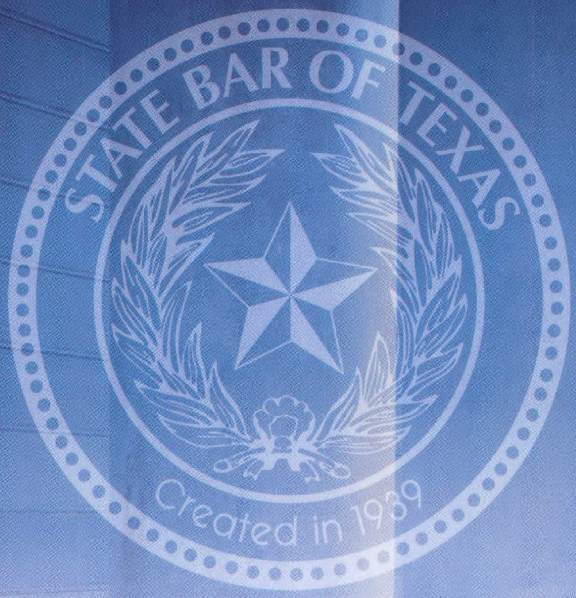


TEXAS PATTERN JURY CHARGES

BUSINESS, CONSUMER, INSURANCE & EMPLOYMENT

2018 EDITION

TEXAS
PATTERN JURY CHARGES

Business • Consumer • Insurance • Employment

TEXAS

PATTERN JURY CHARGES

Business • Consumer

Insurance • Employment

Prepared by the
COMMITTEE
on
PATTERN JURY CHARGES
of the
STATE BAR OF TEXAS

Austin 2018

The State Bar of Texas, through its TexasBarBooks Department, publishes practice books prepared and edited by knowledgeable authors to give practicing lawyers as much assistance as possible. The competence of the authors ensures outstanding professional products, but, of course, neither the State Bar of Texas, the editors, nor the authors make either express or implied warranties in regard to their use. Each lawyer must depend on his or her own knowledge of the law and expertise in the use or modification of these materials.

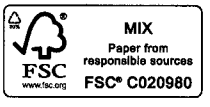
IRS CIRCULAR 230 NOTICE: To ensure compliance with requirements imposed by the IRS, we inform you that (1) this written material was not intended or written by the author(s) to be used for the purpose of avoiding federal penalties that may be imposed on a taxpayer; (2) this written material cannot be used by a taxpayer for the purpose of avoiding penalties that may be imposed on the taxpayer; (3) this written material cannot be used in promoting, marketing, or recommending to another party any tax-related transaction or matter; and (4) a taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

The use of the masculine gender throughout this publication is purely for literary convenience and should, of course, be understood to include the feminine gender as well.

International Standard Book Number: 978-1-938873-66-9

Printed in the United States of America

Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment was formerly titled *Texas Pattern Jury Charges, Volume 4.*



To the memory of
Mark L. Kincaid, 1959–2016,
whose contributions to Texas jurisprudence,
and particularly the Texas Pattern Jury Charges,
will be with us forever.

COMMITTEE ON PATTERN JURY CHARGES

Business • Consumer • Insurance • Employment

2016–2018

LADAWN HORN NANDRASY, *Chair*

WILLIAM J. CHRISS, *Vice-Chair*

HON. GINA M. BENAVIDES
HON. SCOTT BRISTER
HON. J. BRETT BUSBY
KIWI CAMARA
LUIS M. CARDENAS
STUART LEE COCHRAN
TERI L. DANISH
CHRISTOPHER DOVE
DYLAN O. DRUMMOND
DIANA M. GEIS
VALORIE GLASS
MARY TAYLOR HENDERSON
STEVEN C. JAMES
MICHAEL WAYNE MASSIATTIE
PHILIP KENT MAXWELL
RICHARD G. MUNZINGER
CHARLES H. PECKHAM
HON. REBECCA SIMMONS
CARLOS RAMON SOLTERO
HON. JAMES M. STANTON
AMY ELIZABETH STEWART
JEREMY STONE
JACQUELINE M. STROH
MARC A. STROOPE
HON. BONNIE SUDDERTH
GABE T. VICK, III
HOLLY B. WILLIAMS
HON. RENÉE YANTA

COMMITTEE ON PATTERN JURY CHARGES—OVERSIGHT

2016–2018

HON. JANE BLAND, *Chair*

HON. DEAN RUCKER, *Vice-Chair*

HON. PHYLIS J. SPEEDLIN, *Vice-Chair*

HON. JOHN DEVINE, *Supreme Court Liaison*

J. ARNOLD AGUILAR
ALEXANDRA W. ALBRIGHT
KIRSTEN M. CASTAÑEDA
HON. TRACY KEE CHRISTOPHER
HON. DIANE DEVASTO
DAMON EDWARDS
HON. ANA E. ESTEVEZ
DAVID J. FISHER
HON. AIDA FLORES
JOHN BLAISE GSANGER
HON. DAN HINDE
SUSAN RIVA KLEIN
H. E. MENDEZ
BRIAN MILLER
HON. EMILY MISKEL
HON. LANA MYERS
JAMES ROWLAND OLD, JR.
SARAH PATEL PACHECO
DAN POZZA
HON. CATHERINE STONE
HON. KENT C. SULLIVAN
HON. MECA L. WALKER

COMMITTEE ON PATTERN JURY CHARGES

Business • Consumer • Insurance • Employment

1989–2016

Chairs

MIKE M. TABOR, 1989–1993
PHILIP KENT MAXWELL, 1993–1997
SHARON E. CALLAWAY, 1997–2004
TIMOTHY G. CHOVANEC, 2004–2006
KAREN S. PRECELLA, 2006–2009
MARK L. KINCAID, 2009–2011
HON. J. BRETT BUSBY, 2011–2016
LADAWN HORN NANDRASY, 2014–2016

Vice-Chairs

PHILIP K. MAXWELL, 1991–1993
GEORGE WALTER BRAMBLETT, JR., 1993–1995
SHARON E. CALLAWAY, 1995–1997
TIMOTHY G. CHOVANEC, 1997–2004
KAREN S. PRECELLA, 2003–2006
MARK L. KINCAID, 2007–2008
DANIEL L. RENTFRO, JR., 2009–2012
HON. BRIAN PATRICK QUINN, 2012–2014
WILLIAM J. CHRISS, 2014–2016

Members

HON. MARILYN ABOUSSIE
BEN L. ADERHOLT
C. MARK BAKER
DAVID BATSON
ASIM BHANSALI
MICHAEL ALLEN BIRRER
THOMAS BLACK
HON. JANE BLAND
SAMUEL L. BOYD
KATHERINE BUTLER BREM
ARTHUR J. BRENDER, JR.
KAMELA BRIDGES
HON. SCOTT BRISTER
QUENTIN BROGDON
ROBERT L. RUSSELL BUSH
KIWI CAMARA
LUIS M. CARDENAS
STEPHEN ASHON CHAN
DAVID S. COALE
HON. ANN T. COCHRAN
STUART LEE COCHRAN
DOUGLAS G. CORNWELL

Members

PETER M. CURRY, JR.
TERI L. DANISH
HON. MARK D. DAVIDSON
DON C. DENNIS
HARISH C. DHINGRA
MARTIN DIES, JR.
DAVID H. DONALDSON, JR.
HON. GRANT DORFMAN
CHRISTOPHER DOVE
DYLAN O. DRUMMOND
SARAH ANN DUCKERS
HON. JENNIFER WALKER ELROD
HON. DAVID L. EVANS
EDWIN R. FLEURIET
HON. HENRY ROBERT FROST
MARILYN D. GARNER
BERNARDO S. GARZA
DIANA M. GEIS
VALORIE GLASS
JOHN GRIFFIN, JR.
L. BRADLEY HANCOCK
WILLIAM T. HANKINSON
DAVID E. HARRELL, JR.
MARY TAYLOR HENDERSON
CHARLIE HENKE
JAMES A. HERRMANN
PAMELA A. HOPPER
MARK F. HOWELL
CHARLES W. HURD
STEVEN C. JAMES
TERESA RHONDA JONES
JEFFREY R. JURY
DAVID E. KELTNER
ANDREW L. KERR
JEROME M. KOLANDER, JR.
HON. DOUGLAS S. LANG
THOMAS S. LEATHERBURY
JOHN G. LEWIS
PETER LINZER
JACK W. LONDON
DAVID T. LOPEZ
MARK E. LOWES
C. ROBERT MACE
MARGARET M. MAISEL
MICHAEL WAYNE MASSIATTE
MARK MCQUALITY
STERLING MINOR
FRANK W. MITCHELL
HON. KENNETH H. MOLBERG
HON. FRANK MONTALVO
RICHARD G. MUNZINGER
SARA MURRAY
KEITH B. O'CONNELL
KEMNAGUM KEN OKORIE
DUDLEY OLDHAM
CARRIN F. PATMAN
KATRINA SHANA PATRICK
TIMOTHY PATTON
TERRI CURRY PEACE
CHARLES H. PECKHAM
BARBARA RADNOFSKY
HON. JORGE CANTU RANGEL
HON. ROSE GUERRA REYNA
SUSAN RAFFERTY RICHARDSON
CRISTINA ESPINOSA RODRIGUEZ
EDUARDO ROMERO
GREGG M. ROSENBERG
YONA ROZEN
ANTHONY J. SADBERRY
HON. REBECCA SIMMONS
GREG A. SIVINSKI
JEFFREY D. SMALL

Members

LAWRENCE DAVID SMITH
CRAIG SMYSER
ROSEMARY T. SNIDER
CARLOS RAMON SOLTERO
HON. JAMES M. STANTON
AMY ELIZABETH STEWART
SCOTT P. STOLLEY
JEREMY STONE
JACQUELINE M. STROH
MARC A. STROOPE
HON. BONNIE SUDDERTH
DONEAN SURRATT
CLIFTON A. VAUGHN
ROBERT BLAKE WALLIS
WILLIAM E. WALTON
THOMAS H. WATKINS
CHARLES R. WATSON, JR.
TIMOTHY WEBB
TERRY WELDON
HON. W. DAVID WEST
HON. MARK L. WHITTINGTON
HOLLY B. WILLIAMS
DANIEL K. WORTHINGTON
T. J. WRAY
JAMES L. "LARRY" WRIGHT
HON. RENÉE YANTA

ERIC LYF YOLLICK

COMMITTEE ON PATTERN JURY CHARGES

Civil

1990–1991

J. HADLEY EDGAR, *Chair*
HON. WILLIAM L. HUGHES, JR., *Vice-Chair*

BLAKE BAILEY
R. DOAK BISHOP
GEORGE E. CHANDLER
STEPHEN C. DILLARD
ROBERT L. GIBBINS, JR.
DOUGLASS D. HEARNE
KAREN M. KACIR
STEPHEN R. LEWIS
WAYNE H. PRESCOTT
THOMAS T. ROGERS

CONTENTS

PREFACE

The Pattern Jury Charges (volume 4) Committee has worked for over five years to produce this addition to the Pattern Jury Charges series. During most of that period the Committee met once a month and spent additional time between meetings doing research and writing drafts of the various questions, instructions, and comments that make up this volume.

The Committee gratefully acknowledges the instrumental role of Chief Justice Thomas R. Phillips, who chaired the Committee from 1985–87. It is also grateful for the help and support of five State Bar presidents: Charles L. Smith (1985–86), Bill Whitehurst (1986–87), Joe H. Nagy (1987–88), James B. Sales (1988–89), and Darrell Jordan (1989–90).

In every successful enterprise there can be found a few key people who make things happen. The chair is particularly grateful for the attendance, participation, and hard work of Tom Black, Ann Cochran, Don Dennis, John Lewis, Peter Linzer, Phil Maxwell, Frank Mitchell, Richard Munzinger, and Dudley Oldham. We are also indebted to numerous other lawyers and judges who read the drafts and offered ideas for improvement—ranging from matters of substantive law to those having to do with style, format, and utility.

Our project legal editor, Vickie Tatum, deserves special recognition for her work on this volume. The State Bar Books and Systems staff has provided invaluable support, and we are also grateful for the advice and counsel of J. Hadley Edgar, chairman of the State Bar standing Committee on Pattern Jury Charges.

—Mike Tabor, *Chair*

PREFACE TO THE 2018 EDITION

Our Committee is pleased to bring you the new edition of *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment.* The 2018 volume includes new charges on reformation and ambiguity and new commentary on unjust enrichment and money had and received. Additionally, existing charges have been updated throughout the volume to reflect the latest developments from the courts and the legislature.

The Committee worked closely this year with the *Texas Pattern Jury Charges—Oil & Gas* volume to consider and develop new charges in areas of the law affecting both volumes. The Committee similarly worked with the *Texas Pattern Jury Charges—Malpractice, Premises & Products* volume to develop new charges on fiduciary duty to be included in the 2018 *Malpractice* edition. It is always a great privilege to collaborate with the other PJC Committees on cross-volume topics and to work together to ensure that we get it right, considering all sides of the issues.

The Committee was deeply saddened by the untimely passing last year of our colleague Valorie Glass. Valorie was a dedicated and active member of the Committee, leading the employment subcommittee in its work to draft and develop charges in the area of employment law. She contributed greatly to the Committee and is missed.

It was my honor to serve on the Committee, and I will miss it. Although the Committee's work was always hard, it was extremely satisfying and fulfilling to be part of an important effort to provide guidance to the bench and bar. As well, I met extraordinary people during my service on the Committee; I am humbled to count many of them as friends.

My sincere thanks to the members of the Committee for their stringent work ethic and commitment to excellence in drafting and updating the *Business* volume. I am particularly grateful for the attendance, participation, and hard work of Phil Maxwell. Phil has served almost thirty years on the *Business* volume, including four years as its Chair. He was one of the volume's original drafters, and his deep, institutional knowledge has for many years helped maintain the volume's integrity by keeping the Committee on course. Thank you, Phil, for your dedication and impeccable service.

Finally, the Committee is deeply grateful for the invaluable support and guidance of our editor, Elma Garcia. Despite all the moving pieces, she always knew where we were and what needed to be accomplished—and was always able to convey that gently, with kindness and humor. Many thanks also to Jim Norman for assisting Elma in supporting the Committee.

We welcome feedback and suggestions from our readers, which may be e-mailed to **books@texasbar.com**. We also encourage the bench and bar to comment on new draft charges that the Committee plans to include in future editions, which we post periodically at **www.texasbarbooks.net**.

—LaDawn Horn Nandrasy, *Chair*

CHANGES IN THE 2018 EDITION

The 2018 edition of *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment* includes the following changes from the 2016 edition:

1. Admonitory Instructions—
   a. Updated instruction regarding privilege and adverse inference (100.10)
   b. Added new instruction on Fifth Amendment privilege and adverse inference (100.11)
   c. Renumbered following PJCs
2. Contracts—
   a. Revised instruction on mutual mistake—scrivener's error to clarify instruction and more clearly reflect current case law (101.29)
   b. Added comment on "burden of proof" to instruction on modification (101.31)
   c. Added question and instruction on ambiguous provisions (101.37)
   d. Added question and instruction on reformation as an affirmative cause of action (101.38)
   e. Added Comment on money had and received (101.43)
   f. Added Comment on unjust enrichment (101.44)
   g. Updated discussion on concurrent causation and allocation to include discussion on separate and independent causation (101.57–101.59)
3. DTPA/Insurance Code—
   a. Updated comment on *Casteel* and broad-form issues to discuss specific applicability in DTPA cases (102.1, 102.14)
   b. Added discussion on additional notice defenses required by Texas Insurance Code chapter 541 to Comment on defenses to Deceptive Trade Practices Act and Insurance Code Chapter 541 claims (102.22)
   c. Added discussion on claims relating to "forces of nature" under Texas Insurance Code section 542.060(a) (102.25–102.28)
4. Employment—
   a. Added instruction on permissive inference (107.4, 107.6, 107.9)
   b. Added discussion on same-sex harassment in question and instruction on unlawful employment practices and instruction on sexual harassment by

supervisor involving tangible employment action to reflect current case law (107.6, 107.21)

c. Added question limiting relief for retaliation under Texas Whistleblower Act (107.25)

5. Piercing the Corporate Veil—Revised comment on "actual fraud" to reflect use of definition from *Castleberry v. Branscum*, 721 S.W.2d 270 (Tex. 1986) (108.2–108.7)

6. Defamation and Business Disparagement—

   a. Updated discussion on "self-defamation" in question and instruction on publication to reflect current case law indicating self-publication is not a recognized theory (110.2)

   b. Added comment on affirmative defense of truth to question and instruction on falsity (110.4)

   c. Revised discussion of fault required (110.5, 110.6, 110.10, 110.11)

7. Misappropriation of Trade Secrets—

   a. Revised question, instruction, and commentary to more accurately track current statutory language in question and instructions on existence of trade secret (111.1)

   b. Updated comment to clarify displacement of other Texas law in question and instructions on trade secret misappropriation (111.2)

8. Damages—

   a. Updated discussion on policy benefits in question and instruction on actual damages under Insurance Code chapter 541 to reflect that the supreme court has identified certain circumstances in which policy benefits are recoverable (115.13)

   b. Deleted PJC relating to actions filed before September 1, 2003 (115.31A)

   c. Revised discussion in proportionate responsibility to distinguish between common-law claims based on tort and statutory claims (115.36)

   d. Updated questions and instructions relating to grounds for removing limitation on exemplary damages to reflect statutory revisions (115.40, 115.42, 115.43, 115.45)

9. Preservation of Charge Error—

   a. Updated Comment to include discussion on submission of wrong theory (116.1)

b. Moved discussion of broad form to new PJC and revised discussion noting when harmful error must be presumed (116.2)

INTRODUCTION

1. Purpose of Publication

The purpose of this volume, like those of the others in this series, is to assist the bench and bar in preparing the court's charge in jury cases. It provides definitions, instructions, and questions needed to submit jury charges in the following cases:

- contract cases, both common-law and UCC sale of goods, and including construction contracts and insurance contracts;
- actions under the Texas Deceptive Trade Practices–Consumer Protection Act (DTPA) and the Texas Insurance Code;
- actions against insurers for violation of the duty of good faith and fair dealing;
- breach of fiduciary duty;
- fraud, both common-law and statutory (Tex. Bus. & Com. Code § 27.01), negligent misrepresentation, and actions under the Uniform Fraudulent Transfer Act;
- tortious interference with existing contracts and prospective contractual relations;
- employment actions;
- actions to hold shareholders personally liable for the liabilities of a corporation ("piercing the corporate veil");
- civil conspiracy;
- defamation, business disparagement, and invasion of privacy; and
- misappropriation of trade secrets.

It also contains questions and comments pertaining to defenses to the above actions and sections on damages and preservation of charge error.

The pattern charges are suggestions and guides to be used by a trial court if they are applicable and proper in a specific case. The Committee hopes that this volume will prove as worthy as have the earlier *Texas Pattern Jury Charges* volumes.

2. Scope of Pattern Charges

The infinite combinations of possible facts in contract, consumer, employment, and other business cases make it impracticable for the Committee to offer questions suitable for every occasion. The Committee has tried to prepare charges to serve as guides for the usual litigation encountered in these types of cases. However, a charge should conform to the pleadings and evidence of a case, and occasions will arise for the use of questions and instructions not specifically addressed here.

3. Use of Accepted Precedents

Like its predecessors, this Committee has avoided recommending changes in the law and has based this material on what it perceives the present law to be. It has attempted to

foresee theories and objections that might be made in a variety of circumstances but not to express favor or disfavor for particular positions. In unsettled areas, the Committee generally has not taken a position on the exact form of a charge. However, it has provided guidelines in some areas in which there is no definitive authority. Of course, trial judges and attorneys should recognize that these recommendations may be affected by future appellate decisions and statutory changes.

4. Principles of Style

a. *Preference for broad-form questions.* Tex. R. Civ. P. 277 provides that "the court shall, whenever feasible, submit the cause upon broad-form questions." Accordingly, the basic questions are designed to be accompanied by one or more instructions. *See Texas Department of Human Services v. E.B.*, 802 S.W.2d 647 (Tex. 1990). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

b. *Simplicity.* The Committee has sought to be as brief as possible and to use language that is simple and easy to understand.

c. *Definitions and instructions.* The supreme court has disapproved the practice of embellishing standard definitions and instructions, *Lemos v. Montez*, 680 S.W.2d 798 (Tex. 1984), or of adding unnecessary instructions, *First International Bank v. Roper Corp.*, 686 S.W.2d 602 (Tex. 1985). The Committee has endeavored to adhere to standard definitions and instructions stated in general terms rather than terms of the particular parties and facts of the case. If an instruction in general terms would be unduly complicated and confusing, however, reference to specific parties and facts is suggested.

d. *Placement of definitions and instructions in the charges.* Definitions and instructions that apply to a number of questions should be given immediately after the general instructions required by Tex. R. Civ. P. 226a. *See Woods v. Crane Carrier Co.*, 693 S.W.2d 377 (Tex. 1985). However, if a definition or instruction applies to only one question or cluster of questions (e.g., damages questions), it should be placed with that question or cluster. Specific guidance for placement of definitions and instructions can be found in the individual PJCs and comments.

e. *Burden of proof.* As authorized by Tex. R. Civ. P. 277, it is recommended that the burden of proof be placed by instruction rather than by inclusion in each question. When the burden is placed by instruction, it is not necessary that each question begin: "Do you find from a preponderance of the evidence that . . ." The admonitory instructions contain the following instruction, applicable to all questions:

> Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence [unless you are told otherwise]. Whenever a question requires an answer other than "yes" or "no," your answer must be based on a preponderance of the evidence [unless you are told otherwise].
>
> The term "preponderance of the evidence" means the greater weight

> of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

f. *Hypothetical examples.* The names of hypothetical parties and facts have been italicized to indicate that the names and facts of the particular case should be substituted. In general, the name *Paul Payne* has been used for the plaintiff and *Don Davis* for the defendant. Some PJCs use other hypothetical parties (see, e.g., 115.36). Their use is explained in the comments.

5. Comments and Citations of Authority

The comments to each PJC provide a ready reference to the law that serves as a foundation for the charge. The primary authority cited is Texas (or, for employment law, federal) case law. In some instances, secondary authority—for example, *Restatement (Second) of Contracts*—is also cited. The Committee wishes to emphasize that secondary authority is cited solely as additional guidance to the reader and not as legal authority for the proposition stated. Some comments also include variations of the recommended forms and additional questions or instructions for special circumstances.

6. Using the Pattern Charges

Matters on which the evidence is undisputed should not be submitted by either instruction or question. Conversely, questions, instructions, and definitions not included in this book may sometimes become necessary. Finally, preparation of a proper charge requires careful legal analysis and sound judgment.

7. Installing the Digital Download

The complimentary downloadable version of *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment* (2018 edition) contains the entire text of the printed book. To install the digital download—

1. log in to **www.texasbarcle.com**,
2. go to **www.texasbarcle.com/pjc-business-2018**, and
3. install the version of the digital download you want.

Use of the digital download is subject to the terms of the license and limited warranty included in the documentation at the end of this book and on the digital download web pages. By accessing the digital download, you waive all refund privileges for this publication.

8. FUTURE REVISIONS

The contents of questions, instructions, and definitions in the court's charge depend on the underlying substantive law relevant to the case. This volume as updated reflects all amendments to Texas statutes enacted through 2017. The Committee expects to publish updates as needed to reflect changes and new developments in the law.

PJC 100.1 Instructions to Jury Panel before Voir Dire Examination

[Brackets indicate optional, alternative, or instructive text.]

MEMBERS OF THE JURY PANEL:

Thank you for being here. We are here to select a jury. Twelve [six] of you will be chosen for the jury. Even if you are not chosen for the jury, you are performing a valuable service that is your right and duty as a citizen of a free country.

Before we begin: Turn off all phones and other electronic devices. While you are in the courtroom, do not communicate with anyone through any electronic device. [For example, do not communicate by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace.] [I will give you a number where others may contact you in case of an emergency.] Do not record or photograph any part of these court proceedings, because it is prohibited by law.

If you are chosen for the jury, your role as jurors will be to decide the disputed facts in this case. My role will be to ensure that this case is tried in accordance with the rules of law.

Here is some background about this case. This is a civil case. It is a lawsuit that is not a criminal case. The parties are as follows: The plaintiff is _____, and the defendant is _____. Representing the plaintiff is _____, and representing the defendant is _____. They will ask you some questions during jury selection. But before their questions begin, I must give you some instructions for jury selection.

Every juror must obey these instructions. You may be called into court to testify about any violations of these instructions. If you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial.

These are the instructions.

1. To avoid looking like you are friendly with one side of the case, do not mingle or talk with the lawyers, witnesses, parties, or anyone else involved in the case. You may exchange casual greetings like "hello" and "good morning." Other than that, do not talk with them at all. They have to

follow these instructions too, so you should not be offended when they follow the instructions.

2. Do not accept any favors from the lawyers, witnesses, parties, or anyone else involved in the case, and do not do any favors for them. This includes favors such as giving rides and food.

3. Do not discuss this case with anyone, even your spouse or a friend, either in person or by any other means [including by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace]. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you or in your hearing, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.

4. The parties, through their attorneys, have the right to ask you questions about your background, experiences, and attitudes. They are not trying to meddle in your affairs. They are just being thorough and trying to choose fair jurors who do not have any bias or prejudice in this particular case.

5. Remember that you took an oath that you will tell the truth, so be truthful when the lawyers ask you questions, and always give complete answers. If you do not answer a question that applies to you, that violates your oath. Sometimes a lawyer will ask a question of the whole panel instead of just one person. If the question applies to you, raise your hand and keep it raised until you are called on.

Do you understand these instructions? If you do not, please tell me now.

The lawyers will now begin to ask their questions.

COMMENT

When to use. The foregoing oral instructions are prescribed in Tex. R. Civ. P. 226a. The instructions, "with such modifications as the circumstances of the particular case may require," are to be given to the jury panel "after they have been sworn in as provided in Rule 226 and before the voir dire examination."

Rewording regarding investigation by jurors. In an appropriate case, the sentence "Do not post information about the case on the Internet before these court proceedings end and you are released from jury duty" may be added in the second paragraph of this instruction, and the instructions admonishing against independent investigation by the jurors contained in item 6 of PJC 100.2 may be included in the instruction.

PJC 100.2 Instructions to Jury after Jury Selection

[Brackets indicate optional or instructive text.]

[Oral Instructions]

MEMBERS OF THE JURY:

You have been chosen to serve on this jury. Because of the oath you have taken and your selection for the jury, you become officials of this court and active participants in our justice system.

[Hand out the written instructions.]

You have each received a set of written instructions. I am going to read them with you now. Some of them you have heard before and some are new.

1. Turn off all phones and other electronic devices. While you are in the courtroom and while you are deliberating, do not communicate with anyone through any electronic device. [For example, do not communicate by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace.] [I will give you a number where others may contact you in case of an emergency.] Do not post information about the case on the Internet before these court proceedings end and you are released from jury duty. Do not record or photograph any part of these court proceedings, because it is prohibited by law.

2. To avoid looking like you are friendly with one side of the case, do not mingle or talk with the lawyers, witnesses, parties, or anyone else involved in the case. You may exchange casual greetings like "hello" and "good morning." Other than that, do not talk with them at all. They have to follow these instructions too, so you should not be offended when they follow the instructions.

3. Do not accept any favors from the lawyers, witnesses, parties, or anyone else involved in the case, and do not do any favors for them. This includes favors such as giving rides and food.

4. Do not discuss this case with anyone, even your spouse or a friend, either in person or by any other means [including by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace]. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you or in your

hearing, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.

5. Do not discuss this case with anyone during the trial, not even with the other jurors, until the end of the trial. You should not discuss the case with your fellow jurors until the end of the trial so that you do not form opinions about the case before you have heard everything.

After you have heard all the evidence, received all of my instructions, and heard all of the lawyers' arguments, you will then go to the jury room to discuss the case with the other jurors and reach a verdict.

6. Do not investigate this case on your own. For example, do not:

a. try to get information about the case, lawyers, witnesses, or issues from outside this courtroom;

b. go to places mentioned in the case to inspect the places;

c. inspect items mentioned in this case unless they are presented as evidence in court;

d. look anything up in a law book, dictionary, or public record to try to learn more about the case;

e. look anything up on the Internet to try to learn more about the case; or

f. let anyone else do any of these things for you.

This rule is very important because we want a trial based only on evidence admitted in open court. Your conclusions about this case must be based only on what you see and hear in this courtroom because the law does not permit you to base your conclusions on information that has not been presented to you in open court. All the information must be presented in open court so the parties and their lawyers can test it and object to it. Information from other sources, like the Internet, will not go through this important process in the courtroom. In addition, information from other sources could be completely unreliable. As a result, if you investigate this case on your own, you could compromise the fairness to all parties in this case and jeopardize the results of this trial.

