One Breach, Two Breach, Old Breach, New Breach:

An Analysis of Competing Contract Claims in Light of *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*

Presented to:

31st Annual Construction Law Conference
San Antonio, Texas

Presented by:

Amy K. Wolfshohl
Porter Hedges LLP
Houston, Texas

I. Introduction

In disputes involving construction, in many instances the parties are faced with contractual claims and counterclaims. For example, an owner may assert a claim against a contractor for defective work while at the same time withholding funds that the contractor seeks to recover through a contractual claim for payment (among other claims that would likely be asserted). Another common scenario involves competing delay claims between parties in the contractual chain. These types of scenarios create "competing breach" claims.

Competing breach claims almost always involve an analysis of who breached first, whether the claimed breaches were material, and whether a party was required to continue performing or was entitled to cease its performance. Competing breach claims create complexity in jury charges and in awarding attorneys' fees because there may be two valid claims that must be analyzed. While most decisions focus on claims for material breach, the Texas Supreme Court recently issued an opinion with respect to a claim involving a non-material breach. *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.* adds another layer to the analysis of competing breach claims and highlights the importance of analyzing whether a breach is immaterial. This paper includes a discussion of the case, how it adds to competing breach analysis, provides a summary of jury charge issues (including those raised in *Bartush*) and ends with a discussion of attorneys' fees.

II. Discussion of *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*

A food manufacturer, Bartush-Schnitzius Foods, Co. ("Bartush"), sought to develop a new line of food which required refrigerated storage that did not exceed 38 degrees.[1] Bartush contacted a refrigeration contractor, Cimco Refrigeration, Inc. ("Cimco"), to install a new system.[2] Although Cimco sent Bartush a letter listing three options, the letter did not reference a particular temperature range for any option.[3] Bartush accepted the most expensive option.[4]

When the system was completed, Bartush set the temperature to 35 degrees.[5] This caused ice to form on the fan motors, which overheated and failed, causing the temperature to increase at times to 60 degrees.[6] When Bartush discovered the problem, it had already paid Cimco $306,758 but still owed $113,400.[7] The parties did not agree on how to proceed, and the manufacturer hired an engineer to investigate the matter.[8] The engineer recommended a warm-glycol defrost unit,[9] and Bartush hired another contractor to install the unit at a cost of

[1] *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432, 434 (Tex. 2017).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] There is no discussion as to whether the unit constitutes betterment.

$168,079.[10] After the warm-glycol defrost unit was installed, the system was able to maintain a temperature of 35 degrees.[11]

Cimco sued Bartush to recover the balance due on the contract.[12] Bartush asserted a counterclaim for breach of contract, seeking as damages, the cost of the warm-glycol defrost unit.[13] Cimco asserted in its defense that the equipment it installed was exactly as described in the accepted purchase order and denied that it had made any guarantee regarding the equipment's capacity to maintain a specific temperature.[14]

The case was tried to a jury which found: (1) both parties breached the contract, (2) Cimco breached first, (3) Bartush's breach was not excused, (4) Bartush was entitled to $168,079 (the cost of installing the warm-glycol defrost unit), and (5) Cimco was entitled to $113,400 (the contract balance).[15] The remainder of the case involved interpreting the legal significance of the jury's various findings.

a. Trial and Appellate Court Findings

Although the jury found both parties breached the contract and that Bartush's breach was not excused, the trial court believed it favored Bartush and rendered judgment in favor of Bartush for $168,079.[16] The lower court awarded nothing to Cimco, who appealed.[17] In addition to advocating a different interpretation of the jury verdict, Cimco argued that no evidence existed that it had breached the contract.[18]

The Fort Worth Court of Appeals reversed.[19] The appellate court determined that the jury's failure to find Bartush's breach was excused as necessarily implying a finding that Cimco's first breach was nonmaterial.[20] The court of appeals further held that Bartush's failure to pay was a material breach ***as a matter of law***, which rendered irrelevant the jury's finding that Cimco breached first and precluded Bartush's recovery.[21] The appellate court remanded to the trial court for entry of judgment that Bartush take nothing and that Cimco recover $113,400 in damages.[22] The appellate court did not reach Cimco's alternative assertion that no evidence supported the jury's finding that the contractor had breached the contract.[23]

---

[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* at 435.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 438.
[19] *Cimco Refrigeration, Inc. v. Bartush-Schnitzius Foods Co.*, 518 S.W.3d 57, 62 (Tex. App.—Fort Worth 2015), *review granted*, *judgment rev'd*, 518 S.W.3d 432 (Tex. 2017).
[20] *Id.* at 61–62.
[21] *Id.* at 62.
[22] *Id.*
[23] *Bartush-Schnitzius Foods Co.*, 518 S.W.3d at 438.

Both parties appealed to the Texas Supreme Court. Bartush argued that the trial court's judgment should be reinstated because the contractor's first breach was material as a matter of law and thus excused its subsequent failure to comply with the agreement.[24] Alternatively, Bartush argued that both damages awards should be given effect, resulting in its net recovery of $54,679 in compensatory damages.[25] Cimco argued that the court of appeals correctly concluded that Bartush's material breach excused Cimco's nonmaterial breach.[26]

b. Supreme Court Decision

In reaching its decision, the Texas Supreme Court distinguished between material and nonmaterial breach as follows:

> "It is a fundamental principle of contract law that when one party to a contract commits a ***material breach*** of that contract, the other party ***is discharged or excused from further performance***."[27] By contrast, when a party commits a ***nonmaterial breach***, the other party "***is not excused from future performance but may sue for the damages*** caused by the breach."[28]

Thus, according to the Texas Supreme Court, depending on the severity of the first breach, a party's performance may be excused or the non-breaching party may be required to continue to perform. The court also noted that breach of contract does not require a finding of materiality. Specifically, "the claim requires a finding of breach, not a finding of material breach."[29]

In this case, according to the court, materiality was appropriately determined by the jury unlike in *Mustang Pipeline* where materiality could be determined as a matter of law.[30] The court noted that in most cases, materiality presents issues of fact determined by the following factors outlined in *Mustang Pipeline*:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

---

[24] *Id.* at 435.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 436 (quoting *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004)) (emphasis added).
[28] *Id.* (quoting *Levine v. Steve Scharn Custom Homes, Inc.*, 448 S.W.3d 637, 654 (Tex. App.—Houston [1st Dist.] 2014, pet. denied)) (emphasis added) (footnote omitted).
[29] *Id.* (citing *Mays v. Pierce*, 203 S.W.3d 564, 575 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) ("A breach of contract occurs when a party fails or refuses to do something he has promised to do.")).
[30] *Id.* at 436–37.

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of the circumstances including any reasonable assurances; and
(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.[31]

Here, the jury decided these factors in the context of whether Bartush's breach was excused instead of whether Bartush's or Cimco's breach was material.[32] Specifically, the jury question on materiality was as follows:

QUESTION NO. 4

Was BARTUSH's failure to comply excused?

"Failure to comply" by BARTUSH may be excused if you find that CIMCO previously failed to comply with a material obligation of the same agreement.

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

(a) The extent to which the injured party will be deprived of the benefit which it reasonabl[y] expected;

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

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

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

(e) The extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Answer "Yes" or "No".

Answer: No

The Supreme Court determined that it could not "overrule the jury's implied finding" that Cimco's breach was not material.[33] Because Cimco's breach was not material, Bartush was required to continue its performance (*i.e.* payment). Bartush's continued performance, however,

[31] *Id.* (citing *Mustang Pipeline*, 134 S.W.3d at 199).
[32] *See id.* at 436.
[33] *Id.* at 437.

would not discharge its claim for damages against Cimco which had already arisen. In deciding the case, the court held "[w]hile a party's nonmaterial breach does not excuse further performance by the other party, neither does the second breach excuse the first."[34] In other words, as stated by the Texas Supreme Court, "a material breach excuses *future* performance, not *past* performance."[35] Interestingly, there is no discussion regarding whether Bartush's breach was material or—if it was immaterial—how that affected the court's analysis. However, the rule discussed by the court seems to imply that Bartush's non-payment was material.

