

**DANCE OF THE SUMO WRESTLERS:
COMMON “HEADWATERS” ISSUES IN COMMERCIAL CASES**

by

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This paper focuses on “single shot” large commercial cases. By definition, therefore, it excludes consideration of class actions or mass tort cases, either of which are topics or several topics of their own.

Not all commercial cases, or even all events within commercial cases, are of equal importance. Nonetheless, there are recurring case “types” and recurring issues that tend to dictate outcomes of large commercial suits.

In turn, there are lessons to be learned on both sides of the bench as to how to use these patterns to identify and to address “headwaters” issues — issues that will determine the likely outcome of the suit. This paper, therefore, identifies several “types” of commercial cases and the recurring issues in them. Hopefully the result is a road map that is helpful to either a litigant or the courts.

I. Common recurring commercial case types.

There are several recurring types of larger commercial cases. The list below certainly isn’t exhaustive.

A. Contract disputes based upon widespread economic change.

1. Why are these lawsuits filed?

Economic conditions often dictate that certain investments be made in the commercial community: \$40-per-barrel oil prices dictate a given level of capital investments. Frequently commercial entities make very large investments, enter into joint ventures, or craft sale or other contracts assuming that the then existing economic conditions will continue.

Of course they don't. Natural gas, electricity or gypsum wallboard prices rise or fall unexpectedly and change the economics of the contract for one or both of the contracting parties. Examples of these kinds of cases are the natural gas "take or pay" cases of the mid-to-late 1980s and the Westinghouse "uranium" cases of the late 1970s. Currently, a raft of cases and arbitrations are making their way through the system as a result of severe overbuilding of "peaking" electrical power plants.

These contract dispute lawsuits are usually filed because changing economic events have painted one side into an economic corner. Management determines either that breaching the contract and hoping for the best possible settlement or judicial determination is more efficient than performing it. The lawsuits are often accompanied by a pretext excuse for non-performance.

2. How do these cases usually proceed?

These are what I refer to as "trench warfare" cases in that the defendant's incentive is to slow the case down and create as great a burden as possible to the continued prosecution of the case in hopes that the plaintiff will give up or be so deterred from trial as to cut the defendant a favorable deal. Defendants often look for a "silver bullet" contractual interpretation that relieves them of some or all of their liability.

B. Contract disputes based upon huge project cost overruns.

1. Why are these lawsuits filed?

Typical of these cases is a matter we handled many years ago for an exploration and production company in which the operator originally estimated that its gas processing plant would

cost \$33,000,000 and the project cost had climbed to \$96,000,000 and was still rising at the time of suit. These suits typically employ negligence claims, as well as breach of contract, deceptive trade practices, breach of warranty or even breach of fiduciary duty theories. Usually, the plaintiff wants to get out of the deal completely or to use the legal complaints against the manager as leverage to effect an economic reckoning for potential mismanagement of the project. One of the more prominent examples of these cases was the litigation over the handling of the South Texas Nuclear Power Project.

2. How are these cases usually handled?

Unless a defendant determines to seek immediate settlement, these cases are also usually handled as “trench warfare” in which the defendant asserts all ordinary defenses along with any contractual damage limitations available to it. Frequently, damage limitation provisions form a key fulcrum to the outcome because they heavily influence the perceived likely recovery and therefore the settlement outcome.

C. Contract disputes involving covenants against competition.

1. Why are these cases filed?

I encounter fewer and fewer “single shot” applications for temporary restraining orders (“TRO”) or temporary injunctions (“TI”) arising from these claims. Instead, the lawsuits and injunctive applications seem to be filed: (1) when one company sees many of its key employees being hired away and views the competitor as “raiding” a large number of its people in order to create instant competitiveness, or (2) when a very highly-placed scientist or corporate executive is hired away, leading the jilted company to believe that an “inevitable disclosure” of key trade secrets will occur.

2. How are the cases handled?

These cases are in my experience most often resolved in the TRO/TI phase, but the most serious survive to damage claims.

D. Corporate/Partnership/LLC control disputes.

1. Why are these cases filed?

We frequently refer to these as “divorce” proceedings because, in many cases, small closely-held corporations, partnerships or limited liability corporations are constructed by a very few individuals who once shared a common vision for their enterprise but have suffered a falling out. Though rooted in disputes over money, these cases often take on a surprisingly personal aura. Often the suit has been preceded by one of the parties taking preliminary steps (whether or not lawfully) to acquire dominance.

2. How are these cases usually handled?

These cases often resolve during the TI or TRO phase and, whether rightly or not, are often resolved by the degree of determination or capitalization of the litigants. When the TRO/TI phase results in the parties being left in a position of continued conflict, the case may continue for months or years as the parties continue to “spark” with one another. If the TRO/TI process resolves control issues, but sufficient financial interest remains in the damage claims, the matter may be tried after a long and often needlessly fractious discovery process.

Frequently, the attorneys go unpaid or underpaid on these cases, because the clients’ heat for battle exceeds the objective economic worth of the dispute.

E. Breach of Fiduciary Duty/"Picking over the Carcass" cases.

1. Why are these cases filed?

In the words of Andrew Lloyd Webber, "when the money keeps rolling in, you don't ask how." But when the money stops rolling in, our district courts are increasingly called upon to perform factual autopsies of failed business ventures. Often these examinations are lead by dissenting shareholders, creditors or trustees in bankruptcy of the organizations that have failed.

The cases are filed because the losses that are incurred by creditors of a large business venture are frequently enormous and the prospect of a contingent recovery makes the case appear attractive to counsel for the trustee or creditor group. In addition, there are often business "partners" such as financiers, venture capitalists or others whose role before collapse has morphed well beyond simple finance. Inevitably, as the dark day of collapse appears, these parties take steps to protect their interests, leaving shareholders or unsecured creditors the worse for the moves.

2. How are these cases handled?

The handling of these cases often depends largely upon the size of the entity that has collapsed and the nature of its electronic filing system. If the company is large enough to have a well-developed electronic document tracking system and/or file backup, the documents tell the tale of the tape and less will be left to dispute than might otherwise be the case. The cases then tend to turn on the defendants' financial ability and perhaps also on contractual or damage limitation provisions of the parties,

and whether a *res judicata* application can be made from a prior bankruptcy proceeding.