7. Do not tell other jurors about your own experiences or other people's experiences. For example, you may have special knowledge of something in the case, such as business, technical, or professional information. You may even have expert knowledge or opinions, or you may know what

happened in this case or another similar case. Do not tell the other jurors about it. Telling other jurors about it is wrong because it means the jury will be considering things that were not admitted in court.

8. Do not consider attorneys' fees unless I tell you to. Do not guess about attorneys' fees.

9. Do not consider or guess whether any party is covered by insurance unless I tell you to.

10. During the trial, if taking notes will help focus your attention on the evidence, you may take notes using the materials the court has provided. Do not use any personal electronic devices to take notes. If taking notes will distract your attention from the evidence, you should not take notes. Your notes are for your own personal use. They are not evidence. Do not show or read your notes to anyone, including other jurors.

You must leave your notes in the jury room or with the bailiff. The bailiff is instructed not to read your notes and to give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone.

[You may take your notes back into the jury room and consult them during deliberations. But keep in mind that your notes are not evidence. When you deliberate, each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes. After you complete your deliberations, the bailiff will collect your notes.]

When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

11. I will decide matters of law in this case. It is your duty to listen to and consider the evidence and to determine fact issues that I may submit to you at the end of the trial. After you have heard all the evidence, I will give you instructions to follow as you make your decision. The instructions also will have questions for you to answer. You will not be asked and you should not consider which side will win. Instead, you will need to answer the specific questions I give you.

Every juror must obey my instructions. If you do not follow these instructions, you will be guilty of juror misconduct, and I may have to order a new trial and start this process over again. This would waste your time and the par-

ties' money, and would require the taxpayers of this county to pay for another trial.

Do you understand these instructions? If you do not, please tell me now.

Please keep these instructions and review them as we go through this case. If anyone does not follow these instructions, tell me.

COMMENT

When to use. The foregoing instructions are prescribed in Tex. R. Civ. P. 226a. The instructions, "with such modifications as the circumstances of the particular case may require," are to be given to the jury "immediately after the jurors are selected for the case."

If no tort claim is involved. Item 9 should be deleted from the foregoing instructions unless a tort claim is involved in the case.

PJC 100.3 Charge of the Court

PJC 100.3A Charge of the Court—Twelve-Member Jury

[Brackets indicate optional or instructive text.]

MEMBERS OF THE JURY:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason. [I will give you a number where others may contact you in case of an emergency.]

[Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.]

[You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.]

Here are the instructions for answering the questions.

1. Do not let bias, prejudice, or sympathy play any part in your decision.

2. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence [unless you are told otherwise]. Whenever a question requires an answer other than "yes" or "no," your answer must be based on a preponderance of the evidence [unless you are told otherwise].

The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say, "I will answer this question your way if you answer another question my way."

11. [Unless otherwise instructed] The answers to the questions must be based on the decision of at least ten of the twelve jurors. The same ten jurors must agree on every answer. Do not agree to be bound by a vote of anything less than ten jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

[Definitions, questions, and special instructions given to the jury will be transcribed here.]

Presiding Juror:

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

2. The presiding juror has these duties:

   a. have the complete charge read aloud if it will be helpful to your deliberations;

   b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;

   c. give written questions or comments to the bailiff who will give them to the judge;

   d. write down the answers you agree on;

   e. get the signatures for the verdict certificate; and

   f. notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Instructions for Signing the Verdict Certificate:

1. [Unless otherwise instructed] You may answer the questions on a vote of ten jurors. The same ten jurors must agree on every answer in the charge. This means you may not have one group of ten jurors agree on one answer and a different group of ten jurors agree on another answer.

2. If ten jurors agree on every answer, those ten jurors sign the verdict.

If eleven jurors agree on every answer, those eleven jurors sign the verdict.

If all twelve of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all twelve of you agreeing on some answers, while only ten or eleven of you agree on other answers. But when you sign the verdict, only those ten who agree on every answer will sign the verdict.

4. *[Added if the charge requires some unanimity.]* There are some special instructions before Questions _____ explaining how to answer those questions. Please follow the instructions. If all twelve of you answer those questions, you will need to complete a second verdict certificate for those questions.

Do you understand these instructions? If you do not, please tell me now.

_____
JUDGE PRESIDING

Verdict Certificate

Check one:

_____ Our verdict is unanimous. All twelve of us have agreed to each and every answer. The presiding juror has signed the certificate for all twelve of us.

_____ _____
Signature of Presiding Juror Printed Name of Presiding Juror

_____ Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

_____ Our verdict is not unanimous. Ten of us have agreed to each and every answer and have signed the certificate below.

	Signature	Name Printed
1.	_____	_____
2.	_____	_____

3. _____ _____

4. _____ _____

5. _____ _____

6. _____ _____

7. _____ _____

8. _____ _____

9. _____ _____

10. _____ _____

11. _____ _____

If you have answered Question No. _____ [*the exemplary damages amount*], then you must sign this certificate also.

Additional Certificate

[Used when some questions require unanimous answers.]

I certify that the jury was unanimous in answering the following questions. All twelve of us agreed to each of the answers. The presiding juror has signed the certificate for all twelve of us.

[Judge to list questions that require a unanimous answer, including the predicate liability question.]

_____ _____

Signature of Presiding Juror Printed Name of Presiding Juror

PJC 100.3B Charge of the Court—Six-Member Jury

[Brackets indicate optional or instructive text.]

MEMBERS OF THE JURY:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason. [I will give you a number where others may contact you in case of an emergency.]

[Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.]

[You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.]

Here are the instructions for answering the questions.

1. Do not let bias, prejudice, or sympathy play any part in your decision.

2. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence [unless

you are told otherwise]. Whenever a question requires an answer other than "yes" or "no," your answer must be based on a preponderance of the evidence [unless you are told otherwise].

The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say, "I will answer this question your way if you answer another question my way."

11. [Unless otherwise instructed] The answers to the questions must be based on the decision of at least five of the six jurors. The same five jurors must agree on every answer. Do not agree to be bound by a vote of anything less than five jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

[Definitions, questions, and special instructions given to the jury will be transcribed here.]

Presiding Juror:

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

2. The presiding juror has these duties:

   a. have the complete charge read aloud if it will be helpful to your deliberations;

   b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;

   c. give written questions or comments to the bailiff who will give them to the judge;

   d. write down the answers you agree on;

   e. get the signatures for the verdict certificate; and

   f. notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Instructions for Signing the Verdict Certificate:

1. [Unless otherwise instructed] You may answer the questions on a vote of five jurors. The same five jurors must agree on every answer in the charge. This means you may not have one group of five jurors agree on one answer and a different group of five jurors agree on another answer.

2. If five jurors agree on every answer, those five jurors sign the verdict.

If all six of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all six of you agreeing on some answers, while only five of you agree on other answers. But when you sign the verdict, only those five who agree on every answer will sign the verdict.

4. *[Added if the charge requires some unanimity.]* There are some special instructions before Questions _____ explaining how to answer those questions. Please follow the instructions. If all six of you answer those questions, you will need to complete a second verdict certificate for those questions.

Do you understand these instructions? If you do not, please tell me now.

_____
JUDGE PRESIDING

Verdict Certificate

Check one:

_____ Our verdict is unanimous. All six of us have agreed to each and every answer. The presiding juror has signed the certificate for all six of us.

_____ _____
Signature of Presiding Juror Printed Name of Presiding Juror

_____ Our verdict is not unanimous. Five of us have agreed to each and every answer and have signed the certificate below.

	Signature	Name Printed
1.	_____	_____
2.	_____	_____
3.	_____	_____
4.	_____	_____
5.	_____	_____

If you have answered Question No. _____ [*the exemplary damages amount*], then you must sign this certificate also.

Additional Certificate

[Used when some questions require unanimous answers.]

I certify that the jury was unanimous in answering the following questions. All six of us agreed to each of the answers. The presiding juror has signed the certificate for all six of us.

[Judge to list questions that require a unanimous answer, including the predicate liability question.]

Signature of Presiding Juror

Printed Name of Presiding Juror

COMMENT

When to use. The above charge of the court includes the written instructions prescribed in Tex. R. Civ. P. 226a. The court must provide each member of the jury a copy of the charge, including the written instructions, "with such modifications as the circumstances of the particular case may require" before closing arguments begin.

Modification of additional certificate. The additional certificate set forth in Tex. R. Civ. P. 226a lists the questions that require unanimous answers for an award of exemplary damages and requires the presiding juror to sign the certificate only if the jury answered unanimously to all of the listed questions. This format may require modification in cases involving multiple claims and/or multiple parties. In such cases, the jury's answers might be unanimous as to some but not all of the listed questions, and therefore the presiding juror will be unable to sign the certificate even though an award of exemplary damages might be appropriate based on the questions to which the jury answered unanimously. The Committee suggests that the additional certificate be modified in such multiclaim, multiparty cases. One possible approach is as follows:

Additional Certificate

I certify that the jury was unanimous in answering the following questions or parts of questions marked "yes" below. All [twelve/six] of us agreed to each of the answers marked "yes." The presiding juror has signed the certificate for all [twelve/six] of us.

Answer "yes" or "no" for each of the following:

Question No. 1 _____

Question No. 2

Defendant 1 _____

Defendant 2 _____

Defendant 3 _____

Question No. 3

Defendant 1 _____

Defendant 2 _____

Defendant 3 _____

_____

Signature of Presiding Juror

_____

Printed Name of Presiding Juror

PJC 100.4 Additional Instruction for Bifurcated Trial

[Brackets indicate optional, alternative, or instructive text.]

MEMBERS OF THE JURY:

In discharging your responsibility on this jury, you will observe all the instructions that have been previously given you.

_____
JUDGE PRESIDING

Certificate

I certify that the jury was unanimous in answering the following questions. All twelve [six] of us agreed to each of the answers. The presiding juror has signed the certificate for all twelve [six] of us.

[Judge to list questions that require a unanimous answer, including the predicate liability question.]

_____ _____
Signature of Presiding Juror Printed Name of Presiding Juror

COMMENT

When to use. PJC 100.4 should be used as an instruction for the second phase of a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009. *See also Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 29–30 (Tex. 1994). If questions that do not require unanimity are submitted in the second phase of a trial, use the verdict certificate in PJC 100.3.

Source of instruction. The foregoing instructions are prescribed in Tex. R. Civ. P. 226a.

Actions filed before September 1, 2003. For actions filed before September 1, 2003, add the following instruction derived from *Hyman Farm Service, Inc. v. Earth Oil & Gas Co.*, 920 S.W.2d 452 (Tex. App.—Amarillo 1996, no writ), along with signature lines for jurors to use if the verdict is not unanimous:

> I shall now give you additional instructions that you should carefully and strictly follow during your deliberations.

All jurors have the right and the responsibility to deliberate on [*this*] [*these*] question[*s*], but at least ten [five] of those who agreed to the verdict in the first phase of this trial must agree to this answer and sign this verdict accordingly. If your first verdict was unanimous, this second verdict may be rendered by the vote of at least ten [five] of you.

Modification of additional certificate. The additional certificate set forth in Tex. R. Civ. P. 226a lists the questions that require unanimous answers for an award of exemplary damages and requires the presiding juror to sign the certificate only if the jury answered unanimously to all of the listed questions. This format may require modification in cases involving multiple claims and/or multiple parties. In such cases, the jury's answers might be unanimous as to some but not all of the listed questions, and therefore the presiding juror will be unable to sign the certificate even though an award of exemplary damages might be appropriate based on the questions to which the jury answered unanimously. The Committee suggests that the additional certificate be modified in such multiclaim, multiparty cases. One possible approach is as follows:

Additional Certificate

I certify that the jury was unanimous in answering the following questions or parts of questions marked "yes" below. All [twelve/six] of us agreed to each of the answers marked "yes." The presiding juror has signed the certificate for all [twelve/six] of us.

Answer "yes" or "no" for each of the following:

Question No. 1 _____

Question No. 2

Defendant 1 _____

Defendant 2 _____

Defendant 3 _____

Question No. 3

Defendant 1 _____

Defendant 2 _____

Defendant 3 _____

_____

Signature of Presiding Juror

_____

Printed Name of Presiding Juror

PJC 100.5 Instructions to Jury after Verdict

Thank you for your verdict.

I have told you that the only time you may discuss the case is with the other jurors in the jury room. I now release you from jury duty. Now you may discuss the case with anyone. But you may also choose not to discuss the case; that is your right.

After you are released from jury duty, the lawyers and others may ask you questions to see if the jury followed the instructions, and they may ask you to give a sworn statement. You are free to discuss the case with them and to give a sworn statement. But you may choose not to discuss the case and not to give a sworn statement; that is your right.

COMMENT

When to use. The foregoing instructions are prescribed in Tex. R. Civ. P. 226a. The instructions are to be given orally to the jury "after the verdict has been accepted by the court and before the jurors are released from jury duty."

PJC 100.6 Instruction to Jury If Permitted to Separate

You are again instructed that it is your duty not to communicate with, or permit yourselves to be addressed by, any other person about any subject relating to the case.

COMMENT

When to use. The foregoing instruction is required by Tex. R. Civ. P. 284 "[i]f jurors are permitted to separate before they are released from jury duty, either during the trial or after the case is submitted to them."

PJC 100.7 Instruction If Jury Disagrees about Testimony

[Brackets indicate instructive text.]

MEMBERS OF THE JURY:

You have made the following request in writing:

[Insert copy of request.]

Your request is governed by the following rule:

> "If the jury disagree as to the statement of any witness, they may, upon applying to the court, have read to them from the court reporter's notes that part of such witness' testimony on the point in dispute . . . ."

If you report that you disagree concerning the statement of a witness and specify the point on which you disagree, the court reporter will search his notes and read to you the testimony of the witness on the point.

_____
JUDGE PRESIDING

COMMENT

When to use. This written instruction is based on Tex. R. Civ. P. 287 and is to be used if the jurors request that testimony from the court reporter's notes be read to them.

PJC 100.8 Circumstantial Evidence (Optional)

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

COMMENT

When to use. PJC 100.8 may be used when there is circumstantial evidence in the case. It would be placed in the charge of the court (PJC 100.3) after the instruction on preponderance of the evidence and immediately before the definitions, questions, and special instructions. For cases defining circumstantial evidence, see *Blount v. Bordens, Inc.*, 910 S.W.2d 931, 933 (Tex. 1995) (per curiam), and *Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993). It is not error to give or to refuse an instruction on circumstantial evidence. *Larson v. Ellison*, 217 S.W.2d 420 (Tex. 1949); *Johnson v. Zurich General Accident & Liability Insurance Co.*, 205 S.W.2d 353 (Tex. 1947); *Adams v. Valley Federal Credit Union*, 848 S.W.2d 182, 188 (Tex. App.—Corpus Christi 1992, writ denied).

PJC 100.9 Instructions to Deadlocked Jury

I have your note that you are deadlocked. In the interest of justice, if you could end this litigation by your verdict, you should do so.

I do not mean to say that any individual juror should yield his or her own conscience and positive conviction, but I do mean that when you are in the jury room, you should discuss this matter carefully, listen to each other, and try, if you can, to reach a conclusion on the questions. It is your duty as a juror to keep your mind open and free to every reasonable argument that may be presented by your fellow jurors so that this jury may arrive at a verdict that justly answers the consciences of the individuals making up this jury. You should not have any pride of opinion and should avoid hastily forming or expressing an opinion. At the same time, you should not surrender any conscientious views founded on the evidence unless convinced of your error by your fellow jurors.

If you fail to reach a verdict, this case may have to be tried before another jury. Then all of our time will have been wasted.

Accordingly, I return you to your deliberations.

COMMENT

Source. The foregoing instructions are modeled on the charge in *Stevens v. Travelers Insurance Co.*, 563 S.W.2d 223 (Tex. 1978), and on Tex. R. Civ. P. 226a.

For use in civil trials only. The above charge is recommended for use in civil cases. For a sample instruction for use in criminal cases, see the current edition of State Bar of Texas, *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions* CPJC 10.1 (Instruction—*Allen* Charge).

PJC 100.10 Privilege—Generally No Inference

[Brackets indicate instructive text.]

You are instructed that you must not infer anything by [*name of invoking party*]'s refusal to answer questions because of [*name of invoking party*]'s claim of [*privilege asserted*] privilege.

COMMENT

When to use. This instruction should be used in situations other than a claim of Fifth Amendment privilege. See PJC 100.11. On request by any party against whom the jury might draw any inference from a claim of privilege, the court must instruct the jury that no inference may be drawn therefrom. Tex. R. Evid. 513(d).

PJC 100.11 Fifth Amendment Privilege—Adverse Inference May Be Considered

[Brackets indicate instructive text.]

[*Name of invoking party*] refused to answer certain questions on the grounds that it may tend to incriminate *him*. A person has a constitutional right to decline to answer on the grounds that it may tend to incriminate *him*. You may, but are not required to, infer by such refusal that the answers would have been adverse to [*name of invoking party*]'s interests.

COMMENT

When to use. On request by any party after another party has invoked his Fifth Amendment privilege against self-incrimination in the present case, the above instruction may be given at the court's discretion, as controlling authorities neither require nor prohibit its inclusion in the written charge of the court. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Wilz v. Flournoy*, 228 S.W.3d 674, 677 (Tex. 2007); *Texas Department of Public Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 763 (Tex. 1995).

Nonparty witness. The Committee expresses no opinion as to the propriety of such an instruction when a nonparty witness asserts a privilege.

PJC 100.12 Parallel Theories on Damages

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

COMMENT

When to use. If several theories of recovery are submitted in the charge and any theory has a different legal measure of damages to be applied to a factually similar claim for damages, the Committee recommends that a separate damages question for each theory be submitted and that the above additional instruction be included earlier in the charge.

PJC 100.13 Proximate Cause

"Proximate cause" means a cause that was a substantial factor in bringing about an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

COMMENT

Source of instruction. This definition of proximate cause is based on language from *Transcontinental Insurance Co. v. Crump*:

> [W]e first examine the causation standards for proximate cause and producing cause. "The two elements of proximate cause are cause in fact (or substantial factor) and foreseeability. . . . Cause in fact is established when the act or omission was a substantial factor in bringing about the injuries, and without it, the harm would not have occurred." *IHS Cedars Treatment Ctr. v. Mason*, 143 S.W.3d 794, 798–99 (Tex. 2004). "The approved definition of 'proximate cause' in negligence cases and the approved definition of 'producing cause' in compensation cases are in substance the same, except that there is added to the definition of proximate cause the element of foreseeableness." [*Texas Indemnity Insurance Co. v. Staggs*, 134 S.W.2d 1026, 1028–29 (Tex. 1940).] In other words, the producing cause inquiry is conceptually identical to that of cause in fact.

Transcontinental Insurance Co. v. Crump, 330 S.W.3d 211, 222–23 (Tex. 2010). *See also Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007).

The *Crump* and *Ledesma* opinions address the definitions of "producing cause" and "cause in fact." As of the publication date of this edition, there is no decision that expressly overrules the traditional definition of "proximate cause" below:

> "Proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

Former PJC 100.9. This definition was based on the definition approved by the court in *Rudes v. Gottschalk*, 324 S.W.2d 201, 207 (Tex. 1959), and has been cited in many cases.

When to use. PJC 100.13 should be used in every case in which a finding of proximate cause is required. For discussion of the element of "foreseeability," see *Motsenbocker v. Wyatt*, 369 S.W.2d 319, 323 (Tex. 1963), and *Carey v. Pure Distributing Corp.*, 124 S.W.2d 847, 849 (Tex. 1939).

PJC 100.14 Instruction on Spoliation

[Brackets indicate optional, alternative, or instructive text.]

[*Name of spoliating party*] [*destroyed/failed to preserve/destroyed or failed to preserve*] [*describe evidence*]. You [*must/may*] consider that this evidence would have been unfavorable to [*name of spoliating party*] on the issue of [*describe issue(s) to which evidence would have been relevant*].

COMMENT

When to use. The above instruction is recommended for the adverse inference resulting from spoliation. In *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014), the Texas Supreme Court clarified the standards governing spoliation and the parameters of a trial court's discretion to impose spoliation remedies based on the facts of the case. After the trial court has determined that a party has spoliated evidence, it has broad discretion to impose a remedy that is proportionate to the conduct, including, under appropriate circumstances, a spoliation instruction to the jury. *Brookshire Bros.*, 438 S.W.3d at 23–26. A spoliation instruction is a severe sanction the court may use to remedy an act of intentional spoliation that prejudices the nonspoliating party. *Brookshire Bros.*, 438 S.W.3d at 23. To find intentional spoliation, the spoliator must have "acted with the subjective purpose of concealing or destroying discoverable evidence." *Brookshire Bros.*, 438 S.W.3d at 24. To submit a spoliation instruction the trial court must find that "(1) the spoliating party acted with intent to conceal discoverable evidence, or (2) the spoliating party acted negligently and caused the nonspoliating party to be irreparably deprived of any meaningful ability to present a claim or defense." *Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917, 921 (Tex. 2015). Moreover, the court must find that a less severe remedy would be insufficient to reduce the prejudice caused by the spoliation. *Brookshire Bros.*, 438 S.W.3d at 25.

On rare occasions the negligent breach of the duty to reasonably preserve evidence may support the submission of a spoliation instruction. Where the spoliation "so prejudices the nonspoliating party that it is irreparably deprived of having any meaningful ability to present a claim or defense," the court has discretion to remedy the extreme prejudice by submitting a spoliation instruction. *Brookshire Bros.*, 438 S.W.3d at 26.

Caveat. Because the imposition of a spoliation instruction is considered extremely severe, it should be used cautiously, as the wrongful submission of an instruction may result in a reversal of the case. *Brookshire Bros.*, 438 S.W.3d at 17 (citing *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 724 (Tex. 2003) ("[I]f a spoliation instruction should not have been given, the likelihood of harm from the erroneous instruction is substantial, particularly when the case is closely contested.")).

Required findings by the court. Whether a spoliation instruction is appropriate is a question of law for the court. *Brookshire Bros.*, 438 S.W.3d at 20 (citing *Trevino v. Ortega*, 969 S.W.2d 950, 954–55, 960 (Tex. 1998) (Baker, J., concurring)). Before considering whether to instruct the jury on spoliation as a remedy for the loss, alteration, or unavailability of certain evidence, a court must consider—

1. whether there was a duty to preserve the evidence at issue,
2. whether the alleged spoliator breached that duty, and
3. prejudice.

Brookshire Bros., 438 S.W.3d at 20.

In evaluating prejudice the court must analyze—

1. relevance of the spoliated evidence to key issues in the case;
2. the harmful effect of the evidence on the spoliating party's case (or conversely, whether the evidence would be helpful to the nonspoliating party's case); and
3. whether the spoliated evidence was cumulative.

Brookshire Bros., 438 S.W.3d at 20; *see also Petroleum Solutions, Inc. v. Head*, 454 S.W.3d 482 (Tex. 2014). Because the imposition of a spoliation instruction is such a severe sanction, courts must first determine whether a direct relationship exists between the conduct, the offender, and the sanction imposed, and the sanction must not be more severe than necessary. *Petroleum Solutions, Inc.*, 454 S.W.3d at 489 (citing *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991)).

Use of "may" or "must." In *Brookshire Bros.*, the majority does not articulate the specific language that should be included in the instruction, particularly whether the jury "may" or "must" consider that the missing evidence would have been unfavorable to the spoliator. The dissent in *Brookshire Bros.* interpreted the majority as requiring the use of the term *must*. *Brookshire Bros.*, 438 S.W.3d at 34. The overarching guideline, as with any sanction, remains proportionality. "Upon a finding of spoliation, the trial court has broad discretion to impose a remedy that, as with any discovery sanction, must be proportionate; that is, it must relate directly to the conduct giving rise to the sanction and may not be excessive." *Brookshire Bros.*, 438 S.W.3d at 14. Whether *may* or *must* is used should be based on the facts applied to the standards articulated above.

PJC 101.1 Basic Question—Existence

QUESTION _____

Did *Paul Payne* and *Don Davis* agree [*insert all disputed terms*]?

[Insert instructions, if appropriate.]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 101.1 submits the issue of the existence of an agreement. It should be used if there is a dispute about the existence of an agreement or its terms and a specific factual finding is necessary to determine whether the agreement constitutes a legally binding contract. (See the discussion of consideration and essential terms below.) Usually PJC 101.1 will apply in cases involving oral agreements, oral modification of written agreements, and agreements based on several written instruments.

Broad-form submission. PJC 101.1 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

In some cases an even broader question that combines issues of both existence and breach of an agreement may be appropriate. For example:

Did *Don Davis* fail to comply with the agreement, if any?

In such a case, however, care should be taken that the submission does not ask the jury to decide questions of law, which must be determined by the court alone. *MCI Telecommunications Corp. v. Texas Utilities Electric Co.*, 995 S.W.2d 647, 650–51 (Tex. 1999) (construction of unambiguous contract is question of law for court).

Accompanying instructions. In most cases, the court should instruct the jury to consider the facts and circumstances surrounding the contract's execution. See PJC 101.3.

Essential terms. To be enforceable, a contract must be reasonably definite and certain. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992).

Failure to agree on or include an essential term renders a contract unenforceable. *T.O. Stanley Boot Co.*, 847 S.W.2d at 221. The court should include in PJC 101.1 all disputed terms essential to create an enforceable agreement. A disputed nonessential term should also be included if it is the basis of the plaintiff's claim for damages.

Some omitted terms supplied by law. Some omitted terms will be supplied by application of law, and the failure to include those terms will not render the agreement invalid. See, e.g., PJC 101.10 (instruction on time of compliance) and 101.13 (instruction on price). In such cases it is not necessary to secure a jury finding on the parties' agreement to those terms, and they should not be included in PJC 101.1 unless their absence will be confusing to the jury. *See America's Favorite Chicken Co. v. Samaras*, 929 S.W.2d 617, 625 (Tex. App.—San Antonio 1996, writ denied). The circumstances of each case will determine whether it is appropriate to include instructions such as those contemplated by PJC 101.10 and 101.13.

Agreement contemplating further negotiations or writings. During negotiations, the parties may agree to some terms of the agreement with the expectation that other terms are to be agreed on later. Such an expectation may not prevent the agreement already made from being an enforceable agreement if the circumstances indicate that the parties intended to be bound. *Railroad Commission of Texas v. Gulf Energy Exploration Corp.*, 482 S.W.3d 559, 572–75 (Tex. 2016). In such a case, the basic issue submitted in PJC 101.1 should be modified to inquire whether the parties intended to bind themselves to an agreement that includes the terms initially agreed on. *Railroad Commission of Texas*, 482 S.W.3d 559. Case law suggests the following question:

> Did *Paul Payne* and *Don Davis* intend to bind themselves to an agreement that included the following terms:
>
> *[Insert disputed terms.]*

A similar issue is presented if the parties reach preliminary agreement on certain material terms yet also contemplate a future written document. Whether the parties intended to be bound in the absence of execution of the final written document is ordinarily a question of fact. *Foreca, S.A. v. GRD Development Co.*, 758 S.W.2d 744 (Tex. 1988). The *Foreca* opinion approves the following submission in such a case:

> Do you find that the writings of *September 2, 2001*, and *October 19, 2001*, constituted an agreement whereby [*insert disputed terms*]?

The court cited comment c to section 27 of the *Restatement (Second) of Contracts* (1981) as setting forth circumstances that may be helpful in determining whether a contract has been formed. *Foreca, S.A.*, 758 S.W.2d at 746 n.2. The court did not make it clear, however, whether these considerations should be included in the jury instructions.

Insurance contracts. In an insurance case when there is a written insurance policy, the existence of the agreement is not disputed, so the general question in PJC 101.1 is unnecessary. Alternate questions suitable for insurance disputes that focus on whether claims are covered by specific contract language are found in PJC 101.57–101.59.

PJC 101.2 Basic Question—Compliance

QUESTION _____

Did *Don Davis* fail to comply with *the agreement*?

[Insert instructions, if appropriate.]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. If breach is the only issue in dispute, no predicate is required. Otherwise, PJC 101.2 should be submitted predicated on an affirmative answer to PJC 101.1.

Broad-form submission. PJC 101.2 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

When a broad-form submission is not feasible, the cause may be submitted on more limited fact-specific questions, such as—

Did *Don Davis* fail [*insert alleged failure*]?

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

[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 both Question 1 and Question 2, then answer Question 3. Otherwise, do not answer Question 3.

QUESTION 3

Who failed to comply with *the agreement* first?