Thus, the Texas Supreme Court found that the Fort Worth Court of Appeals erred in holding that Bartush's later, material breach excused Cimco from liability for its breach of its duty to perform.[36] The Texas Supreme Court agreed with Bartush's alternative argument in holding that both parties should be awarded the damages found by the jury, so that Bartush was entitled to a net award.[37] Except, the Texas Supreme Court remanded to the court of appeals for a determination of whether there was any evidence that Cimco breached.[38] Accordingly, Bartush's claim for a net damage award remains viable unless Cimco prevails on its argument that there was no evidence of its breach.

III. Analysis

a. Key Finding of Materiality

Key to the *Bartush* court's holding is the non-materiality of the original breach. In particular, the Texas Supreme Court found that Bartush was required to continue to perform and pay Cimco because Cimco's breach was nonmaterial. Consequently, in rendering advice to clients based upon whether to continue to perform after a breach, it is critical to know whether the breach is material or immaterial. Because only certain breaches are material as a matter of law, tread lightly on advising clients to discontinue performance.

The following cases discuss: (i) when materiality of a breach can be determined as a matter of law; (ii) when materiality is a fact question; and (iii) breaches that are not immaterial as a matter of law.

i. Material Breach Determined as a Matter of Law.

Cases holding that a breach is material as a matter of law are the exception to the rule, but important to analyzing competing breach claims. The following cases present examples where material breach could be determined as a matter of law.

In *Mustang Pipeline*, the Texas Supreme Court determined that a jury need not make an express finding of materiality when the evidence shows a material breach as a matter of law.[39]

---

[34] *Id.*
[35] *Id.* (emphasis in original).
[36] *Id.* 437–38.
[37] *See id.* at 437.
[38] *Id*. at 438.
[39] *Mustang Pipeline Co. v. Driver Pipeline* Co., 134 S.W.3d 195, 198 (Tex. 2004).

Mustang contracted with Driver for the construction of 100 miles of pipeline.[40] During the bidding phase, Mustang emphasized a completion deadline of April 30, 1997.[41] The parties' contract contained a "time is of the essence" clause while also contemplating avoidance of weather-related delays.[42] Claiming extensive weather delays, Driver only completed 15 miles of pipeline during the first 58-days of a 98-day schedule.[43] With 40 days to complete 85 miles of pipeline to meet the April 30th deadline, Mustang terminated Driver and hired another contractor to complete the work. Mustang sued Driver for the cost of completion, lost profits, and attorneys' fees.[44] Driver asserted a counterclaim for breach of contract alleging Mustang wrongfully terminated the contract.[45] After considering factors of material breach laid out in the Restatement (Second) of Contracts §§ 261–62, the court found that Driver materially breached the contract as a matter of law, and therefore discharged Mustang from further performance under the contract.[46] In sum, the *Mustang Pipeline* court held that Driver breached as a matter of law because: (i) the contract contained a hard deadline, a time is of the essence clause, and contemplated avoidance of delays and (ii) an objective inability to cure existed.

Hooker v. Nguyen also addressed material breach as a matter of law.[47] In *Hooker*, the owner, Hooker, contracted with Nguyen, the contractor, for the construction of a salon.[48] After notifying Nguyen of many construction issues, Hooker and Nguyen entered into an agreement by which Nguyen agreed to remedy the issues and complete the salon by February 4, 2001.[49] Based on the evidence, the jury found that Nguyen failed to substantially complete his obligations by February 4.[50] Because Nguyen failed to prove substantial performance, the Fourteenth District Houston Court of Appeals held that Nguyen materially breached as a matter of law.[51] Therefore, Hooker was discharged of his obligation to pay the remaining contract price.[52]

A similar set of facts are addressed in *Casarez v. Alltec Const. Co.* [53] The parties' contract on a home elevation project required substantial completion by a certain date and included a time is of the essence clause.[54] The contractor could not complete the project without additional money in excess of the contract price.[55] The homeowners refused to pay the

---

[40] *Id.* at 196.
[41] *Id.*
[42] *Id.* at 196–97.
[43] *Id.*
[44] *Id.* at 197.
[45] *Id.*
[46] *Id.* at 200.
[47] *Hooker v. Nguyen*, 14-04-00238-CV, 2005 WL 2675018, at *3 (Tex. App.—Houston [14th Dist.] Oct. 20, 2005, pet. denied).
[48] *Id.* at *1–2.
[49] *Id.* at *2.
[50] *Id.* at *10.
[51] *Id.* This does not apply when the owner is the first to materially breach. *1.9 Little York, Ltd. v. Allice Trading Inc.*, 01-11-00390-CV, 2012 WL 897776, at *6 (Tex. App.—Houston [1st Dist.] Mar. 15, 2012, pet. denied) (citing *Tips v. Hartland Developers, Inc.*, 961 S.W.2d 618, 623 (Tex. App.—San Antonio 1998, no pet.)).
[52] *Hooker*, 2012 WL 897776, at *10.
[53] *Casarez v. Alltec Const. Co.*, 14-07-00068-CV, 2007 WL 3287933, at *5 (Tex. App.—Houston [14th Dist.] Nov. 6, 2007, no pet.).
[54] *Id.* at *1, *5.
[55] *Id.* at *5.

additional money and the contractor stopped work before the home was substantially complete.[56] Through its failure to achieve substantial completion, the contractor materially breached the contract as a matter of law and the homeowners were discharged from any remaining contractual duties.[57]

ii. Material Breach Not Determined as a Matter of Law.

In contrast to cases holding that material breach could be determined as a matter of law, the murky water presented by dueling breach claims is the more common scenario. The following cases presented the court with material breach claims that could not be determined as a matter of law.

For example, in *MHI Partnership. Ltd. v. DH Real Estate Investment Co.*, a builder entered into a contract with a developer to purchase residential lots within a subdivision.[58] An amendment to the contract required that the developer provide backup information for an increase or decrease in actual construction and engineering costs three weeks before the closing date.[59] The developer achieved substantial completion of Phase 1 and demanded closing on lot sales within the next 10 days.[60] The developer also notified the builder that costs had increased 2%, but such backup information verifying the cost increase was not provided three weeks before closing.[61] The builder terminated the contract for developer's failure to provide the backup information three weeks before closing as provided in the contractual amendment. The builder asserted such a failure was a material breach of the parties' contract based on the "boilerplate" time is of the essence clause in the contract.[62] After a review of the evidence, the Austin Court of Appeals determined that the parties' "boilerplate" time is of the essence clause and circumstances indicated that the parties did not intend the time is of the essence clause to apply to this particular three week deadline.[63] Therefore, the court could not conclude that the breach was material as a matter of law and affirmed the trial court's denial of a directed verdict.[64]

In *Continental Dredging, Inc. v. De-Kaizered, Inc.*, a Houston dock owner contracted for dredging services in front of his dock to a uniform depth of 36-feet.[65] After several ships were unable to dock, the owner refused to pay the contractor's outstanding invoice for the material dredged.[66] At the trial court, the jury determined that the contractor had breached the contract, but that the breach did not excuse the owner from performance.[67] Thus, the jury impliedly found that the breach was immaterial.[68] On appeal, the owner argued that the evidence was factually

---

[56] *Id.*
[57] *Id.* at *6.
[58] *MHI P'ship, Ltd. v. DH Real Estate Inv. Co.*, 03-04-00485-CV, 2008 WL 3877717, at *1 (Tex. App.—Austin Aug. 20, 2008, pet. denied).
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.* at *2.
[63] *Id.* at *5–6.
[64] *Id.* at *6.
[65] *Cont'l Dredging, Inc. v. De-Kaizered, Inc.*, 120 S.W.3d 380, 386 (Tex. App.—Texarkana 2003, pet. denied).
[66] *Id.* at 387.
[67] *Id.* at 394.
[68] *Id.*

and legally sufficient to support a finding that the contractor materially breached as a matter of law.[69] The Texarkana Court of Appeals disagreed, holding that there was sufficient evidence to prove that the contractor almost dredged to 36-feet.[70] With sufficient evidence to prove that the contractor substantially performed, there could be no finding of material breach as a matter of law.[71]