F. Theft of Trade Secrets cases — the newest widget.

1. Why are these cases filed?

Increasingly, the value of a business' assets is found largely in its intellectual property — its patents, copyrights, trademarks and trade secrets. As a focal point for worldwide oil and gas exploration and the development of new tools and procedures for finding and lifting oil and gas, Houston has more than its share of “IP” litigation. These cases are typically filed because one party sees access and results: a competitor has developed a tool or process that is largely identical to the plaintiff's own and has had demonstrable access to the plaintiff's trade secrets — either through a planned acquisition, a data room, a licensing agreement, a joint venture or the hiring of a key employee.

2. How do these cases proceed?

In one way or another, discovery determines the outcome of these cases. If the results of discovery indicate actual misappropriation of trade secrets, the valuation of the case becomes very volatile because of the inherently emotionally-charged nature of the case and the often speculative nature of damage claims. If discovery indicates either that no theft of trade secrets occurred, or that the newly developed technology is fundamentally different from, or derived independently of, the plaintiff's technology, the cases typically settle.

G. Oil and Gas Royalty disputes.

1. Why are these cases filed?

Oil and gas royalty interests are often concentrated in a particular field in the hands of a very few owners, such as the descendants of the original landowner. If prices dip and the exploration and production company makes a mess of the surface or refuses to drill a well when the owners believe it ought to be drilled, the result can be a very broad-based claim for the non-payment or underpayment of royalties. More recently, royalty owners have taken exploration and production companies to task for their accounting of costs or their measurement of oil and gas production. Plaintiffs invariably seek out a dispute with a multiplicand so that the damage claim can be applied to large volumes of gas.

2. How do these cases resolve?

As production in Harris County has declined, so too has pure royalty litigation. Generally, the cases are resolved in part, but usually not entirely, through lease interpretation. In South Texas, they are frequently decided upon the strength of local counsel.

II. A funny thing happened on the way to the forum.

The forum in which disputes are held is often outcome-determinative of complex commercial litigation. Plaintiffs prefer jury trials, usually in state court and preferably in a state court where the sea breezes blow through the courthouse window. Defendants prefer to deny a forum entirely if they can and, in the alternative, to compel the matter to arbitration (by a panel appointed by the parties if they can get them) or, if an arbitral forum is not available, to a trial by the judge.

The battle over the forum, therefore, includes fights over jurisdiction, “first to file” claims and motions to compel arbitration.

A. We’re here, but are we staying here? Part one: special appearances.

The Supreme Court of Texas has recognized that hailing a defendant into a court in a state in which she has insufficient contacts is so damaging that mandamus is permissible to correct an abuse of discretion by the trial court. *CSR Ltd. v. Link*, 925 S.W.2d 591 (Tex. 1996).

The reverse is true: the grant of a special appearance under Texas Rule of Civil Procedure 120a is often the death-knell of a commercial case. This is particularly true when the opponent resides in a country whose laws or procedures are rudimentary, or where the opponent is a state-owned organization that will be protected by the foreign country's domestic courts. It is one thing to be forced to litigate in Wyoming and quite another to be forced to litigate in Romania against a state-owned business.

With so much on the line, special appearances are often hard-fought. While the rules establishing general and special jurisdiction are straightforward, the mass of decisions on the issue of jurisdiction bring to mind Justice Stewart's comment on pornography that he "knew it when he saw it."

Other than correctly applying United States Supreme Court authority, the trial court's primary aid to the litigants is to ensure that the record is decided with full documentation of the contacts with the forum.

B. Can I stay? Part two: "first to file" disputes.

In the days or months leading up to a commercial dispute, each side may be appraising its position and deciding what might be a favorable venue. The result is that both plaintiff and defendant may file lawsuits within days or weeks of one another in the attempt to get the jump on the opposition.

The general rule in these cases is easy to state but hard to apply — the court in which the matter is first filed acquires "dominant

jurisdiction” over the dispute and the second filed court is to give way to that court. *Curtis v. Gibbs*, 511 S.W.2d 263 (Tex. 1974). Of course, lawyers don’t like to make things easy for trial courts. As a result, when they’ve been beaten to the punch and don’t like the venue they face, the lawyers will make the second-filed suit as dissimilar as possible from the first while still being “on point” enough to get to the issues that they want resolved.

The Supreme Court of Texas has made clear that it isn’t much interested in this kind of gamesmanship. In *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245 (Tex. 1988), the court emphasized that an absolute identity of parties and issues is not required for the “first to file” rule to apply. Instead, the issue for the second court is whether “an inherent interrelation of the subject matter exists” in the two lawsuits. 760 S.W.2d 247. “It is not required that the exact issues and all the parties be included in the first action before the second is filed, provided that the claim in the first suit may be amended to bring in all necessary and proper parties and issues.” *Id.*

A good example of this principle in practice is a recent federal court case we handled for Destiny’s Child. In suit one, the parties were the “songwriter” who claimed to have drafted the multi-platinum hit “Survivor” and the actual author of the work who had indemnified the singing group for its use. In the subsequent suit, the claimant named the group, its members, its management and the songwriter listed on the CD margin notes as defendants in a copyright action. Magistrate Maloney correctly determined that the key issue in both cases (case #1 for slander and case #2 for copyright infringement) was the allegation that Destiny’s Child had copied and misused the claimant’s musical composition. The court consolidated the two cases.

Courts may ignore the “first to file” rule in two circumstances. First, if a litigant files a case to “fix venue” and doesn’t serve the defendant, the process is viewed as abusive and the court in the second-filed suit has discretion to refuse to apply the rule. *Wyatt*, 760

S.W.2d at 248; *So. County Mut. Ins. Co. v. Ochoa*, 19 S.W.3d 452, 468 (Tex. App.—Corpus Christi 2000, no pet.). Second, though it is rarely discussed in the case law, if the court in which the second suit is filed can grant an accelerated trial setting, the court in which suit is first filed may decide to step away from the dispute so that the matter can be resolved more quickly.

The court’s decision on the application of the “first to file” rule is treated like a venue decision and does not give litigants the right to an intermediate appeal or mandamus. *Abor v. Black*, 695 S.W.2d 564 (Tex. 1985).