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

Answer: _____

The Committee believes that this conditional submission satisfies the supreme court's instruction in *Mustang Pipeline Co.*, 134 S.W.3d at 200, to have the jury determine which party breached first and thereby excuse performance by the other party. *See Mustang Pipeline Co.*, 134 S.W.3d at 200. The Committee recommends that any damages submission be predicated on a "Yes" answer to Question 1 or Question 2, but not on the answer to Question 3, which submits the defense of prior material breach. *National City Bank of Indiana v. Ortiz*, 401 S.W.3d 867, 883 n.11 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

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

1. the extent to which the injured party will be deprived of the benefit which he reasonably expected;

2. the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

3. the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

4. the likelihood that the party failing to perform or to offer to perform will cure his failure, taking into account the circumstances including any reasonable assurances;

5. 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.

Mustang Pipeline Co., 134 S.W.3d at 199 (adopting *Restatement (Second) of Contracts* § 241 (1981)). See also PJC 101.22.

Integrated written document. If the dispute arises from an integrated written document, a phrase identifying the agreement should be substituted for the words *the agreement*. *See Intercontinental Group Partnership v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 652 n.5 (Tex. 2009) ("Did Intercontinental Group Partnership fail to comply with the Santa Clara Lot Contract?").

Implied terms. If the alleged breach involves an omitted term, such as time of compliance, an additional instruction is necessary. See, e.g., PJC 101.10 and 101.13.

Interpretation. Construction of an unambiguous term is an issue for the court. *Milner v. Milner*, 361 S.W.3d 615, 619 (Tex. 2012). If appropriate, an instruction should be included giving the jury the correct interpretation of that term. See PJC 101.7. If the court determines that a particular provision is ambiguous, an instruction on resolving that ambiguity should be included. See PJC 101.8.

Caveat. Care must be taken to ensure that the question is appropriate under the facts of the particular case. Many contract disputes focus entirely on issues such as defenses, damages, promissory estoppel, quantum meruit, or agency, which are addressed in other parts of this volume. In such cases the parties may not need any form of PJC 101.2. If the only jury question is the validity of a defense, PJC 101.2 is not appropriate, and the instruction appropriate to that defense (e.g., PJC 101.21–101.33) may be rewritten as the question.

UCC good-faith obligation. Every contract or duty governed by the Uniform Commercial Code imposes an obligation of good faith in its performance or enforcement. Tex. Bus. & Com. Code § 1.304 (Tex. UCC); *El Paso Natural Gas Co. v. Minco Oil & Gas, Inc.*, 8 S.W.3d 309, 313 (Tex. 1999). The failure to act in good faith under the UCC does not create an independent cause of action. *Northern Natural Gas Co. v. Conoco, Inc.*, 986 S.W.2d 603, 606 (Tex. 1998) (to be actionable, bad-faith conduct must relate to some aspect of performance under terms of contract).

Except as otherwise provided in chapter 5 of the Code, "'Good faith' . . . means honesty in fact and the observance of reasonable commercial standards of fair dealing." Tex. UCC § 1.201(b)(20).

If the transaction is covered by the Code, the following instruction would be appropriate to submit with the basic question:

> In addition to the language of the agreement, the law imposes on a party to a contract a duty to [*perform*] [*enforce*] [*perform or enforce*] the contract in good faith. In that connection, good faith means honesty in fact and the observance of reasonable commercial standards of fair dealing.

Depending on the pleadings and evidence in the particular case, the court may instruct on performance or enforcement or both.

If a party contends that the agreement defines the standards for good-faith performance, the jury should be instructed as follows:

> The parties to the agreement may by agreement determine the standards by which the performance of the obligation of good faith is to be measured if such standards are not manifestly unreasonable.

Tex. UCC § 1.302(b). The Committee is not aware of any Texas case supporting a departure from the language of section 1.302(b) (formerly section 1.102(c)).

Good and workmanlike manner. In some cases involving construction, repairs, and some services, there is an obligation to perform in a good and workmanlike manner. For instructions and comments, see PJC 102.12.

PJC 101.3 Instruction on Formation of Agreement

In deciding whether the parties reached an agreement, you may consider what they said and did in light of the surrounding circumstances, including any earlier course of dealing. You may not consider the parties' unexpressed thoughts or intentions.

COMMENT

When to use. If appropriate, PJC 101.3 should be submitted with the question of the existence of a contract (PJC 101.1) to confine the jury's deliberations on the issue of contract formation to legally appropriate factors.

Source of instruction. The supreme court has explained that the parties' intent expressed in the text should be "understood in light of the facts and circumstances surrounding the contract's execution." *Houston Exploration Co. v. Wellington Underwriting Agencies*, 352 S.W.3d 462, 469 (Tex. 2011). Surrounding circumstances include the commercial or other setting in which the contract was negotiated and facts that give a context to the transaction between the parties. *Houston Exploration Co.*, 352 S.W.3d at 469 (citing *Williston on Contracts* § 32.7 (4th ed. 1999)). Only the parties' objective manifestations of intent may be considered. *Adams v. Petrade International, Inc.*, 754 S.W.2d 696, 717 (Tex. App.—Houston [1st Dist.] 1988, writ denied). An agreement may be implied from and evidenced by the parties' conduct in the light of the surrounding circumstances, including any earlier course of dealing. *Haws & Garrett General Contractors, Inc. v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 609–10 (Tex. 1972). Generally, silence and inaction cannot be construed as an assent to an offer. *Texas Ass'n of Counties County Government Risk Management Pool v. Matagorda County*, 52 S.W.3d 128, 132 (Tex. 2000) (applying 2 *Williston on Contracts* § 6.49 (4th ed. 1999)). The parol evidence rule applies when the parties have a valid, integrated written agreement and precludes enforcement of other prior or contemporaneous agreements. *Houston Exploration Co.*, 352 S.W.3d at 469. But the rule does not preclude consideration of surrounding circumstances that inform, rather than vary from or contradict, the contract text. *Houston Exploration Co.*, 352 S.W.3d at 469.

UCC article 2 cases. Tex. Bus. & Com. Code § 1.201(b)(3) (Tex. UCC) defines "agreement" and includes those factors that may be considered in determining the existence of an agreement. *See also* Tex. UCC § 1.303 (course of performance, course of dealing, and usage of trade), § 2.202 (final written expression: parol evidence), § 2.204 (formation in general).

PJC 101.4 Instruction on Authority

A party's conduct includes the conduct of another who acts with the party's authority or apparent authority.

Authority for another to act for a party must arise from the party's agreement that the other act on behalf and for the benefit of the party. If a party so authorizes another to perform an act, that other party is also authorized to do whatever else is proper, usual, and necessary to perform the act expressly authorized.

Apparent authority exists if a party (1) knowingly permits another to hold himself out as having authority or, (2) through lack of ordinary care, bestows on another such indications of authority that lead a reasonably prudent person to rely on the apparent existence of authority to his detriment. Only the acts of the party sought to be charged with responsibility for the conduct of another may be considered in determining whether apparent authority exists.

COMMENT

When to use. PJC 101.4 may be appropriate if the evidence raises a question of express, implied, or apparent authority. It is to be used only to determine whether a party is contractually bound by the conduct of another. In common-law tort and statutory actions, where the issue is a party's vicarious liability for the wrongful conduct of another, different rules of law may apply. For the rules relating to deceptive trade practices and insurance actions, see the comments titled "Vicarious liability" at PJC 102.1, 102.7, 102.8, and 102.14.

Express authority. Express authority arises from the principal's agreement that the agent act on the principal's behalf and for his benefit. *Clark's-Gamble, Inc. v. State*, 486 S.W.2d 840, 845 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.) (upholding charge submission that an "agent is one who acts in behalf of another under the latter's authority and for the latter's benefit"); *see Gaines v. Kelly*, 235 S.W.3d 179, 183 (Tex. 2007) (an agent's authority to act on behalf of a principal depends on some communication by the principal to the agent).

Implied authority. Implied authority arises by implication from a grant of express authority. A grant of express authority implies authority to do those acts proper, usual, and necessary to perform the act expressly authorized. *Nears v. Holiday Hospitality Franchising, Inc.*, 295 S.W.3d 787, 795 (Tex. App.—Texarkana 2009, no pet.).

Apparent authority. Apparent authority, which is based partly on estoppel, may arise from two sources: first, from the principal's knowingly allowing an agent to

claim authority; and second, from the principal's negligently bestowing on the agent such indications of authority that a reasonably prudent person is led to rely on the existence of that authority. *Gaines*, 235 S.W.3d at 182–84.

Because apparent authority is based on estoppel, the principal's conduct must be that which would lead a reasonably prudent person to believe that authority exists. *Gaines*, 235 S.W.3d at 182. A principal's full knowledge of all material facts is essential to establish a claim of apparent authority, and only the conduct of the principal is relevant for determining the existence of apparent authority. *Gaines*, 235 S.W.3d at 182.

If apparent authority is not an issue, the phrase "or apparent authority" should be deleted from the first paragraph of the instruction, along with the definition of apparent authority.

PJC 101.5 Instruction on Ratification

A party's conduct includes conduct of others that the party has ratified. Ratification may be express or implied.

Implied ratification occurs if a party, though he may have been unaware of unauthorized conduct taken on his behalf at the time it occurred, retains the benefits of the transaction involving the unauthorized conduct after he acquired full knowledge of the unauthorized conduct. Implied ratification results in the ratification of the entire transaction.

COMMENT

When to use. PJC 101.5 may be appropriate if a party seeks to avoid liability on the basis that the act of a purported agent was unauthorized or if a party seeks to hold another responsible for unauthorized but ratified conduct.

Source of instruction. The instruction is derived from *Land Title Co. v. F.M. Stigler, Inc.*, 609 S.W.2d 754 (Tex. 1980) (ratification occurs if principal retains benefits of transaction after full knowledge of unauthorized acts of person acting on principal's behalf). *See also Willis v. Donnelly*, 199 S.W.3d 262, 273 (Tex. 2006).

Timing of knowledge. A principal may ratify the conduct whether he has knowledge of the transaction at the time he received the benefits or whether he gains such knowledge at a time after he receives the benefits. *Land Title Co.*, 609 S.W.2d at 756–57.

Not applicable to fraud. PJC 101.5 does not apply in situations involving ratification of fraud.

PJC 101.6 Conditions Precedent (Comment)

Conditions precedent defined. "A condition precedent may be either a condition to the formation of a contract or to an obligation to perform an existing agreement. Conditions may, therefore, relate either to the formation of contracts or to liability under them." *Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976). "A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation." *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992).

Conditions precedent to an obligation to perform are acts or events that are to occur after the contract is made and that must occur before there is a right to immediate performance and before there can be a breach of contractual duty. *Hohenberg Bros. Co.*, 537 S.W.2d at 3.

Creation of condition precedent. Although no particular words are necessary to create a condition, terms such as "if," "provided that," and "on condition that" usually connote a condition rather than a covenant or promise. Absent such a limiting clause, whether a provision represents a condition or a promise must be gathered from the contract as a whole and from the intent of the parties. *Temple-Eastex Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984); *Hohenberg Bros. Co.*, 537 S.W.2d at 3.

Conditions not favored. To prevent forfeitures, courts are inclined to construe provisions as covenants rather than as conditions. *PAJ, Inc. v. Hanover Insurance Co.*, 243 S.W.3d 630, 636 (Tex. 2008).

Insurance cases. These principles apply to insurance contracts. *Harwell v. State Farm Mutual Automobile Insurance Co.*, 896 S.W.2d 170, 173–74 (Tex. 1995). For additional discussion, see PJC 101.59.

PJC 101.7 Court's Construction of Provision of Agreement (Comment)

Court's construction should be included in charge. If the construction of a provision of the agreement is in dispute and the court resolves the dispute by interpreting the provision according to the rules of construction, the court should include that interpretation in submitting PJC 101.2.

Court's duty to interpret unambiguous contract. If a contract is unambiguous or if it is ambiguous but parol evidence of circumstances is undisputed, construction of the contract is an issue for the court. *In re Hite*, 700 S.W.2d 713, 718 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.) (citing *Brown v. Payne*, 176 S.W.2d 306, 308 (Tex. 1943)). Whether a contract is ambiguous is a question of law. If a contract as written can be given a clear and definite legal meaning, it is not ambiguous as a matter of law. *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 133 (Tex. 2010). A contract is ambiguous if, after application of the pertinent rules of construction, it remains reasonably susceptible of more than one meaning, taking into consideration the circumstances present when the contract was executed. *Dynegy Midstream Services, L.P. v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009); *Coker v. Coker*, 650 S.W.2d 391, 393–94 (Tex. 1983).

PJC 101.8 Instruction on Ambiguous Provisions

It is your duty to interpret the following language of the agreement:

[Insert ambiguous language.]

You must decide its meaning by determining the intent of the parties at the time of the agreement. Consider all the facts and circumstances surrounding the making of the agreement, the interpretation placed on the agreement by the parties, and the conduct of the parties.

COMMENT

When to use. If the court determines that the contract contains ambiguous language, PJC 101.8 should accompany PJC 101.1 or 101.2. See PJC 101.37 for a question and instruction on ambiguity to be used in appropriate circumstances.

If a contract is unambiguous, or if it is ambiguous but parol evidence of circumstances is undisputed, construction of the contract is an issue for the court. *Brown v. Payne*, 176 S.W.2d 306, 308 (Tex. 1943); *In re Hite*, 700 S.W.2d 713, 718 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.). "Whether a contract is ambiguous is a legal question for the court." *Dynegy Midstream Services, L.P. v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009). If the court determines that the contract is ambiguous, the parties' intent is a fact issue. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003).

Insurance cases. When an insurance contract is ambiguous and the court resolves the uncertainty favorably to the insured as a matter of law, there is no question for the jury. *Progressive County Mutual Insurance Co. v. Kelley*, 284 S.W.3d 805, 808 (Tex. 2009). The preceding instruction about the intent of the parties would not be correct in such a case.

Parties' interpretation given great weight. The most significant rule of contractual interpretation is that great, if not controlling, weight should be given to the parties' interpretation. *See, e.g., Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979). The court and the jury should assume that parties to a contract are in the best position to know what they intended by the language used. *Harris*, 593 S.W.2d at 306. One factor to be considered in determining the construction the parties placed on a contract is their conduct. *Consolidated Engineering Co. v. Southern Steel Co.*, 699 S.W.2d 188, 192–93 (Tex. 1985).

PJC 101.9 Trade Custom (Comment)

Instruction may be appropriate. Texas law is not clear on whether trade custom is merely evidentiary and not appropriate for jury instruction or whether it may in fact form the basis for a proper instruction. Such an instruction would be used to augment or modify PJC 101.1 or 101.2. It could inquire whether a particular custom or usage existed and, if it existed, whether the parties intended that it would affect a contract term. *Lambert v. H. Molsen & Co.*, 551 S.W.2d 151, 154 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.) ("The [trial] court instructed the jury . . . that if it found . . . that the custom and usage actually existed, then it could be considered by the jury toward determining the parties' contractual intent."). The court in *Lambert* did not expressly approve the instruction used by the trial court, but the opinion does provide an example of the form of a trade-custom instruction. *See also Tennell v. Esteve Cotton Co.*, 546 S.W.2d 346, 354–55 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.) (discussing submissions of instructions on trade); *Englebrecht v. W.D. Brannan & Sons, Inc.*, 501 S.W.2d 707 (Tex. Civ. App.—Amarillo 1973, no writ) (discussing submission of instructions on custom).

Evidence of trade custom may aid interpretation of ambiguous contract. Evidence of custom may be admitted to aid in the interpretation of a contract if the contract is ambiguous, imprecise, incomplete, or inconsistent, but such evidence is not admissible to contradict, restrict, or enlarge what otherwise needs no explanation. *Miller v. Gray*, 149 S.W.2d 582, 583–84 (Tex. 1941); *see Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 239–40 (Tex. 2016).

UCC article 2 cases. Trade custom, course of dealing, and course of performance are relevant in determining the meaning of the agreement. *See* Tex. Bus. & Com. Code §§ 1.303, 2.202 (Tex. UCC).

Insurance cases. When an insurance contract is ambiguous and the court resolves the uncertainty favorably to the insured as a matter of law, there is no question for the jury. *See Progressive County Mutual Insurance Co. v. Kelley*, 284 S.W.3d 805, 808 (Tex. 2009). While evidence of trade usage or custom might be considered by the court in construing the policy, there will not be a jury question when the court construes the language as a matter of law. *See National Union Fire Insurance Co. of Pittsburgh v. Hudson Energy Co.*, 780 S.W.2d 417, 423–24 (Tex. App.—Texarkana 1989), *aff'd*, 811 S.W.2d 552 (Tex. 1991) (trial judge interpreted policy and there was no fact issue about parties' intent). The standard PJC instruction on trade custom to interpret an ambiguous contract would not be correct in such a case.

PJC 101.10 Instruction on Time of Compliance

Compliance with an agreement must occur within a reasonable time under the circumstances unless the parties agreed that compliance must occur within a specified time and the parties intended compliance within such time to be an essential part of the agreement.

In determining whether the parties intended time of compliance to be an essential part of the agreement, you may consider the nature and purpose of the agreement and the facts and circumstances surrounding its making.

COMMENT

When to use. PJC 101.10 is appropriate if a party contends that failure to comply by the date specified in the agreement constitutes a material breach, even though the agreement itself does not expressly state that time is of the essence. *See Kennedy Ship & Repair, L.P. v. Pham*, 210 S.W.3d 11, 19 (Tex. App.—Houston [14th Dist.] 2006, no pet.) ("Unless the contract expressly makes time of the essence, the issue is a fact question for the jury.").

UCC article 2 cases. If the time for delivery or shipment is not specified in the contract, the time shall be reasonable. Tex. Bus. & Com. Code § 2.309(a) (Tex. UCC). "Whether a time for taking an action required by this title is reasonable depends on the nature, purpose, and circumstances of the action" and on any prior dealing between the parties. Tex. UCC § 1.205(a) & cmt. 2; *see also* Tex. UCC §§ 2.504, 2.601, 2.612.

PJC 101.11 Instruction on Offer and Acceptance

In attempting to reach an agreement, one party may specifically prescribe the time, manner, or other requirements for the other party's acceptance of the offer. If the offer is not accepted as prescribed, there is no agreement.

COMMENT

When to use. PJC 101.11 submits a common offer-and-acceptance instruction and may be used in an appropriate case with PJC 101.1. The offeror can waive limitations on manner of acceptance, and the above instruction should be modified to incorporate waiver in an appropriate case. *See Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995).

Acceptance by performance. Under some circumstances performance of an act that the offeree is requested to promise to perform may constitute a valid acceptance. *Mid-Continent Casualty Co. v. Global Enercom Management, Inc.*, 323 S.W.3d 151, 157 (Tex. 2010) (citing *United Concrete Pipe Corp. v. Spin-Line Co.*, 430 S.W.2d 360, 364 (Tex. 1968)).

Time for acceptance. If no time for acceptance of an offer is specified, the law implies a reasonable time. *Union Carbide Corp. v. Jones*, No. 01-14-00574-CV, 2016 WL 1237825, at *7 (Tex. App.—Houston [1st Dist.] Mar. 29, 2016, pet. denied) (citing *Valencia v. Garza*, 765 S.W.2d 893, 897 (Tex. App.—San Antonio 1989, no writ)).

PJC 101.12 Instruction on Withdrawal or Revocation of Offer

There is no agreement unless the party to whom an offer is made accepts it before knowing that the offer has been withdrawn.

COMMENT

When to use. PJC 101.12 should be included with PJC 101.1 only if one party claims the offer was withdrawn before it was accepted.

Acceptance by performance. Under some circumstances performance of an act that the offeree is requested to promise to perform may constitute a valid acceptance. *Mid-Continent Casualty Co. v. Global Enercom Management, Inc.*, 323 S.W.3d 151, 157 (Tex. 2010) (citing *United Concrete Pipe Corp. v. Spin-Line Co.*, 430 S.W.2d 360, 364 (Tex. 1968)).

Revocable or irrevocable offers. Ordinarily, the party making an offer may revoke it anytime before the offeree accepts it in the manner prescribed. *See Bowles v. Fickas*, 167 S.W.2d 741, 742–43 (Tex. 1943); *Morgan v. Bronze Queen Management Co., LLC*, 474 S.W.3d 701, 706 (Tex. App.—Houston [14th Dist.] 2014, no pet.). The offeror can effectively revoke an offer by doing some act inconsistent with the offer, but the offeree must have actual knowledge of the revocation. *Antwine v. Reed*, 199 S.W.2d 482, 485 (Tex. 1947). After making an irrevocable offer, however, the offeror cannot unilaterally vary or revoke it. *Wall v. Trinity Sand & Gravel Co.*, 369 S.W.2d 315, 317 (Tex. 1963). A common type of irrevocable offer is an option contract where the offer is supported by independent consideration.

UCC cases. *See* Tex. Bus. & Com. Code § 2.206(b) (Tex. UCC).

PJC 101.13 Instruction on Price

If *Paul Payne* and *Don Davis* agreed to other essential terms but failed to specify price, it is presumed a reasonable price was intended.

COMMENT

When to use. PJC 101.13 should accompany PJC 101.1 or 101.2 in appropriate cases. *See Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 241 (Tex. 2016) (law's presumption that parties intended a reasonable price is particularly strong when the agreement specifies a formula or other basis on which a reasonable price may be determined); *Sacks v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008); *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992) (material terms of the contract must be agreed on before a court can enforce the contract; where an essential term is open for future negotiation, there is no binding contract).

Source of instruction. The above instruction is derived from *Fischer*, 479 S.W.3d at 241, and *Sacks*, 266 S.W.3d at 450.

UCC cases. Tex. Bus. & Com. Code § 2.305(a) (Tex. UCC) states:

> (a) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if
>
> (1) nothing is said as to price; or
>
> (2) the price is left to be agreed by the parties and they fail to agree; or
>
> (3) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

PJC 101.14 Consideration (Comment)

Consideration essential. Consideration is essential to a contract. *Unthank v. Rippstein*, 386 S.W.2d 134, 137 (Tex. 1964). Whether a particular matter constitutes adequate legal consideration is a question of law for the court. *Brownwood Ross Co. v. Maverick County*, 936 S.W.2d 42, 45 (Tex. App.—San Antonio 1996, no writ). The court's determination, however, may be based on facts found by the jury. *See, e.g., Houston Medical Testing Services v. Mintzer*, 417 S.W.3d 691, 695–96 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

Burden of proof. In suits on a written contract, the burden of proof rests on the party alleging a lack of consideration. Tex. R. Civ. P. 94; *Simpson v. MBank Dallas, N.A.*, 724 S.W.2d 102, 107 (Tex. App.—Dallas 1987, writ ref'd n.r.e.). In actions on an oral contract, the burden is on the plaintiff to prove the existence of consideration. *Okemah Construction, Inc. v. Barkley-Farmer, Inc.*, 583 S.W.2d 458, 460 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ) (collecting cases).

Failure of consideration. The doctrine of failure of consideration does not involve issues relating to contract formation but is usually an affirmative defense based on a claim that the party seeking to recover on the contract has breached it in a manner sufficient to excuse the other party's noncompliance. For appropriate instructions, see PJC 101.22.

[PJC 101.15–101.20 are reserved for expansion.]

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?

[Insert instructions; see PJC 101.22–101.33.]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 101.21 poses the controlling question for cases where a defendant asserts one or more defenses to a contract suit.

Broad-form submission. PJC 101.21 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")).

Instructions on grounds of defense required. In the absence of one or more independent grounds of defense, the jury is not permitted to excuse the defendant from complying with the agreement. Standing alone, PJC 101.21 does not encompass any grounds of defense, so it is mandatory that grounds raised by the pleadings and evidence be submitted by including instructions such as PJC 101.22–101.33. *See, e.g., Traeger v. Lorenz*, 749 S.W.2d 249 (Tex. App.—San Antonio 1988, no writ) (separate grounds of waiver and abandonment should have been submitted in deed restriction case).

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.

COMMENT

When to use. PJC 101.22 may accompany PJC 101.21 if the defendant raises the affirmative defense of the plaintiff's material breach of the agreement. Generally, when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance. *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432, 436 (Tex. 2017); *see also Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004).

Form of instruction. The instruction is suggested by *Huff v. Speer*, 554 S.W.2d 259, 262 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.), and *King Title Co. v. Croft*, 562 S.W.2d 536, 537 (Tex. Civ. App.—El Paso 1978, no writ).

If the alleged failure to comply by the complaining party involves timeliness of performance and if no date for completion is specified in the agreement, the following instruction should be added to PJC 101.22:

> Delay in compliance beyond a reasonable period is a failure to comply.

See Cannan v. Varn, 591 S.W.2d 583, 588 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

Material breach vs. failure of consideration. Although designated here as plaintiff's material breach, the issue is commonly referred to as failure or partial failure of consideration. The Committee considers the latter designation inappropriate and confusing, however, because it suggests issues relating to contract formation. See PJC 101.3; see also PJC 101.14. The facts involved usually pertain instead to the affirmative defense that the party seeking to recover on a contract has breached it in a manner sufficient to excuse the defendant's noncompliance. *See National Bank of Commerce v. Williams*, 84 S.W.2d 691, 692 (Tex. 1935); *Austin Lake Estates, Inc. v. Meyer*, 557 S.W.2d 380, 384 (Tex. Civ. App.—Austin 1977, no writ).

Failure to comply with provisions of a bilateral contract may be excused by the unjustifiable failure of the other party to comply with provisions binding on him. *Jordan Drilling Co. v. Starr*, 232 S.W.2d 149, 159 (Tex. Civ. App.—El Paso 1950, writ ref'd n.r.e.) (op. on reh'g). The breach need not be total for rescission to be proper; a partial breach is sufficient if it affects a material part of the agreement. *Ennis v. Interstate Distributors, Inc.*, 598 S.W.2d 903, 906 (Tex. Civ. App.—Dallas 1980, no writ).

Partial failure of consideration involves breach of a nonmaterial provision of the contract and does not support rescission but merely damages. *Gensco, Inc. v. Transformaciones Metalurgicias Especiales, S.A.*, 666 S.W.2d 549, 553 (Tex. App.—Houston [14th Dist.] 1984, writ dism'd).

Whether a breach is so material as to support this defense is a question of fact for the jury. *Bartush-Schnitzius Foods Co.*, 518 S.W.3d at 436. In determining the materiality of a breach, courts will consider, among other things, "the extent to which the nonbreaching party will be deprived of the benefit that it could have reasonably anticipated from full performance." *Lennar Corp. v. Markel American Insurance Co.*, 413 S.W.3d 750, 755 (Tex. 2013); *see also Restatement (Second) of Contracts* § 241(a) (1981); *Advance Components, Inc. v. Goodstein*, 608 S.W.2d 737, 739–40 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) (listing other factors for determining the materiality of a breach).

PJC 101.23 Defenses—Instruction on Anticipatory Repudiation

Failure to comply by *Don Davis* is excused by *Paul Payne*'s prior repudiation of the same agreement.

A party repudiates an agreement when he indicates, by his words or actions, that he is not going to perform his obligations under the agreement in the future, showing a fixed intention to abandon, renounce, and refuse to perform the agreement.

COMMENT

When to use. PJC 101.23 submits the doctrine of anticipatory repudiation as a defensive measure. It may also be appropriate, in slightly different form, as an element of the plaintiff's cause of action. Upon a party's repudiation of a contract, the nonrepudiating party may treat the repudiation as a breach or may continue to perform under the contract and await the time of the agreed-upon performance. *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 211 (Tex. 1999); *Pagosa Oil & Gas, L.L.C. v. Marrs & Smith Partnership*, 323 S.W.3d 203, 216 (Tex. App.—El Paso 2010, pet. denied).

Source of instruction. The elements in the instruction are adapted from the discussion of the doctrine in *Group Life & Health Insurance Co. v. Turner*, 620 S.W.2d 670, 672–73 (Tex. Civ. App.—Dallas 1981, no writ).

"Without just excuse." To excuse a failure to comply, the repudiation must have been "without just excuse." *Group Life & Health Insurance Co.*, 620 S.W.2d at 673 (quoting *Universal Life & Accident Insurance Co. v. Sanders*, 102 S.W.2d 405 (Tex. 1937)).

UCC cases. In cases involving the sale of goods, the instruction defining anticipatory repudiation may need to be revised. *See* Tex. Bus. & Com. Code § 2.610 (Tex. UCC).

PJC 101.24 Defenses—Instruction on Waiver

Failure to comply by *Don Davis* is excused if compliance is waived by *Paul Payne*.

Waiver is an intentional surrender of a known right or intentional conduct inconsistent with claiming the right.

COMMENT

When to use. PJC 101.24 is appropriate to submit the affirmative defense of waiver. It may also be appropriate, in slightly different form, as an element of the plaintiff's cause of action, because waiver is an independent ground of recovery. *See Middle States Petroleum Corp. v. Messenger*, 368 S.W.2d 645, 654 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.). The Committee believes that an instruction on waiver should be submitted if the issue is raised by the evidence. *But see Island Recreational Development Corp. v. Republic of Texas Savings Ass'n*, 710 S.W.2d 551 (Tex. 1986) (affirming judgment notwithstanding lack of submission of waiver).