The First District Houston Court of Appeals addressed a material breach claim made by a Municipal District against a Utility District for its failure to "promptly" bill for water supplied.[72] The contract provided that the Districts would supply water to one another in the event of an emergency.[73] Thereafter, the providing District was obligated to bill "promptly upon termination of the Emergency or Temporary Period, whichever is earlier."[74] From 1999 to 2006, the Districts' water supply was carried on account and the offset balance was reported.[75] During this time, the Municipal District received substantially more water than it supplied to the Utility District.[76] After determining its need for emergency water had diminished, the Utility District sent the Municipal District an invoice to settle the account.[77] The Municipal District refused to pay.[78] One of the Municipal District's arguments was that the Utility District materially breached the contract by failing to "promptly" bill, thus excusing the Municipal District's obligation to pay.[79] While acknowledging that under a time is of the essence contract a court may find a material breach as a matter of law, the Houston Court of Appeals concluded that was not the intent of the parties in this case.[80]

The First District Houston Court of Appeals in *GCC Constructors, Inc. v. American Horizon Concrete, Inc.*, held that evidence presented at the trial court was insufficient to find that the subcontractor's abandonment of a construction project after late payment was a material breach as a matter of law.[81] GCC, a first-tier subcontractor, contracted with American Horizon, a second-tier subcontractor, for concrete work, including both materials and manpower.[82] The subcontract did not contain a completion date or impose a work schedule.[83] While the subcontract did contain a time is of the essence clause, the same provision allowed for GCC to amend American Horizon's work schedule.[84] It was undisputed that American Horizon abandoned the project after only partial performance.[85] American Horizon alleges that it

---

[69] *Id.* at 393–94.
[70] *Id.* at 395.
[71] *Id.*
[72] *Harris Cty. Util. Dist. No. 16 v. Harris Cty. Mun. Dist. No.* 36, 01-10-00042-CV, 2011 WL 3359698, at *9 (Tex. App.—Houston [1st Dist.] Aug. 4, 2011, no pet.).
[73] *Id.* at *1.
[74] *Id.*
[75] *Id.* at *2.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at *9.
[80] *Id.* (citing *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004)).
[81] *GCC Constructors, Inc. v. Am. Horizon Concrete, Inc.*, 01-04-00817-CV, 2007 WL 926652, at *5 (Tex. App.—Houston [1st Dist.] Mar. 29, 2007, no pet.).
[82] *Id.* at *1.
[83] *Id.*
[84] *Id.*
[85] *Id.*

abandoned the project because of GCC's failure to pay, delays not entirely caused by American Horizon, and requests for expedited work without pay.[86] The trial court found that GCC breached the contract awarding American Horizon $40,000 in damages.[87] On appeal, GCC claimed that under *Mustang Pipeline*'s analysis, the facts indicate that American Horizon breached the subcontract, and GCC was also excused from its financial obligation to pay.[88] While the court recognized that the subcontract contained a time is of the essence clause, GCC-American Horizon's circumstances differed from those of *Mustang Pipeline*.[89] Unlike in *Mustang Pipeline*, the need for timely performance was only one of several issues GCC and American Horizon disputed.[90] Furthermore, the majority of delays on the project did not stem from American Horizon.[91] In sum, because the trial court was required to resolve the parties' factually disputed allegations concerning timely performance and causal delays, the appellate court overruled GCC's argument that American Horizon materially breached the subcontract as a matter of law.[92]

iii. Immaterial Breach

On the flip side of the coin, some litigants have argued that the court should determine ***immateriality*** as a matter of law. The following breach, however, was not immaterial as a matter of law:

In *Pelco Construction Co. v. Chambers County*, the First District Houston Court of Appeals refused to find that an owner's withholding of 10% of the contract price from a contractor was an immaterial breach as a matter of law.[93] Chambers County withheld 10% of two invoices submitted by Pelco for its work constructing a firehouse.[94] Chambers County alleged that it withheld payment due to defects in the work and asserted three reasons as to why the court should find that withholding 10% was an immaterial breach as a matter of law.[95] First, Chambers County argued that 10% was a nominal amount to withhold.[96] Second, the withheld amount was not intended to be permanent; once Pelco made corrections, the remaining amount would be paid.[97] And third, Chambers County argued that Pelco's failure to follow the payment dispute resolution process prevented Pelco from claiming the breach as material.[98] The court rejected all three arguments refusing to find immateriality as a matter of law because 1) case law does not support the assertion that 10% contractual withholding is a nominal amount as a matter of law; 2) the justification for withholding any amount was based on Pelco's defective work which was not established as a matter of law; and 3) it was unclear whether the contractual provision at issue was applicable to the circumstances and even if it was, failure to follow the

[86] *Id.* at *4.
[87] *Id.* at *2.
[88] *Id.* at *4.
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.* at *5.
[93] *Pelco Constr. Co. v. Chambers Cty.*, 495 S.W.3d 514, 524–26 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).
[94] *Id.* at 518.
[95] *Id.* at 524–25.
[96] *Id.* at 525.
[97] *Id.*
[98] *Id.* at 525–26.

dispute resolution procedures does not establish that Chambers County's breach was immaterial.[99] Further, the court reasoned that Chambers County did not provide Pelco with notice and an opportunity to cure the defects as required under their contract, but simply issued payment for less than the entire amount.[100] To find immateriality, the court would have to conclude that Chambers County's failure to notify Pelco of the alleged defects was immaterial, but that Pelco's failure to follow the claims procedure was material.[101] Nothing in Chambers County's motion for summary judgment established such conclusion as a matter of law.[102]

The cases above demonstrate that even the same type of breach—*i.e*. failure to timely perform, will in some instances be material as a matter of law and in other instances be a matter for a jury to determine. Consequently, a prudent litigator should not count on any particular breach being classified as material as a matter of law.

b. If a Contractor substantially performs, is the breach ever material?

Substantial performance of a construction contract throws another wrinkle into a material breach analysis. In ordinary contract cases, a party who is in default cannot maintain a suit for its breach.[103] This strict rule has been relaxed in the law of construction contracts by the doctrine of substantial performance, which allows recovery to a building contractor who has breached but substantially performed his contract.[104] This raises the question as to whether a contractor can ever *materially* breach a contract that it substantially performs. It would appear the answer to that question is no.

In a footnote, the Texas Supreme Court analogized the *Bartush* case to a construction case in which the contractor achieves only substantial completion as follows: "[a] similar state of affairs often arises in the context of construction contracts, when a contractor sues for the balance due and owing on the contract and the property owner counterclaims for damages for incomplete or defective performance."[105] The Texas Supreme Court noted that "[i]n such cases if the contractor has substantially completed performance, *i.e*. the contractor's breach is **not material**, then the contractor has a claim for the unpaid balance and the owner has a claim for damages."[106]

"Substantial performance may be raised by a party seeking to recover on a contract that was not fully performed or may be raised as the defensive issue of prior material breach by the

---

[99] *Id.* at 526.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Gulf Pipe Line Co. v. Nearen*, 138 S.W.2d 1065, 1068 (Tex. 1940).
[104] *Dobbins v. Redden*, 785 S.W.2d 377, 378 (Tex. 1990); *Vance v. My Apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 481 (Tex. 1984); *Atkinson v. Jackson Bros.*, 270 S.W. 848, 850 (Tex. Comm'n App. 1925, holding approved).
[105] *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432, 437 n.5 (Tex. 2017) (citing *Vance*, 677 S.W.2d at 480)). *Accord*, the Restatement (Second) of Contracts § 237, cmt. d (discussing the substantial performance doctrine).
[106] *Id.*

party defending a breach of contract action."[107] However, the contractor has the burden to prove substantial performance.[108] Consequently, the owner (or other upstream party) should consider raising substantial performance as an issue if the contractor's substantial performance is in question.[109]

In the end, a finding that the contractor substantially performed is similar to the material breach analysis. Indeed, "the doctrine of substantial performance overlaps with the requirement that the breach of a contract must be material."[110] "[T]he doctrine assumes, if there is substantial performance, the breach is immaterial."[111]

For the contractor to meet its burden that it substantially performed a construction contract,

> the contractor must have in good faith intended to comply with the contract, and shall have substantially done so in the sense that the defects are not pervasive, do not constitute a deviation from the general plan contemplated for the work, and are not so essential that the object of the parties in making the contract and its purpose cannot, without difficulty, be accomplished by remedying them.[112]

Thus, the contractor must prove: (i) good faith; (ii) the absence of pervasive defects; and (iii) that the defects can be remedied without the contract failing its essential purpose.

