By Stephen Gibson[1]

***Contracts – Anticipatory Breach*: A Later Breach Can Only Be Excused by a *Material* Breach; an Immaterial Breach Supports a Damage Award Only.**

***Error Preservation - Jury Charge*: A Valid Objection to a Predicate Question May Preserve Error on a *Different* Basis to the Submission of a Dependent Question.**

Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc. was a dispute over a refrigeration system that did not meet the purchaser's undisclosed needs. Bartush, a food manufacturer, bought the system from Cimco. A third party successfully modified the system to meet Bartush's requirements. The cost of those modifications exceeded the balance Bartush still owed Cimco for the purchase price. Bartush refused to pay, Cimco sued to collect, and Bartush counterclaimed to recover the modification costs.

The jury found both Bartush and Cimco breached their agreement, that Cimco breached first, and that neither's breach was excused. The jury found $168,079 as Bartush's reasonable repair costs and awarded $215,000 for attorney's fees. It awarded Cimco the unpaid balance of $113,400, but did not decide the amount of Cimco's attorney's fees because the jury charge conditioned that answer on an unfulfilled condition.

The trial court rendered judgment for Bartush, but the court of appeals reversed and rendered judgment that Bartush take nothing. Notwithstanding the instruction informing the jury that it could only find a breach if there was a failure to comply with a *material* agreement, the court of appeals reasoned that the jury's further finding that Bartush also breached necessarily meant that Cimco's did *no*t materially breach the agreement even though the court's charge required materiality for any breach found by the jury.

***Material Breach Excuses Future Performance; Finding That a Breach Does Not Excuse Future Performance Impliedly Finds That the Breach Is* Immaterial.**

In a *per curiam* opinion, the Texas Supreme Court agreed that finding that neither party's breach was excused necessarily meant that Cimco's breach could not have been deemed material. The opinion reiterates Restatement §241's materiality factors and deemed materiality a question the trier of fact when not conclusively established by the evidence. *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004); Restatement (Second) of Contracts §241.

[1] The opinions expressed are solely those of the author. They do not necessarily represent the views of Munsch, Hardt Kopf & Harr, P.C. or its clients.

Immaterial Breach Supports Recovery of Damages, But Does Not Excuse the Other Party's Future Obligation to Perform.

The supreme court concluded that the judgment of neither lower court was correct. An immaterial breach is still a breach of contract, just not one that excuses the other party's future obligations. When a party commits an immaterial breach, the other must still perform. But the other party – the one that did not commit the immaterial breach – has the right to recover damages from the immaterial breach. In this case, that meant Cimco's failure to deliver a system meeting Bartush's needs did not excuse Bartush's failure to pay the balance owed under the original contract. Rather than render judgment, the court remanded the case to the court of appeals to consider Cimco's argument that no evidence supported the finding it breached the parties' agreement.

A Valid Objection to a Predicate Question May Suffice to Preserve Error on a* Different *Basis to the Submission of a Dependent Question.

The supreme court also disapproved the holding of the court of appeals concerning preservation of Cimco's complaint about the jury's failure to answer concerning its attorney's fees. That question was conditioned on findings that Bartush breached first and that its breach was not excused. The jury followed those instructions and did not determine Cimco's attorney's fees.

Before the case was submitted to the jury, Cimco did not object to those conditions. However, it objected on no-evidence grounds to the predicate question about whether Cimco breached first. The jury's failure to answer the attorney's fee question resulted from the condition permitting an answer only if the jury found that Bartush breached first. The court of appeals held the failure to object to the conditions waived Cimco's complaint.

The supreme court disagreed. Cimco had objected to that there was no evidence to support the finding that Cimco was the first to breach the agreement. In light of the remand for consideration of that "no evidence" complaint, the supreme court observed that Cimco's "no evidence" objection to an invalid basis for liability "preserves error for any impact the wrongful inclusion [of that basis of liability] has on other charge questions." Accordingly, it directed the court of appeals to consider Cimco's complaint about the failure to determine attorney's fees if Cimco's "no evidence" objection proved valid.