Source of definition. The definition is adapted from *United States Fidelity & Guaranty Co. v. Bimco Iron & Metal Corp.*, 464 S.W.2d 353, 357 (Tex. 1971); *see also Gage v. Langford*, 582 S.W.2d 203, 207 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.) (definition of waiver incorrectly omitted "intentionally" from phrase "giving up, relinquishment, or surrender of some known right").

Distinguished from estoppel. The supreme court has emphasized the unilateral character of waiver and distinguished it from estoppel:

> [W]aiver is essentially unilateral in its character; it results as a legal consequence from some act or conduct of the party against whom it operates; no act of the party in whose favor it is made is necessary to complete it. It need not be founded upon a new agreement or be supported by consideration, nor is it essential that it be based upon an estoppel.

Massachusetts Bonding & Insurance Co. v. Orkin Exterminating Co., 416 S.W.2d 396, 401 (Tex. 1967).

UCC article 2 cases. A waiver affecting an executory portion of the agreement may be retracted on reasonable notification that strict performance will be required. Tex. Bus. & Com. Code § 2.209(e) (Tex. UCC).

Waiver and estoppel in insurance cases. The rules of waiver and estoppel apply differently in insurance cases. The principle has been stated as follows:

> Waiver and estoppel may operate to avoid forfeiture of a policy, but they have consistently been denied operative force to change, re-write and

> enlarge the risks covered by a policy. *In other words, waiver and estoppel cannot create a new and different contract with respect to risks covered by the policy.*

Ulico Casualty Co. v. Allied Pilots Ass'n, 262 S.W.3d 773, 780 (Tex. 2008) (quoting *Great American Reserve Insurance Co. v. Mitchell*, 335 S.W.2d 707, 708 (Tex. Civ. App.—San Antonio 1960, writ ref'd)). If the court determines that the insurance case presents an instance in which waiver or estoppel may apply, those issues may be submitted. *See Riggs v. Sentry Insurance*, 821 S.W.2d 701, 705 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (approving estoppel instructions); *Preferred Risk Mutual Insurance Co. v. Rabun*, 561 S.W.2d 239, 243–44 (Tex. Civ. App.—Austin 1978, writ dism'd) (finding elements of waiver by insurer's agent).

PJC 101.25 Defenses—Instruction on Equitable Estoppel

Failure to comply by *Don Davis* is excused if the following circumstances occurred:

1. *Paul Payne*
   a. by words or conduct made a false representation or concealed material facts, and
   b. with knowledge of the facts or with knowledge or information that would lead a reasonable person to discover the facts, and
   c. with the intention that *Don Davis* would rely on the false representation or concealment in acting or deciding not to act; and
2. *Don Davis*
   a. did not know and had no means of knowing the real facts and
   b. relied to *his* detriment on the false representation or concealment of material facts.

COMMENT

When to use. PJC 101.25 submits the affirmative defense of equitable estoppel.

Source of definition. The elements of estoppel are adapted from *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991); *Gulbenkian v. Penn*, 252 S.W.2d 929, 932 (Tex. 1952). For a general discussion of equitable estoppel, see *Barfield v. Howard M. Smith Co. of Amarillo*, 426 S.W.2d 834 (Tex. 1968).

Equitable estoppel distinguished from other types of estoppel. Equitable estoppel differs from other types of estoppel because it requires some deception practiced on a party who was misled to his injury. *Bocanegra v. Aetna Life Insurance Co.*, 605 S.W.2d 848, 851 (Tex. 1980). That party, however, must show his justifiable reliance on the representation. *Kuehne v. Denson*, 219 S.W.2d 1006, 1008–09 (Tex. 1949).

Estoppel based on silence. Estoppel may also be based on silence or inaction, rather than on affirmative misrepresentations, if one under a duty to speak or act has by his silence or inaction misled the opposing party to his detriment. *Smith v. National Resort Communities, Inc.*, 585 S.W.2d 655, 658 (Tex. 1979); *Scott v. Vandor*, 671 S.W.2d 79, 87 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). If estoppel is based on something other than affirmative misrepresentations, a different instruction should be substituted for PJC 101.25.

Waiver and estoppel in insurance cases. The rules of waiver and estoppel apply differently in insurance cases. The principle has been stated as follows:

> Waiver and estoppel may operate to avoid forfeiture of a policy, but they have consistently been denied operative force to change, re-write and enlarge the risks covered by a policy. *In other words, waiver and estoppel cannot create a new and different contract with respect to risks covered by the policy.*

Ulico Casualty Co. v. Allied Pilots Ass'n, 262 S.W.3d 773, 780 (Tex. 2008) (quoting *Great American Reserve Insurance Co. v. Mitchell*, 335 S.W.2d 707, 708 (Tex. Civ. App.—San Antonio 1960, writ ref'd)). If the court determines that the insurance case presents an instance in which waiver or estoppel may apply, those issues may be submitted. *See Riggs v. Sentry Insurance*, 821 S.W.2d 701, 705 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (approving estoppel instructions); *Preferred Risk Mutual Insurance Co. v. Rabun*, 561 S.W.2d 239, 243–44 (Tex. Civ. App.—Austin 1978, writ dism'd) (finding elements of waiver by insurer's agent).

PJC 101.26 Defenses—Instruction on Duress

Failure to comply by *Don Davis* is excused if the agreement was made under duress caused by *Paul Payne.*

Duress is the mental, physical, or economic coercion of another, causing that party to act contrary to his free will and interest.

COMMENT

When to use. PJC 101.26 is appropriate if one party claims the agreement is voidable because it was made under duress. It may also be used in slightly different language to submit an affirmative claim for rescission. As a general rule, a party seeking cancellation or rescission must do equity by restoring the other party to his original status. *Texas Co. v. State*, 281 S.W.2d 83, 91 (Tex. 1955); *Freyer v. Michels*, 360 S.W.2d 559, 562 (Tex. Civ. App.—Dallas 1962, writ dism'd). It is not clear whether this rule applies if the doctrine is asserted as a defense.

Source of definition. The definition is derived from *Black Lake Pipe Line Co. v. Union Construction Co.*, 538 S.W.2d 80, 85 n.2 (Tex. 1976), *overruled on other grounds by Sterner v. Marathon Oil Co.*, 767 S.W.2d 686 (Tex. 1989); *Brooks v. Taylor*, 359 S.W.2d 539, 542 (Tex. Civ. App.—Amarillo 1962, writ ref'd n.r.e.); and *Housing Authority of City of Dallas v. Hubbell*, 325 S.W.2d 880, 905 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.).

Caveat. Unless the alleged coercion can legally constitute duress, PJC 101.26 should not be submitted. It is never duress to threaten to do that which a party has a legal right to do. *In re First Merit Bank, N.A.*, 52 S.W.3d 749, 758 (Tex. 2001). Filing or threatening to file a civil suit cannot, as a matter of law, constitute duress. *Continental Casualty Co. v. Huizar*, 740 S.W.2d 429, 430 (Tex. 1987). The vice arises only if extortive measures are employed or if improper demands are made in bad faith. *Matthews v. Matthews*, 725 S.W.2d 275, 279 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Sanders v. Republic National Bank*, 389 S.W.2d 551, 555 (Tex. Civ. App.—Tyler 1965, no writ); *see also Mitchell v. C.C. Sanitation Co.*, 430 S.W.2d 933 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.). *State National Bank v. Farah Manufacturing Co.*, 678 S.W.2d 661 (Tex. App.—El Paso 1984, judgm't dism'd by agr.), gives a general overview of this topic. A threat to file criminal prosecution may constitute duress even if the threatened party is guilty of the crime. *Pierce v. Estate of Haverlah*, 428 S.W.2d 422, 425 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

Economic duress. If economic duress is alleged, this instruction should be submitted only if the party against whom duress is charged was responsible for the other party's financial distress. *Simpson v. MBank Dallas, N.A.*, 724 S.W.2d 102, 109 (Tex.

App.—Dallas 1987, writ ref'd n.r.e.); *Griffith v. Geffen & Jacobsen, P.C.*, 693 S.W.2d 724, 728 (Tex. App.—Dallas 1985, no writ).

Imminence of harm. The threat of harm must be imminent, and the threatened party must have no present means of protection. It must cause the threatened person to do what there was no legal obligation to do. *Dale v. Simon*, 267 S.W. 467, 470 (Tex. Comm'n App. 1924, judgm't adopted); *Creative Manufacturing, Inc. v. Unik, Inc.*, 726 S.W.2d 207, 211 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.).

PJC 101.27 Defenses—Instruction on Undue Influence

Failure to comply by *Don Davis* is excused if the agreement was made as the result of undue influence by *Paul Payne.*

"Undue influence" means that there was such dominion and control exercised over the mind of the person executing the agreement, under the facts and circumstances then existing, as to overcome his free will. In effect, the will of the party exerting undue influence was substituted for that of the party entering the agreement, preventing him from exercising his own discretion and causing him to do what he would not have done but for such dominion and control.

COMMENT

When to use. PJC 101.27 is appropriate when one party disputes the existence of the agreement because it was made under undue influence. As a general rule, a party seeking cancellation or rescission must do equity by restoring the other party to his original status. *Texas Co. v. State*, 281 S.W.2d 83, 91 (Tex. 1955); *Freyer v. Michels*, 360 S.W.2d 559, 562 (Tex. Civ. App.—Dallas 1962, writ dism'd). It is not clear whether this rule applies if the doctrine is asserted as a defense.

Source of definition. The definition is adapted from *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963). Although that case concerns a will contest, the definition for undue influence used in *Rothermel* is often used in cases involving disputes over agreements. *See Decker v. Decker*, 192 S.W.3d 648, 651 (Tex. App.—Fort Worth 2006, no pet.) (dispute over agreement to transfer deed); *Seymour v. American Engine & Grinding Co.*, 956 S.W.2d 49, 59 (Tex. App.—Houston [14th Dist.] 1996, pet. denied) (dispute involving stock purchase agreement).

"Undue influence." Not every influence exerted on the will of another is undue. *Rothermel*, 369 S.W.2d at 922. The exertion of undue influence is usually a subtle thing involving an extended course of dealings and circumstances, and it may be proved by circumstantial as well as direct evidence. *Rothermel*, 369 S.W.2d at 922. Influence is not undue merely because it is persuasive and effective, and the law does not condemn all persuasion, entreaty, importunity, or intercession. *B.A.L. v. Edna Gladney Home*, 677 S.W.2d 826, 830 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.); *In re C.E.*, No. 02-14-0054-CV, 2014 WL 3866159, at *6 (Tex. App.—Fort Worth Aug. 7, 2014, no pet.).

PJC 101.28 Defenses—Instruction on Mutual Mistake of Fact

Failure to comply is excused if the agreement was made as the result of a mutual mistake.

A mutual mistake results from a mistake of fact common to both parties if both parties had the same misconception concerning the fact in question. A mistake by one party but not the other is not a mutual mistake.

COMMENT

When to use. PJC 101.28 is appropriate when a party disputes terms of the agreement on the basis that they were established by mutual mistake of fact. See PJC 101.29 for an instruction on mutual mistake due to a scrivener's error.

Mistake must relate to same subject matter. To prove a mutual mistake, evidence must show that both parties had the same misunderstanding of the same material fact. *A.L.G. Enterprises v. Huffman*, 660 S.W.2d 603, 606 (Tex. App.—Corpus Christi 1983), *aff'd & remanded for mutual mistake issue only*, 672 S.W.2d 230 (Tex. 1984).

Excuses failure to perform. Mutual mistake is an equitable defense that, if proved, excuses a party's failure to perform a contract. *A.L.G. Enterprises*, 660 S.W.2d at 606; *but see Geodyne Energy Income Production Partnership I-E v. Newton Corp.*, 161 S.W.3d 482, 491 (Tex. 2005) (holding that "[a] person who intentionally assumes the risk of unknown facts cannot escape a bargain by alleging mistake or misunderstanding" (footnote omitted)). The question of mutual mistake is for the jury. *See, e.g., Davis v. Grammer*, 750 S.W.2d 766, 767 (Tex. 1988) (illustrating that mutual mistake is submitted to the jury); *see also James T. Taylor & Son, Inc. v. Arlington Independent School District*, 335 S.W.2d 371, 376 (Tex. 1960). This instruction may also be used, in slightly different language, to submit an affirmative claim for rescission.

Caveat: unilateral mistake. Case law has drawn a distinction between unilateral and mutual mistake. Evidence may give rise to a defense based on unilateral mistake but fail to raise a defense based on mutual mistake. *See Durham v. Uvalde Rock Asphalt Co.*, 599 S.W.2d 866, 870 (Tex. Civ. App.—San Antonio 1980, no writ). For a discussion of issues involved in cases of unilateral mistake, see *Monarch Marking System Co. v. Reed's Photo Mart, Inc.*, 485 S.W.2d 905 (Tex. 1972).

PJC 101.29 Defenses—Instruction on Mutual Mistake—Scrivener's Error

Failure to comply is excused if [*the breached term*] resulted from a mutual mistake.

A mutual mistake arises when the parties have previously reached an agreement but, because of a mistake common to both parties, the [*instrument*] as written does not reflect the prior agreement.

Unilateral mistake by one party, and knowledge of that mistake by the other party, is equivalent to mutual mistake.

COMMENT

When to use. PJC 101.29 is appropriate if a party seeks to avoid the enforcement of a disputed term of the agreement because it resulted from a mutual mistake in reducing the agreement to writing. For an instruction on mutual mistake of fact, see PJC 101.28; for a question and instruction on reformation as an affirmative cause of action resulting from mutual mistake due to a scrivener's error, see PJC 101.38.

Source of instruction. When addressing the elements of mutual mistake as a defense, Texas courts incorporate the elements of reformation. *See Samson Exploration, LLC v. T.S. Reed Properties, Inc.*, 521 S.W.3d 766 (Tex. 2017); *CenterPoint Energy Houston Electric, L.L.P. v. Old TJC Co.*, 177 S.W.3d 425, 430 n.3 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (mutual mistake is an affirmative defense); *Gail v. Berry*, 343 S.W.3d 520, 524 (Tex. App.—Eastland 2011, pet. denied) (recognizing that a scrivener's error is a type of mutual mistake); *Wright v. Gernandt*, 559 S.W.2d 864, 868 (Tex. Civ. App.—Corpus Christi 1977, no writ) (analyzing elements of reformation for affirmative defense of mutual mistake based on scrivener's error).

"[R]eformation requires two elements: (1) an original agreement and (2) a mutual mistake, made *after* the original agreement, in reducing the original agreement to writing." *Cherokee Water Co. v. Forderhause*, 741 S.W.2d 377, 379 (Tex. 1987) (emphasis added). An exception to the requirement that the mistake be mutual is the unilateral mistake by one party "accompanied by fraud or other inequitable conduct of the remaining party." *Cambridge Companies, Inc. v. Williams*, 602 S.W.2d 306, 308 (Tex. App.—Texarkana 1980), *aff'd on other grounds*, 615 S.W.2d 172 (Tex. 1981). "Unilateral mistake by one party, and knowledge of that mistake by the other party, is equivalent to mutual mistake." *Davis v. Grammer*, 750 S.W.2d 766, 768 (Tex. 1988) (citing *Cambridge Companies, Inc.*, 602 S.W.2d at 308).

PJC 101.30 Defenses—Instruction on Novation

Failure to comply with one agreement is excused if the parties agreed that a new agreement would take its place.

COMMENT

When to use. PJC 101.30 may be used to submit the affirmative defense of novation. Novation occurs when the rights of the parties are determined by a new agreement that extinguishes the previous one. *See Flanagan v. Martin*, 880 S.W.2d 863, 867 (Tex. App.—Waco 1994, writ dism'd w.o.j.); *DoAll Dallas Co. v. Trinity National Bank*, 498 S.W.2d 396, 400–401 (Tex. Civ. App.—Texarkana 1973, writ ref'd n.r.e.). A novation may also be the substitution of new for old parties to an agreement. *See Russell v. Northeast Bank*, 527 S.W.2d 783, 786 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

If reasonable minds differ on the evidence of a new express agreement, novation is a question of law for the court. Absent an express agreement, novation is a question of fact. *Chastain v. Cooper & Reed*, 257 S.W.2d 422, 424 (Tex. 1953).

Accord and satisfaction distinguished from novation. The defense of accord and satisfaction "rests upon a new contract, express or implied, in which the parties agree to the discharge of an existing obligation in a manner otherwise than originally agreed." *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979).

"An accord and satisfaction may or may not be also a novation, but where the new promise itself is accepted as satisfaction the transaction is more properly termed a novation." *DoAll Dallas Co.*, 498 S.W.2d at 400.

PJC 101.31 Defenses—Instruction on Modification

Failure to comply with a term in an agreement is excused if the parties agreed that a new term would take its place.

COMMENT

When to use. PJC 101.31 is appropriate if the defendant claims he was excused from complying with a term of the agreement because the parties had agreed to modify the agreement by substituting a new term for an old term. *See Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 228 (Tex. 1986) (parties have power to modify their contracts); *Mandril v. Kasishke*, 620 S.W.2d 238, 244 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.) (parties have power to make and modify contracts). A modification must satisfy the elements of a contract: a meeting of the minds supported by consideration. *Hathaway*, 711 S.W.2d at 228. The question of whether a modification has taken place is one of fact and depends on the intent of the parties. *Hathaway*, 711 S.W.2d at 228–29.

Burden of proof. The burden of proving modification rests on the party asserting the modification. *Hathaway*, 711 S.W.2d at 229.

UCC article 2 cases. An agreement modifying a sales contract needs no consideration to be binding, but any modification must meet the test of good faith imposed by the Code. Tex. Bus. & Com. Code § 2.209(a) & cmt. 2 (Tex. UCC). *See El Paso Natural Gas Co. v. Minco Oil & Gas, Inc.*, 8 S.W.3d 309, 314 (Tex. 1999).

Accord and satisfaction and novation. For instructions on accord and satisfaction and novation, see PJC 101.32 and 101.30.

PJC 101.32 Defenses—Instruction on Accord and Satisfaction

Failure to comply with an agreement is excused if a different performance was accepted as full satisfaction of performance of the original obligations of the agreement.

COMMENT

When to use. PJC 101.32 is appropriate to submit the affirmative defense of accord and satisfaction. This defense is raised by pleading and evidence that the plaintiff agreed to and accepted performance different from that of the original agreement, in full satisfaction of the original obligation. *Jenkins v. Henry C. Beck Co.*, 449 S.W.2d 454, 455 (Tex. 1969); *see also Pileco, Inc. v. HCI, Inc.*, 735 S.W.2d 561 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). If the plaintiff refuses to accept the defendant's performance of an executory accord, the defendant may seek to enforce the terms of the accord and satisfaction by specific performance but is not absolved of its obligation to perform under the accord and satisfaction. *See Alexander v. Handley*, 146 S.W.2d 740, 743 (Tex. Comm'n App. 1941, holding approved) (nonbreaching party to executory accord can choose to enforce the original agreement or seek enforcement of the agreement in accord and satisfaction); *BACM 2001-1 San Felipe Road Ltd. Partnership v. Trafalgar Holdings I, Ltd.*, 218 S.W.3d 137, 146 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (when debtor failed to perform under an executory accord, creditor could sue to recover under the original cause of action or the accord).

If existence of accord is disputed. If existence of the accord is disputed, the above instruction should be accompanied by an instruction on the elements of agreement, mutual assent, and, if appropriate, other elements of contract formation as suggested in PJC 101.3–101.8.

PJC 101.33 Defenses—Instruction on Mental Capacity

Failure to comply is excused if *Don Davis* lacked sufficient mind and memory to understand the nature and consequences of *his* acts and the business *he* was transacting.

COMMENT

When to use. PJC 101.33 is appropriate if a party defends on the basis of lack of mental capacity. It may also be used, in slightly different language, to submit an affirmative claim for rescission.

Source of instruction. The instruction is derived from *Mardell & Wright v. Thomas*, 441 S.W.2d 841, 845 (Tex. 1969); *see also Bach v. Hudson*, 596 S.W.2d 673, 675–76 (Tex. Civ. App.—Corpus Christi 1980, no writ).

Burden of proof. The burden of proof falls on the party seeking to show lack of mental capacity. *Walker v. Eason*, 643 S.W.2d 390, 391 (Tex. 1982).

PJC 101.34 Defenses—Statute of Frauds (Comment)

Agreements that must be in writing. It is a defense to the enforcement of certain contracts that the promise or agreement was not made or reflected in a writing signed by the party against whom enforcement is sought. *See* Tex. Bus. & Com. Code § 26.01(a)(1), (2) ("A promise or agreement [described in this statute] is not enforceable unless the promise or agreement, or a memorandum of it, is in writing; and signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.").

Contracts that require a writing include but are not limited to a promise by an executor or administrator to answer for a debt due from the estate; a promise to answer for the debt of another; an agreement made on consideration of marriage; a contract for the sale of real estate; a lease of real estate for a term longer than one year; an agreement that is not to be performed within one year of the date of making the agreement; a promise to pay a commission for an oil or gas lease, royalty, or mineral interest; and a promise of cure relating to medical care by a health-care provider. *See, e.g.*, Tex. Bus. & Com. Code § 26.01(b).

Electronic satisfaction. Regarding the electronic satisfaction of the requirement for a writing, see the Texas Uniform Electronic Transactions Act, chapter 322 of the Texas Business and Commerce Code. Tex. Bus. & Com. Code §§ 322.001–.021.

Legal question. Whether a contract falls within the statute of frauds is a legal question. *Bratcher v. C.K. Dozier*, 346 S.W.2d 795, 796 (Tex. 1961) (holding that duration of a contract is a legal question and not an issue for the jury to decide). *But see Metromarketing Services, Inc. v. HTT Headwear, Ltd.*, 15 S.W.3d 190, 196 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (stating that if extrinsic evidence is disputed about whether an agreement can be completed within one year and thus does not fall within statute of frauds, what constitutes reasonable time for completion is question of fact).

The defense must be raised, or it is waived; a contract subject to the statute of frauds is voidable, not void. *See* Tex. R. Civ. P. 94 (requiring parties to plead statute of frauds as an affirmative defense); *Crill, Inc. v. Bond*, 76 S.W.3d 411, 420 (Tex. App.—Dallas 2001, no writ) (holding that agreement subject to statute of frauds could not be challenged by third party, as it was voidable and not void).

Exceptions to writing requirement. Equitable remedies exist for enforcing a promise that is otherwise unenforceable because of the statute of frauds, where application of the statute of frauds would be unfair due to partial or full performance of the oral agreement or detrimental reliance. These exceptions can involve questions of fact. *Adams v. Petrade International, Inc.*, 754 S.W.2d 696, 705 (Tex. App.—Houston [1st Dist.] 1988, writ denied). Examples include the main purpose doctrine (see PJC 101.35); promissory estoppel (see PJC 101.41); and quantum meruit (see PJC 101.42).

In addition, although the statute of frauds forecloses a fraudulent inducement claim, a limited fraud claim for out-of-pocket damages is not similarly barred. *See Haase v. Glazner*, 62 S.W.3d 795, 799 (Tex. 2001).

Burden of proof. The party pleading the statute of frauds bears the initial burden of establishing its applicability. Tex. R. Civ. P. 94; *Dynegy, Inc. v. Yates*, 422 S.W.3d 638 (Tex. 2013). Once that party meets its initial burden, the burden shifts to the opposing party to establish an exception that would take the verbal contract out of the statute of frauds. *Dynegy, Inc.*, 422 S.W.3d at 641.

Contracts for international sale of goods. The statute of frauds does not apply to contracts subject to the 1980 United Nations Convention on Contracts for the International Sale of Goods. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 ("A contract of sale need not be concluded in or evidenced by a writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.").

PJC 101.35 Question on Main Purpose Doctrine

QUESTION _____

Did *Don Davis* promise to be primarily responsible for paying the debt of [*name of third party*], and was *Don Davis*'s main purpose for the promise, if any, to gain a benefit for *himself*?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. The "main purpose" doctrine is an exception to the statute of frauds requirement that an obligation to pay the debt of another be in writing. See PJC 101.34. The doctrine requires that (1) the promisor intended to create primary responsibility in itself to pay the debt of another; (2) there was consideration for the promise; and (3) the consideration was primarily for the promisor's own use and benefit—that is, the benefit it received was the promisor's main purpose for making the promise.

Source of question. PJC 101.35 is derived from *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 828 (Tex. 2012).

Broad-form submission. PJC 101.35 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")).

Consideration essential. The promise to become liable for the debt of another must be supported by consideration. *See Gulf Liquid Fertilizer Co. v. Titus*, 354 S.W.2d 378, 387 (Tex. 1962). To take the promise out of the statute of frauds, the consideration must be primarily for the promisor's own use and benefit. *Gulf Liquid Fertilizer Co.*, 354 S.W.2d at 386–87. Whether a particular matter constitutes adequate legal consideration is a question of law for the court. *Williams v. Hill*, 396 S.W.2d 911, 913 (Tex. Civ. App.—Dallas 1965, no writ). The court's determination, however, may be based on facts found by the jury. *See, e.g., Houston Medical Testing Services v. Mintzer*, 417 S.W.3d 691, 695–96 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

Burden of proof. The party pleading the statute of frauds bears the initial burden of establishing its applicability. Tex. R. Civ. P. 94; *Dynegy, Inc. v. Yates*, 422 S.W.3d 638 (Tex. 2013). Once that party meets its initial burden, the burden shifts to the

opposing party to establish an exception that would take the verbal contract out of the statute of frauds. *Dynegy, Inc.*, 422 S.W.3d at 641. A party relying on the main purpose doctrine therefore must plead and establish facts to take a verbal contract out of the statute of frauds. *Dynegy, Inc.*, 422 S.W.3d at 641.

PJC 101.36 Third-Party Beneficiaries (Comment)

Third-party beneficiaries. A third party may enforce an agreement as a beneficiary to that agreement if the contracting parties (1) "'intended to secure a benefit to th[e] third party'" and (2) "'entered into the contract directly for the third party's benefit.'" *First Bank v. Brumitt*, 519 S.W.3d 95, 102 (Tex. 2017). *See also Basic Capital Management, Inc. v. Dynex Commercial, Inc.*, 348 S.W.3d 894, 900 (Tex. 2011) (quoting *MCI Telecommunications Corp. v. Texas Utilities Electric Co.*, 995 S.W.2d 647, 651 (Tex. 1999)); *City of Houston v. Williams*, 353 S.W.3d 128, 145 (Tex. 2011). The "'intention to contract or confer a direct benefit to a third party must be clearly and fully spelled out or enforcement by the third party must be denied.'" *Basic Capital Management, Inc.*, 348 S.W.3d at 900 (quoting *MCI Telecommunications Corp.*, 995 S.W.2d at 651).

It is presumed that parties contract solely for themselves, "only a clear expression of the intent to create a third-party beneficiary can overcome that presumption," and doubts regarding the parties' intent "must be resolved against conferring third-party beneficiary status." *First Bank*, 519 S.W.3d at 103; *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 420 (Tex. 2011). A court will not create a third-party-beneficiary contract by implication. *Basic Capital Management, Inc.*, 348 S.W.3d at 900.

It is not enough that the third party would benefit—whether directly or indirectly—from the parties' performance, or that the parties knew that the third party would benefit. *First Bank*, 519 S.W.3d at 102; *Sharyland Water Supply Corp.*, 354 S.W.3d at 421. Nor does it matter that the third party intended or expected to benefit from the contract, for only the "intention of the contracting parties in this respect is of controlling importance." *First Bank*, 519 S.W.3d at 102 (quoting *Banker v. Breaux*, 128 S.W.2d 23, 24 (Tex. 1939)).

Form of question. Ordinarily, construction of an unambiguous written instrument to determine third-party-beneficiary status is a question of law for the court. *See First Bank*, 519 S.W.3d at 105–06 (court should determine whether agreement is ambiguous and whether it "clearly, fully, and unequivocally express[es] the parties' mutual intent" to confer third-party-beneficiary status); *Basic Capital Management, Inc.*, 348 S.W.3d at 900. When deciding whether the parties to an unambiguous contract intended to create a third-party beneficiary, the court must look solely to the contract's language construed as a whole. *First Bank*, 519 S.W.3d at 106.

If the court determines the agreement is ambiguous such that there is a fact issue regarding whether the contracting parties intended to confer third-party-beneficiary status on a nonparty, the Committee recommends that the following question be submitted to the jury:

QUESTION _____

Did *Paul Payne* and *Don Davis* enter into the agreement with the intent to confer some direct benefit on *Third-Party Tom*?

[Insert instructions and definitions, if appropriate.]

Answer "Yes" or "No."