In the following case, the court found there was no material breach because the contractor substantially performed. In *Continental Dredging*, the court found that an owner was not excused from paying a contractor who substantially performed the contract.[113] The court equated substantial performance with the lack of material breach. Specifically, the court found that the contractor's dredging operation did not achieve 36-feet required by the contract but almost achieved that depth. The court noted that "[t]he ratio between what was left unperformed and the total performance promised will frequently be decisive."[114] The dredging contractor also acted in good faith that it had concluded the contract.[115] As such, there was substantial performance and no material breach.[116]

---

[107] *St. Paul Mercury Ins. Co. v. Stewart Builders, Ltd.*, 01-09-00276-CV, 2011 WL 944377, at *6 (Tex. App.—Houston [1st Dist.] Mar. 17, 2011, no pet.).
[108] *Vance*, 677 S.W.2d at 482.
[109] *See* Texas Pattern Jury Charge 101.46; *cf Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, 642 S.W.2d 160, 165 (Tex. 1982) (discussing an implied finding of substantial performance due to the presentation of some evidence that the contractor substantially performed); *Movie Grill Concepts I, Ltd. v. CCM Grp., Inc.*, 05-02-00892-CV, 2003 WL 549425, at *2 (Tex. App.—Dallas Feb. 27, 2003, pet. denied) (discussing instruction in jury charge relating to substantial performance).
[110] *See Gentry v. Squires Const., Inc.*, 188 S.W.3d 396, 403 n.3 (Tex. App.—Dallas 2006, no pet.).
[111] *Id.*
[112] *Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, 642 S.W.2d 160, 164 (Tex. 1982).
[113] *Cont'l Dredging, Inc. v. De-Kaizered, Inc.*, 120 S.W.3d 380, 395–96 (Tex. App.—Texarkana 2003, pet. denied).
[114] *Id.* at 395.
[115] *Id.*
[116] *Id.* at 396.

While not a construction dispute, the Fifth Circuit also held that a finding of substantial performance establishes no material breach occurred and therefore does not excuse the other party's performance.[117] In *Measday v. Kwik-Kopy Corp.*, the Fifth Circuit, applying Texas law, analyzed the doctrine of substantial performance as applied to an employment/service contract.[118] Measday was hired to serve as Kwik-Kopy's regional franchise director under a 5-year contract.[119] Before expiration of the contractual relationship between Measday and Kwik-Kopy, Kwik-Kopy's director of marketing told Measday he needed to sign a new agreement and had no choice in the matter. Preferring to work under the existing contract, Measday refused to sign the new contract and was subsequently terminated.[120] Measday sued for breach of contract. The trial court found a valid 5-year contract and awarded Measday damages.[121] On appeal, Kwik-Kopy argued that the jury instruction of substantial performance was in error.[122] Although the Fifth Circuit agreed, the court held that such error did not require reversal because the facts presented by Measday were sufficient to prove substantial performance.[123] Therefore, Kwik-Kopy's argument—that Measday did not substantially perform thereby excusing Measday's termination—must fail.[124] "A finding of substantial performance established there was no material breach," and therefore Kwik-Copy was not excused from performance.[125]

These cases demonstrate that substantial performance may help certain parties to demonstrate the lack of a material breach. In cases where the contractor or other downstream party is less likely to prove substantial completion, it may be helpful to raise the issue due to the burden shifting aspect of proving substantial performance.

c. Hypothetical Discussion of *Bartush*

Assume that the jury in the *Bartush* case found that Cimco breached first and the breach was material (or that Bartush's breach of contract was excused). Does Cimco's breach excuse Bartush from remitting any additional funds to Cimco? In addition to the amounts it withheld, could Bartush seek an award of repair costs?

In the *Bartush* case, the Texas Supreme Court echoes the familiar rule that a material breach by one party discharges the other from future performance.[126] But how far does that rule extend? Under the hypothetical, would it justify the jury verdict in the *Bartush* case where the trial court rendered judgement for Bartush for $168,079 and awarded nothing to Cimco? Remember that Cimco was owed $113,400, which was the balance due on the contract.

---

[117] *Measday v. Kwik-Kopy Corp.*, 713 F.2d 118, 126 (5th Cir. 1983).
[118] *Id.* at 124.
[119] *Id.* at 121.
[120] *Id.* at 122.
[121] *Id.*
[122] *Id.* at 123.
[123] *Id.*
[124] *Id.* at 125.
[125] *Id.*
[126] *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432, 437 (Tex. 2017).

The hypothetical is similar to the facts in *Hooker v. Nguyen*.[127] In that case, Hooker hired Nguyen to build the interior of a salon.[128] Nguyen's work was late and some defects existed in the work.[129] At the end of the project, Hooker failed to pay $44,159.20 to Nguyen.[130] The jury found that Nguyen failed to substantially perform but also awarded him the balance outstanding on the work.[131] The jury also awarded Hooker $58,949.00 ($3,949.00 for costs of remedying or repairing defects; $5,000.00 for liquidated damages for Nguyen's late performance; and $50,000.00 in diminution of value of the salon).[132] The Fourteenth District Houston Court of Appeals determined that the jury finding that Nguyen failed to substantially perform was equivalent to a finding of material breach excusing Hooker's further performance.[133] Thus, the appellate court reversed and rendered.[134] Nguyen was awarded nothing and Hooker was awarded the damages found by the jury.[135]

Based upon the precedent in *Hooker*, Cimco would not be entitled to its balance due and Bartush would be entitled to its cost of repair. This result raises questions relating to an owner receiving a windfall due to not paying for defective work and being awarded the cost of repair. Perhaps, however, this result was brought about due to the lack of a claim for quantum meruit.[136]

IV. Other common breach scenarios – Continuing Performance

The first to breach rule stated in *Mustang Pipeline*—that "when one party to a contract commits a material breach of that contract, the other party is discharged or excused from future performance"—applies only so long as the parties do not treat the contract as continuing in effect.[137]

Chilton Ins. Co. v. Pate & Pate Enterprises, Inc. illustrates an example of when the non-breaching party elects to continue the contract after a breach by its contractual counter-party, but then later attempts to withhold payments based on these prior material breaches. In *Chilton*, Chilton provided a performance bond on behalf of Caliber, the subcontractor hired by the general contractor, Pate, to perform a public works project.[138] After Caliber defaulted, Chilton entered into a takeover agreement with Pate, whereby Chilton agreed to complete Caliber's work and Pate agreed to pay Chilton in accordance with the terms of Caliber's subcontract.[139] Due to delays and problems with Chilton's work, Pate withheld payment from Chilton, even though

---

[127] 14-04-00238-CV, 2005 WL 2675018 (Tex. App.—Houston [14th Dist.] Oct. 20, 2005, pet. denied).
[128] *Id.* at *1.
[129] *Id.*
[130] *Id.* at *3.
[131] *Id.* at *3.
[132] *Id.* at *3 n.2.
[133] *Id.* at *10.
[134] *Id.* at *11.
[135] *Id.*
[136] *See Beeman v. Worrell*, 612 S.W.2d 953, 956 (Tex. Civ. App.—Dallas 1981, no writ) (holding that recovery in quantum meruit was proper where contractor failed to substantially perform and where owner had payments outstanding).
[137] *Gupta v. E. Idaho Tumor Inst., Inc*., 140 S.W.3d 747, 756 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).
[138] *Chilton Ins. Co. v. Pate & Pate Entes., Inc*., 930 S.W.2d 877, 888 (Tex. App.—Corpus Christi 1996, writ denied).
[139] *Id*.