C. Can I stay? Part three: compulsory arbitration.

Arbitration is regarded as anathema to most plaintiffs for many reasons. First, while a jury will be a socioeconomic “mixer” of persons, arbitrators or arbitration panels are likely to be older, whiter and more conservative members of the business community than the average juror. Second, arbitration is expensive and the cost of arbitration may deter continued prosecution of cases by lightly-capitalized plaintiffs. Though many codes of arbitration contain provisions permitting involuntary discovery of documents or testimony, our experience is that the arbitration panels do not show the level of interest or determination that we see in our district courts to ensure that full document production occurs. Finally, many arbitration systems such as the National Association of Securities Dealers “publish” arbitration results. Arbitrators know that if they grant large awards, they are unlikely to be approved for subsequent arbitrations by the industry members who are repeat participants in the arbitration process. A decision to compel the arbitration of a commercial dispute, therefore, often results in a reduction of the value of the plaintiffs’ case by half or more — a result that may make the decision outcome determinative or at least outcome influencing.

Many commercial contracts, including all securities customer agreements, most franchise agreements, most credit card agreements and increasingly employment agreements, come with some form of arbitration clause. Recent decisions by the Supreme Court of Texas appear likely to promote the more widespread use of arbitration clauses in the employment context. *See In re Halliburton Co.*, 80 S.W.3d 566 (Tex. 2002).

Again, the general rule relating to arbitration is not hard to state. When parties enter into a binding agreement to arbitrate their disputes, the agreement is enforceable by a motion to compel arbitration and an abuse of discretion by the trial court may be corrected by a mandamus proceeding or an interlocutory appeal. *See, e.g., J.M. Davidson, Inc.*, 128 S.W.3d 223 (Tex. 2003) (interlocutory appeal of order denying motion to compel arbitration); *EZ Pawn v. Mancias*, 934 S.W.2d 87 (Tex. 1996) (mandamus review of order denying arbitration). The avenue for review depends on whether the Federal Arbitration Act or Texas Arbitration Act applies to the dispute. Interlocutory appeal is available under TEX. CIV. PRAC. & REM. CODE 171.098 for disputes to which the state act applies; review by mandamus is available for disputes to which the federal act applies. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266 (Tex. 1992). The arbitration agreement may not be attacked on grounds that the contract in which arbitration provisions are found was obtained by fraud, but that the *arbitration clause* was obtained by a fraud directed to that provision. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749 (Tex. 2001). Needless to say, such findings are rare. Though “procedural unconscionability” is a defense to arbitration provisions in Texas, cases invoking that doctrine are also rare. *See Fleetwood Enters. Inc. v. Gaskamp*, 280 F.3d 1069 (5th Cir. 2002). An agreement to arbitrate can be formed in any manner in which contractual assent can be given, including a battle of the forms. *Gilliam v. Global Leak Detection U.S.A. Inc.*, 141 F. Supp.2d 734 (S.D. Tex. 2001). Generally, the arbitration provisions of a contract survive an effort to

terminate it. *Henry v. Gonzalez*, 18 S.W.3d 684 (Tex. App.—San Antonio 2000, pet. denied).

More difficult issues arise when (1) the arbitration agreement doesn't clearly cover all claims involved in a piece of litigation, (2) the arbitration agreement covers some, but not all, of the parties to litigation or (3) the advocate of arbitration has waited too long or used the judicial process to its advantage before invoking arbitration.

In these circumstances, the general trend of the appellate decisions is to use the strong federal policy favoring arbitration to compel it under a finding of an “implied” agreement to arbitrate or similar judicial constructs. In each of these disputes, the courts are given wide discretion, with the clear leaning of appellate courts being in the direction of sustaining arbitration. *See, e.g., In re Koch Indus., Inc.*, 49 S.W.3d 439 (Tex. App.—San Antonio 2001, orig. proceeding) (affiliates of company signing arbitration agreement bound by it); *McMillan v. Computer Translation Sys. & Support, Inc.*, 66 S.W.3d 477 (Tex. App.—Dallas 2001, no pet.) (affiliate bound by agency status of arbitration agreement signator).

The courts treat waiver a bit differently. The key variable in determining whether a party has waived its right to arbitrate is not simply the passage of time, but whether the party enjoying the right to arbitrate has “affirmatively invoked the jurisdiction of the court.” *Valero Refining Inc. v. M/T Lauberhorn*, 813 F.2d 60 (5th Cir. 1987).

A litigant's application for preliminary injunctive relief or for pre-judgment writs is usually insufficient to invoke the court's jurisdiction, but the continued use of discovery procedures not available in the applicable arbitration forum may be. *Id.*; *Hunt v. BP Exploration Co. (Libya) Ltd.*, 580 F. Supp. 304 (N.D. Tex. 1984).

One major exception exists to compulsory arbitration; that exception is in the field of preliminary injunctive relief. Early decisions holding that the decision to arbitrate precluded preliminary injunctive relief have now been superseded. *Compare Merrill Lynch, Pierce, Fenner*

& Smith, Inc. v. McCollum, 666 S.W.2d 604 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (trial court correctly denied request for injunction without an evidentiary hearing); *Bumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049 (2nd Cir. 1990) (federal district court has power to grant preliminary injunctive relief pending arbitration). As a result, though arbitration may be obligatory, it is entirely possible that the direction of an arbitration may be heavily influenced by these preliminary proceedings.

III. Major procedural decisions likely to be encountered in large commercial cases other than forum selection.

A. Who's on first? Issues of standing.

1. Questions regarding a party's standing to bring suit are increasingly being applied to dismiss significant cases. *See, e.g., Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547 (Tex. 2000); *TAC Realty, Inc. v. City of Bryan*, 126 S.W.3d 558 (Tex. App.—Houston [14th Dist.] 2003, pet. filed).
2. A party has standing to bring suit when he or she is “personally aggrieved,” that is, when he or she can show an actual or threatened injury such that he or she has a personal stake in the litigation. *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704 (Tex. 2001); *Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996).
3. The best practice is to address the standing issue as soon as it is recognized. First, you'll potentially avoid two years of wasted time by all concerned. Second, some standing problems are curable by the intervention of real parties in interest. Unfortunately, the court often has to figure it out because the plaintiff may be ignorant of the issue or willing to take the risk and the defendant wants the limitations period to continue to roll.