Answer: _____

See First Bank, 519 S.W.3d at 102–04; *Basic Capital Management, Inc.*, 348 S.W.3d at 899–900; *MCI Telecommunications Corp.*, 995 S.W.2d at 651. For more detailed discussion regarding what may constitute a "direct benefit," see *Sharyland Water Supply Corp.*, 354 S.W.3d at 421; *City of Houston*, 353 S.W.3d at 145; and *Basic Capital Management, Inc.*, 348 S.W.3d at 900.

Upon an affirmative answer to this question, the third-party beneficiary may submit PJC 101.2 to determine compliance of the party allegedly in breach.

PJC 101.37 Question and Instruction on Ambiguous Provisions

The following language is at issue:

[Insert ambiguous language.]

QUESTION _____

Did the parties mutually intend [*insert plaintiff's contention*]?

You must determine the intent of the parties at the time of the agreement. Consider all the facts and circumstances surrounding the making of the agreement, the interpretation placed on the agreement by the parties, and the conduct of the parties.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 101.37 may be used in cases in which the court has made a determination that a contract or other instrument contains ambiguous terms and it is necessary to determine the meaning of those terms. The determination of whether a contract is ambiguous is a question of law for the court. *Endeavor Energy Resources, L.P. v. Discovery Operating, Inc.*, 554 S.W.3d 586, 601 (Tex. 2018); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003); *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983). Whether the contract is ambiguous is determined by looking at the contract as a whole, in light of the circumstances present when the parties entered into the contract. *Universal Health Services, Inc. v. Renaissance Women's Group, P.A.*, 121 S.W.3d 742, 746 (Tex. 2003). A contract is ambiguous if it is susceptible of more than one reasonable interpretation. *Frost National Bank v. L&F Distributors, Ltd.*, 165 S.W.3d 310, 312 (Tex. 1995). That the parties disagree about a contract's meaning does not render it ambiguous. *Endeavor Energy Resources, L.P.*, 554 S.W.3d at 601. See PJC 101.8 for an instruction on ambiguous provisions that may be used in appropriate circumstances.

An ambiguity creates a fact issue as to the parties' intent. *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996); *see also Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979). The court may conclude that a contract is ambiguous in the absence of such a pleading by any party. *See Progressive County Mutual Insurance Co. v. Kelley*, 284 S.W.3d 805, 808–09 (Tex. 2009) (per curiam) (summary judgment appeal where supreme court concluded contract was ambiguous

even though neither party asserted ambiguity); *see also Sage Street Associates v. Northdale Construction Co.*, 863 S.W.2d 438, 445 (Tex. 1993).

If a contract is unambiguous, or if it is ambiguous but parol evidence of circumstances is undisputed, construction of the contract is an issue for the court. *Brown v. Payne*, 176 S.W.2d 306, 308 (Tex. 1943); *In re Hite*, 700 S.W.2d 713, 718 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

Broad-form submission. PJC 101.37 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")).

Source of question. PJC 101.37 is derived in part from *Trinity Universal Insurance Co. v. Ponsford Bros.*, 423 S.W.2d 571, 575 (Tex. 1968), and *Recognition Communications, Inc. v. American Automobile Ass'n, Inc.*, 154 S.W.3d 878, 886–87 (Tex. App.—Dallas 2005, pet. denied).

Intent must be understandable. Parties to a contract must express their intentions understandably. *See City of Houston v. Williams*, 353 S.W.3d 128, 138, 143–44 (Tex. 2011); *Montgomery County Hospital District v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998). To be enforceable, a contract must be sufficiently certain to enable the court to determine the legal obligations of the parties. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992); *Bendalin v. Delgado*, 406 S.W.2d 897, 899 (Tex. 1966).

Parties' interpretation given great weight. The most significant rule of contractual interpretation is that great, if not controlling, weight should be given to the parties' interpretation. *See, e.g., Harris*, 593 S.W.2d at 306. The court and the jury should assume that parties to a contract are in the best position to know what they intended by the language used. *Harris*, 593 S.W.2d at 306. One factor to be considered in determining the construction the parties placed on a contract is their conduct. *Consolidated Engineering Co. v. Southern Steel Co.*, 699 S.W.2d 188, 192–93 (Tex. 1985).

Patent and latent ambiguities. An ambiguity in a contract may be either "patent" or "latent." *National Union Fire Insurance Co. of Pittsburgh v. CBI Industries, Inc.*, 907 S.W.2d 517, 520 (Tex. 1995). A patent ambiguity is evident on the face of the contract, while a latent ambiguity arises when a contract, unambiguous on its face, is applied to subject matter with which it deals, and an ambiguity appears by reason of some collateral matter. *National Union Fire Insurance Co. of Pittsburgh*, 907 S.W.2d at 520.

PJC 101.38 Question and Instruction on Reformation as an Affirmative Cause of Action

QUESTION 1

Prior to the time the [*instrument*] was reduced to writing, did *Paul Payne* and *Don Davis* agree that [*insert all disputed terms*]?

Answer "Yes" or "No."

Answer: _____

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

QUESTION 2

Did the failure of the [*instrument*] to set out the [*disputed terms*] result from a mutual mistake?

"Mutual mistake" occurs when the parties have previously reached an agreement, but because of a mistake common to both parties the [*instrument*] as written does not reflect the prior agreement.

Unilateral mistake by one party, and knowledge of that mistake by the other party, is equivalent to mutual mistake.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 101.38 is appropriate for use when a party claims that a mutual mistake in reducing the agreement to writing failed to accurately reflect the prior agreement and that the instrument should be "reformed" by the court to correctly state the prior agreement.

Broad-form submission. PJC 101.38 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")).

Source of question. PJC 101.38 is derived from *Davis v. Grammer*, 750 S.W.2d 766, 768 (Tex. 1988), and *Sun Oil Co. v. Bennett*, 84 S.W.2d 447, 451 (Tex. 1935). The broad form of this question is adapted from the Texas Supreme Court's analysis in *Cherokee Water Co. v. Forderhause*, 741 S.W.2d 377, 380 (Tex. 1987). Although the court disapproved of the jury questions actually submitted in that case, it held that the charge would have been correct had the jury been instructed to find (1) the terms of an agreement that was made prior to reducing the relevant instruments to writing and (2) that a mutual mistake was made in presenting those terms within the documents.

Requirements for reformation. "[R]eformation requires two elements: (1) an original agreement and (2) a mutual mistake, made *after* the original agreement, in reducing the original agreement to writing." *Cherokee Water Co.*, 741 S.W.2d at 379 (emphasis added). An exception to the requirement that the mistake be mutual is the unilateral mistake by one party "accompanied by fraud or other inequitable conduct of the remaining party." *Cambridge Companies, Inc. v. Williams*, 602 S.W.2d 306, 308 (Tex. App.—Texarkana 1980), *aff'd on other grounds*, 615 S.W.2d 172 (Tex. 1981). "Unilateral mistake by one party, and knowledge of that mistake by the other party, is equivalent to mutual mistake." *Davis*, 750 S.W.2d at 768 (citing *Cambridge Companies, Inc.*, 602 S.W.2d at 308).

See PJC 101.29 for an instruction on the defense of mutual mistake due to a scrivener's error.

Disputed terms. The disputed terms inserted in the question should reflect the contention of the party bearing the burden of proof.

Burden of Proof. Reformation requires clear, exact, and satisfactory evidence of mutual mistake. *Sun Oil Co.*, 84 S.W.2d at 452; *Estes v. Republic National Bank of Dallas*, 462 S.W.2d 273, 275 (Tex. 1970). The general rule, however, is that the burden of proof in civil cases is by a preponderance of the evidence. *See, e.g., Ellis County State Bank v. Keever*, 888 S.W.2d 790 (Tex. 1994); *State v. Turner*, 556 S.W.2d 563, 565 (Tex. 1977). *But cf. Hardy v. Bennefield*, 368 S.W.3d 643, 648 (Tex. App.—Tyler 2012, no pet.) (citing *Estes* and noting "burden at trial is proof by clear and convincing evidence" for reformation).

[PJC 101.39 and 101.40 are reserved for expansion.]

PJC 101.41 Question on Promissory Estoppel

QUESTION _____

Did *Paul Payne* substantially rely to *his* detriment on *Don Davis*'s promise, if any, and was this reliance foreseeable by *Don Davis*?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. The doctrine of promissory estoppel may be invoked as a cause of action. It is appropriate if a promisee has acted to his detriment in reasonable reliance on an otherwise unenforceable promise. The theory supplies a remedy enabling an injured party to be compensated for "foreseeable, definite and substantial reliance." *Wheeler v. White*, 398 S.W.2d 93, 96–97 (Tex. 1965). See PJC 115.6 for a question on promissory estopppel—reliance damages.

Broad-form submission. PJC 101.41 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Source of question. PJC 101.41 is derived from *Wheeler*, 398 S.W.2d at 96–97; *see also English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983) (requisites of promissory estoppel are "(1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial reliance by the promisee to his detriment"); *Restatement (Second) of Contracts* § 90 (1981).

Exception to statute of frauds. This doctrine also can be used as a plea in avoidance of a statute-of-frauds defense. *"Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 937–40 (Tex. 1972).

Waiver and estoppel in insurance cases. The rules of waiver and estoppel apply differently in insurance cases. The principle has been stated as follows:

> Waiver and estoppel may operate to avoid forfeiture of a policy, but they have consistently been denied operative force to change, re-write and enlarge the risks covered by a policy. *In other words, waiver and estoppel*

> *cannot create a new and different contract with respect to risks covered by the policy.*

Ulico Casualty Co. v. Allied Pilots Ass'n, 262 S.W.3d 773, 780 (Tex. 2008) (quoting *Great American Reserve Insurance Co. v. Mitchell*, 335 S.W.2d 707, 708 (Tex. Civ. App.—San Antonio 1960, writ ref'd)). If the court determines that the insurance case presents an instance in which waiver or estoppel may apply, those issues may be submitted. *See Riggs v. Sentry Insurance*, 821 S.W.2d 701, 705 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (discussing estoppel instructions); *Preferred Risk Mutual Insurance Co. v. Rabun*, 561 S.W.2d 239, 243–44 (Tex. Civ. App.—Austin 1978, writ dism'd) (finding elements of waiver by insurer's agent).

PJC 101.42 Question and Instruction on Quantum Meruit

QUESTION _____

Did *Paul Payne* perform compensable work for *Don Davis* for which *he* was not compensated?

Paul Payne performed compensable work if *he* rendered valuable services or furnished valuable materials to *Don Davis*; *Don Davis* accepted, used, and benefited from the services or materials; and, under the circumstances, *Don Davis* was reasonably notified that *Paul Payne* expected to be compensated for the services or materials.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. If one party receives a benefit by accepting the services of another, the accepting party is obligated by principles of equity to pay the reasonable value of those services. *Colbert v. Dallas Joint Stock Land Bank*, 150 S.W.2d 771, 773 (Tex. 1941). The elements of a quantum meruit claim are set out in *Vortt Exploration Co. v. Chevron U.S.A.*, 787 S.W.2d 942 (Tex. 1990) (citing *Bashara v. Baptist Memorial Hospital System*, 685 S.W.2d 307, 310 (Tex. 1985)).

If a valid express contract covering the services rendered or materials furnished exists, recovery on quantum meruit generally is not allowed under Texas law. *Truly v. Austin*, 744 S.W.2d 934, 936 (Tex. 1988); *see also Woodard v. Southwest States, Inc.*, 384 S.W.2d 674, 675 (Tex. 1964). When the existence of or the terms of a contract are in doubt, the party disputing recovery in quantum meruit has the burden of proving that an express contract exists covering the subject matter of the dispute. *Freeman v. Carroll*, 499 S.W.2d 668 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.), *cited with approval in Fortune Production Co. v. Conoco, Inc.*, 52 S.W.3d 671, 685 (Tex. 2000); *see Truly*, 744 S.W.2d at 936 (discussing the general rule that one may recover in quantum meruit only when there is no express contract).

The existence of an express contract does not, however, preclude recovery in quantum meruit for the reasonable value of work performed and accepted but not covered by the contract. *Black Lake Pipe Line Co. v. Union Construction Co.*, 538 S.W.2d 80, 86 (Tex. 1976), *overruled on other grounds by Sterner v. Marathon Oil Co.*, 767 S.W.2d 686 (Tex. 1989); *Shamoun & Norman, LLP v. Hill*, 483 S.W.3d 767, 779 (Tex. App.—Dallas 2016, pet. granted). When "the evidence shows that no contract covers

the service at issue, *then* the question of whether a party may recover in quantum meruit is for the trier of fact." *Gulf Liquids New River Project, LLC v. Gulsby Engineering, Inc.*, 356 S.W.3d 54, 70 (Tex. App.—Houston [1st Dist.] 2011, no pet.). The right to recover in quantum meruit is based on a promise "implied by law to pay for beneficial services rendered and knowingly accepted." *Davidson v. Clearman*, 391 S.W.2d 48, 50 (Tex. 1965).

Recovery in quantum meruit is allowed for partial performance of an express contract if (1) the defendant's breach prevents the plaintiff's completion or (2) the contract is unilateral and requires no performance by the plaintiff. *Truly*, 744 S.W.2d at 936–37.

Texas cases involving building or construction contracts have permitted a *breaching plaintiff* to recover in quantum meruit. *Truly*, 744 S.W.2d at 937. *See also Dobbins v. Redden*, 785 S.W.2d 377, 378 (Tex. 1990); *Beeman v. Worrell*, 612 S.W.2d 953, 956 (Tex. Civ. App.—Dallas 1981, no writ); *Coon v. Schoeneman*, 476 S.W.2d 439, 442–43 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.). For further discussion of construction contracts, see PJC 101.46–.49.

Quantum meruit may also permit a recovery in equity when a contract is unenforceable because it is barred by the statute of frauds. *See Quigley v. Bennett*, 227 S.W.3d 51, 55 (Tex. 2007) (holding that alleged oral agreement to receive royalty interest was barred by the statute of frauds but remanding for consideration of quantum meruit claim).

See PJC 115.7 for a question on quantum meruit recovery.

Broad-form submission. PJC 101.42 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Modification of instruction. The above instruction may be modified to delete references to either materials or services if one is not at issue in the case.

PJC 101.43 Money Had and Received (Comment)

Texas has long recognized a claim for money had and received if a defendant holds money that "in equity and good conscience" belongs to the plaintiff. *See Plains Exploration & Production Co. v. Torch Energy Advisors Inc.*, 473 S.W.3d 296, 302 n.4 (Tex. 2015); *Merryfield v. Willson*, 14 Tex. 224, 225 (1855). But the boundaries of the claim are not always clear, as it is "less restricted and fettered by technical rules and formalities than any other form of action." *Staats v. Miller*, 243 S.W.2d 686, 687–88 (Tex. 1951) (quoting *United States v. Jefferson Electric Manufacturing Co.*, 291 U.S. 386, 402–03 (1934)).

For example, the textbook money-had-and-received claim involves a mistaken overpayment to a defendant, *see Pickett v. Republic National Bank of Dallas*, 619 S.W.2d 399, 400 (Tex. 1981), or payment to the wrong party, *see Amoco Production Co. v. Smith*, 946 S.W.2d 162, 165 (Tex. App.—El Paso 1997, no writ). But recovery for money had and received may not be available in either case, depending on the circumstances. *Samson Exploration, LLC v. T.S. Reed Properties, Inc.*, 521 S.W.3d 766, 780 (Tex. 2017) (denying recovery of overpayment deemed voluntary); *Holden Business Forms Co. v. Columbia Medical Center of Arlington Subsidiary, L.P.*, 83 S.W.3d 274, 278 (Tex. App.—Fort Worth 2002, no pet.) (denying recovery of insurer's mistaken payment to hospital); *see also Best Buy Co. v. Barrera*, 248 S.W.3d 160, 162 (Tex. 2007) (presuming without deciding that claim applied to restocking fee charged for returned items). Circumstances that may permit or limit the claim are discussed below.

Prerequisite findings. Money had and received "is not premised on wrongdoing." *Plains Exploration & Production Co.*, 473 S.W.3d at 302 n.4. Thus, a bank that puts too much money in a customer's account can recover it even if the customer did nothing wrong. *See Pickett*, 619 S.W.2d at 400. But "equity follows the law," so equitable doctrines like money had and received generally must conform to legal rules. *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 648 (Tex. 2007). For example, when a valid contract addresses a matter, recovery under equity cannot rewrite the parties' contract. *Fortune Production Co. v. Conoco, Inc.*, 52 S.W.3d 671, 685 (Tex. 2000). Thus, if a plaintiff's claim to money held by another depends on a contract, statute, will, or other legal claim, failure to establish the prerequisite claim may defeat the money-had-and-received claim too. *Southwestern Electric Power Co. v. Burlington Northern Railroad Co.*, 966 S.W.2d 467, 471 (Tex. 1998). This is true whether the contract is written or oral. *Tex Star Motors, Inc. v. Regal Finance Co.*, 401 S.W.3d 190, 202 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

While a claim for money had and received cannot seek more than a contract specifies, it can seek a refund of amounts overpaid according to the contract's own terms. *Southwestern Electric Power Co.*, 966 S.W.2d at 469. Recovery for money had and received may also be available if a contract "is unenforceable, impossible, not fully

performed, thwarted by mutual mistake, or void for other legal reasons." *City of Harker Heights v. Sun Meadows Land, Ltd.*, 830 S.W.2d 313, 319 (Tex. App.—Austin 1992, no writ); *see also McCullough v. Scarbrough, Medlin & Associates, Inc.*, 435 S.W.3d 871, 891 (Tex. App.—Dallas 2014, pet. denied). The Texas Supreme Court has noted only that equity "might" allow recovery of money when a contract is voidable. *Gotham Insurance Co. v. Warren E&P, Inc.*, 455 S.W.3d 558, 563 n.11 (Tex. 2014); *cf. Neese v. Lyon*, 479 S.W.3d 368, 391 (Tex. App.—Dallas 2015, no pet.) ("If the instrument is voidable rather than void, the party must sue for rescission and cannot sue for money had and received."). One court has allowed recovery for money had and received despite no damages under the related contract. *See Norhill Energy LLC v. McDaniel*, 517 S.W.3d 910, 917 (Tex. App.—Fort Worth 2017, pet. filed).

Money received. Money had and received requires that the defendant actually received the money. Receipt of goods is not enough. *Hurst v. Mellinger*, 11 S.W. 184, 185 (Tex. 1889). Nor is a claim that the defendant will receive money in the future. *Mary E. Bivins Foundation v. Highland Capital Management L.P.*, 451 S.W.3d 104, 112 (Tex. App.—Dallas 2014, no pet.). The claim does not include other damages measures like benefit of the bargain or cost of replacement. *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 860 (Tex. App.—Fort Worth 2005, no pet.). It is no defense that the defendant no longer has the same money on hand. *Pickett*, 619 S.W.2d at 399. But it is a defense that the defendant materially changed its position in reliance on a mistaken payment. *Bryan v. Citizens National Bank in Abilene*, 628 S.W.2d 761, 763 (Tex. 1982).

Equity and good conscience. "A claim for money had and received is equitable in nature." *Plains Exploration & Production Co.*, 473 S.W.3d at 302 n.4. Texas courts have traditionally submitted such claims to a jury. *See Staats*, 243 S.W.2d at 688 ("[T]he trial court erred in refusing to submit to the jury the petitioners' case on the theory of money had and received."). "As a general rule, the trial court, not the jury, determines the 'expediency, necessity, or propriety of equitable relief.'" *Hill v. Shamoun & Norman, LLP*, 544 S.W.3d 724, 741 (Tex. 2018) (quoting *State v. Texas Pet Foods, Inc.*, 591 S.W.2d 800, 803 (Tex. 1979)). But "'when contested fact issues must be resolved before equitable relief can be determined, a party is entitled to have that resolution made by a jury.'" *Hill*, 544 S.W.3d at 741 (quoting *Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999)). "Once any such necessary factual disputes have been resolved, the weighing of all equitable considerations . . . and the ultimate decision of how much, if any, equitable relief should be awarded, must be determined by the trial court." *Hill*, 544 S.W.3d at 741 (citation omitted).

But "equity and good conscience" is a term of art unfamiliar to most jurors. Many factors might bear on what "equity and good conscience" require, so it is not possible to comprehensively list all the instructions jurors should receive in such cases. *See, e.g., Stonebridge Life Insurance Co. v. Pitts*, 236 S.W.3d 201, 206 (Tex. 2007) (listing factors like knowledge of and consent to credit card charges and desire for product

regardless of the charges); *Edwards v. Mid-Continent Office Distributors, L.P.*, 252 S.W.3d 833, 841 (Tex. App.—Dallas 2008, pet. denied) (listing factors like the parties' business practices, communications, reliance, and the *status quo ante*). Some relevant factors may be legal questions beyond the competence of jurors. *See Restatement (Third) of Restitution and Unjust Enrichment* § 32 cmt. c (2011) (noting that availability of restitution when a contract is illegal or unenforceable "involves a complex assessment of interrelated factors" including "the nature of the illegality; the strength of the prohibition; the extent of the claimant's culpability; whether illegal conduct was central or merely tangential to the performance in question; the deterrent effect, if any, of a decision one way or the other; the cost and difficulty of the adjudications necessitated by alternative legal rules; and the extent to which a remedy in restitution would tend to carry out (or, conversely, to frustrate) a transaction that the law has in some way sought to suppress").

Adequate legal remedy. Equitable claims are sometimes supplanted if an adequate legal remedy exists. *Best Buy Co.*, 248 S.W.3d at 161 n.1. For example, a claim for money had and received may not be available if a statutory remedy supplants it. *See Bryan*, 628 S.W.2d at 763 (supplanted by Tex. Bus. & Com. Code § 4.403); *Vista Medical Center Hospital v. Texas Mutual Insurance Co.*, 416 S.W.3d 11, 40 (Tex. App.—Austin 2013, no pet.) (supplanted by workers' compensation administrative procedures). The Texas Supreme Court has noted but not decided the issue of whether a claim for money had and received requires proof that no adequate legal remedy exists in other contexts. *See Best Buy Co.*, 248 S.W.3d at 161 n.1; *Stonebridge Life Insurance Co.*, 236 S.W.3d at 203 n.1.

But equity may require a plaintiff to pursue legal remedies against a wrongdoer rather than an equitable claim for money had and received against an innocent bystander. Thus, an insured's claim that policy proceeds were wrongly paid to a third party must pursue a contract claim against the insurer, not a money-had-and-received claim against the third party who received the proceeds. *Evans v. Opperman*, 13 S.W. 312, 313 (Tex. 1890). Similarly, if *A* fraudulently causes *B* to pay a debt *A* owes to *C*, *B* must sue *A* for fraud rather than suing *C* for receiving money it was rightfully due. *Edwards*, 252 S.W.3d at 841.

Defenses. The defendant may "raise any defenses that would deny the claimant's right or show that the claimant should not recover." *Best Buy Co.*, 248 S.W.3d at 162. Since "equity and good conscience" may depend on the validity of those defenses, the supreme court has indicated they may relate to the plaintiff's case-in-chief and do not present independent affirmative defenses as traditionally defined. *Best Buy Co.*, 248 S.W.3d at 163.

Voluntary payment. Voluntary payment may be an additional defense to claims for money had and received. A party cannot recover for voluntary payments made on a claim of right, with full knowledge of all the facts and in the absence of fraud, decep-

tion, duress, or compulsion, even if the party was mistaken about the law. *Samson Exploration, LLC*, 521 S.W.3d at 779.

"Voluntary payment" is a term of art that may turn on the facts in each case, so it is not possible to comprehensively list all the instructions jurors should receive. *See BMG Direct Marketing, Inc. v. Peake*, 178 S.W.3d 763, 771 (Tex. 2005) ("[A]lthough the voluntary-payment rule may have been widely used by parties and some Texas courts at one time, its scope has diminished as the rule's equitable policy concerns have been addressed through statutory or other legal remedies.").

PJC 101.44 Unjust Enrichment (Comment)

The doctrine of unjust enrichment is appropriate "'when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage.'" *Southwestern Bell Telephone Co. v. Marketing on Hold Inc.*, 308 S.W.3d 909, 921 (Tex. 2010) (quoting *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992)). Because unjust enrichment is quasi-contractual, it may not be submitted to the jury "when a valid, express contract covers the subject matter of the parties' dispute." *Fortune Production Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000) (citing *TransAmerican Natural Gas Corp. v. Finkelstein*, 933 S.W.2d 591, 600 (Tex. App.—San Antonio 1996, writ denied) (no recovery for unjust enrichment if the same subject is covered by an express contract)). But overpayments under a contract can be recovered under unjust enrichment. *Southwestern Electric Power Co. v. Burlington Northern Railroad Co.*, 966 S.W.2d 467, 469–70 (Tex. 1998).

The Committee has not identified any authority specifically defining "undue advantage" in this context. But the Dallas, San Antonio, and Corpus Christi courts of appeals have explained that unjust enrichment occurs when someone "has wrongfully secured a benefit or has passively received one which it would be unconscionable to retain." *Texas Integrated Conveyor Systems, Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 367 (Tex. App.—Dallas 2009, pet. denied) (citing *Villarreal v. Grant Geophysical, Inc.*, 136 S.W.3d 265, 270 (Tex. App.—San Antonio 2004, pet. denied) (quoting *City of Corpus Christi v. S.S. Smith & Sons Masonry, Inc.*, 736 S.W.2d 247, 250 (Tex. App.—Corpus Christi 1987, writ denied))).

The Texas Supreme Court has referred to unjust enrichment as an independent "cause of action" (*HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 891 (Tex. 1998)), "claim" (*Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 870 (Tex. 2007) (per curiam)), and "theory" of recovery (*Marketing on Hold, Inc.*, 308 S.W.3d at 921). Some courts of appeals have questioned whether unjust enrichment is an independent cause of action as opposed to a remedy for fraud or other improper conduct. *See, e.g., Casstevens v. Smith*, 269 S.W.3d 222, 229 (Tex. App.—Texarkana 2008, pet. denied) (is not an independent cause of action); *R.M. Dudley Construction Co. v. Dawson*, 258 S.W.3d 694, 703 (Tex. App.—Waco 2008, pet. denied) (same); *Argyle Independent School District v. Wolf*, 234 S.W.3d 229, 246 (Tex. App.—Fort Worth 2007, no pet.) (same); *Mowbray v. Avery*, 76 S.W.3d 663, 679 (Tex. App.—Corpus Christi 2002, pet. denied) (same); *Walker v. Cotter Properties*, 181 S.W.3d 895, 900 (Tex. App.—Dallas 2006, no pet.) (same); *but see, e.g., Pepi Corp. v. Galliford*, 254 S.W.3d 457, 460 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (is an independent cause of action); *Elledge*, 240 S.W.3d at 870 (determining that "unjust enrichment claims are governed by the two-year statute of limitations"); *Clark v. Dillard's, Inc.*, 460 S.W.3d 714, 720–21 (Tex. App.—Dallas 2015, no pet.) (same).

[PJC 101.45 is reserved for expansion.]

PJC 101.46 Construction Contracts Distinguished from Ordinary Contracts (Comment)

Doctrine of substantial performance. In ordinary contract cases, a party who is himself in default cannot maintain a suit for its breach. *Gulf Pipe Line Co. v. Nearen*, 138 S.W.2d 1065, 1068 (Tex. 1940). 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. *Dobbins v. Redden*, 785 S.W.2d 377 (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).

Quantum meruit as alternate ground. A building contractor who has not substantially performed may have quantum meruit as an alternate ground of recovery. *Dobbins*, 785 S.W.2d at 378; *Truly v. Austin*, 744 S.W.2d 934, 937 (Tex. 1988); *see also Beeman v. Worrell*, 612 S.W.2d 953, 956 (Tex. Civ. App.—Dallas 1981, no writ); *Coon v. Schoeneman*, 476 S.W.2d 439, 442–43 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.). For questions on quantum meruit, see PJC 101.42 and 115.7.

Construction contract and quantum meruit questions may be submitted in the same charge under certain circumstances. *See Truly,* 744 S.W.2d at 937; *see also Chapa v. Reilly*, 733 S.W.2d 236, 237 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

Recovery. A contractor who has substantially performed may recover the contract price less the cost of completion and remedying any defects. *Vance*, 677 S.W.2d at 481.

The doctrine of substantial performance also comes into play when the owner sues the contractor. If the contractor has substantially performed, the owner can recover the cost of completion less the unpaid balance on the contract price, known as the remedial measure of damages. If the contractor has not substantially performed, the measure of the owner's damages is the difference between the value of the building as constructed and its value had it been constructed in accordance with the contract. *Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, 642 S.W.2d 160, 164 (Tex. 1982).

Jury submissions in these suits are complicated if both the owner and the contractor seek affirmative recovery. *See, e.g., Fidelity & Deposit Co. of Maryland v. Stool*, 607 S.W.2d 17 (Tex. Civ. App.—Tyler 1980, no writ); *Greene v. Bearden Enterprises, Inc.*, 598 S.W.2d 649 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).