***Jury Charge*: Asking an Immaterial Question Proves Fatal to Contractual Case Even When the Objection Is First Raised Post-Verdict.**

***Oil and Gas*: Court Addresses Proper Interpretation of Shut-In Royalty Clauses.**

BP America Production Co. v. Red Deer Resources, LLC involved an attempt by a top lessee, Red Deer, to terminate the bottom lease held by BP. The bottom lease required production of oil & gas in paying quantities to keep the lease in force beyond the primary term. The lease also provided for a shut-in royalty that kept it alive from year-to-year upon payment of the annual shut- in royalty, regardless of actual production, "[w]he[n] gas from any well or wells capable of producing gas [in paying quantities] . . . is not sold or used during or after the primary term and this lease is not otherwise maintained in effect."

Under the shut-in royalty clause, the payment must occur within 12 months of the cessation of sale or use of gas produced by the well. BP last sold or used gas from the well on June 4, 2012. It shut-in the well on June 12, 2012, and tendered the shut-in royalty the next day, June 13, 2012

Red Deer sued to terminate BP's lease after BP shut off the last producing well. The jury did not find the well failed to produce in paying quantities for the 45-day period ending June 12, 2012, the day BP closed the valve for the well. However, the jury found the well "was incapable of producing in paying quantities when it was shut-in on June 13, 2012."

The problem was that the jury questions did not ask about the date that determines whether and when the shut-in royalty clause can be invoked. Under the unambiguous lease language, the shut in royalty clause ran for a year from the last date gas from the well was "sold or used," *not* the date the well ceased to be capable of production. Under the evidence, the last sale or use of gas from the well was June 4. June 12 or 13 were proved to be the last dates the well was able to produce.

The supreme court ruled that Red Deer failed prove and obtain the necessary findings to disallow BP from invoking the shut-in royalty. Although BP did not object to the question asked about a date that immaterial, the court held that an objection was not required. The immateriality of a question or finding may be asserted for the first time by post-verdict or post-judgment motions. Because Red Deer had the burden of proof and did not secure findings on the relevant issues, the supreme court rendered judgment that Red Deer take nothing.

If that result seems harsh, the opinion suggests that there was no serious dispute that the last "sale or use" occurred on June 4, and that BP tendered the shut-in royalty nine days later. Red Deer's argument that the tender was not timely was based on the interpretation of differently worded shut-in royalty clauses. Justice Green's unanimous opinion engaged in a detailed discussion and distinction of prior opinions interpreting these other shut-in royalty clauses to explain why they did not govern the outcome in this case.

The takeaway: asking the right question is just as important as getting the right answers.

***Certificate of Merit*: Dismissal for Failure to File Certificate of Merit With Original Complaint Is Mandatory and Cannot Be Avoided by Non-Suit and Re-Filing, *But* the Trial Court May Dismiss Without Prejudice So the Plaintiff Can Re-File.**[1]

If a lawsuit or arbitration arises out of the professional services of a licensed or registered professional, Texas Civil Practice & Remedies Code § 150.002 requires dismissal of the proceeding unless another licensed member of the same profession submits a "certificate of merit" – i.e., an affidavit showing the case is not baseless ("COM"). Under §150.002, the dismissal "may," but is not required to, be with prejudice against refiling. In *Pedernal Energy, LLC v. Bruington Engineering, Ltd.*, the claimant did not supply the COM until it non-suited the original

[1] Yes, you read that correctly

petition and "re-filed suit" in the form of an amended petition.[2] Even then, the claimant did not file a COM until it filed its amended, not the original, complaint. Further, the COM that was filed did not vouchsafe all of the claims asserted in the amended petition. Before the supreme court, the parties agreed that failure to file the COM with the original petition required dismissal of the suit.

The question was whether the dismissal should have been with prejudice. The trial court conducted a hearing on whether the dismissal should be with or without prejudice. Finding the failure to file the COM was not intentional or due to conscious indifference, the trial court dismissed *without* prejudice. After a divided court of appeals ruled that the dismissal should have been *with* prejudice, the supreme court examined whether the trial court's dismissal without prejudice was an abuse of the trial court's discretion.