Chilton continued to perform the work.[140] When the project was complete, Pate acknowledged that Chilton was owed a balance under the takeover agreement, but claimed that it had been damaged by Chilton's poor performance and delays and demanded reimbursement from Chilton.[141] Chilton filed suit alleging, among other claims, breach of contract.[142] Pate counterclaimed to recover its damages for Chilton's breach of contract.[143] In its live pleadings, Pate judicially acknowledged that Chilton was entitled to a credit against the actual damages it allegedly owed to Pate.[144]

Pate, however, argued that its failure to pay Chilton the remaining amount owed under the takeover agreement was excused by Chilton's prior material breach.[145] The court acknowledged the general rule that "[w]here one party materially breaches a contract, the non-breaching party is forced to elect between two courses of action—continuing performance or ceasing performance. ***Treating a contract as continuing, after a breach, deprives the non-breaching party of any excuse for terminating their own performance***."[146] The court found that Pate treated the contract with Chilton as continuing because "by its own words, [Pate] admits it 'did not seek to declare the contract terminated [upon the breach], but rather operated within the terms of the contract and performed its obligations under such contract.'"[147] The court rejected Pate's argument that the election of remedies doctrine applied to Chilton when Pate first withheld a progress payment because Pate was permitted to withhold this payment under the subcontract, finding that "[a]n election does not arise until the other party materially breaches the contract. Pate's failure to comply with the subcontract did not occur at the time it withheld progress payments. If a breach occurred, it was when Pate withheld final payment after the Project was accepted by the City."[148] Instead, the election of remedies occurred when *Pate* determined that Chilton materially breached the contract—at that time, Pate could have either discontinued its own performance, rescinded the contract and sued for material breach, or continue its performance and lose Chilton's material breach as an excuse for its own non-performance.[149] By its own actions, Pate elected to treat the contract as continuing, and therefore forfeited any excuse for its own breach of failing to pay the admitted credit to Chilton.[150]

Similarly, in *Eco Built*, the court found that a contractor, Landmark, could not refuse to pay a terminated subcontractor, Eco Built, for work completed before the termination even though the jury found that Eco Built breached the contract first and the breach was material.[151] Specifically, the court held that Landmark waived Eco Built's prior breach as an excuse for terminating its own non-performance (*i.e.* not paying Eco Built's invoices before termination).[152]

---

[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id*. at 885–86.
[145] *Id*. at 887.
[146] *Id*. at 887–88 (citations omitted) (emphasis added).
[147] *Id*. at 888.
[148] *Id*.
[149] *Id*.
[150] *Id*.
[151] *Eco Built, Inc. v. Lulfs*, 2010 WL 3629821, at *6 (Tex. App.—Austin, Sep. 17, 2010).
[152] *Id*. at *5.

As a result, the payments owed to Eco Built were offset against the damages incurred by Landmark.[153]

While parties are required to continue to perform after another party breaches the contract if they elect to treat the contract as continuing, that does not mean a claim for damages is waived.[154] The non-breaching party's election of remedies "affects only whether the non-breaching party is required to perform fully after the breach."[155] "[A]ny action indicating an intent to continue [the contract] will operate as a conclusive choice," and while the non-breaching party will be deprived of "any excuse for ceasing performance on his own part," the injured party will not be deprived of "his cause of action for the breach which has already taken place."[156] A party's "continuing performance after another party's breach is not a waiver of the right to recover damages due to the breach, and a non-breaching party's honest efforts to induce the party in default to perform the contract do not constitute waiver." As such, a prior material breach is treated more like an immaterial breach when the non-breach party continues to perform.

V. Jury charge

Drafting the jury charge is complicated by dueling breach claims. The biggest mistake is assuming that one size fits all. While you can begin with the jury charges recommended by the Texas PJC and the Texas Supreme Court, all charges have to be adjusted to the needs of the case.

Texas Pattern Jury Charge 101.2 (2016) includes the following comment with respect to competing claims of material breach:

> **Disjunctive question for competing claims of material breach.** If both parties allege a breach of contract against one another, the court can ask the breach-of-contract question disjunctively, together with an appropriate instruction directing the jury to decide who committed the first material breach.[157] An alternative way to submit competing claims of breach of an agreement is set forth below.
>
> QUESTION 1
>
> Did *Don Davis* fail to comply with *the agreement*?

[153] This case illustrates the ease with which parties can be considered to have continued performance after the breach. The contract was executed on September 27, 2002. On November 15, 2002 Landmark served notice of default and on December 6, 2002, Landmark terminated the contract. While Landmark made a partial payment after disputes arose and amended the contracts at issue, this continued "performance" only lasted for a couple of weeks. There was no jury question regarding continued performance. Had Landmark not paid anything to Eco Built the results may have been different in the case.

[154] *Chilton Ins. Co. v. Pate & Pate Enters., Inc.*, 930 S.W.2d 877, 888 (Tex. App.—Corpus Christi 1996, writ denied) (citing *Western Irr. Co. v. Reeves Land Co.*, 233 S.W.2d 599, 602–03 (Tex. App.—El Paso 1950, no writ)).

[155] *Avasthi & Assocs., Inc. v. Dronamraju*, No. 01-11-00786-CV, 2012 WL 6644873, at *8 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (mem. op.).

[156] *Avasthi*, 2012 WL 6644873, at *7 (quoting *Compass Bank v. MFP Fin. Servs., Inc.*, 152 S.W.3d 844, 858 (Tex. App.—Dallas 2005, pet. denied)).

[157] *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 200 (Tex. 2004).

[Insert instructions, if appropriate.]

Answer "Yes" or "No."

Answer: _____

QUESTION 2

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

[Insert instructions, if appropriate.]

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1 and Question 2, then answer Question 3. Otherwise, do not answer Question 3. QUESTION 1

QUESTION 3

Who failed to comply with *the agreement* first?

Answer "*Don Davis*" or "*Paul Payne*."

Answer: _____

The pattern jury questions in Pattern Jury Charge 101.2 are a derivation of the charge recommended by the Texas Supreme Court in *Mustang Pipeline*. In that case, the court noted that the parties could have avoided having the jury finding both parties in breach "had the trial court submitted the breach of contract question disjunctively ("Did Driver Pipeline Company or Mustang Pipeline Company fail to comply with the parties' contract?") accompanied by an appropriate instruction directing the jury to decide who committed the first material breach."[158] However, the Committee on Pattern Jury Charges elected to re-state the disjunctive question as two questions and pose a third question relating to order of breach which, according to the Committee, focuses on the "defense of prior material breach."[159] Additionally, the Committee recommends predicating damages only on an affirmative finding of Question 1 and 2 but not 3 relating to who failed to comply first.

The Committee on Pattern Jury Charges of the Texas State Bar also provides the following commentary with respect to materiality listing the factors for determining materiality and noting:

[158] *Id.*

[159] PJC 101.2 Comments to disjunctive question for competing claims of material breach (noting Question 3 submits the defense of prior material breach).

Material breach. If the parties dispute whether the alleged breach is a material one, the court should insert any or all of the following instructions regarding materiality, as appropriate:

> A failure to comply must be material.

Interestingly, the PJC arguably does not contemplate a nonmaterial breach like the one discussed in *Bartush* (which the court found justified an award of damages but required continued performance[160]) because it states that a failure to comply must be material or alternatively permits the parties to assume the breach was material.

In the *Bartush* case, the parties appear to have followed the instruction of PJC 101.21-22 which recommends the following question when a party submits one or more defenses to a contract suit:

> PJC 101.21 Defenses—Basic Question
>
> If you answered "Yes" to Question [*101.1*], then answer the following question. Otherwise, do not answer the following question.
>
> QUESTION _____
>
> Was *Don Davis*'s failure to comply excused?
>
> PJC 101.22 Defenses—Instruction on Plaintiff's Material Breach (Failure of Consideration)
>
> Failure to comply by *Don Davis* is excused by *Paul Payne*'s previous failure to comply with a material obligation of the same agreement.
>
> Answer "Yes" or "No."
>
> Answer:_____

Thus, prior material breach was submitted as a defense instead of part of Question 2 which asked whether Cimco failed to comply with the contract. Interestingly, had materiality been raised in connection with Question 2 relating to Cimco's failure to comply it is possible the jury would have found Cimco did not breach because the jury later found that Cimco did not fail to comply with a material obligation of the agreement in Question 4. If the jury had found that Cimco did not breach but Bartush did, Bartush would not have been awarded any damages.