PJC 101.47 Construction Contracts—Question and Instruction—Misapplication of Trust Funds under the Texas Construction Trust Funds Act

QUESTION _____

Did *Don Davis* intentionally, knowingly, or with intent to defraud misapply trust funds of which *Paul Payne* was a beneficiary?

Misapplication of trust funds occurs if *Don Davis*—

1. directly or indirectly retained, used, disbursed, or otherwise diverted trust funds, and did so

2. without first fully paying all current or past-due obligations incurred by *Don Davis* to the beneficiaries of the trust funds.

"Current or past-due obligations" are those obligations incurred or owed by *Don Davis* for labor or materials furnished in the direct prosecution of the work under the construction contract prior to the receipt of the trust funds and which are due and payable by *Don Davis* no later than thirty days following receipt of the trust funds.

"Trust funds" are—

1. construction payments made to a [*contractor or subcontractor or to an officer, director, or agent of a contractor or subcontractor*], under a construction contract for the improvement of specific real property; or

2. loan receipts borrowed by a [*contractor, subcontractor, or owner or by an officer, director, or agent of a contractor, subcontractor, or owner*] for the purpose of improving specific real property, and the loan is secured in whole or in part by a lien on the property.

A "beneficiary" is a[*n*] [*artisan/laborer/mechanic/contractor/subcontractor/materialman*] who labors or who furnishes labor or materials for the construction or repair of an improvement on specific real property.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. The above question submits the liability of a defendant for the misapplication of construction payments or loan receipts as trust funds. PJC 101.47 is a basic question appropriate in cases brought under the Texas Construction Trust Funds Act. Tex. Prop. Code § 162.031. Texas recognizes that the Act creates civil as well as criminal liability. *Dealers Electrical Supply Co. v. Scoggins Construction Co.*, 292 S.W.3d 650, 657 (Tex. 2009) ("A party who misapplies trust funds under the [Texas Construction] Trust Fund[s] Act is subject to civil liability to trust-fund beneficiaries whom the Act was designed to protect."). This question applies to public or private construction contracts for the improvement of specific real property in Texas, regardless of whether a construction contract is covered by a statutory or common-law payment bond. Tex. Prop. Code § 162.004(c). This question does not apply to (1) a bank, savings and loan, or other lender; (2) a title company or other closing agent; or (3) a corporate surety who issues a payment bond covering the contract for the construction or repair of the improvement. Tex. Prop. Code § 162.004(a).

Broad-form submission. PJC 101.47 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Use of statutory language. The supreme court has held that "[w]hen liability is asserted based upon a provision of a statute or regulation, a jury charge should track the language of the provision as closely as possible." *Spencer v. Eagle Star Insurance Co. of America*, 876 S.W.2d 154, 157 (Tex. 1994), *cited in Felton v. Lovett*, 388 S.W.3d 656, 661 n.18 (Tex. 2012).

Source of question. The question is adapted from Tex. Prop. Code §§ 162.001, 162.005, 162.031 and *Dealers Electrical Supply Co.*, 292 S.W.3d at 657. The definitions are derived from Tex. Prop. Code §§ 162.001, 162.003.

Trust funds. If there is no fact issue regarding the existence of trust funds, the definition of "trust funds" should be omitted and the court should instruct the jury that the funds in question are trust funds.

Certain fees payable to contractor not considered trust funds. The statute provides an exception to the definition of trust funds. Fees payable to a contractor are not considered trust funds if—

> (1) the contractor and property owner have entered into a written construction contract for the improvement of specific real property . . .

> before the commencement of construction of the improvement and the contract provides for the payment by the owner of the costs of construction and a reasonable fee specified in the contract payable to the contractor; and
>
> (2) the fee is earned as provided by the contract and paid to the contractor or disbursed from a construction account described by Section 162.006, if applicable.

Tex. Prop. Code § 162.001(c).

If there is a fact issue regarding this exception, additional instructions should be given.

Beneficiary. If the existence of a person as a beneficiary is not disputed, the definition of "beneficiary" should be omitted and the court should instruct the jury that the person is a beneficiary.

Intent to defraud. If there is a fact issue regarding intent to defraud, the following instruction should be submitted:

> A person acted with "intent to defraud" if he—
>
> *[Insert one or more of the following instructions.]*
>
> 1. retained, used, disbursed, or diverted trust funds with the intent to deprive the beneficiaries of the trust funds; [*or*]
>
> 2. retained, used, disbursed, or diverted trust funds and failed to establish or maintain a construction account or failed to establish or maintain an account record for the construction account; [*or*]
>
> 3. used, disbursed, or diverted trust funds that were paid to him in reliance on an affidavit furnished by him if the affidavit contains false information relating to his payment of current or past-due obligations.

The foregoing instructions are prescribed in Tex. Prop. Code § 162.005. Only the appropriate instruction(s) raised by the circumstances should be submitted.

Intentionally or knowingly. The Property Code does not define "intentionally" or "knowingly," so the Committee has not provided a definition of these terms.

Use of "or." If more than one of the alternative instructions listed above regarding intent to defraud is used, each must be separated by the word *or*, because a finding of any one of the acts or practices defined in the instructions would support recovery under the Texas Construction Trust Funds Act. Because each of these acts or practices

is actionable under the Act, the intent-to-defraud instruction should be adapted to include the kind of conduct involved in a given case.

Issue of trustee is disputed. If the existence of a trustee is disputed, the following question should be submitted before PJC 101.47. The definition of "trustee" is taken from Tex. Prop. Code § 162.002.

> Was *Don Davis* a trustee?
>
> A trustee is a contractor, subcontractor, or owner or an officer, director, or agent of a contractor, subcontractor, or owner, who receives trust funds or who has control or direction of trust funds.
>
> *[Include definition of "trust funds" from PJC 101.47.]*

Residential construction contract. If the contract is a residential construction contract, include the following instruction:

> A property owner is a beneficiary of trust funds in connection with a residential construction contract, including funds deposited into a construction account.

Tex. Prop. Code § 162.003(b).

> "Construction account" means an account in a financial institution into which only trust funds and funds deposited by the contractor that are necessary to pay charges imposed on the account by the financial institution may be maintained.

Tex. Prop. Code § 162.005(6).

> "Financial institution" means a bank, savings association, savings bank, credit union, or savings and loan association authorized to do business in the state.

Tex. Prop. Code § 162.005(5).

PJC 101.48 Construction Contracts—Affirmative Defenses—Basic Question

If you answered "Yes" to Question _____ [*101.47*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Is *Don Davis*'s misapplication of trust funds excused?

[Insert instructions; see PJC 101.49.]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 101.48 poses the controlling question for cases in which a defendant asserts one or more affirmative defenses provided by the Texas Construction Trust Funds Act.

Broad-form submission. PJC 101.48 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")).

Instructions on grounds of defense required. In the absence of one or more independent grounds of defense, the jury is not permitted to excuse the trustee from misapplying trust funds. Standing alone, PJC 101.48 does not encompass any grounds of defense, so it is mandatory that grounds raised by the pleadings and evidence be submitted by including one or more instructions from PJC 101.49. *See, e.g., Traeger v. Lorenz*, 749 S.W.2d 249 (Tex. App.—San Antonio 1988, no writ) (separate grounds of waiver and abandonment should have been submitted in deed restriction case).

Partial excuse. If there is a factual dispute regarding whether only a portion of the misapplication of trust funds is excused, the question may be modified as follows:

Is any misapplication of trust funds by *Don Davis* excused?

An instruction should also be added to the damages question to allow the jury to exclude misapplied trust funds to which an excuse applies. See PJC 115.48.

PJC 101.49 Construction Contracts—Affirmative Defenses—Instructions

Misapplication of trust funds by *Don Davis* is excused if—

1. the trust funds were used by *Don Davis* to pay *Don Davis*'s actual expenses directly related to the construction or repair of the improvement; [*or*]

2. the trust funds have been retained by *Don Davis*, after notice to the beneficiary who has made a request for payment, as a result of *Don Davis*'s reasonable belief that the beneficiary is not entitled to such funds; [*or*]

3. *Don Davis* paid the beneficiaries all trust funds that they are entitled to receive no later than thirty days following written notice to *Don Davis* of the filing of a criminal complaint or other notice of a pending criminal investigation.

COMMENT

When to use. PJC 101.49 is to be used in conjunction with PJC 101.48 if the defendant raises a statutory defense prescribed in Texas Property Code section 162.031(b)–(c).

Source of instruction. The affirmative-defense instruction is derived from Tex. Prop. Code § 162.031(b)–(c) as well as *Dealers Electrical Supply Co. v. Scoggins Construction Co.*, 292 S.W.3d 650, 657 (Tex. 2009) ("A party who misapplies trust funds under the [Texas Construction] Trust Fund[s] Act is subject to civil liability to trust-fund beneficiaries whom the Act was designed to protect.").

Use of "or." Each of elements 1, 2, and 3 should be used only when raised by the evidence. If more than one of the alternative instructions listed above is used, each must be separated by the word *or*, because a finding of any one of the acts or practices defined in the instructions would constitute an affirmative defense under the Texas Construction Trust Funds Act. Because each of these acts or practices constitutes an affirmative defense under the Act, the instructions should be adapted to include the kind of conduct involved in a given case.

Trust funds retained as authorized or required by law. Texas Property Code section 162.031(b) provides an affirmative defense if the trust funds have been retained as authorized or required by chapter 53 of the Code. This affirmative defense is a question of law for the court.

PJC 101.50 Question on Prompt Payment to Contractors and Subcontractors

QUESTION _____

Did *Don Davis* fail to pay *Paul Payne* promptly for [*properly performed work/suitably stored materials/specially fabricated materials*]?

A payment is not prompt if it is not made by—

[Insert the following if Don Davis is the owner.]

the thirty-fifth day after the date Don Davis received a written payment request from *Paul Payne*.

[Insert the following if Don Davis is the contractor.]

the seventh day after the date Don Davis received payment from the owner.

[Insert the following if Don Davis is a subcontractor.]

the seventh day after the date Don Davis received payment from the contractor.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 101.50 submits the liability of a party to a construction contract for the failure to promptly pay a contractor or subcontractor. PJC 101.50 is a basic question appropriate in cases brought under chapter 28 of the Texas Property Code. This question does not apply to any agreement for mineral development and oil field services. Tex. Prop. Code § 28.010.

Alternative instructions. The instruction includes three separate fact scenarios in which a payment may not be prompt. Only one of the instructions should be used based on the relationship between the parties in a given case. *Paul Payne* should be submitted as the contractor when *Don Davis* is the owner, as the subcontractor when *Don Davis* is the contractor, and as the secondary subcontractor when *Don Davis* is the subcontractor.

Broad-form submission. PJC 101.50 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that

"the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Use of statutory language. The supreme court has held that "[w]hen liability is asserted based upon a provision of a statute or regulation, a jury charge should track the language of the provision as closely as possible." *Spencer v. Eagle Star Insurance Co. of America*, 876 S.W.2d 154, 157 (Tex. 1994), *cited in Felton v. Lovett*, 388 S.W.3d 656, 661 n.18 (Tex. 2012).

Source of question. The question is adapted from Tex. Prop. Code § 28.002. The definitions are derived from Tex. Prop. Code § 28.001.

Owner, contractor, and subcontractor. If there is a factual dispute regarding the status of a pertinent person or entity as an owner, a contractor, or a subcontractor, a predicate question should be submitted to determine that status. Appropriate definitions of owner, contractor, and subcontractor should accompany the question. *See* Tex. Prop. Code § 28.001.

Exception regarding timing of payment to contractor. For a claim against an owner, substitute the phrase *the fifth day after the date Don Davis received loan proceeds* for *the thirty-fifth day after the date Don Davis received* a written payment request from *Paul Payne* if—

(1) the owner has obtained a loan intended to pay for all or part of a contract to improve real property;

(2) the owner has timely and properly requested disbursement of proceeds from that loan; and

(3) the lender is legally obligated to disburse such proceeds to the owner, but has failed to do so within 35 days after the date the owner received the contractor's payment request.

See Tex. Prop. Code § 28.008.

Interest on overdue payment. An unpaid amount begins to accrue interest on the day after the date on which the payment becomes due and bears interest at the rate of 1.5 percent per month and 18 percent per year. *See* Tex. Prop. Code § 28.004.

Interest on an unpaid amount stops accruing under section 28.004 on the earlier of—

1. the date of delivery;

2. the date of mailing, if payment is mailed and delivery occurs within three days; or

3. the date the judgment is entered for violation of prompt payment.

See Tex. Prop. Code § 28.004.

To the extent there are factual disputes about the date payment became due or the date the interest on the unpaid account stopped accruing, additional jury questions may be necessary.

PJC 101.51 Question on Good-Faith Dispute

If you answered "Yes" to Question _____ [*101.50*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was *Don Davis*'s failure to pay promptly excused?

Don Davis's failure to pay promptly is excused if—

1. *Don Davis* disputed in good faith *his* obligation to pay or the amount of payment, and

2. *Don Davis* withheld no more than 100 percent of the difference between the amount *Paul Payne* claims is due and the amount that *Don Davis* claims is due.

[*A good-faith dispute includes a dispute regarding whether the work was performed in a proper manner.*]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 101.51 is appropriate when a party disputes that prompt payment was owed on the basis that there was a good-faith dispute with regard to the obligation to pay or the amount of the payment. *See* Tex. Prop. Code § 28.003(b).

Broad-form submission. PJC 101.51 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")).

Contract for construction of or improvements to detached single-family residence, duplex, triplex, or quadruplex. The following instruction should be substituted if the contract is a contract for construction of or improvements to a detached single-family residence, duplex, triplex, or quadruplex:

Don Davis's failure to pay promptly is excused if—

1. *Don Davis* disputed in good faith *his* obligation to pay or the amount of payment, and

2. *Don Davis* withheld no more than 110 percent of the difference between the amount *Paul Payne* claims is due and the amount that *Don Davis* claims is due.

[*A good-faith dispute includes a dispute regarding whether the work was performed in a proper manner.*]

See Tex. Prop. Code § 28.003(a).

[PJC 101.52–101.55 are reserved for expansion.]

PJC 101.56 Insurance Contracts Distinguished from Other Contracts (Comment)

In most insurance breach-of-contract cases, there is no dispute about whether the parties had an agreement, because the insurance policy is the agreement. In these cases, the general PJC 101.1 question asking whether the parties had an agreement is unnecessary.

Common disputed issues are whether an event is covered or excluded by specific policy language, whether another contractual defense or limitation applies, or the amount of the covered loss. The following alternative questions focus on those issues.

PJC 101.57 asks whether the insurer breached the agreement by failing to pay a covered claim, which is defined by the applicable policy language.

If the jury finds breach of the agreement, then PJC 101.58 asks the jury to determine causation and damages. The question asks the amount of the covered loss, if any, and instructs the jury to exclude any amount that was not covered. Because PJC 101.58 asks only about the amount of policy benefits, when consequential damages are sought, a separate question and instructions on damages as in PJC 115.3–115.5 are also required.

Often there is no dispute that the insurer has not paid the insured, so that a finding of covered damages necessarily means that the insurer failed to comply with the agreement. When it is stipulated or undisputed that a finding of covered damages establishes the insurer's breach, the preliminary liability question in PJC 101.57 may be omitted, because the finding of covered damages in 101.58 is sufficient to establish liability.

PJC 101.59 asks whether a loss or event is excluded by specific policy language. The question may be adapted to submit other limitations, avoidances, and policy defenses.

PJC 101.57 Insurance Contracts—Compliance—Specific Policy Language

QUESTION _____

Did *Insurer, Inc.* fail to comply with the agreement?

Insurer, Inc. failed to comply with the agreement if it failed to pay for [*all*] the damages, if any, [*that were caused (partly/solely) by/that resulted from/because of*] the [*description of covered loss, event, or cause*].

[Insert instructions and definitions, if appropriate.]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. The above question may be submitted to determine whether the insurer breached the agreement by failing to pay a covered loss. Conditioned on an affirmative answer, this question will be followed by PJC 101.58, which submits causation and policy benefits as damages. Additional questions are required for any alleged consequential damages and attorney's fees, as set out in PJC 115.3–115.5 and PJC 115.60.

Because nonpayment of an excluded loss is not a failure to comply with the agreement, this question should not be used when the application of an exclusion is the sole disputed issue. Instead, PJC 101.59 should be used in such a case.

The word *all* should be included if the insurer has paid benefits but there is a dispute about whether the insurer paid all that was owed.

If the existence of an agreement is disputed, PJC 101.1 should be submitted before this question.

Broad-form submission. PJC 101.57 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Source of question. The above question is based on PJC 101.2 and is adapted from jury questions based on specific policy language mentioned in the following cases: *National Union Fire Insurance Co. of Pittsburgh v. Hudson Energy Co.*, 811 S.W.2d 552, 554–55 & n.3 (Tex. 1991); *Union Mutual Life Insurance Co. v. Meyer*, 502 S.W.2d 676, 677–79 (Tex. 1973); *Employers Mutual Casualty Co. of Des Moines, Iowa v. Nelson*, 361 S.W.2d 704, 706–07 (Tex. 1962); and *Telepak v. United Services Automobile Ass'n*, 887 S.W.2d 506, 507 (Tex. App.—San Antonio 1994, writ denied).

Description of covered loss/instructions based on policy language. The description of covered loss submitted to the jury should include any coverage language and any exception to an exclusion on which the insured relies. *Telepak*, 887 S.W.2d at 507. When instructions are given, they generally should follow the terms in the policy. *International Travelers Ass'n v. Marshall*, 114 S.W.2d 851, 852 (Tex. 1938); *Mutual Life Insurance Co. of New York v. Steele*, 570 S.W.2d 213, 217 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).

It may be error to submit an instruction that does not sufficiently track the policy language. *See Aetna Life Insurance Co. v. McLaughlin*, 380 S.W.2d 101, 105 (Tex. 1964); *New York Underwriters Insurance Co. v. Coffman*, 540 S.W.2d 445, 450 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.). But any error may be harmless if the deviation is not material. *See Coffman*, 540 S.W.2d at 450–51; *Truck Insurance Exchange v. Ballard*, 343 S.W.2d 953, 957–59 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.).

An instruction that submits policy language but unduly emphasizes one part is erroneous. *Nelson*, 361 S.W.2d at 706–07 (question overemphasized "settling" in phrase "settling, shrinkage or expansion").

It is not error to omit policy language about an element that is undisputed. *See National County Mutual Fire Insurance Co. v. Wallace*, 673 S.W.2d 410, 411–12 (Tex. App.—Houston [1st Dist.] 1984, no writ); *U.S. Fire Insurance Co. v. Skatell*, 596 S.W.2d 166, 169 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.).

While instructions based on policy language may be helpful, they are not always required. In *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 451–52 (Tex. 1997), the court held that it was not error to refuse instructions that would have tracked the policy when the policy was in evidence, the relevant language was presented to the jury and discussed at length, and there was no dispute about the meaning of the policy terms. In other circumstances, including instructions that submit the relevant policy language may assist the jury.

Instruction based on judicial construction or definition. It may be necessary to deviate from the exact policy language to correctly submit an issue, for example, when the language has been judicially construed or qualified. *See Southern Farm Bureau Life Insurance Co. v. Dettle*, 707 S.W.2d 271, 272–73 (Tex. App.—Amarillo 1986, no writ) (instruction added word "intentional" to policy definition of suicide, to conform

to judicial decisions); *Slocum v. United Pacific Insurance Co.*, 615 S.W.2d 807, 810 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.) (deviation to instruct jury on court's interpretation was proper).

If the court construes the meaning of a contract term, the jury should be given an instruction with that interpretation. See PJC 101.7.

The court also may submit a definition of a term not defined by the policy. *See, e.g., Nelson*, 361 S.W.2d at 706–07, 709 ("normal" and "partial collapse"); *Robinson v. Aetna Life Insurance Co.*, 276 S.W. 900, 902 (Tex. Comm'n App. 1925, judgm't adopted) ("apoplexy"); *Brooks v. Blue Ridge Insurance Co.*, 677 S.W.2d 646, 651–52 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.) ("tenant").

It is not error for the trial court to decline to submit definitions of common terms. *See Prudential Insurance Co. of America v. Uribe*, 595 S.W.2d 554, 563–64 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.) (trial court did not define "duties" or "passenger").

Causation. Insurance policies may cover losses "caused by," "resulting from," or "because of" a covered event or some other causation standard. The causation language should be modified to conform to the policy.

"Partly" or "solely"—concurrent causation, separate and independent causation, and allocation. Depending on the policy language, a loss may be covered if it is partially caused by a covered risk, even if damage was also caused by an excluded risk, to the extent the damage can be allocated between the causes. *See Utica National Insurance Co. of Texas v. American Indemnity Co.*, 141 S.W.3d 198, 204 (Tex. 2004). In cases involving separate and independent causation, the covered event and the excluded event each independently cause the plaintiff's injury, and the insurer must provide coverage despite the exclusion. *Utica National Insurance Co. of Texas*, 141 S.W.3d at 204. Under the concurrent causation doctrine, the excluded and covered events combine to cause the plaintiff's injuries. *Utica National Insurance Co. of Texas*, 141 S.W.3d at 204. Initially, the insured has the burden of pleading and proving facts that establish coverage under the terms of the policy. *Seger v. Yorkshire Insurance Co., Ltd.*, 503 S.W.3d 388, 400 (Tex. 2016); *JAW The Pointe, L.L.C. v. Lexington Insurance Co.*, 460 S.W.3d 597, 603 (Tex. 2015); *Utica National Insurance Co. of Texas*, 141 S.W.3d at 203. To avoid liability, the insurer then has the burden to plead and prove an exclusion, which is an affirmative defense. Tex. R. Civ. P. 94; Tex. Ins. Code § 554.002; *Seger*, 503 S.W.3d at 400; *Utica National Insurance Co. of Texas*, 141 S.W.3d at 204. To avoid coverage in situations involving multiple causes of liability or loss, the insurer may need to secure jury findings that determine the cause of the liability or loss, whether the liability or loss was caused solely by the excluded risk, or segregate the liability or loss caused by the insured peril from that caused by an excluded peril. *Utica National Insurance Co. of Texas*, 141 S.W.3d at 204. Proof of an affirmative defense includes proof of the extent of the defense. *See, e.g.,* PJC 115.8;

Cocke v. White, 697 S.W.2d 739, 744 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.); *R.A. Corbett Transport, Inc. v. Oden*, 678 S.W.2d 172, 176 (Tex. App.—Tyler 1984, no writ); *Copenhaver v. Berryman*, 602 S.W.2d 540, 544 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.). *Cf. Lyons v. Millers Casualty Insurance Co. of Texas*, 866 S.W.2d 597, 601 (Tex. 1993) (involving a case arising prior to the adoption of Tex. Ins. Code § 554.002 and holding that "[w]hen covered and excluded perils combine to cause an injury, the insured must present some evidence affording the jury a reasonable basis on which to allocate the damage."). PJC 101.58 allocates damages by asking the amount of damage caused by the covered peril and instructing the jury not to consider damage caused by an excluded peril.

If there is no question of covered versus excluded causes, it is unnecessary to include the words "partly" or "solely."

In other cases, policy language may provide that a loss is covered only if it is caused solely by a covered risk, exclusive of all other causes. *See, e.g., Meyer*, 502 S.W.2d at 677–79 (coverage for death resulting from bodily injury independent of all other causes); *JAW The Pointe, L.L.C.*, 460 S.W.3d at 608 (anti-concurrent-causation clause bars recovery where loss is concurrently caused by both covered and uncovered perils). In such a case the word "solely" should be included in the question and "partly" should not. In other cases, even an excluded loss may be covered to the extent that an exception to the exclusion reflected in the policy applies and reinstates coverage to the extent of that exception. In such a case, the insured bears the burden to prove the existence and extent of application of the exception to the exclusion. *Telepak*, 887 S.W.2d at 507–08.

Burden of proof—separate question for exclusions and other defenses. PJC 101.57 puts the burden of proof on the insured. A separate question could ask whether the loss resulted from an excluded cause or fit within some other limitation, avoidance, or defense. See PJC 101.59. Separate questions may be required, because the insured has the initial burden to show that a loss is covered, and then the insurer has the burden to establish any exclusions. *JAW The Pointe, L.L.C.*, 460 S.W.3d at 603; Tex. R. Civ. P. 94; Tex. Ins. Code § 554.002. The above question, placing the burden on the insured, would also be proper to submit any exception to an exclusion that would bring the loss back within coverage. *Telepak*, 887 S.W.2d at 507–08.

PJC 101.58 Insurance Contracts—Coverage and Damages Question—Specific Policy Language

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* [*unpaid*] damages [*, if any,*] [*that were caused (partly/solely) by/that resulted from/because of*] the [*description of covered loss, event, or cause*]?

[*Do not include in your answer damages, if any, caused by (description of excluded cause.)*]

[Insert other instructions and definitions, if appropriate.]

Answer in dollars and cents for damages, if any.

Answer: _____

COMMENT

When to use. PJC 101.58 determines the amount of damages, if any, caused by a covered event. If PJC 101.57 is submitted, PJC 101.58 should be predicated on a "Yes" answer to PJC 101.57.

PJC 101.58 may be submitted without PJC 101.57 when the parties' dispute focuses on whether a loss is covered or on the amount of the covered loss. Because PJC 101.58 does not ask whether the insurer failed to comply with the agreement, the question is proper without 101.57 only when it is stipulated or undisputed that, if there was a covered loss, the insurer breached the agreement by failing to pay it.

If damages are not disputed, the words *if any* should be omitted.

When an excluded cause would limit recovery, the trial court may submit the exclusion by instructing the jury not to include excluded damages. *Union Mutual Life Insurance Co. v. Meyer*, 502 S.W.2d 676, 679 (Tex. 1973) (trial court may submit exclusion by instruction). The "do not include" instruction should not be used in cases in which no excluded cause is at issue. The instruction also should not be used when an exclusion is not disputed but recovery is sought based on an exception to an exclusion.

The above question determines the amount of benefits, if any, owed under the policy, so a separate question on direct damages is not required. Additional questions are required for any alleged consequential damages and attorney's fees. Pattern questions are set out in PJC 115.3–115.5 and PJC 115.60.

Broad-form submission. PJC 101.58 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Multiple coverage provisions. If the loss is potentially covered by more than one policy provision, the question should be modified to include each disputed provision. Similarly, when more than one type of covered damage is alleged, the question may be modified to allow separate answers for the amount of each type of damage. See PJC 115.3.

Source of questions. The question is based on PJC 115.3, which submits contract damages. *See also Crisp v. Security National Insurance Co.*, 369 S.W.2d 326, 327–28 (Tex. 1963); *New York Underwriters Insurance Co. v. Coffman*, 540 S.W.2d 445, 453 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.); *Commercial Insurance Co. of Newark, N.J. v. Colvert*, 425 S.W.2d 34, 36–37 (Tex. Civ. App.—Fort Worth 1968, no writ).

When there is no dispute that the insurer's failure to pay would breach the contract if a certain loss or event occurred:

- The charge may ask about a disputed fact that determines coverage under specific policy language. *See, e.g., Houston Fire & Casualty Insurance Co. v. Walker*, 260 S.W.2d 600, 602 (Tex. 1953) (whether lightning struck tree); *Cox v. National Life & Accident Insurance Co.*, 420 S.W.2d 213, 215 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.) (whether insured was not in sound health).

- The charge may ask about a fact that determines coverage under a statutory provision. *See, e.g., Guevara v. Guevara*, No. 04-01-00326-CV, 2002 WL 562179, at *2 (Tex. App.—San Antonio Apr. 17, 2002, pet. denied) (not designated for publication) (whether beneficiary murdered insured, which under statute would forfeit benefits).

- The charge may ask whether an admitted event satisfies specific policy language. *See, e.g., Progressive County Mutual Insurance Co. v. Boyd*, 177 S.W.3d 919, 920 (Tex. 2005) (whether accident involved "uninsured motor vehicle").

The question is adapted from jury questions based on specific policy language mentioned in the following cases: *National Union Fire Insurance Co. of Pittsburgh v. Hudson Energy Co.*, 811 S.W.2d 552, 554–55 & n.3 (Tex. 1991); *Meyer*, 502 S.W.2d at 677–79; *Employers Mutual Casualty Co. of Des Moines, Iowa v. Nelson*, 361 S.W.2d 704, 706–07 (Tex. 1962); and *Telepak v. United Services Automobile Ass'n*, 887 S.W.2d 506, 507 (Tex. App.—San Antonio 1994, writ denied).

Causation. Insurance policies may cover losses "caused by," "resulting from," or "because of" a covered event or some other causation standard. The causation language should be modified to conform to the policy.