B. Discovery, discovery, discovery.

My personal slant on this is: if in doubt, order production. I still think *Jampole v. Touchy*, 673 S.W.2d 569 (Tex. 1984), captures the spirit of the discovery rules. Having all the documents on the table is the only way to effectively resolve the case. Further, the costs of production, which are occasionally extreme, pale by comparison with the cost of the fees paid to attorneys who wander around in the case for many months without the documents necessary to finish it.

1. Hot-button issue #1: ‘Tis/’taint disputes. These are frays in which the requesting party says it hasn’t gotten production and the responding party says it has produced everything. How do you resolve this?
 - A. The duty is on the requesting party to convince the court that the document production is incomplete. *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844 (Tex. 1992).
 - B. How can a movant do this? What are some things to look for in the proof?
 1. Partial production, where three out of five pages of a letter are produced.
 2. Are documents referenced but not produced? Documents produced say “the quarterly X report covers all this,” but the quarterly reports are missing.
 3. Testimony of the witnesses (frequently former employees) that the documents really exist.

4. Testimony that the searches conducted for documents have been insufficient or intentionally clipped.
 5. Documents that should have been produced by a party showing up in third-party production.
- C. One key factor is the characteristic of the documents that have not been produced. Are they good for the party that should have produced them or bad for that party? If they are consistently bad, it is a strong indication of intentional concealment.
- D. The only thing the court cannot do is to permit one party to paw willy-nilly through the other's warehouse. *Dominguez v. Texaco*, 812 S.W.2d 451 (Tex. App.—San Antonio 1991).
2. Hot-button issue #2: Do I get my opposition's computers or back-up tapes?

The world has changed; almost every business produces and maintains data on a computer and perhaps on backed-up tapes as well. See Anthony J. Marchetta, *et al.*, *Electronic Data Production—Courts Begin to Set Parameters—Part I*, 12 *The Metropolitan Corporate Counsel* 1, 1(2004). The discovery rules recognize this fact. If a party requesting documents specifically requests production of “electronic or magnetic data” and specifies the form for production, the responding party “must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business.” TEX. R. CIV. P. 196.4. It is expensive to strip computers of their data so the willingness to spend the \$10,000 to \$20,000 to get a

hard drive copied and analyzed is a sign of more than passing interest.

- A. Computer records, including “deleted” documents are discoverable documents on their own. *Simon Property Group, L.P. v. mySimon, Inc.*, 194 F.R.D. 639 (S.D. Ind. 2000). Deleted files may be available in back—up tapes or on a computer’s hard drive. *See Kleiner v. Burns*, No. 00—2160—JWL, 2000 WL 1909470 (W.D. Kan. Dec. 15, 2000) (discussing sources for deleted documents).
- B. Characteristics of the computer may themselves be probative of issues in a case.
 - 1. Trade secret case, documents copied by employee onto mobile medium.
 - 2. Use of zip drive to obtain large amounts of data for no purpose or immediately before departure of a competitor.
 - 3. Time of deletion of documents (after demand? after meeting with offended party?)
 - 4. Use of software unrelated to the employee’s position.
 - 5. Revelations of prior drafts revealing knowledge of claims or facts supporting estoppel.
- 3. Hot-button issue #3: Attorney-client privilege exceptions that really matter.

Fewer than 1 in 5 of our cases involve major issues of attorney-client privilege. Even amongst those cases, very rarely do we encounter decisions in which key attorney-client-privileged

materials are produced. Here are some exceptions, the characteristic of which helps explain also why production in these cases may be outcome-determinative. Either, knew of a fact at a specific time, relied upon an attorney rather than the defendant or “blew through” the red light presented by the attorney’s advice.

This is not a discussion of standard non-privileged items such as: (a) retention agreements and billing records, *In re Grand Jury Proceedings*, 33 F.3d 342, 353—54 (4th Cir. 1994); *see Borden, Inc. v. Valdez*, 773 S.W.2d 718, 721 (Tex. App.—Corpus Christi 1989, orig. proceeding) (terms and conditions of attorney’s employment are not confidential); *Duval County Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627, 634 (Tex. App.—Amarillo 1983, writ ref’d n.r.e.) (same); (b) underlying documents delivered to an attorney or which an attorney happens to possess, *Methodist Home v. Marshall*, 830 S.W.2d 220 (Tex. App.—Dallas 1992, orig. proceeding); or (c) business or non-legal advice by the attorney, *State v. Delany*, No. 14—03—00052—CV, 2004 WL 503632 (Tex. App.—Houston [14th Dist.] Mar. 16, 2004, no pet. H.). It is not that these issues are unimportant but rather that they are usually not outcome-determinative. Documents that end up being produced under one of these exceptions usually duplicate or supplement proof that the producing party has already provided to the opposition.

A. Our experience is that what would otherwise be attorney-client-privileged items may become outcome-determinative when the attorney violates the “Eldridge Cleaver” rule and is part of the problem, not the solution. Some examples:

1. In-house counsel knows of new employee’s non-compete, advises him it is unenforceable and to

ignore it. The company then hires the employee to work in direct competition to his former employer.

2. Attorney advises trustee that it is fine for trustee to use estate funds to invest in trustee's closely-held corporation because the connection was (1) disclosed and (2) entirely fair.

B. Attacks on privilege in these contexts generally fall into one of three categories: (1) the crime and fraud exception, (2) the offensive use exception and (3) the "she's my lawyer" exception.

1. Crime and fraud. TEX. R. EVID.(d)(3); *Warrantech Corp. v. Computer Adapters Servs., Inc.*, 134 S.W.3d 516 (Tex. App.—Fort Worth 2004, no pet.). The exception "applies only if a prima facie case is made of contemplated fraud" and there is "a relationship between the document for which the privilege is challenged and the prima facie proof offered." *Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223, 227 (Tex. 1992). Under federal court decisions, the party who relies on the otherwise privileged evidence must establish "a prima facie case that the attorney—client relationship was intended to further criminal or fraudulent activity." *United States v. Edwards* 303 F.3d 606, 618 (5th Cir. 2002), *cert. denied*, 437 U.S. 1192, 1240 (2003).