[160] *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432, 437 (Tex. 2017).

In *CFS Forming Structures Co. v. Flintco, Inc*., the Fifth Circuit approved another form of jury instructions in connection with competing breach scenarios.[161] In this case, Flintco contracted with CFS to perform the concrete scope in connection with a conference center and a hotel. While several schedules were issued, Flintco became concerned that CFS was not timely performing the concrete work.[162] Before the project manager went on vacation, he sent a cure notice to CFS requesting CFS commence curing its delay in beginning the concrete work. While he was out, CFS began the slab work by laying down vapor barriers, applying pest control, grading the site, and similar actions consistent with preparing the concrete work.[163] The project manager returned and terminated CFS because it had failed to undertake "significant carton form" work.[164] The submitted jury questions were as follows:[165]

> Question 1: Do you find that CFS was in compliance with the master project schedule on September 28? If "No" proceed to question 2; if yes, proceed to question 3.
>
> Question 2: Do you find that CFS satisfied the notice in the "cure letter" of September 28 by commencing operations? If yes, proceed to question 3; if "no" proceed to question 4.
>
> Question 3: What amount of money would compensate CFS for Flintco's termination?
>
> Question 4: What amount of money would compensate Flintco for CFS's breach?

The jury found that CFS was not in breach of the subcontract on September 28 and awarded damages for Flintco's unjustified termination.[166] Flintco argued that the district court erred by refusing to submit the questions in the disjunctive as recommend by *Mustang Pipeline*. In rejecting Flintco's argument, the Fifth Circuit opined that the purpose behind the *Mustang Pipeline* court's instruction was to capture the concept of materiality. Specifically, the Fifth Circuit held that "[t]he district court's jury instruction here adequately capture the question of materiality despite their not being worded in the disjunctive [because] [t]he charge contains the implicit assumption that the breaches, if they occurred were material."[167]

> That is, the jury questions require that, (1) if the jury finds that CFS breached the subcontract by failing to comply with the CPM, Flintco must be awarded damages, but (2) if CFS was in compliance, then Flintco's termination was wrongful and the jury must determine the quantity of damages incurred by CFS. Even though they do not explicitly require the jury to decide materiality,

[161] *CFS Forming Structures Co., Inc. v. Flintco, Inc.*, 393 F. App'x. 136, 142 (5th Cir. 2010).
[162] *Id*. at 139.
[163] *Id*.
[164] *Id*.
[165] *Id*. at 139–40.
[166] *Id*. at 140.
[167] *Id*. at 142.

> these instructions will nevertheless establish which breach, if any, is material. And, because of the "cure" provision, CFS could only be in breach under the instant facts if it were first notified of a putative breach and afforded an opportunity to cure. There is no question that Flintco terminated the subcontract and that it purported to do so because of CFS's putative failure to cure the delay outlined in the "cure letter." It necessarily follows that if CFS was not actually in breach *vel non*, then the termination for that breach was wrongful.[168]

Because the jury charge addressed materiality and prevented conflicting findings, it was proper.[169]

Upon review of the cases above, there is much more guidance with respect to submitting questions regarding breaches that are clearly material. The Texas Pattern Jury Charge fails to provide guidance with respect to common breach scenarios where one of the breaches was immaterial or where the parties continue to perform after the original breach. Likewise, *Mustang Pipeline* and *Flintco* do not address a scenario like that in *Bartush* where the court found that Cimco breached first but its breach was not material.

While the *Bartush* Court used implied findings to resolve the issues before it, the Texas Supreme Court made no further recommendations for handling jury questions relating to material breach in that case. As such, practitioners are left without much guidance to draft jury charges where one breach was not material or the first breach was material but later performance was not excused because the non-breaching party continued to perform. While there are multiple ways to ask the jury to decide completing breach claims, to the extent the parties believe that one of the breaches was immaterial, consider a modification of the questions posed by *Bartush* and *Cimco* as follows: Question 1 and 2 regarding each parties' failure to comply with the agreement at issue, Question 3 regarding order of breach (predicated on an affirmative finding for 1 and 2) and then express questions regarding materiality with appropriate predicates. The materiality questions are suggested in lieu of asking the jury to determine whether a party's breach was excused to avoid having a court decide whether a finding of materiality or immateriality was implied. If additional questions are used regarding materiality as suggested, the jury will decide materiality and it will not be implied either through asking who breached first or in a question relating to whether a parties' breach was excused.

VI. How are attorneys' fees affected by competing breach claims?

Dueling breach claims also create unique issues with respect to attorneys' fees. In *Bartush*, the jury was asked about both parties' fees and awarded Bartush fees but not Cimco.[170] According to Cimco, it was not awarded fees due to conditional submission of the question regarding its fees.[171]

---

[168] *Id.* at 142–43.
[169] *Id*. at 143.
[170] *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432, 435 (Tex. 2017).
[171] *Id*. at 438.

In connection with competing breach claims, both parties may be awarded fees under certain circumstances. The analysis is varied depending upon the existence of a prevailing party clause.

a. No prevailing party clause

Texas Civil Practice and Remedies Code § 38.001 is the statute that Texas litigants look to for recovery of attorneys' fees in connection with breach of contract claims. Parties are entitled to recover fees from individuals and corporations under Texas Civil Practice and Remedies Code § 38.001 even in the absence of a prevailing party when they (1) prevail on a cause of action for which attorneys' fees are recoverable, and (2) recover damages.[172]

Under the predecessor to Texas Civil Practice and Remedies Code § 38.001, the Texas Supreme Court analyzed the ability of both parties to recover fees in the absence of a prevailing party clause. In *McKinley v. Drozd*, a general contractor brought suit against homeowners to recover the balance due on a construction contract and its attorneys' fees.[173] The homeowners asserted a competing claim for breach of contract and requested attorneys' fees.[174] The trial court awarded both parties damages under their breach claims as well as equal attorneys' fees.[175] The Texas Supreme Court addressed the issue of whether a party needs a net recovery in order to recover attorneys' fees under Texas Civil Statutes, article 2226—the predecessor to Texas Civil Practice and Remedies Code § 38.001.[176] The court looked to the wording of the statute and concluded, "all that is required to obtain attorneys' fees is a 'just amount owing' not tendered within 30 days."[177] Therefore, in competing breach claims, even if a party's damages are completely offset, the party may still recover its attorneys' fees.[178]

The party who prosecutes a breach of contract claim but recovers no damages, cannot be awarded fees under § 38.001 because he did not receive relief on a valid claim.[179] Specifically, § 38.001(8) provides that a party "may recover reasonable attorneys' fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for . . . an oral or written contract."[180] In *Green v. Solis*, although a jury found that Solis failed to comply with a subcontract, the jury awarded zero damages to Green for Solis' breach.[181] Because Green failed to recover damages on its breach of contract claim, Green was not entitled to recover attorneys' fees under § 38.001.[182]

---

[172] *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997) (citing *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 437 (Tex. 1995)).
[173] *McKinley v. Drozd*, 685 S.W.2d 7, 8 (Tex. 1985).
[174] *Id.*
[175] *Id.*
[176] *Id.* at 10.
[177] *Id*.
[178] *Id*. at 11.
[179] *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 389–90 (Tex. 1997).
[180] TEX. CIV. PRAC. & REM. CODE § 38.001(8).
[181] *Green*, 951 S.W.2d at 386.
[182] *Id.* at 390.

b. Prevailing party clause

In *Intercontinental Group Partnership v. KB Home Lone Star, L.P.*, the Texas Supreme Court, identified the standard for determining the prevailing party in a breach of contract action in connection with a prevailing party clause. In considering whether an award of contractual attorneys' fees was proper, the court determined that a party "prevails" on a claim "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."[183]

Thus, the concept of "prevailing party" as a claimant includes not just successfully proving or defending against a claim but also receiving relief. In a breach of contract action where a party seeks § 38.001 attorneys' fees,[184] the party who "prevails" must be the breach of contract claimant who "prove[s] compensable injury and secure[s] an enforceable judgment in the form of damages or equitable relief."[185]

On the other hand, in connection with a prevailing party clause, a party may—in many instances—be awarded fees for successfully defending a breach of contract claim.[186] Thus, the analysis of cost of defense is different for competing breach claims where a prevailing party clause exists and where one does not because there is no award of fees under § 38.001 for a successful defense.

