Tex. 2005) (holding that consent to fraudulent misrepresentations constituted ratification); Chambers,

319 S.W.3d at 900-01 (holding that amended agreement was binding despite any fraud).

n487. Vandervoort v. Sansom, 293 S.W.2d 271, 276 (Tex. Civ. App. - Fort Worth 1956, writ ref'd n.r.e.) (characterizing the plaintiff seeking rescission of the sale of a coin-machine business, including the coin machines, as the "involuntary bailee/trustee" of the machines; stating "it was the plaintiff's duty to use all reasonable care to make the defendants' loss (in the event of a judgment of rescission) as light as possible. To that end he must not wilfully allow the property to deteriorate or be destroyed, although he has a right to do any act in regard thereto reasonably necessary to protect his own interest, while at the same time maintaining his claim to rescind.").

n488. Id.

n489. Id.

n490. See Watson v. Baker, 9 S.W. 867, 869 (Tex. 1888) (taking note of claimant's delay in bringing suit in court to rescind a sale of land on ground of fraud); Nu-Enamel Paint Co. v. Davis, 63 S.W.2d 861, 863 (Tex. Civ. App. - Fort Worth 1933, writ dism'd) (bringing distributor's suit to rescind contract after discovering false representations had induced him to make the contract); McCleskey v. McCleskey, 7 S.W.2d 657, 660 (Tex. Civ. App. - Amarillo 1928, no writ) (noting that any insufficiency in a tender of rescission and return will be waived by an absolute refusal of the other party to entertain the proposal).

n491. Am. Network Leasing Corp. v. Corp. Funding Houston, Inc., No. 01-00-00789-CV, 2002 Tex. App. LEXIS 7267, at 15 (Tex. App. - Houston [1st Dist.] Oct. 10, 2002, pet. dism'd) (mem. op.) ("The determination of whether a party has come to court with unclean hands is left to the discretion of the trial court.").

n492. Aegis Ins. Holding Co., L.P. v. Gaiser, No. 04-05-00938-CV, 2007 Tex. App. LEXIS 2364, at 18 (Tex. App. - San Antonio Mar. 28, 2007, pet. denied).

n493. Bagby Elevator Co. v. Schindler Elevator Corp., 609 F.3d 768, 774 (5th Cir. 2010). But see Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 25-26 (Tex. App. - Tyler 2000, pet. denied) ("Although the jury found that Chappell did not suffer any damages from these violations, the fiduciary duty owed by an attorney to his client is of such magnitude that the Jacksons did not come to the court of equity with clean hands. We hold that public policy of Texas is best preserved by applying the unclean hands doctrine in this case.").

n494. See Bank of Saipan v. CNG Fin. Corp., 380 F.3d 836, 842 (5th Cir. 2004) ("It should be noted, however, that the unclean hands defense is inapplicable altogether where the plaintiff's sins do not affect or prejudice the defendant."); Canal Ins. Co. v. Flores, No. 3:06-CV-84-KC, 2009 U.S. Dist. LEXIS 37013, at 53 (W.D. Tex. Apr. 13, 2009) (stating that the "doctrine applies when a party seeking relief has committed an unconscionable act immediately related to the equity the party seeks in respect to the litigation"); Am. Network Leasing, 2002 Tex. App. LEXIS 7267, at 15 ("The doctrine cannot be used as a defense if the unlawful or inequitable conduct of the plaintiff is merely collateral to the plaintiff's cause of action.").

n495. Lazy M Ranch, Ltd. v. TXI Operations, LP, 978 S.W.2d 678, 683 (Tex. App. - Austin 1998, pet. denied); Crown Constr. Co. v. Huddleston, 961 S.W.2d 552, 559 (Tex. App. - San Antonio 1997, no pet.).

n496. Precision Instr. Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945) ("For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public."); Jackson Law Office, 37 S.W.3d at 25-26.

n497. Hughes v. Aycock, 598 S.W.2d 370, 375 (Tex. App. - Houston [14th Dist.] 1980, writ ref'd n.r.e.) ("One with unclean hands cannot rely on the equitable defense of estoppel.").

n498. See James T. Taylor & Son, Inc. v. Arlington Indep. Sch. Dist., 335 S.W.2d 371, 374 (Tex. 1960) ("Generally it is only when negligence amounts to such carelessness or lack of good faith in calculation which violates a positive duty in making up a bid ... that equitable relief will be denied.").

n499. See Norris v. Gafas, 562 S.W.2d 894, 897 (Tex. Civ. App. - Houston 1978, writ ref'd n.r.e.) (noting that the clean hands doctrine "does not operate to repel all sinners from a court of equity"); Ligon v. E. F. Hutton & Co., 428 S.W.2d 434, 437 (Tex. Civ. App. - Dallas 1968, writ ref'd n.r.e.) (noting that mere negligence does not render hands so unclean as to bar recovery); Red Ball Motor Freight, Inc. v. Bailey, 332 S.W.2d 411, 418-19 (Tex. Civ. App. - Amarillo 1960, writ ref'd n.r.e.) (making repeated appeals to "equity and good conscience" in considering unclean hands defense); Aetna Cas. & Sur. Co. v. Corpus Christi Nat'l Bank, 186 S.W.2d 840, 842 (Tex. Civ. App. - San Antonio 1944, writ ref'd w.o.m.) (holding that bank may recover fraudulently obtained funds even if it is negligent, provided recovery does not pass loss to innocent payee); Edwards v. Trinity & Bravos Valley Ry., 118 S.W. 572, 576 (Tex. Civ. App. - Galveston 1909) (noting that negligence must amount to violation of positive legal duty for it to wholly bar relief - and then only if other party has been prejudiced).

n500. See Schenck v. Ebby Halliday Real Estate, Inc., 803 S.W.2d 361, 367 (Tex. App. - Fort Worth 1990, no writ) (noting that because the jury found the plaintiffs negligent in delaying their rescission past the fifteen days allowed by the contract, their unclean hands would affect their remedy).

n501. Id. at 367.

n502. Texas v. Morales, 869 S.W.2d 941, 944 (Tex. 1994) (quoting Henry Home, Principles of Equity 46 (2d ed. 1767)).

n503. See Table E of the Appendix for data relating to executory contracts. For Texas state opinions in the LEXIS database, there were a total of 1171 opinions that used "rescission" as a core term in the 110 years since January 1, 1900 - 669 in the first forty years of that period, 277 in the second forty-year period, and 225 opinions in the last thirty years. In total, 234 opinions (20%) used "rescission" as a core term and used "securities" in the body of the opinion. Within the total 110 years, 116 opinions (17%) met both conditions in the first forty years, 57 opinions (21%) in the second forty years and 61 opinions (27%) thereafter. Similarly, 216 opinions (18%) used "rescission" as a core term and used "mistake" in the body of the opinion. Within the total 110 years, 101 opin-

ions (15%) met both conditions in the first forty years, 45 opinions (16%) in the second forty years, and 70 opinions (31%) thereafter.

n504. Laycock, supra note 124.