Revelation of these kinds of attorney-client-privileged materials is usually critical because their volatility has two effects. First, the advice is itself likely to inflame a jury because of their inherent dislike and distrust of attorneys. Second, if the

attorney is in-house and still involved in the case, the matter takes on a “third rail” quality that may result in one of two polar extreme responses — immediate settlement or further entrenchment.

2. Offensive use — *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105 (Tex. 1985) as refined by *Republic Ins. Co. v. Davis*, 856 S.W.2d 158 (Tex. 1993). A waiver based on offensive use of information is based on the principle that one cannot seek affirmative relief on the one hand and “with the other lower an iron curtain of silence against otherwise pertinent and proper questions which may have a bearing” upon the right to maintain the action. *Ginsberg*, 686 S.W.2d at 108. In *Republic Insurance*, the supreme court concluded that the principle applies to waiver of the attorney—client privilege when “it is being used as a sword rather than a shield” if the following criteria are satisfied. 856 S.W.2d at 163.

The criteria are: “First, before a waiver may be found the party asserting the privilege must seek affirmative relief. Second, the privileged information sought must be such that, if believed by the fact finder, in all probability it would be outcome determinative of the cause of action asserted. Mere relevance is insufficient. A contradiction in position without more is insufficient. The confidential communication must go to the very heart of the affirmative relief sought. Third, disclosure of the confidential communication must be the only means by which the aggrieved party may obtain the evidence.” *Id.*

The difficult questions are two and three. Certainly the doctrine of waiver of the privilege through offensive use is more restrictive than was previously the case. Here are some examples of cases where the material was viewed as outcome determinative.

- A. Where the plaintiff asserts a fraud claim and the attorney's advice is directly pertinent to whether the plaintiff relied on his lawyers instead of his accountants, reliance occurred. *Westheimer v. Tennant*, 831 S.W.2d 880 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding). See *Republic Ins. Co.*, 856 at 162 n.6 (noting that court denies the mandamus proceeding in *Westheimer*).
 - B. Where the plaintiff claims he was induced by fraudulent concealment to delay the filing of suit, but consulted an attorney about litigation well before limitations ran. *Conkling v. Turner*, 883 F.2d 431 (5th Cir. 1989).
 - C. Where you won't get it is when the request is clearly pretextual — i.e., I need the documents to question a witness' credibility. See, e.g., *Warrantech Corp. v. Computer Adapters Servs., Inc.*, 134 S.W.3d 516 (Tex. App.—Fort Worth 2004, pet. dism'd).
3. “But she’s my lawyer” — joint representation and representation of closely-held or parallel interests. It is useful to contrast *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970) with *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996). *Garner* holds that where counsel represents an entity, typically the

management of a corporation, she cannot shield her advice to the corporation from the beneficiaries of that management's interests — the shareholders in all circumstances. The court adopts a multi—part test to determine whether the shareholder seeking the communication represents a sufficiently serious interest to obtain the communication. *Huie v. DeShazo*, on the other hand, holds that the trustee of a trust and his counsel may assert an attorney-client privilege *against* the beneficiaries, but does not seem to address itself to whether beneficiaries can ever obtain access to the information sought under a balancing test.

The Supreme Court of Texas might well have believed that it was doing attorneys a favor in maintaining its strict privity rules in the context of attorney-client communications. I believe plaintiffs may react to the rule by increasingly naming “related” counsel in suits against fiduciaries under the “aiding and abetting” theories. *See, e.g., Kinzbach Tool Co. v. Corbett—Wallace Corp.*, 160 S.W.2d 509 (Tex. 1942). There is a serious question whether the current Texas Supreme Court will permit such suits in light of its fairly narrow interpretation of aider and abettor liability under the Texas Blue Sky statutes and unwillingness to find “new” causes of action generally. *See Insurance Co. of N. Am. v. Morris*, 981 S.W.2d 667 (Tex. 1998), and *Trevino v. Ortega*, 969 S.W.2d 950 (Tex. 1997) (no cause of action for negligent or willful spoliation).

IV. Major substantive issues likely to prove outcome-determinative.

A. Contract cases: Is the key provision of the contract ambiguous?

1. The existence of ambiguity is for the court. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223 (Tex. 2003); *Coker v. Coker*, 650 S.W.2d 391 (Tex. 1983). If the contract is ambiguous, then interpretations of key provisions will likely create jury questions (with or without instructions). If the contract language is unambiguous, then if the provision in question precludes claims made in the case, it will give rise to a summary judgment.
2. How do you determine legal ambiguity? Ultimately, it is a judgment call and the one place in Texas law where trial court almost gets to apply the “objective juror” standard used in federal motions for summary judgment. For ambiguity to exist, the pertinent language must be subject to two reasonable constructions. *J.M. Davidson*, 128 S.W.3d at 223. The ambiguity can either be patent (evident on the face of the document) or “latent” (not evident, but when the entire document is read, an internal inconsistency is created). *Nat’l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517 (Tex. 1995). The single most helpful litmus test I’ve run across to decide if an “alternative” interpretation of contractual language is reasonable is whether the interpretation offered by a party renders part of the contract meaningless.
3. It is unclear how courts are to use the panoply of “helpful” interpretative rules supplied by the courts of appeal. The rules run the gamut and generally constitute the lone remaining touch with Latin that the law still enjoys. *See Hussong v. Schwan’s Sales Enters., Inc.*, 896 S.W.2d 320 (Tex. App.—1995, no writ). Doctrines like *contra proferenda*, *ejusdem generis*, *expressio unius est exclusio ulterius* appear to be result-oriented conveniences that allow courts to reach outcomes and feel good about having done so.

B. Contract/Tort cases: Are potential case-killing provisions applicable and enforceable?

1. Damage limitations provisions.

The following is an example of a loss limitation provision:

APS IS NOT AN INSURER; LIQUIDATED DAMAGES; LIMITATION OF LIABILITY: It is understood and agreed: . . .

Subscriber understands and agrees that if APS should be found liable for loss or damage . . .APS's liability shall be limited to a sum equal to the total of six (6) monthly payments or Two Hundred Fifty (\$250.00) Dollars, whichever is the lesser, as liquidated damages and not as a penalty and this liability shall be exclusive; that APS shall not be liable for consequential or incidental damages except to the extent of the liquidated damages herein provided; and that the provisions of this section shall apply if loss or damage, irrespective of cause or origin, results directly or indirectly to persons or property, from performance or nonperformance of the obligations imposed by this contract, or from negligence, active or otherwise, of APS, its agents, servants, assigns or employees.