"Partly" or "solely"—concurrent causation, separate and independent causation, and allocation. Depending on the policy language, a loss may be covered if it is partially caused by a covered risk, even if damage was also caused by an excluded risk, to the extent the damage can be allocated between the causes. *See Utica National Insurance Co. of Texas v. American Indemnity Co.*, 141 S.W.3d 198, 204 (Tex. 2004). In cases involving separate and independent causation, the covered event and the excluded event each independently cause the plaintiff's injury, and the insurer must provide coverage despite the exclusion. *Utica National Insurance Co. of Texas*, 141 S.W.3d at 204. Under the concurrent causation doctrine, the excluded and covered events combine to cause the plaintiff's injuries. *Utica National Insurance Co. of Texas*, 141 S.W.3d at 204. Initially, the insured has the burden of pleading and proving facts that establish coverage under the terms of the policy. *Seger v. Yorkshire Insurance Co., Ltd.*, 503 S.W.3d 388, 400 (Tex. 2016); *JAW The Pointe, L.L.C. v. Lexington Insurance Co.*, 460 S.W.3d 597, 603 (Tex. 2015); *Utica National Insurance Co. of Texas*, 141 S.W.3d at 203. To avoid liability, the insurer then has the burden to plead and prove an exclusion, which is an affirmative defense. Tex. R. Civ. P. 94; Tex. Ins. Code § 554.002; *Seger*, 503 S.W.3d at 400; *Utica National Insurance Co. of Texas*, 141 S.W.3d at 204. To avoid coverage in situations involving multiple causes of liability or loss, the insurer may need to secure jury findings that determine the cause of the liability or loss, whether the liability or loss was caused solely by the excluded risk, or segregate the liability or loss caused by the insured peril from that caused by an excluded peril. *Utica National Insurance Co. of Texas*, 141 S.W.3d at 204. Proof of an affirmative defense includes proof of the extent of the defense. *See, e.g.*, PJC 115.8; *Cocke v. White*, 697 S.W.2d 739, 744 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.); *R.A. Corbett Transport, Inc. v. Oden*, 678 S.W.2d 172, 176 (Tex. App.—Tyler 1984, no writ); *Copenhaver v. Berryman*, 602 S.W.2d 540, 544 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.). *Cf. Lyons v. Millers Casualty Insurance Co. of Texas*, 866 S.W.2d 597, 601 (Tex. 1993) (involving a case arising prior to the adoption of Tex. Ins. Code § 554.002 and holding that "[w]hen covered and excluded perils combine to cause an injury, the insured must present some evidence affording the jury a reasonable basis on which to allocate the damage."). PJC 101.58 allocates damages by asking the amount of damage caused by the covered peril and instructing the jury not to consider damage caused by an excluded peril.

If there is no question of covered versus excluded causes, it is unnecessary to include the words "partly" or "solely."

In other cases, policy language may provide that a loss is covered only if it is caused solely by a covered risk, exclusive of all other causes. *See, e.g., Meyer*, 502 S.W.2d at 677–79 (coverage for death resulting from bodily injury independent of all other

causes); *JAW The Pointe, L.L.C.*, 460 S.W.3d at 608 (anti-concurrent-causation clause bars recovery where loss is concurrently caused by both covered and uncovered perils). In such a case the word "solely" should be included in the question and "partly" should not. In other cases, even an excluded loss may be covered to the extent that an exception to the exclusion reflected in the policy applies and reinstates coverage to the extent of that exception. In such a case, the insured bears the burden to prove the existence and extent of application of the exception to the exclusion. *Telepak*, 887 S.W.2d at 507–08.

Instructions based on policy language. The comments accompanying PJC 101.57 regarding the description of covered loss, instructions based on policy language, and instruction based on judicial construction or definition also apply to PJC 101.58.

"Do not include" instruction on excluded or paid damages. When an exclusion is at issue, the jury should be instructed not to include damages, if any, from the excluded cause. Any instruction should follow the policy language on which the insurer relied, subject to the other rules set out above.

When no exclusion is at issue, or when the dispute is over whether an exception to the exclusion applies, the "do not include" instruction should be omitted.

When the jury hears evidence that the insurer has partially paid the loss, the jury should be instructed not to include in its answer any sums that have already been paid, to avoid confusion about whether the insurer is entitled to or will receive a credit. Alternatively, the jury could simply be asked to determine the amount of *unpaid* damages.

Instructing jury on measure of damages. It may be appropriate to instruct the jury on the measure of damages under the applicable policy provision. *See U.S. Fire Insurance Co. v. Stricklin*, 556 S.W.2d 575, 582 (Tex. Civ. App.—Dallas 1977), *writ ref'd n.r.e.* 565 S.W.2d 43 (Tex. 1978) (where market value is proper measure of damages, trial court should instruct jury on difference in value as measure of damages); *Coffman*, 540 S.W.2d at 453 ("daily loss of rental income" defined); *Colvert*, 425 S.W.2d at 38 ("reasonable cash market value").

When a damage limitation in the policy is raised by the evidence, it is error not to instruct the jury. *Hibernia Insurance Co. v. Starr*, 13 S.W. 1017, 1017 (Tex. 1890). It is also error not to instruct the jury on failure to mitigate when raised by the evidence. *Eagle Star & British Dominions Insurance Co. of London v. Head*, 47 S.W.2d 625, 630 (Tex. Civ. App.—Amarillo 1932, writ dism'd w.o.j.). A defensive mitigation instruction is found at PJC 115.8.

Many property policies impose a duty on the insured after a loss to protect the property from further damage and make reasonable and necessary repairs to protect the property. *See Carrizales v. State Farm Lloyds*, 518 F.3d 343, 349–50 (5th Cir. 2008) (construing Texas law). Mitigation costs, therefore, are a recoverable element of dam-

ages, as in other contract cases. PJC 115.4 provides an instruction for recovering mitigation expenses.

Burden of proof—separate question for exclusions and other defenses. PJC 101.58 puts the burden of proof on the insured. A separate question could ask whether the loss resulted from an excluded cause or fit within some other limitation, avoidance, or defense. See PJC 101.59. Separate questions may be required, because the insured has the initial burden to show that a loss is covered, and then the insurer has the burden to establish any exclusions. *JAW The Pointe, L.L.C.*, 460 S.W.3d at 603; Tex. R. Civ. P. 94; Tex. Ins. Code § 554.002. The above question, placing the burden on the insured, would also be proper to submit any exception to an exclusion that would bring the loss back within coverage. *Telepak*, 887 S.W.2d at 507–08.

PJC 101.59 Insurance Contracts—Exclusions, Limitations, Avoidance, and Other Affirmative Defenses—Specific Policy Language

QUESTION _____

[*Were Paul Payne's damages*] [*Was the (loss) (event) (other description)*] [, *if any,*] caused [*partly or solely*] *by* [*description of excluded cause*]?

[Insert instructions and definitions, if appropriate.]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. An insurer has the burden to plead and prove any exclusion, limitation, avoidance, or other affirmative defense. Tex. R. Civ. P. 94; Tex. Ins. Code § 554.002. The submission of a policy exclusion may require a separate question. *Union Mutual Life Insurance Co. v. Meyer*, 502 S.W.2d 676, 679 (Tex. 1973). When the insurer's exclusion, limitation, or other defense to coverage would be a complete bar to recovery, this question would be proper to submit the defense. When the defense merely limits recovery, PJC 101.58 should be used to allocate damages between covered and excluded causes. The proper sequence of these questions may depend on the facts of the particular case.

When it is stipulated or undisputed that the insurer is liable for a certain amount of damages under the agreement unless the jury finds an exclusion or other defense, this question is sufficient to determine liability and damages. When liability or damages are otherwise disputed, the insured should also submit and obtain findings on affirmative issues as in PJC 101.57 and 101.58.

If damages are not disputed, the words *if any* should be omitted.

Broad-form submission. PJC 101.59 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")).

Defenses. The general PJC contract questions submit defenses by asking whether the failure to comply was "excused" and then instructing on excuses, such as the plain-

tiff's material breach, anticipatory repudiation, waiver, estoppel, duress, mistake, and so forth. See PJC 101.21–101.42. The question could be modified to ask about any defense that would excuse the insurer from payment, other than a policy exclusion (see the question above) or the failure of the insured to perform a condition or covenant (see PJC 101.60):

QUESTION _____

Was *Insurer, Inc.*'s failure to comply excused?

[*For its failure to comply to be excused, Insurer, Inc. must show (insert exception, limitation, avoidance, or other affirmative defense).*]

Answer "Yes" or "No."

Answer: _____

Instruction on exclusion or limitation. When the evidence raises an exclusion or limitation on liability, the court should give a proper instruction. *Hibernia Insurance Co. v. Starr*, 13 S.W. 1017, 1017 (Tex. 1890).

When submitting specific questions based on policy exclusions, it may be necessary to instruct the jury on judicial interpretation of specific policy language. For example, in *Aetna Life Insurance Co. v. McLaughlin*, 380 S.W.2d 101, 102 (Tex. 1964), the supreme court decided which rule to follow in determining whether suicide by the insured barred recovery under an accidental death policy. After adopting the majority rule, the court held that the trial court's instruction following the minority rule was erroneous. *McLaughlin*, 380 S.W.2d at 105. *See also Republic National Life Insurance Co. v. Heyward*, 536 S.W.2d 549, 556–57 (Tex. 1976) (eliminating the distinction between "accidental death" and "death by accidental means").

"Partly" or "solely"—concurrent causation, separate and independent causation, and allocation. Depending on the policy language, a loss may be covered if it is partially caused by a covered risk, even if damage was also caused by an excluded risk, to the extent the damage can be allocated between the causes. *See Utica National Insurance Co. of Texas v. American Indemnity Co.*, 141 S.W.3d 198, 204 (Tex. 2004). In cases involving separate and independent causation, the covered event and the excluded event each independently cause the plaintiff's injury, and the insurer must provide coverage despite the exclusion. *Utica National Insurance Co. of Texas*, 141 S.W.3d at 204. Under the concurrent causation doctrine, the excluded and covered events combine to cause the plaintiff's injuries. *Utica National Insurance Co. of Texas*, 141 S.W.3d at 204. Initially, the insured has the burden of pleading and proving facts that establish coverage under the terms of the policy. *Seger v. Yorkshire Insurance Co., Ltd.*, 503 S.W.3d 388, 400 (Tex. 2016); *JAW The Pointe, L.L.C. v. Lexington*

Insurance Co., 460 S.W.3d 597, 603 (Tex. 2015); *Utica National Insurance Co. of Texas*, 141 S.W.3d at 203. To avoid liability, the insurer then has the burden to plead and prove an exclusion, which is an affirmative defense. Tex. R. Civ. P. 94; Tex. Ins. Code § 554.002; *Seger*, 503 S.W.3d at 400; *Utica National Insurance Co. of Texas*, 141 S.W.3d at 204. To avoid coverage in situations involving multiple causes of liability or loss, the insurer may need to secure jury findings that determine the cause of the liability or loss, whether the liability or loss was caused solely by the excluded risk, or segregate the liability or loss caused by the insured peril from that caused by an excluded peril. *Utica National Insurance Co. of Texas*, 141 S.W.3d at 204. Proof of an affirmative defense includes proof of the extent of the defense. *See, e.g.*, PJC 115.8; *Cocke v. White*, 697 S.W.2d 739, 744 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.); *R.A. Corbett Transport, Inc. v. Oden*, 678 S.W.2d 172, 176 (Tex. App.—Tyler 1984, no writ); *Copenhaver v. Berryman*, 602 S.W.2d 540, 544 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.). *Cf. Lyons v. Millers Casualty Insurance Co. of Texas*, 866 S.W.2d 597, 601 (Tex. 1993) (involving a case arising prior to the adoption of Tex. Ins. Code § 554.002 and holding that "[w]hen covered and excluded perils combine to cause an injury, the insured must present some evidence affording the jury a reasonable basis on which to allocate the damage."). PJC 101.58 allocates damages by asking the amount of damage caused by the covered peril and instructing the jury not to consider damage caused by an excluded peril.

If there is no question of covered versus excluded causes, it is unnecessary to include the words "partly" or "solely."

In other cases, policy language may provide that a loss is covered only if it is caused solely by a covered risk, exclusive of all other causes. *See, e.g., Meyer*, 502 S.W.2d at 677–79 (coverage for death resulting from bodily injury independent of all other causes); *JAW The Pointe, L.L.C.*, 460 S.W.3d at 608 (anti-concurrent-causation clause bars recovery where loss is concurrently caused by both covered and uncovered perils). In such a case the word "solely" should be included in the question and "partly" should not. In other cases, even an excluded loss may be covered to the extent that an exception to the exclusion reflected in the policy applies and reinstates coverage to the extent of that exception. In such a case, the insured bears the burden to prove the existence and extent of application of the exception to the exclusion. *Telepak*, 887 S.W.2d at 507–08.

PJC 101.60 Insurance Contracts—Conditions Precedent and Prejudice (Comment)

Burden of proving compliance. "A party seeking to recover under a contract bears the burden of proving that all conditions precedent have been satisfied." *Associated Indemnity Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 283 (Tex. 1998). "Conversely, if an express condition is not satisfied, then the party whose performance is conditioned is excused from any obligation to perform." *Solar Applications Engineering, Inc. v. T.A. Operating Corp.*, 327 S.W.3d 104, 108 (Tex. 2010); *see Harwell v. State Farm Mutual Automobile Insurance Co.*, 896 S.W.2d 170, 173–74 (Tex. 1995).

Conditions precedent defined; creation of condition precedent; conditions not favored. These principles are discussed at PJC 101.6.

Prejudice—burden of proof. An insured's failure to comply with a condition precedent does not relieve the insurer of liability unless that failure prejudices the insurer, and the insurer has the burden to show prejudice. *Prodigy Communications Corp. v. Agricultural Excess & Surplus Insurance Co.*, 288 S.W.3d 374, 382–83 (Tex. 2009); *PAJ, Inc. v. Hanover Insurance Co.*, 243 S.W.3d 630, 636–37 (Tex. 2008); *Harwell*, 896 S.W.2d at 174.

Form of questions. If there is a fact issue about whether the insured complied with a condition precedent, a question similar to PJC 101.57 and 101.58 that tracks the contract language and places the burden on the insured should be submitted:

QUESTION _____

Did Paul Payne [*notify the insurer of the suit/give notice of the claim as soon as practicable/etc.*]?

See Prodigy Communications Corp., 288 S.W.3d at 382–83; *Harwell*, 896 S.W.2d at 174.

If raised by the evidence, a question asking whether the insurer was prejudiced should be submitted, conditioned on a finding that the insured failed to comply. *See Prodigy Communications Corp.*, 288 S.W.3d at 382–83; *Harwell*, 896 S.W.2d at 174.

QUESTION _____

Was *Insurer, Inc.* prejudiced by *Paul Payne*'s failure to [*notify the insurer of the suit/give notice of the claim as soon as practicable/etc.*]?

When to use. These questions would be proper if failure to comply with a condition precedent precludes liability. When the remedy for failure to comply with a condition precedent is abatement, the matter would be handled before trial, so no jury

question should be submitted. *See Philadelphia Underwriters' Agency of Fire Insurance Ass'n of Philadelphia v. Driggers*, 238 S.W. 633, 635 (Tex. 1922) (failure to submit to examination after loss did not bar recovery but merely suspended right until complied with); *see also In re Cypress Texas Lloyds*, 437 S.W.3d 1, 15 (Tex. App.—Corpus Christi 2011, orig. proceeding) (insurer's remedy to enforce condition precedent requiring examination is abatement).

Instructions based on policy language. The principles regarding tracking policy language found in PJC 101.57–101.59 should be followed. *See, e.g., League City v. Texas Windstorm Insurance Ass'n*, No. 01-15-00117-CV, 2017 WL 405816, at *5 (Tex. App.—Houston [1st Dist.] Jan. 31, 2017, no pet.) (mem. op.) (approving jury question regarding prejudice).

Excuse. If the court determines that the insurance case presents an instance in which failure to comply with the condition precedent may be excused, the court should charge the jury with the elements of excuse. *See, e.g., Employers Casualty Co. v. Scott Electric*, 513 S.W.2d 642, 645 (Tex. Civ. App.—Corpus Christi 1974, no writ); *Proctor v. Southland Life Insurance Co.*, 522 S.W.2d 261, 265 (Tex. Civ. App—Fort Worth 1975, writ ref'd n.r.e.); *Dairyland County Mutual Insurance Co. v. Roman*, 486 S.W.2d 847 (Tex. Civ. App.—San Antonio 1972), *aff'd*, 498 S.W.2d 154 (Tex. 1973).

[PJC 102.15 is reserved for expansion.]

PJC 102.1 Question and Instructions on False, Misleading, or Deceptive Act or Practice (DTPA § 17.46(b))

QUESTION _____

Did *Don Davis* engage in any false, misleading, or deceptive act or practice that *Paul Payne* relied on to *his* detriment and that was a producing cause of damages to *Paul Payne*?

"Producing cause" means a cause that was a substantial factor in bringing about the damages, if any, and without which the damages would not have occurred. There may be more than one producing cause.

"False, misleading, or deceptive act or practice" means any of the following:

[Insert appropriate instructions.]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 102.1 is a basic question that should be appropriate in most cases brought under section 17.46(b) of the Texas Deceptive Trade Practices–Consumer Protection Act (Tex. Bus. & Com. Code §§ 17.41–.63) (DTPA). *See Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 824 n.6 (Tex. 2012) (noting PJC 102.1). Questions for other causes of action based on the DTPA or the Insurance Code may be found at PJC 102.7 (unconscionable action), 102.8 (warranty), 102.14 (Insurance Code), and 102.21 (knowing or intentional conduct).

Accompanying instructions. Instructions to accompany PJC 102.1, informing the jury what type of conduct should be considered under the question, are at PJC 102.2–102.6. If more than one instruction is used, each must be separated by the word *or*, because a finding of any one of the acts or practices defined in the instructions would support recovery under the DTPA.

"Producing cause." Under section 17.50(a) of the DTPA, a "consumer may maintain an action where any of the following constitute a *producing cause*" of actual damages. DTPA § 17.50(a) (emphasis added). The definition of "producing cause" is from *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007) (stating that "[d]efining producing cause as being a substantial factor in bringing about an injury, and without which the injury would not have occurred . . . is the definition that should be given in the jury charge"). "For DTPA violations," the Texas Supreme Court has repeatedly

reaffirmed that "only producing cause must be shown." *Transcontinental Insurance Co. v. Crump*, 330 S.W.3d 211, 223 (Tex. 2010) (quoting *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995)). In *Ledesma*, the supreme court explained that, "[t]o say that a producing cause is 'an efficient, exciting, or contributing cause that, in a natural sequence, produces the incident in question' is incomplete and, more importantly, provides little concrete guidance . . . [and] little practical help" to modern jurors. *Ledesma*, 242 S.W.3d at 46. The supreme court subsequently clarified *Ledesma* in *Transcontinental Insurance Co.*, wherein it reasoned that, although "the use of the 'efficient, exciting, or contributing cause' language" to define producing cause "is not, in itself, error," the supreme court believes "those terms ought not to be used to define producing cause in the future." *Transcontinental Insurance Co.*, 330 S.W.3d at 223–24 & n.12.

Broad-form submission. PJC 102.1 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). In *Crown Life Insurance Co. v. Casteel*, the supreme court reviewed a charge that included five DTPA "laundry-list" theories of liability incorporated into a single question submitting an article 21.21 claim. *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378, 386–88 (Tex. 2000). The supreme court held that it was error to submit four of the five DTPA-based theories of liability because Casteel did not possess the requisite consumer status to maintain an article 21.21 claim. *Casteel*, 22 S.W.3d at 388. Most importantly, the supreme court decided that this error should be presumed to be harmful when a single broad-form liability question commingles valid and invalid theories of liability such that it cannot be determined whether the improperly submitted theories formed the sole basis for the jury's finding. *Casteel*, 22 S.W.3d at 388–89. For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Knowing or intentional conduct. If the defendant is found to have knowingly or intentionally engaged in any false, misleading, or deceptive conduct, the DTPA provides for additional damages. DTPA § 17.50(b)(1). See PJC 102.21 for a question on knowing or intentional conduct and PJC 115.11 for a question on additional damages.

Vicarious liability. If the issue is the vicarious liability of one for another's conduct, see *Celtic Life Insurance Co. v. Coats*, 885 S.W.2d 96, 98–99 (Tex. 1994); *Royal Globe Insurance Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 693–95 (Tex. 1979) (discussing principal's liability for acts of agent in DTPA and Insurance Code case under the previous "adversely affected" standard); and *Southwestern Bell Telephone Co. v. Wilson*, 768 S.W.2d 755, 759 (Tex. App.—Corpus Christi 1988, writ denied) (citing *Aetna Casualty & Surety Co. v. Love*, 121 S.W.2d 986, 990 (Tex. 1938)) (com-

pany liable for unreasonable collection efforts of outside attorneys that "were committed for the purpose of accomplishing the mission entrusted to the attorneys").

PJC 102.2 Description of Goods or Services or Affiliation of Persons (DTPA § 17.46(b)(5))

Representing that *goods* [*or services*] had or would have *characteristics* that they did not have [*or*]

COMMENT

When to use. PJC 102.2 is designed to accompany the question in PJC 102.1 to submit a cause of action based on Tex. Bus. & Com. Code § 17.46(b)(5) (DTPA).

Use of "or." If used with other instructions (see PJC 102.3–102.6), PJC 102.2 must be followed by the word *or*, because a finding of any one of the acts or practices defined in the instructions would support recovery under the DTPA.

Source of instruction. DTPA § 17.46(b)(5) prohibits "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which the person does not."

Use of statutory language. The supreme court has held that jury submissions of section 17.46(b) cases should follow the language of the statute as closely as possible but may be altered somewhat to conform to the evidence of the case. *Spencer v. Eagle Star Insurance Co. of America*, 876 S.W.2d 154, 157 (Tex. 1994); *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980); *accord Regal Finance Co., Ltd. v. Tex Star Motors, Inc.*, 355 S.W.3d 595, 601 (Tex. 2010) (adopting *Spencer* and *Brown* in a UCC article 9 case). Thus, if appropriate, the word *characteristics* may be replaced with the word *sponsorship*, *approval*, *ingredients*, *uses*, *benefits*, or *quantities*. *See* DTPA § 17.46(b)(5); *Brown*, 601 S.W.2d at 937 Material terms, however, should not be omitted or substituted. *See Transport Insurance Co. v. Faircloth*, 898 S.W.2d 269, 273 (Tex. 1995) (construing DTPA section 17.46(b)(23), renumbered in 2001 as DTPA § 17.46(b)(24)).

Affiliation of person. If deception regarding a person's affiliation is claimed, PJC 102.2 may be reworded as follows:

> Representing that a *person* had or would have *a sponsorship* that the *person* does not or will not have.

Substitutions for "sponsorship." In an appropriate case, the word *sponsorship* may be replaced with *approval*, *status*, *affiliation*, or *connection*. *See* DTPA § 17.46(b)(5).

"Person" includes business entity. Under the DTPA, the word *person* includes a business entity. DTPA § 17.45(3). In a case in which a business entity is involved,

however, it may be advisable either to include the statutory definition in the charge or to substitute the name of the entity for the word *person*.

Affiliation of person. The use of the word *goods* in PJC 102.2 is intended to cover real property. *See* DTPA § 17.45(1). If real estate is involved, however, it may be advisable either to include the statutory definition in the charge or to substitute a reference to the real estate in question for the word *goods*.

Misrepresentations about future characteristics, uses, or benefits. Although not appearing in the statute, the words "would have" are used in PJC 102.2. The Committee believes this use to be appropriate under *Brown*, 601 S.W.2d at 937, and *Smith v. Baldwin*, 611 S.W.2d 611, 614–16 (Tex. 1980) (representation need not be untrue when made: DTPA § 17.46(b) applies to misrepresentations about the future as well as about the present).

PJC 102.3 Quality of Goods or Services (DTPA § 17.46(b)(7))

Representing that *goods* [*or services*] are or will be of a particular *quality* if they were of another [*or*]

COMMENT

When to use. PJC 102.3 should be used with PJC 102.1 to submit a cause of action under Tex. Bus. & Com. Code § 17.46(b)(7) (DTPA).

Use of "or." If used with other instructions (see PJC 102.2 and 102.4–102.6), PJC 102.3 must be followed by the word *or*, because a finding of any one of the acts or practices defined in the instructions would support recovery under the DTPA.

Source of instruction. DTPA § 17.46(b)(7) prohibits "representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another."

Use of statutory language. The supreme court has held that jury submissions of section 17.46(b) cases should follow the language of the statute as closely as possible but may be altered somewhat to conform to the evidence of the case. *Spencer v. Eagle Star Insurance Co. of America*, 876 S.W.2d 154, 157 (Tex. 1994); *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980); *accord Regal Finance Co., Ltd. v. Tex Star Motors, Inc.*, 355 S.W.3d 595, 601 (Tex. 2010) (adopting *Spencer* and *Brown* in a UCC article 9 case). Thus, if appropriate, the word *quality* may be replaced with the word *standard* or *grade*, and, if only goods and not services are involved, the word *style* or *model* may replace the word *quality*. *See* DTPA § 17.46(b)(7); *Brown*, 601 S.W.2d at 937. Material terms, however, should not be omitted or substituted. *See Transport Insurance Co. v. Faircloth*, 898 S.W.2d 269, 273 (Tex. 1995) (construing DTPA section 17.46(b)(23), renumbered in 2001 as DTPA § 17.46(b)(24)).

"Goods" includes real estate. The use of the word *goods* in PJC 102.3 is intended to cover real property. *See* DTPA § 17.45(1). If real estate is involved, however, it may be advisable either to include the statutory definition in the charge or to substitute a reference to the real estate in question for the word *goods*.

Misrepresentations about future quality. Although not appearing in the statute, the words "will be" are used in PJC 102.3. The Committee believes this use to be appropriate under *Brown*, 601 S.W.2d at 937, and *Smith v. Baldwin*, 611 S.W.2d 611, 614–16 (Tex. 1980) (representation need not be untrue when made: DTPA § 17.46(b) applies to misrepresentations concerning both present and future quality of goods or services).

PJC 102.4 Misrepresented and Unlawful Agreements (DTPA § 17.46(b)(12))

Representing that an agreement confers or involves *rights* that it did not have or involve [*or*]

COMMENT

When to use. PJC 102.4 should be used with PJC 102.1 to submit a cause of action under Tex. Bus. & Com. Code § 17.46(b)(12) (DTPA).

Use of "or." If used with other instructions (see PJC 102.2–102.3 and 102.5–102.6), PJC 102.4 must be followed by the word *or*, because a finding of any one of the acts or practices defined in the instructions would support recovery under the DTPA.

Source of instruction. DTPA § 17.46(b)(12) prohibits "representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law."

Use of statutory language. The supreme court has held that jury submissions of section 17.46(b) cases should follow the language of the statute as closely as possible but may be altered somewhat to conform to the evidence of the case. *Spencer v. Eagle Star Insurance Co. of America*, 876 S.W.2d 154, 157 (Tex. 1994); *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980); *accord Regal Finance Co., Ltd. v. Tex Star Motors, Inc.*, 355 S.W.3d 595, 601 (Tex. 2010) (adopting *Spencer* and *Brown* in a UCC article 9 case). Thus, if appropriate, the word *remedies* or *obligations* may be added to or substituted for the word *rights* in the above instruction. *See* DTPA § 17.46(b)(12); *Brown*, 601 S.W.2d at 937. Material terms, however, should not be omitted or substituted. *See Transport Insurance Co. v. Faircloth*, 898 S.W.2d 269, 273 (Tex. 1995) (construing DTPA section 17.46(b)(23), renumbered in 2001 as DTPA § 17.46(b)(24)).

Misrepresentations about the future. A representation need not be untrue when made. Because DTPA § 17.46(b) applies to misrepresentations about the future as well as about the present, misrepresentations of present and future rights are covered by this instruction. *See Smith v. Baldwin*, 611 S.W.2d 611, 614–16 (Tex. 1980).

Unlawful agreement. DTPA § 17.46(b)(12) also prohibits representing that an agreement has terms that are "prohibited by law." Because the Committee believes that the question of what is prohibited by law would be for the court, the jury would be asked only whether the representation occurred. In such a case, the question might include:

Representing that an agreement confers or involves [*insert particular right, remedy, or obligation found to be unlawful*].

PJC 102.5 Failure to Disclose Information (DTPA § 17.46(b)(24))

Failing to disclose information about *goods* [*or services*] that was known at the time of the transaction with the intention to induce *Paul Payne* into a transaction *he* otherwise would not have entered into if the information had been disclosed [*or*]

COMMENT

When to use. PJC 102.5 should be used with PJC 102.1 to submit a cause of action under Tex. Bus. & Com. Code § 17.46(b)(24) (DTPA).