The issue before the supreme court is what standard measures the trial court's discretion when the statute itself does not specify one. After a tedious analysis of the statute, the supreme court refused to apply a "good cause" standard before allowing a dismissal without prejudice. The Legislature used "good cause" in other parts of the statute, but not here. The statute was intended to eliminate groundless suits, so dismissal was mandatory when the COM was not filed with the original complaint. Non-suit and re-filing was not permitted because that would evade the statute. However, the supreme court also concluded that dismissal with prejudice was not mandatory in cases where the action was not so baseless as to be sanctionable by a dismissal with prejudice. Accordingly, it rendered judgment reinstating the trial court's dismissal sans prejudice.

The opinion does not explain how refiling after a dismissal without prejudice is materially different from re-filing after a non-suit. Both subject the professional to litigation when the plaintiff failed to comply with §150.002 to begin with. The opinion does not explain how the trial court is supposed to distinguish the meritless from the meritorious without a hearing on the merits. But if a merits hearing is necessary, doesn't that proceeding in and of itself subject the professional to the same litigation expense §150.002 was intended to avoid in the first place? On this score, the opinion simply offers

[2] The opinion by Justice Johnson does not elaborate on how the plaintiff filed an amended petition in a non-suited cause.

the conclusion sans explanation that the trial court's decision to dismiss without prejudice was not an abuse of discretion.

Justice Devine concurred in the judgment reinstating the dismissal *without* prejudice, but urged that the case should have been remanded to the trial court. He suggests that the analysis applicable to discovery sanctions also applies to §150.002. Accordingly, he concludes that the trial court could consider on remand with instructions to follow the requirements for sanctions generally and consider whether a lesser sanction would suffice to secure compliance.[3]

***Property Taxes*: The U. S. Constitution's Commerce Clause Does Not Proscribe Assessing Non-Discriminatory Property Taxes on Natural Gas Stored for Future Sale.**

In *ETC Marketing, Ltd. v. Harris County Appraisal District*, the court resolved differing results among the courts of appeals and ruled by a 7:1 majority through an opinion authored by Justice Devine that "a nondiscriminatory tax on surplus gas held for future resale does not violate the Commerce Clause." In doing so, the supreme court joined the resolution of the Kansas and Oklahoma supreme courts.

The Relevant Questions

The gas in question was stored in Texas as part of transmission in a pipeline system that did not extend beyond outside Texas but was connected to

---

[3] *In this writer's opinion*. both the majority and the concurring opinions dance around the fact that Chapter 150 is simply poorly-crafted legislation. As such, it requires judicial interlineation to fulfill what the Legislature probably intended. Judicial interlineation is useful as a feedback loop between the legislative and judicial branches. The Legislature is always free to change the statute when it disagrees with the judiciary's interpretation. But, implementing that feedback loop is exponentially more difficult (if not logically impossible) if fidelity to statutory text is the be-all-and-end-all of statutory construction. Here, it is a fair assumption that the legislature meant the prejudice v. non-prejudice decision to be made in light of the larger statutory purpose: eliminating the expense for litigating meritless claims. Neither the majority nor concurring opinions advance that objective.

interstate pipelines. Harris County sought to tax gas stored in a facility there as it awaited shipment – a necessary measure to accommodate varying demand and limited pipeline capacity. The owner asserted that the tax violated the Commerce Clause by taxing interstate commerce. Under *Complete Auto Transit, Inc. v. Brady*, there are two issues. The first is whether the property is in interstate commerce. The second is whether the tax is prohibited by the Commerce Clause. *Complete Auto* holds the tax prohibited unless it: (1) applies to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services the state provides.

Possible Partial Intrastate Distribution Does Not Mean Goods Are Not "In Transit."

The opinion rejected the appraisal district's contention the gas was not "in transit" while being stored by relying on *Maryland v. Louisiana*, 451 U.S. 725, 754–55 (1981), which held that, interrupted or not, gas that ultimately flows across state lines is in interstate commerce. That some of the stored gas might go to an intrastate consumer did not, under the *Maryland* analysis, prevent the stored gas from nonetheless being in interstate commerce.

Substantial Nexus Exists When Transit Interrupted By Owner for a Non-Transportation Business Purpose.