Fox Elec. Co., Inc. v. Tone Guard Sec., Inc., 861 S.W.2d 79, 81 (Tex. App.—Fort Worth 1993, no writ). A number of issues will determine whether such a provision will be controlling in a case before you.

A. Was the contract formed? The Uniform Commercial Code, TEX. BUS. & COM. CODE § 2.207 governs a “battle

of the forms” when parties have exchanged written documents that vary. One party may accept the other party’s offer although the acceptance contains alterations or additions.

- B. A second question is whether the damages are truly consequential so as to be barred by the applicable language. *Mead v. Johnson Group, Inc.*, 615 S.W.2d 685 (Tex. 1981) (holding that lost credit reputation was a direct loss arising from a contract for the sale of a business, not a “consequential” loss).
 - C. A third issue is whether damage provisions defeat the entire purpose of the contract? If they do, they are invalid. *See, e.g.*, Uniform Commercial Code, TEX. BUS. & COM. CODE § 2.719.
 - D. Is there a charge of fraud in the inducement which might go to the entire contract and permit the recovery of reliance-based damages? In *Formosa Plastics Corp. v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41 (Tex. 1998), the supreme court clarified that “tort damages are recoverable for a fraudulent inducement claim irrespective of whether the fraudulent representations are later subsumed in a contract or whether the plaintiff only suffers an economic loss related to the subject matter of the contract.” These damages may include “reliance damages that are to reimburse the plaintiff for expenditures made toward execution of the contract. *Foley v. Parlier*, 68 S.W.3d 870 (Tex. App.—Fort Worth 2002, no pet.)
2. Do I have an enforceable contract or unenforceable letter of intent? *See Murphy v. Seabarge, Ltd.*, 868 S.W.2d 929, 933 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

Letters of intent are utilized in a number of businesses, but most commonly in the financial and mergers and acquisitions field and often look like this:

15. Binding Effect. This Letter Agreement constitutes a summary of the principal terms and conditions of the understanding which has been reached regarding the sale of certain assets to Purchaser [ICO]. It does not address all of the terms and conditions which the parties must agree upon to become binding and consummated. The Purchaser, however, does intend to move forward with its due diligence and expects to expend considerable sums to review the Sellers' Business. In consideration therefor, the parties have agreed to make certain covenants of this letter binding upon the parties notwithstanding the fact that not all details of the transactions have been agreed upon. Accordingly, it is understood and agreed that this letter is an expression of the parties' mutual intent and is not binding upon them except for the provisions of paragraphs (4), (7), (9), (10), (11), (12), (13), and (14) hereof.

John Wood Group USA, Inc. v. ICO, Inc., 26 S.W.3d 12, 15 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

The trial court's difficulty occurs when a party walks away from the transaction and the other sues for breach of contract or even fraud. The trial court faces two difficult issues: (1) whether or not the negotiations of the parties reached the stage where their promises constituted enforceable agreements and (2) if not, can the language of the letter of intent govern non-contractual claims?

The difficulty of handling these legal questions is worsened by factual issues that consistently arise. Extrinsic evidence surrounding the letter of intent will often augment the LOI or even contradict the language stating that it is not yet a deal. In their enthusiasm for the transaction, parties frequently loosely refer to the LOI as their “deal” or even their “contract.” Additionally, parties may begin to perform certain aspects leading to the conclusion that they believed a deal to be in place.

Nonetheless, the general rule is that such provisions are controlling and continue to control the outcome of the matter even vis-à-vis events occurring subsequent to execution of the LOI.

3. Dispositive Agency appointments.

Contracts will occasionally irrevocably appoint an agent for some purpose — certifying that construction is complete or that the conditions for a letter of credit have been met. One example of this contractual language was found in the buy-back provision of a client’s corporate by-laws:

[T]he total purchase price per Share of the Shares transferred pursuant to this Agreement shall be determined by . . . Hodgson, C.P.A., . . . using such methods of evaluation, and taking into consideration such factors, as he deems, in his sole and absolute discretion, appropriate. Mr. Hodgson’s determination and valuation shall be final and binding upon all of the parties to this Agreement.

The cases treat these appointments much like the appointment of an arbitrator for the resolution of a case. Once the agent begins his work, the result is conclusive unless some form of corruption of the appointee is involved.

4. Internal statute of limitations provisions.

The accounting procedures for a model joint operating agreement provide an example of internal statutes of limitation:

Payment of any such bills shall not prejudice the right of any Non-Operator to protest or question the correctness thereof: provided, however, all bills and statements rendered to Non-Operators by Operator during any calendar year shall conclusively be presumed to be true and correct after twenty-four (24) months following the end of any such calendar year, unless within the said twenty-four (24) month period a Non-Operator takes written exception thereto and makes claim on Operator for adjustment.

Exxon Corp. v. Crosby—Miss. Resources, Ltd. 40 F.3d 1474, 1476 (5th Cir. 1995) (quoting Council of Petroleum Accountants Societies Accounting Procedure Joint Operations).

Generally these provisions are controlling absent proof of a defense such as estoppel of fraudulent concealment. *See, e.g., Exxon Corp.*, 40 S.W.3d at 1485 (concluding that provision creates a conclusive presumption upon failure to except to statements within the applicable time period); *Calpetco 1981 v. Marshall Exploration, Inc.*, 989 F.2d 1408 (5th Cir. 1993) (stating that accounting procedures bound non—operator party unless exception taken and claim made within applicable time period).

5. Standard of care provisions.

[Operator] . . . shall conduct and direct and have full control of all operations on the Contract Area as permitted and required by, and within the limits of, this agreement. It shall conduct all such operations

in a good and workmanlike manner, but it shall have no liability as Operator to the other parties for losses sustained or liabilities incurred, except such as may result from gross negligence or willful misconduct.

Castle Tex. Prod. Ltd. Partnership v. Long Trusts, 134 S.W.3d 267 (Tex. App.—Tyler 2003, pet. denied).

6. “As is where is” and *Schlumberger* cases.