In *www.Urban.inc. v. Drummond*, the court discussed order of breach in connection with whether a defendant could be a prevailing party entitled to attorneys' fees in connection with its defense of a breach of contract claim.[187] In the *Drummond* case, Chris Drummond signed a Residential Buyer/Tenant Representation Agreement in 2011 in which Drummond agreed to exclusively work through Urban for six months. Under the terms of the agreement, Urban was entitled to a commission based on the gross sales price of the property. The agreement also provided for a payment to Urban upon Drummond's default. The agreement also contained the following attorneys' fees provision:

> ATTORNEY'S FEES: If Client or Broker is a prevailing party in any legal proceeding brought as a result of a dispute under this agreement or any transaction related to this agreement, such party

[183] *Intercontinental Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 654 (2009) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992)). Note that the Court left open the issue of whether a defendant who successfully defends a breach of contract claim would be entitled to contractual attorneys' fees.

[184] TEX. CIV. PRAC. & REM. CODE § 38.001.

[185] *KB Home*, 295 S.W.3d at 652 (defining "prevail" in relation to breach of contract claimant in contractual attorneys' fees case); *Green*, 951 S.W.2d at 390 (defining "prevail" in relation to breach of contract claimant under TEX. CIV. PRAC. & REM. CODE § 38.001 breach of contract case); *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 201 (Tex. 2004) (holding party not entitled to attorneys' fees where party has valid breach of contract claim but awarded no damages).

[186] *Chevron Phillips Chem. Co. LP v. Kingwood Crossroads, L.P.*, 346 S.W.3d 37, 70 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (holding fees for defense of claim were proper where "contractual provision entitling a 'prevailing party' to recover attorneys' fees does not distinguish between successful prosecution and successful defense of a claim"); *see also VSDH Vaquero Venture, Ltd. v. Gross*, 05-16-01041-CV, 2017 WL 3405312, at *5 (Tex. App.—Dallas Aug. 9, 2017, no pet.).

[187] *WWW.URBAN.INC. v. Drummond*, 508 S.W.3d 657, 663 (Tex. App.—Houston [1st Dist.] 2016, no pet.), reh'g denied in part (Feb. 7, 2017).

> will be entitled to recover from the non-prevailing party all costs of such proceeding and reasonable attorney's fees.

Only Urban's breach of contract claim and Drummond's affirmative defense of prior material breach and breach of fiduciary duty were submitted to the jury. The jury found that Urban materially breached first through its failure to use best efforts under the agreement. The jury also found the Drummond breached. Neither party was awarded damages. Urban contended that the trial court erred by awarding attorneys' fees to Drummond because Drummond is not a "prevailing party" under the agreement.[188]

Urban asserted several arguments to attempt to show that it was the prevailing party including that Drummond's breach necessitates a finding that Drummond was not the prevailing party.[189] Specifically, Urban argued that Drummond could not recover attorneys' fees based on his defense of Urban's breach of contract claim because the jury found that Drummond breached the agreement and there is no jury finding that Drummond's breach was excused. The court reasoned, however, that the jury's findings demonstrate that Drummond's failure to comply with the agreement was excused as a matter of law by Urban's prior material breach. As such, the order of breach can also affect the party designated as the prevailing party.

The determination of the prevailing party under a prevailing party clause is even more complicated by facts similar to those in *McKinley* and in *Bartush* where both parties prevail on a claim and are awarded damages particularly due to the lack of case law available to provide guidance on the issue. While it was at least partially rejected in *KB Home*,[190] some courts continue to rely upon the "main issue" analysis in other contexts.[191] Thus, some courts may determine the identity of a prevailing party through an analysis of who prevailed on the main issue. The author also has experience with arbitrators permitting both parties to recover fees without engaging in an analysis of who prevailed on the main issue. If parties desire more

---

[188] *Id*. at 665.

[189] *Id*. at 670.

[190] *KB Home*, 295 S.W.3d at 661–62 (rejecting the dissenting opinion's "main issue" analysis used to define a "prevailing party").

[191] *Drummond*, 508 S.W.3d at 667–68 ("Therefore, we do not read *KB Home* as rejecting "main issue" analysis in all cases in which a contractual attorneys' fee provision controls, but, rather, only in those cases in which such analysis is incompatible with a controlling contractual provision."). *See Silver Lion, Inc. v. Dolphin Street, Inc.*, 01-07-00370-CV, 2010 WL 2025749, at *18 (Tex. App.—Houston [1st Dist.] May 20, 2010, pet. denied) (relying upon pre-*KB Home* authorities and holding defendant who prevailed on "main issue" was entitled to attorneys' fees pursuant to contract provision); *see also SEECO, Inc. v. K.T. Rock, LLC*, 416 S.W.3d 664, 674 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (holding defendant who prevailed on "main issue" was entitled to attorneys' fees pursuant to contract provision); *Bhatia v. Woodlands N. Houston Heart Ctr., PLLC*, 396 S.W.3d 658, 670–71 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (same); *Johnson v. Smith*, No. 07-10-00017-CV, 2012 WL 140654, at *2 (Tex. App.—Amarillo Jan. 18, 2012, no pet.) (same). In a case tried to a jury, the issues that are fully litigated and properly submitted to the jury provide compelling evidence of the main issues in that case. *See Bhatia*, 396 S.W.3d at 670–71 (holding that, in suit involving multiple claims and counterclaims based on breach of contract, tort, and statutory causes of action, some of which "were essentially abandoned, and others were defeated in motions practice and were not submitted to the jury or raised in th[e] appeal," main issues were those that were fully litigated, properly submitted to jury, and formed the basis of the "vast majority of the [trial] testimony"); *see generally Johnson*, 2012 WL 140654, at *3 (stating that parties who "obtained favorable findings on all major jury issues" and take-nothing judgment in their favor were prevailing parties under contract).

certainty with respect to fees and the identity of a prevail party, the best practice would be to define the prevailing party in the attorneys' fee provision.

VII. Conclusion

In analyzing competing breach claims, attorneys should consider materiality first and then analyze whether parties continued to perform. Construction litigators should also be mindful that not all breaches are material and that damages may also be awarded for certain non-material breaches. In drafting the jury charge, consider both material and immaterial breaches and remember that the Texas Pattern Jury Charge does not address immaterial breaches or continuing performance after a material breach. In determining strategy in settlement and trial, attorneys should also consider the effect of competing breach claims as well as the existence of a prevailing party clause on attorneys' fees.

One Breach, Two Breach, Old Breach, New Breach:

An Analysis of Competing Contract Claims in Light of *Bartush-Schnitzius Foods v. Cimco Refrigeration*

Presented by: Amy K. Wolfshohl
awolfshohl@porterhedges.com

Construction Law Foundation of Texas, 31st Annual Construction Law Conference

Competing Breach Claims

- When both parties assert claims for breach of contract questions arise regarding:
  - Who breached first
  - Whether the breaches were material
  - Whether performance continued after a breach
  - Whether either party or both are entitled to fees
- Analysis of these issues should begin with established case law

First Breach is Material

- First breach is material [*Mustang Pipeline*]
  - Non-breaching party is no longer required to perform
  - Second breach by non-breaching party is excused

Material Breach + Continued Performance

- First breach is material but non-breaching party continues to perform [*Chilton*]
  - Non-breaching party's performance is not excused
  - Second breach by non-breaching party is not excused
  - Claim for damages for first breach is not waived

First Immaterial Breach

- What is the effect of the first breach being *im*material?
  - Are damages available for the immaterial breach?
  - Does the first material breach following the immaterial one negate the immaterial breach?
- The questions were answered recently and definitely by the Texas Supreme Court.