The opinion then turned to application of Complete Auto's four-part test to determine whether the tax would violate the Commerce Clause, paying especial attention to the substantial nexus limitation on state taxing power. The court first clarified that the only "substantial nexus" necessary for a property tax is the connection between the taxing jurisdiction and the taxed property. Unlike a sales or activity-based taxes, location of the taxpayer is irrelevant for purposes of whether a property tax violates the Commerce Clause. Mere physical presence in the jurisdiction alone is not sufficient because it would permit taxation of goods that are merely in transit – a result not permitted by the Commerce Clause. Also, the duration for which the goods are present is irrelevant because consideration of duration as a factor leads to arbitrary and impractical line-drawing.

The distinguishing factor for whether a "substantial nexus" exists is whether the stoppage in transit is for a business purpose, or simply part of the

transportation process. In other words, a business purpose and, hence, a substantial nexus exists when the goods stop in the jurisdiction at the behest of the owner who can then choose whether and where to dispose of the property. Here, the owner controlled the timing of the sale, waiting for the peak in market price. This power disrupted any continuity in transit. It made storage of the gas within the jurisdiction sufficient to supply the necessary "substantial nexus."

Texas Property Taxes Are Fairly Apportioned, Not Discriminatory, and Reasonably Related to the Services Provided.

To be "fairly apportioned," the apportionment must relate to activities in the state so no state taxes more than its fair share of interstate commerce. This test is met if an "identical tax, imposed elsewhere, would impose a greater tax burden on traveling property than on property that remains within the state." Texas property taxes satisfy that test because they are imposed only on property within the jurisdiction's geographic boundaries and only on a specific date. Thus, there is no risk that an identical tax elsewhere would result in multiple taxation.

The *ad valorem* tax scheme is non-discriminatory because it gives no consideration to whether the destination of goods is intrastate or interstate. The court also concluded that the police and fire protection, along with other state services, made the tax reasonably related to the services rendered to the taxed property itself. Accordingly, the majority held that the personal property tax on gas stored for future sale did not violate the Commerce Clause of the U. S. Constitution.

The Dissent Would Have Held That Transit Was Never Interrupted Because Storage Is an Essential Part of Pipeline Operations.

Chief Justice Hecht dissented. He would hold that storage was a necessary incident to transportation and, regardless of the business choice that stoppage may afford the owner, it does not terminate the "in transit" status of the gas and thereby makes the tax impermissible under the dormant Commerce Clause. Storage is necessary to maintain proper pressure, which in turn is necessary to pipeline operation, he reasons. He was unpersuaded that the owner's seasonal use of the storage reservoir was dispositive because the owner was not the pipeline's sole user. According to Chief Justice Hecht,

storage did not give the owner any opportunity other than timing the sale because "gas pipelines cannot manage market fluctuations, maintain structural integrity and operational efficiency, and assure dependable delivery by adjusting supplies from gas producers."

> *The Concurring Justices Respond – The Dormant Commerce Clause is an [Illegitimate] Judicial Departure from the Plain Text and Rejecting the Need for a* Complete Auto *Analysis Because the Answer Is "Plain as Day"*

Justices Brown and Willett responded in a separate concurring opinion, criticizing Chief Justice Hecht's reliance on the dormant Commerce Clause – which they characterize as "already enough of a deviation from the Constitution's text." they argue that clause requires a balancing of the needs of commerce against those of the state government. In their view, that balancing is dedicated to the legislative, not judicial, branch. In their view and rowing from the late Justice Scalia, the *Complete Auto* test prescribed by the U. S. Supreme Court is ""interpretive jiggery-pokery" that is unnecessary because "[i]t's plain as day" the tax at issue doesn't discriminate against interstate commerce.[4] For the concurring Justices, it appears that analysis according to stated criteria is unnecessary when the issue can be resolved by instinctive reaction.[5]

[4] The concurring Justices also joined the majority opinion invoking the *Complete Auto* analysis.

[5] *This writer's opinion – again*: Consider how that observation comports with the aspiration to be a government of objective standards in the form of laws, not one of subjective standards based on an individual's perception and reaction. If something is both obvious and correct, then it is capable of principled explanation by objective criteria. That process is the primary bulwark against the arbitrary and capricious exercise of judicial power.