This property is sold “AS IS WHERE IS WITH ALL FAULTS.” Seller makes no representations regarding the suitability of the home, its fitness for any particular use, its merchantability, its compliance with state or federal statutes or regulations, including without limitation RECLA or CERCLA and expressly disclaims any representations regarding same. Buyer hereby agrees and warrants that it will rely solely upon its own due diligence in investigating the condition of the property, its fitness for the purpose intended, its merchantability and whether or not same is in compliance with any applicable rules and/or regulations and not upon any representation, presentation, written or oral statement or the omission to make any representation, presentation or written or oral statement concerning the property. Buyer further warrants that it is sophisticated in transactions of this kind and that Seller is relying upon that sophistication in permitting this transaction to go forward.

These kinds of contracts are not one integrated unit but instead have two different provisions that are often viewed as co-terminous but in fact have different meaning and are supported

by different lines of authority. “As is” provisions were first authorized in connection with the sale of goods under the Uniform Commercial Code, but were extended to real estate transactions by the Supreme Court of Texas in 1995. Uniform Commercial Code, TEX. BUS. & COM. CODE § 2.316; *Prudential Ins. Co. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156 (Tex. 1995). These “as is” provisions, standing alone, however, may be subject to exceptions. *See Id.* at 162; *see also Nelson v. Najm*, 127 S.W.3d 170 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

When the “no reliance” language is added to the contract, however, litigants opposing the provisions appear to have little or no wiggle room. When the party certifies that it has not received a representation, or that it will not rely upon the opposing party’s representations, it will be held to that bargain. *Schlumberger Tech. Co. v. Swanson*, 959 S.W.2d 171 (Tex. 1997). Several cases have utilized this language to impose summary judgment in the last several years. *See, e.g., Coastal Bank SSB v. Chase Bank of Tex., N.A.*, No. 01-01-01013-CV, 2004 WL 253254 (Tex. App.—Houston [14th Dist.] Feb. 12, 2004, no pet.); *Airborne Freight Corp. v. Lee Enters., Inc.*, 847 S.W.2d 289 (Tex. App.—El Paso 1992, writ denied).

C. Tort cases — Does a duty exist?

Recently the courts have decided a number of cases on legal findings that “no duty” existed on the part of the defendant to compel action or disclosures of the kind the plaintiff seeks. *See, e.g., Keck, Mahin & Cate v. Nat’l Union Fire Ins. Co.*, 20 S.W.3d 692 (Tex. 2000) (concluding that excess insurer had no duty to act until primary insurer tendered its limits and surrendered its defense); *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667 (Tex. 1998) (surety had no duty to disclose information to investors in bonds that surety guaranteed).

If a pattern can be discerned in the cases in which summary judgment or a directed verdict is granted to the defendant, it is that the duty sought to be imposed appears well outside the ordinary realm of operation for the defendant.

Of course, plaintiffs are incredibly inventive when it comes to describing a source of the duty to act or to speak and include custom and usage within the industry at issue, federal or state statutory schemes or federal regulations. The most common sources of duty are state statutes or regulations. For example, TNRCC regulations requiring oil and gas exploration and production companies to set protective well casing to the lowest recorded depth of the local aquifer were the basis for the initial \$205,000,000 verdict in *Mitchell Energy Co. v. Bartlett*, 958 S.W.2d 430 (Tex. App.—Fort Worth 1997, pet. denied). Plaintiffs have regularly borrowed from a whole phalanx of federal regulations to describe the scope of a defendants' standard of care in various negligence cases. *See generally Montet v. Narcotics Withdrawal Ctrs., Inc.*, No. 14—99—01401—CV 2001, WL 1287384 (Tex. App.—Houston [14th Dist.] Oct. 25, 2001, no pet.) (not designated for publication) (stating that evidence of government regulations is admissible to define standard of care); *Elder v. E.I. Du Pont de Nemours & Co.*, 479 So.2d 1243 (Ala. 1985) (recognizing that under proper circumstances, OSHA provisions and regulations may be admissible for consideration in determining the standard of care) that a defendant should have followed); *Thoma v. Kettler Bros., Inc.*, 632 A.2d 725 (D.C. 1993) (OSHA regulation); *Salisbury v. Gordon Air Mgmt. Corp.*, No. C.A. No. 19085, 2000 WL 92087 (Ohio Ct. App. Jan. 19, 2000) (FAA regulations). What is surprising about these cases is that they are frequently decided without any reference to negligence *per se* law. Instead, the issue usually revolves around the use by one or more experts of the regulations to describe what ought to be done by the defendant. The author has not been able to find any consistent pattern in the development of this law. Perhaps this is best as it leaves the trial

court sufficient latitude to give the regulations weight but to avoid having them dominate a controversy.

- D. Contract & tort cases: Can I prove my damages with sufficient certainty?

This is not a discussion of *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) although certainly *Daubert* and its progeny can be brought into play on the issue. Rather, the question here is whether the plaintiff can adduce enough proof of profitability of an intended business or technology to permit recovery in light of the requirements of *Texas Instruments, Inc. v. Teletron Energy Management, Inc.*, 877 S.W.2d 276 (Tex. 1994). In *Texas Instruments*, the court focused upon the reliability of lost-profits evidence in a suit for the breach of contract in TI's refusal to build a home monitoring system. The key component of the court's ruling appears to be that the plaintiff had never before produced, much less mass produced, the product it was relying upon to make its damage claim. *Id.* at 280—81. This condition left the court with too little basis to reasonably permit a jury to determine whether lost-profit damages had been suffered.

Texas Instruments finds its greatest application to two situations: a new business or a new technology. The application of the case to new businesses is fairly straightforward and depends largely upon accumulated experience of the plaintiff.

The really difficult issue arises, in my opinion, in theft of trade secret cases where the plaintiff's case revolves around a new tool or process. The plaintiff's dilemma is that it must file suit within three years of knowledge of the theft. TEX. CIV. PRAC. & REM. CODE § 16.010. Frequently, however, the subject of the trade secret is not sufficiently well developed to have established a track record in the market which will make the imposition of damages clearly permissible by the time suit is required.