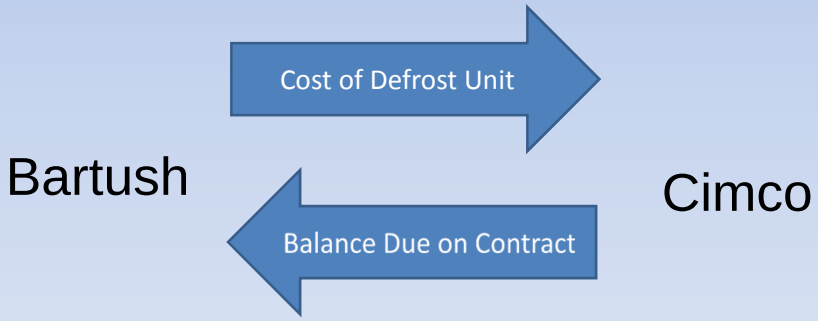
Bartush-Schnitzius Foods v. Cimco Refrigeration

- Bartush hired Cimco to build refrigerated storage for seafood dips.
- The refrigerated storage could not maintain the temperature necessary for the dip without ice forming on the fan motors.
- When Bartush discovered the problem, it had already paid Cimco $306,758, but still owed $113,400.

Bartush-Schnitzius Foods v. Cimco Refrigeration

- The parties did not agree on how to proceed, and the manufacturer hired an engineer.
- The engineer recommended a warm-glycol defrost unit, and Bartush hired another contractor to install the unit at a cost of $168,079.
- After the warm-glycol defrost unit was installed, the system was able to maintain a temperature of 35 degrees.

Competing Breach Claims



Jury Findings

1. Both parties breached the contract
2. Cimco breached first
3. Bartush's breach was not excused
4. Bartush was entitled to $168,079 (the cost of installing the warm-glycol defrost unit)
5. The contractor was entitled to $113,400 (the contract balance)

Trial Court

- Although the jury found both parties breached the contract and that Bartush's breach was not excused, the trial court believed it favored Bartush and rendered judgment in favor of Bartush for $168,079.

Fort Worth Court of Appeals Reversal

- Bartush breached the contract, and the jury's failure to find the breach was not excused necessarily implied a finding that Cimco's first breach was nonmaterial.
- Bartush's failure to pay was a material breach as a matter of law, rendering irrelevant the jury's finding that Cimco breached first and precluding Bartush's recovery.

Fort Worth Court of Appeals Reversal

Breach 1 – Cimco's failure to perform (immaterial)

Breach 2 – Bartush's non-payment (material as a MOL)

Cimco wins and Bartush gets nothing

Texas Supreme Court

- "It is a fundamental principle of contract law that when one party to a contract commits a ***material breach*** of that contract, the other party ***is discharged or excused from further performance***."
- By contrast, when a party commits a ***nonmaterial breach***, the other party "***is not excused from future performance but may sue for the damages*** caused by the breach."

Texas Supreme Court

- Materiality was appropriately determined by the jury unlike in *Mustang Pipeline* where materiality was determined as a matter of law
- Materiality was determined by the jury in connection with finding that Bartush's breach was not excused (not in the initial questions regarding who breached and which breach was first)
  - Resulted in implied finding that Cimco's breach was immaterial

Immaterial Breach is Relevant

- "While a party's nonmaterial breach does not excuse further performance by the other party, neither does the second breach excuse the first."
- "[A] material breach excuses *future* performance, not *past* performance."
- Court seems to imply that Bartush's non-payment was material even though it was not discussed by the court or decided by the jury.

Immaterial Breach is Relevant

- Cimco breached first but its breach was immaterial
- Bartush breached second
- Bartush was required to continue to perform (pay the balance due) but was also entitled to damages for Cimco's immaterial breach
- Result: Bartush's damages offset by amounts owed to Cimco (assuming the appellate court determines issues in a manner that favors Bartush on remand)

Closer Look at the Jury Charge

Jury Question/Answer	Potential for Conflict	Conflicting Result	Resolution by TXSC
Q1 and Q2 – Whether the parties complied with agreement? Neither complied.			
Q3 – Who breached first? Cimco [No instruction on materiality]	PJC – Implies materiality in the absence of an instruction or question.	Trial court concluded that verdict favored Bartush. Appellate court disregarded finding and concluded Bartush's breach was material as a MOL.	Cimco's first breach entitled Bartush to damages.
Q4 – Was Bartush's failure to comply excused due to Cimco's prior material breach? No.	Materiality factors as an affirmative defense potentially conflict with the PJC assumption of materiality.	Disregarded by trial court.	Implied a finding that Cimco's breach was immaterial which meant Bartush was required to perform.

Jury Questions to Consider

- Q1 and Q2 – Failure to comply (same)
- Q3 – Who breached first? (same)
- Q4 and 5 – Explicitly ask about materiality of breach to the extent a jury answers "yes" to questions 1 and 2
  - No implied findings
  - Enables the jury to determine both material and immaterial breach

Materiality as a Matter of Law

- While materiality is typically determined by the fact finder, some breaches are material as a matter of law.
- When a breach can be determined as a matter of law, you can recommend a client cease its performance without worrying about whether a fact finder will also determine that the client breached.

Material Breaches as a Matter of Law

- Failure of a contractor to prove substantial performance [*Hooker v. Nguyen*] relieved owner of remaining payment obligations
- Contractor breached as a matter of law because: (i) the contract contained a hard deadline, a time is of the essence clause, and contemplated avoidance of delays and (ii) an objective inability to cure existed [*Mustang Pipeline*]

Consider a Hypothetical

- Assume that the jury in Bartush found that Cimco breached first and that Bartush's breach was excused (*i.e*. Cimco's breach was material). Was Bartush permitted to keep the contract balance owed to Cimco and receive an award of repair costs?

Hypothetical

- Likely yes. *See Hooker v. Nguyen*
- Windfall for the owner who was awarded repair costs and entitled to withhold the contract balance
- Consider a *quantum meruit* claim when representing a contractor under similar circumstances

Attorneys' Fees

- Competing breach claims complicate the analysis of fee awards
- Analysis depends upon whether there is a prevailing party clause in the contract

Recovery of Attorneys' Fees under Tex. Civ. Prac. Rem. Code §38.001

- Recovery for claimant from individuals and corporations when:
  - Claimant prevails on a breach of contract action; and
  - Recovers damages.
- Zero damages = Zero fees [*Green v. Solis*]
- Attorneys' fees may be awarded even if the damages award by one party is completely offset by the other award [*McKinley v. Drozd*]

Recovery of Attorneys' Fees with a Prevailing Party Clause

- To be a prevailing party, a claimant who seeks money damages on a breach claim must prevail on the claim and be awarded damages [*Intercontinental Group Partnership v. KB Home Lone Star, L.P.]*
- A defendant must prevail, but does not need to be awarded damages.
- Party seeking an award of fees does not need to be concerned with the type of entity sued.

Poll

- Can both parties recover fees when:
  - Both parties assert breach claims
  - Both parties are awarded damages
  - The contract includes a prevailing party clause

Main Issue?

- Main issue analysis rejected in part by the Texas Supreme Court in *KB Home*.
- Some courts continue to apply it
- Would seem to make sense that there is one prevailing party in a dispute BUT…

Two Prevailing Parties?

- No case specifically addresses the issue
- Parties can alternatively request fees against individuals and corporations under §38.001 [*Alta Mesa Holdings, LP v. Ives*, 488 S.W.3d 438, 455 (Tex. App.—Houston [14th Dist.] 2016, pet. denied)].
- Consider defining the prevailing party in your contract to ensure certainty of any result you want to achieve.

Final Thoughts

- Don't neglect the immaterial breach claim
- Remember that the PJC does not address claims for non-material breach
- Materiality will typically be determined by a fact finder and not as a matter of law
- Use a prevailing party clause with a definition of the prevailing party to get more certainty in attorneys' fee awards

Any Questions?

- Thanks to Dr. Seuss for inspiring the title of this presentation.