We have encountered the problem and addressed it with a combination of approaches. First, we relied upon the projections of the defendant which are not dispositive under *Texas Instruments* but are helpful. Typically, the alleged thief goes through an extensive capital allocation budget where the engineers or scientists who are involved in creating the competing tool estimate how well it will penetrate the market and the resulting economic gain. These reports are as beneficial as they are serious and studied. Second, we relied upon analogous tools or methods and the economic effect they had in the market. Third, we attempted to establish that the tool is “extant” in prototype or limited production models. Finally, if they are available, they note actual sales and compare them to the earliest economic models of the defendant. In any event, both sides to this sort of litigation are usually well aware of the end game and both sides try mightily to load their quiver with proof arrows designed to foster or exclude consideration of profits.

E. Contract/tort/other: is there a bankruptcy in someone’s past?

A final area in which a case before you may be altered overnight is when bankruptcy affects the controversy. Most of us view bankruptcy proceedings as a version of “Dungeons and Dragons” where the participants can fall prey to any number of procedural and substantive maladies and mishaps. They’re right. In part this is because bankruptcies, particularly business bankruptcies, involve a vast array of motions, applications and adversary proceedings directed to administering a bankruptcy “estate.”

In this process, the bankruptcy court may reach very substantial decisions concerning a broad variety of matters that may impact subsequent litigation. Two situations arise in which a prior bankruptcy has its greatest impact on subsequent commercial cases.

1. Did your plaintiff disclose her claim in her prior bankruptcy?

Not infrequently, a plaintiff may have filed a prior bankruptcy proceeding and obtained a discharge of her debt. When she does so, she engages in a *quid pro quo*, disclosing the existence and value of all of her assets, including contingent and unliquidated assets, and sharing non-exempt assets with her creditors in exchange for a discharge. *See* 11 U.S.C. § 521(1). But what happens when a debtor knows of claims she has but does not disclose them to her creditors?

The answer is that with limited exceptions, she loses that subsequent claim by application of the doctrine of judicial estoppel. In *In re Coastal Plains, Inc.*, 179 F.3d 197 (5th Cir. 1999), the court held that debtors who knew of, but did not disclose claims relating to misrepresentation in a sale transaction were precluded from later asserting those claims. The logic behind these decisions is simple: a debtor who is unwilling to share with her creditors the proceeds of a known claim is unworthy of recovering on that claim. 179 F.3d 210. The defendant asserting this doctrine need not prove reliance upon the failure of the debtor to disclose, because the injury from non-disclosure is to the judicial system rather than any particular creditor or litigant. *Id.*

This rule will frequently spawn a dispute over whether the failure to give notice of the claim was “inadvertent”. The plaintiff will claim that the omission on his bankruptcy schedules was inadvertent—either because he did not understand the complex bankruptcy proceeding or got bad advice from his lawyer—and the defendant will claim that the duty to disclose was evident and the failure to disclose was without excuse. Generally, the rules relating to claims of inadvertent omission work against the debtor and in favor of the defendant in the subsequent litigation. 179 F.3d at 211 (“the debtor’s failure to satisfy its statutory disclosure duty is ‘inadvertent’ only when, in general, the debtor either lacks knowledge of the undisclosed claims *or* has no motive for their concealment.”). Though there are some loose subsequent appellate decisions finding inadvertence on Steve Martin grounds (“I . . . forgot”), these do not appear to be fair interpretations of the original doctrine. *See, e.g., Thompson v. Continental Airlines*, 18 S.W.3d 701, 704 (Tex. App.—San Antonio 2000, no pet.) (summary judgment

against trip and fall plaintiff reversed because plaintiff created a fact issue by claiming that she thought “all other contingent and unliquidated claims” did not include “personal injury claims”).

2. *Res Judicata* and collateral estoppel.

While we might tend to think of bankruptcy courts as forums for “winding up” the affairs of a business they in fact enjoy a broad grant of jurisdiction to do much more than liquidate assets and make distributions. As a result, debtors in possession in these cases file many motions, applications or objections that may preclude litigation in a subsequent case.

For example, a debtor may: (1) hire, fire, pay or force disgorgement from an attorney, accountant or other professional (11 U.S.C. § 327); (2) object to a creditor’s claim and obtain a final accounting of it (11 U.S.C. 502); (3) seek to retain and bonus its management (11 U.S.C. §§ 704, 1108); (4) sell assets free and clear of liens (11 U.S.C. § 363) or (5) assume an executory contract such as a lease agreement or license (11 U.S.C. § 365). In taking these actions, the court may automatically make determinations that affect future litigation.

In *Southmark v. Coopers & Lybrand*, 163 F.3d 925 (5th Cir. 1999), the court affirmed summary judgment granted by the bankruptcy court on Southmark’s state law claim of accounting malpractice. During the bankruptcy proceeding Coopers had been retained by Southmark to investigate whether it had claims against various parties, including Drexel Burnham & Lambert. After the proceeding a Coopers employee went to Southmark’s general counsel and advised him that (1) Coopers had not disclosed all of its contacts with Drexel, but was in fact its primary auditor and had a long and financially involved history with DBL and (2) his suggestions that Southmark had good claims against DBL were ignored and he was reassigned for making them. 163 F.3d 927. Southmark filed a motion and obtained a ruling from the bankruptcy court forcing Coopers to disgorge over \$55,000 in fees made in connection with work reviewing

Southmark's claims against Drexel, treble damages and Southmark's attorneys' fees for bringing the disgorgement motion. 163 F.3d 933.

Three days after obtaining the order, Southmark filed a legal malpractice claim in state district court contending that it had lost money because Coopers failed to recommend that it file a proof of claim in the DBL bankruptcy. Summary judgment was appropriate, the fifth circuit ruled, because the issue stated in the state court proceeding had actually and necessarily been litigated in the disgorgement motion. "For instance, Southmark's pleadings in the disgorgement proceeding specifically state that Southmark 'surely would have' filed a Drexel proof of claim had Coopers 'further investigated and disclosed' theories of liability against Drexel." *Id.* n.10. This being the case, the court ruled that the criteria necessary for issue preclusion had been met and affirmed the bankruptcy court's decision. *Id.*

These doctrines may have broad application to subsequent state court proceedings, but reaching a correct decision concerning them requires a painstaking analysis of what issues were actually addressed in the underlying bankruptcy case.