Use of "or." If used with other instructions (see PJC 102.2–102.4 and 102.6), PJC 102.5 must be followed by the word *or*, because a finding of any one of the acts or practices defined in the instructions would support recovery under the DTPA.

Source of instruction. DTPA § 17.46(b)(24) makes it a deceptive trade practice to fail "to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed."

Use of statutory language. The supreme court has held that jury submissions of section 17.46(b) cases should follow the language of the statute as closely as possible but may be altered somewhat to conform to the evidence of the case. *Spencer v. Eagle Star Insurance Co. of America*, 876 S.W.2d 154, 157 (Tex. 1994); *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980); *accord Regal Finance Co., Ltd. v. Tex Star Motors, Inc.*, 355 S.W.3d 595, 601 (Tex. 2010) (adopting *Spencer* and *Brown* in a UCC article 9 case). Material terms, however, should not be omitted or substituted. *See Transport Insurance Co. v. Faircloth*, 898 S.W.2d 269, 273 (Tex. 1995) (construing DTPA section 17.46(b)(23), renumbered in 2001 as DTPA § 17.46(b)(24)).

"Goods" includes real estate. The use of the word *goods* in PJC 102.5 is intended to cover real property. *See* DTPA § 17.45(1). If real estate is involved, however, it may be advisable either to include the statutory definition in the charge or to substitute a reference to the real estate in question for the word *goods*.

PJC 102.6 Other "Laundry List" Violations (DTPA § 17.46(b)) (Comment)

PJC 102.2–102.5 provide patterns for submitting the most frequently litigated claims under section 17.46(b). *See* Tex. Bus. & Com. Code § 17.46(b)(5), (7), (12), (24) (DTPA). However, a claim arising under any other subsection of section 17.46(b) may be handled in the same manner—for example, by adapting the statutory language to the facts of the case in the form of an instruction to be submitted with PJC 102.1.

PJC 102.7 Question and Instructions on Unconscionable Action or Course of Action (DTPA §§ 17.50(a)(3) and 17.45(5))

QUESTION _____

Did *Don Davis* engage in any unconscionable action or course of action that was a producing cause of damages to *Paul Payne*?

"Producing cause" means a cause that was a substantial factor in bringing about the damages, if any, and without which the damages would not have occurred. There may be more than one producing cause.

An unconscionable action or course of action is an act or practice that, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 102.7 is to be used with PJC 102.1 to submit a claim based on Tex. Bus. & Com. Code § 17.50(a)(3) (DTPA). This statute gives a consumer a cause of action for "any unconscionable action or course of action by any person." The definition of "unconscionable action or course of action" is derived from DTPA § 17.45(5). Questions for other causes of action based on the DTPA or the Insurance Code may be found at PJC 102.1 (false, misleading, or deceptive act or practice), 102.8 (warranty), 102.14 (Insurance Code), and 102.21 (knowing or intentional conduct).

"Producing cause." Under section 17.50(a) of the DTPA, a "consumer may maintain an action where any of the following constitute a *producing cause*" of actual damages. DTPA § 17.50(a) (emphasis added). The definition of "producing cause" is from *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007) (stating that "[d]efining producing cause as being a substantial factor in bringing about an injury, and without which the injury would not have occurred . . . is the definition that should be given in the jury charge"). "For DTPA violations," the Texas Supreme Court has repeatedly reaffirmed that "only producing cause must be shown." *Transcontinental Insurance Co. v. Crump*, 330 S.W.3d 211, 223 (Tex. 2010) (quoting *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995)). In *Ledesma*, the supreme court explained that, "[t]o say that a producing cause is 'an efficient, exciting, or contributing cause that, in a natural sequence, produces the incident in question' is incomplete and, more importantly, provides little concrete guidance . . .

[and] little practical help" to modern jurors. *Ledesma*, 242 S.W.3d at 46. The supreme court subsequently clarified *Ledesma* in *Transcontinental Insurance Co.*, wherein it reasoned that, although "the use of the 'efficient, exciting, or contributing cause' language" to define producing cause "is not, in itself, error," the supreme court believes "those terms ought not to be used to define producing cause in the future." *Transcontinental Insurance Co.*, 330 S.W.3d at 223–24 & n.12.

Broad-form submission. PJC 102.7 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Knowing or intentional conduct. If the defendant is found to have knowingly or intentionally engaged in any false, misleading, or deceptive conduct, the DTPA provides for additional damages. DTPA § 17.50(b)(1). See PJC 102.21 for a question on knowing or intentional conduct and PJC 115.11 for a question on additional damages.

Vicarious liability. If the issue is the vicarious liability of one for another's conduct, see *Celtic Life Insurance Co. v. Coats*, 885 S.W.2d 96, 98–99 (Tex. 1994); *Royal Globe Insurance Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 693–95 (Tex. 1979) (discussing principal's liability for acts of agent in DTPA and Insurance Code case under the previous "adversely affected" standard); and *Southwestern Bell Telephone Co. v. Wilson*, 768 S.W.2d 755, 759 (Tex. App.—Corpus Christi 1988, writ denied) (citing *Aetna Casualty & Surety Co. v. Love*, 121 S.W.2d 986, 990 (Tex. 1938)) (company liable for unreasonable collection efforts of outside attorneys that "were committed for the purpose of accomplishing the mission entrusted to the attorneys").

PJC 102.8 Question and Instructions on Warranty (DTPA § 17.50(a)(2); Tex. UCC §§ 2.313–.315)

QUESTION _____

Was the failure, if any, of *Don Davis* to comply with a warranty a producing cause of damages to *Paul Payne*?

"Producing cause" means a cause that was a substantial factor in bringing about the damages, if any, and without which the damages would not have occurred. There may be more than one producing cause.

"Failure to comply with a warranty" means any of the following:

[Insert appropriate instructions.]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 102.8 is a basic question that should be appropriate in most cases brought under Tex. Bus. & Com. Code § 17.50(a)(2) (DTPA). *See also* Tex. Bus. & Com. Code §§ 2.313–.315 (Tex. UCC). Questions for other causes of action based on the DTPA or the Insurance Code may be found at PJC 102.1 (false, misleading, or deceptive act or practice), 102.7 (unconscionable action), 102.14 (Insurance Code), and 102.21 (knowing or intentional conduct).

Accompanying instructions. Instructions to accompany PJC 102.8, informing the jury what type of conduct should be considered under the question, are at PJC 102.9–102.13. If more than one instruction is used, each must be separated by the word *or*, because a finding of any one of the acts or practices defined in the instructions would support recovery under the DTPA.

Creation of warranty. The DTPA does not define "warranty." Nor does it create any warranties; therefore, any warranty must be established independently of the Act. *Melody Home Manufacturing Co. v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987) (citing *La Sara Grain Co. v. First National Bank of Mercedes*, 673 S.W.2d 558, 565 (Tex. 1984)).

"Producing cause." Under section 17.50(a) of the DTPA, a "consumer may maintain an action where any of the following constitute a *producing cause*" of actual damages. DTPA § 17.50(a) (emphasis added). The definition of "producing cause" is from *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007) (stating that "[d]efin-

ing producing cause as being a substantial factor in bringing about an injury, and without which the injury would not have occurred . . . is the definition that should be given in the jury charge"). "For DTPA violations," the Texas Supreme Court has repeatedly reaffirmed that "only producing cause must be shown." *Transcontinental Insurance Co. v. Crump*, 330 S.W.3d 211, 223 (Tex. 2010) (quoting *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995)). In *Ledesma*, the supreme court explained that, "[t]o say that a producing cause is 'an efficient, exciting, or contributing cause that, in a natural sequence, produces the incident in question' is incomplete and, more importantly, provides little concrete guidance . . . [and] little practical help" to modern jurors. *Ledesma*, 242 S.W.3d at 46. The supreme court subsequently clarified *Ledesma* in *Transcontinental Insurance Co.*, wherein it reasoned that, although "the use of the 'efficient, exciting, or contributing cause' language" to define producing cause "is not, in itself, error," the supreme court believes "those terms ought not to be used to define producing cause in the future." *Transcontinental Insurance Co.*, 330 S.W.3d at 223–24 & n.12.

Broad-form submission. PJC 102.8 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Knowing or intentional conduct. If the defendant is found to have knowingly or intentionally engaged in any false, misleading, or deceptive conduct, the DTPA provides for additional damages. DTPA § 17.50(b)(1). See PJC 102.21 for a question on knowing or intentional conduct and PJC 115.11 for a question on additional damages.

Vicarious liability. If the issue is the vicarious liability of one for another's conduct, see *Celtic Life Insurance Co. v. Coats*, 885 S.W.2d 96, 98–99 (Tex. 1994); *Royal Globe Insurance Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 693–95 (Tex. 1979) (discussing principal's liability for acts of agent in DTPA and Insurance Code case under the previous "adversely affected" standard); and *Southwestern Bell Telephone Co. v. Wilson*, 768 S.W.2d 755, 759 (Tex. App.—Corpus Christi 1988, writ denied) (citing *Aetna Casualty & Surety Co. v. Love*, 121 S.W.2d 986, 990 (Tex. 1938)) (company liable for unreasonable collection efforts of outside attorneys that "were committed for the purpose of accomplishing the mission entrusted to the attorneys").

PJC 102.9 Express Warranty—Goods or Services (DTPA § 17.50(a)(2); Tex. UCC § 2.313)

Failing to comply with an express warranty.

An express warranty is any affirmation of fact or promise made by *Don Davis* that relates to the [*describe particular goods*] and becomes part of the basis of the bargain. It is not necessary that formal words such as "warrant" or "guarantee" be used or that there be a specific intent to make a warranty.

[or]

COMMENT

When to use. PJC 102.9 may be used with PJC 102.8 to submit a claim of breach of express warranty involving the sale of goods. *See* Tex. Bus. & Com. Code § 17.50(a)(2) (DTPA); *see also* Tex. Bus. & Com. Code § 2.313 (Tex. UCC) (creation of express warranty).

Use of "or." If used with other instructions (see PJC 102.10–102.13), PJC 102.9 must be followed by the word *or*, because a finding of any one of the acts or practices defined in the instructions would support recovery under the DTPA.

Creation of warranty. The DTPA does not define "warranty." Nor does it create any warranties; therefore, any warranty must be established independently of the Act. *Melody Home Manufacturing Co. v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987) (citing *La Sara Grain Co. v. First National Bank of Mercedes*, 673 S.W.2d 558, 565 (Tex. 1984)).

Goods or services. The Uniform Commercial Code defines and creates warranties in the sale of goods. Tex. UCC § 2.313. It defines "goods" as "all things . . . movable at the time of identification to the contract for sale" and "the unborn young of animals and growing crops and other identified things attached to realty." Tex. UCC § 2.105(a). The DTPA, however, has a broader definition of "goods" in that it includes real estate. DTPA § 17.45(1) ("goods" means tangible chattels or real property purchased or leased for use). The DTPA also includes services. DTPA § 17.45(2).

There are no decisions compelling the use of the UCC definition of express warranty set forth in PJC 102.9 in a nongoods case. In *Southwestern Bell Telephone Co. v. FDP Corp.*, 811 S.W.2d 572, 574 (Tex. 1991), the supreme court stated that because "sale of advertising is predominantly a service transaction, not a sale of goods, the warranty provisions of Article Two of the [UCC] do not explicitly govern this case." The court also stated that "although the case at bar involves a service transaction, reference to the Code is instructive." *Southwestern Bell Telephone Co.*, 811 S.W.2d at

575. The Committee expresses no opinion on whether the above definition should be used in nongoods cases.

Affirmation merely of value of goods. A mere affirmation of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty. Tex. UCC § 2.313(b).

Superior knowledge. If the seller has knowledge superior to that of the consumer, however, such an affirmation may create a warranty. *Valley Datsun v. Martinez*, 578 S.W.2d 485, 490 (Tex. Civ. App.—Corpus Christi 1979, no writ) (seller's knowledge, in conjunction with buyer's ignorance, operated to "make the slightest divergence from mere praise into representations of fact" and create warranty). In a case in which the issue is in dispute, the jury might be asked whether the defendant *had* such knowledge:

> Did *Don Davis* have, or purport to have, superior knowledge of the subject matter of any misrepresentation that you have found was a producing cause of *Paul Payne*'s damages?
>
> *Don Davis* had superior knowledge of the subject matter if *his* knowledge or information regarding that subject matter was superior to that possessed by *Paul Payne* and *Paul Payne* did not have equal access to such knowledge or information.
>
> *Don Davis* purported to have superior knowledge if *he* had the appearance of having such knowledge or implied, professed outwardly, or claimed that *he* had such knowledge regarding a matter that was not equally open to *Paul Payne*.

For discussions of the "superior knowledge" rule, see *Italian Cowboy Partners, Ltd. v. Prudential Insurance Co. of America*, 341 S.W.3d 323, 337–39 (Tex. 2011); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983); *United States Pipe & Foundry Co. v. City of Waco*, 108 S.W.2d 432, 435–37 (Tex. 1937); *Valley Datsun*, 578 S.W.2d at 490; and *General Supply & Equipment Co. v. Phillips*, 490 S.W.2d 913, 917 (Tex. Civ. App.—Tyler 1972, writ ref'd n.r.e.).

PJC 102.10 Implied Warranty of Merchantability—Goods (DTPA § 17.50(a)(2); Tex. UCC § 2.314(b)(3))

Furnishing goods that, because of a lack of something necessary for adequacy, were not fit for the ordinary purposes for which such goods are used [*or*]

COMMENT

When to use. PJC 102.10 may be used with PJC 102.8 to submit a cause of action for breach of an implied warranty of merchantability under Tex. Bus. & Com. Code § 2.314(b)(3) (Tex. UCC). *See also* Tex. Bus. & Com. Code § 17.50(a)(2) (DTPA); *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 444 (Tex. 1989).

Use of "or." If used with other instructions (see PJC 102.9 and 102.11–102.13), PJC 102.10 must be followed by the word *or*, because a finding of any one of the acts or practices defined in the instructions would support recovery under the DTPA.

Caveat. Note that the above instruction is appropriate *only* for a case brought under Tex. UCC § 2.314(b)(3). *See Plas-Tex, Inc.*, 772 S.W.2d at 444–45. *Plas-Tex, Inc.* defined "defect" as "a condition of the goods that renders them unfit for the ordinary purposes for which they are used because of a lack of something necessary for adequacy." *Plas-Tex, Inc.*, 772 S.W.2d at 444. For simplicity and clarity, the Committee has included only the definition itself in the above instruction. The Committee expresses no opinion about the above definition's applicability if the evidence shows a *presence*, rather than a *lack*, of something that makes the goods unfit.

Other elements of merchantability. For cases involving other elements of merchantability, the instruction should be modified to delete the reference to "defect" and to include the relevant elements raised by the evidence. The elements are as follows:

> Furnishing fungible goods not of fair average quality within the description;
>
> Furnishing goods that did not run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved;
>
> Furnishing goods that were not adequately contained, packaged, and labeled as the agreement required;
>
> Furnishing goods that did not conform to the promises or affirmations of fact made on the container or label.

Tex. UCC § 2.314(b)(2), (4)–(6); *see also* Tex. UCC § 2.314(b)(1).

Seller must be merchant. The implied warranty arises only if the seller is a "merchant" as defined in Tex. UCC § 2.104(a). Tex. UCC § 2.314(a). Whether the seller is subject to the statute has been held to be a jury issue. *Nelson v. Union Equity Co-operative Exchange*, 536 S.W.2d 635, 641 (Tex. Civ. App.—Fort Worth 1976), *aff'd on other grounds*, 548 S.W.2d 352 (Tex. 1977).

PJC 102.11 Implied Warranty of Fitness for Particular Purpose—Goods (DTPA § 17.50(a)(2); Tex. UCC § 2.315)

Furnishing or selecting goods that were not suitable for a particular purpose if *Don Davis* had reason to know the purpose and also had reason to know that *Paul Payne* was relying on *Don Davis*'s skill or judgment to furnish or select suitable goods [*or*]

COMMENT

When to use. PJC 102.11 may be used with PJC 102.8 to submit a claim of breach of an implied warranty of fitness for a particular purpose. *See* Tex. Bus. & Com. Code § 17.50(a)(2) (DTPA); Tex. Bus. & Com. Code § 2.315 (Tex. UCC).

Use of "or." If used with other instructions (see PJC 102.10 and 102.12–102.13), PJC 102.11 must be followed by the word *or*, because a finding of any one of the acts or practices defined in the instructions would support recovery under the DTPA.

Defendant need not be merchant. Note that this warranty does not require the defendant to be a "merchant," as does the implied warranty of merchantability in Tex. UCC § 2.314. See PJC 102.10.

PJC 102.12 Implied Warranty of Good and Workmanlike Performance—Services (DTPA § 17.50(a)(2))

Failing to perform services in a good and workmanlike manner.

A good and workmanlike manner is that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work.

[or]

COMMENT

When to use. PJC 102.12, when used with PJC 102.8, submits the claim of a breach of an implied warranty to perform services in a good and workmanlike manner. *See* Tex. Bus. & Com. Code § 17.50(a)(2) (DTPA); *Melody Home Manufacturing Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987) (implied warranty to repair or modify goods or property in good and workmanlike manner); *Humber v. Morton*, 426 S.W.2d 554, 559 (Tex. 1968) (implied warranty of construction of new home in good and workmanlike manner). In *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 439 (Tex. 1995), the supreme court announced that this service warranty (1) "will not be judicially imposed unless there is a demonstrated need for it"; and (2) "extends only to services provided to remedy defects existing at the time of the relevant consumer transaction." The warranty is a "gap-filler" warranty that "attaches to a contract if the parties' agreement does not provide for the quality of the services to be rendered or how such services are to be performed." *Gonzales v. Southwest Olshan Foundation Repair Co.*, 400 S.W.3d 52, 56 (Tex. 2013).

During the period in which the Texas Residential Construction Commission Act was in effect (September 1, 2003, to September 1, 2009), the workmanship and habitability warranties for new residential construction were supplanted by statute. *See* Tex. Prop. Code §§ 401.006, 408.001(2).

Use of "or." If used with other instructions (see PJC 102.9–102.11 and 102.13), PJC 102.12 must be followed by the word *or*, because a finding of any one of the acts or practices defined in the instructions would support recovery under the DTPA.

Source of instruction. The above instruction is from *Melody Home Manufacturing Co.*, 741 S.W.2d at 354.

Independent of warranty of habitability. The warranty covered by PJC 102.12 parallels the implied warranty of habitability addressed in PJC 102.13, and the two implied warranties may overlap. *Centex Homes v. Buecher*, 95 S.W.3d 266, 273 (Tex.

2002). There is no need for additional language in the instruction, such as "and suitable for human habitation." *Cocke v. White*, 697 S.W.2d 739, 744 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

PJC 102.13 Implied Warranty of Habitability (DTPA § 17.50(a)(2))

Selling a home that was not suitable for human habitation [*or*]

COMMENT

When to use. PJC 102.13 may be used with PJC 102.8 to submit a claim of breach of implied warranty of habitability. *See* Tex. Bus. & Com. Code § 17.50(a)(2) (DTPA); *Humber v. Morton*, 426 S.W.2d 554, 559 (Tex. 1968) (implied warranty of habitability in new home construction); *see also Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168, 169 (Tex. 1983) (warranty extends to all subsequent purchasers). *But see PPG Industries v. JMB/Houston Centers Partners Ltd. Partnership*, 146 S.W.3d 79, 88 n.37 (Tex. 2004) (asserting that *Gupta* has been overruled on this issue). During the period in which the Texas Residential Construction Commission Act was in effect (September 1, 2003, to September 1, 2009), the workmanship and habitability warranties for new residential construction were supplanted by statute. *See* Tex. Prop. Code §§ 401.006, 408.001(2).

Use of "or." If used with other instructions (see PJC 102.9–102.12), PJC 102.13 must be followed by the word *or*, because a finding of any one of the acts or practices defined in the instructions would support recovery under the DTPA.

Habitability in residential leases. In *Kamarath v. Bennett*, 568 S.W.2d 658, 660–61 (Tex. 1978), the court found an implied warranty of habitability applicable to a rented apartment. However, legislation has since been passed setting forth the specific duties of a landlord "to repair and remedy" residential premises. Tex. Prop. Code § 92.052; *see also Daitch v. Mid-America Apartment Communities, Inc.*, 250 S.W.3d 191, 195 (Tex. App.—Dallas 2008, no pet.) (holding that *Kamarath* has been superseded by Tex. Prop. Code § 92.052). These duties are in lieu of existing common-law and statutory warranties. Tex. Prop. Code § 92.061.

Suitability in commercial leases. In *Davidow v. Inwood North Professional Group—Phase I*, 747 S.W.2d 373, 377 (Tex. 1988), the court held that an implied warranty of suitability had been breached in the commercial lease of a doctor's office. *See also Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 910 (Tex. 2007) ("*Davidow* merely expanded the application of the implied warranty of habitability already recognized in residential leases in *Kamarath v. Bennett*."). In an appropriate case, the language of PJC 102.13 may be adapted to cover the breach of this warranty.

Distinguished from "good and workmanlike" warranty. The *Humber* warranty contains two distinct elements: (1) warranty of good and workmanlike manner of construction of a new home and (2) warranty of habitability. *Evans v. J. Stiles, Inc.*, 689 S.W.2d 399, 400 (Tex. 1985). Unlike the implied warranty of good and workmanlike performance, the implied warranty of habitability "looks only to the finished product"

and "only protects new home buyers from conditions that are so defective that the property is unsuitable for its intended use as a home." *Centex Homes v. Buecher*, 95 S.W.3d 266, 273 (Tex. 2002). As "compared to the warranty of good workmanship, the warranty of habitability represents a form of strict liability" because "the adequacy of the completed structure and not the manner of performance by the builder governs liability." *Centex Homes*, 95 S.W.3d at 273 (internal quotation marks omitted). For the warranty of good and workmanlike manner of construction, see PJC 102.12.

The warranty covered by PJC 102.12 parallels the implied warranty of habitability addressed in PJC 102.13, and the two implied warranties may overlap. *Centex Homes*, 95 S.W.3d at 273.

PJC 102.14 Question on Insurance Code Chapter 541

QUESTION _____

Did *Don Davis* engage in any unfair or deceptive act or practice that caused damages to *Paul Payne*?

"Unfair or deceptive act or practice" means any of the following:

[Insert appropriate instructions.]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 102.14 is a basic question that should be appropriate in most cases brought under Tex. Ins. Code ch. 541 (formerly Tex. Ins. Code art. 21.21). Code section 541.003 also prohibits "unfair methods of competition," and in such a case PJC 102.14 should be modified as appropriate. Questions for causes of action based on the DTPA may be found at PJC 102.1 (false, misleading, or deceptive act or practice), 102.7 (unconscionable action), and 102.8 (warranty). See also PJC 102.21 (knowing or intentional conduct).

Accompanying instructions. Instructions to accompany PJC 102.14, informing the jury what type of conduct should be considered under the question, are at PJC 102.16–102.19. If more than one instruction is used, each must be separated by the word *or*, because a finding of any one of the acts or practices defined in the instructions would support recovery under the Insurance Code.

Broad-form submission. PJC 102.14 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). In *Crown Life Insurance Co. v. Casteel*, the supreme court reviewed a charge that included five DTPA "laundry-list" theories of liability incorporated into a single question submitting an article 21.21 claim. *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378, 387–88 (Tex. 2000). The supreme court held that it was error to submit four of the five DTPA-based theories of liability because Casteel did not possess the requisite consumer status to maintain an article 21.21 claim. *Casteel*, 22 S.W.3d at 388. Most importantly, the supreme court

decided that this error should be presumed to be harmful when a single broad-form liability question commingles valid and invalid theories of liability such that it cannot be determined whether the improperly submitted theories formed the sole basis for the jury's finding. *Casteel*, 22 S.W.3d at 388–89. For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Knowing conduct. If the defendant is found to have knowingly engaged in an unfair or deceptive act or practice, the Insurance Code provides for additional damages. Tex. Ins. Code § 541.152(b). See PJC 102.21 for a question on knowing conduct and PJC 115.11 for a question on additional damages.

Additional damages. An award of additional damages is discretionary with the trier of fact if the defendant acted knowingly. To seek additional damages, the plaintiff should submit the question on knowing conduct as in PJC 102.21 and then should ask the jury to determine the amount of additional damages as in PJC 115.11.

Causation. Unlike the DTPA questions (PJC 102.1, 102.7, and 102.8), PJC 102.14 does not contain the term "producing cause," because the Insurance Code does not refer to "producing cause" as an element. Instead, the Code grants a cause of action to a person who has sustained actual damages "caused by" another's engaging in a prohibited act. *See* Tex. Ins. Code § 541.151 (formerly Tex. Ins. Code art. 21.21, § 16(a)). The Committee believes that "producing cause" need not be submitted to obtain actual damages as long as the damages question inquires about damages that were caused by the prohibited conduct. The insurance damages question, PJC 115.13, contains such an inquiry. For a discussion of the special causation issues relating to recovery of policy benefits as damages, see the PJC 115.13 Comment.

Vicarious liability. If the issue is the vicarious liability of one for another's conduct, see *Celtic Life Insurance Co. v. Coats*, 885 S.W.2d 96, 98–99 (Tex. 1994); *Royal Globe Insurance Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 693–95 (Tex. 1979) (discussing principal's liability for acts of agent in DTPA and Insurance Code case under the previous "adversely affected" standard); and *Southwestern Bell Telephone Co. v. Wilson*, 768 S.W.2d 755, 759 (Tex. App.—Corpus Christi 1988, writ denied) (citing *Aetna Casualty & Surety Co. v. Love*, 121 S.W.2d 986, 990 (Tex. 1938)) (company liable for unreasonable collection efforts of outside attorneys that "were committed for the purpose of accomplishing the mission entrusted to the attorneys").

[PJC 102.15 is reserved for expansion.]

PJC 102.16 Misrepresentations or False Advertising of Policy Contracts—Insurance (Tex. Ins. Code § 541.051(1))

Making or causing to be made any statement misrepresenting the terms, benefits, or advantages of an insurance policy [*or*]

COMMENT

When to use. PJC 102.16 may be used with PJC 102.14 to submit a claim of misrepresentation or false advertising of an insurance policy. *See* Tex. Ins. Code § 541.051(1) (formerly Tex. Ins. Code art. 21.21, § 4(1)); *Royal Globe Insurance Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688 (Tex. 1979). A claim may also be brought under Tex. Bus. & Com. Code § 17.50(a)(4) (DTPA).

Use of "or." If used with other instructions (see PJC 102.17–102.19), PJC 102.16 must be followed by the word *or*, because a finding of any one of the acts or practices defined in the instructions would support recovery.

Use of statutory language. The supreme court has held that jury submission in this type of case should follow the statutory language as closely as possible but may be altered somewhat to conform to the evidence of the case. *Spencer v. Eagle Star Insurance Co. of America*, 876 S.W.2d 154, 157 (Tex. 1994); *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980); *accord Regal Finance Co., Ltd. v. Tex Star Motors, Inc.*, 355 S.W.3d 595, 601 (Tex. 2010) (adopting *Spencer* and *Brown* in a UCC article 9 case). Material terms, however, should not be omitted or substituted. *See Transport Insurance Co. v. Faircloth*, 898 S.W.2d 269, 273 (Tex. 1995) (construing DTPA section 17.46(b)(23), renumbered in 2001 as DTPA § 17.46(b)(24)).

Adapt instruction for other claims. Other kinds of conduct are outlawed by chapter 541, subchapter B, of the Insurance Code, all of which are actionable under DTPA § 17.50(a)(4) and Tex. Ins. Code ch. 541, subch. D, and the instruction should be adapted to include the kind involved in the case. *See, e.g.*, Tex. Ins. Code § 541.054 ("Boycott, Coercion and Intimidation"). For sample instructions submitting other claims under chapter 541, subchapter B, see PJC 102.17–102.19. For other conduct prohibited by other subparts of subchapter B, instructions may be drafted using the above instruction or the forms at PJC 102.17–102.19.

PJC 102.17 False Information or Advertising—Insurance (Tex. Ins. Code § 541.052)

Making, or directly or indirectly causing to be made, an assertion, representation, or statement with respect to insurance that was untrue, deceptive, or misleading [*or*]

COMMENT

When to use. PJC 102.17 should be used with PJC 102.14 to submit a claim under Tex. Ins. Code § 541.052 (formerly Tex. Ins. Code art. 21.21, § 4(2)), which prohibits false information and false advertising in the business of insurance. *See Royal Globe Insurance Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 691–92 (Tex. 1979). A claim may also be brought under Tex. Bus. & Com. Code § 17.50(a)(4) (DTPA).

Use of "or." If used with other instructions (see PJC 102.16 and 102.18–102.19), PJC 102.17 must be followed by the word *or*, because a finding of any one of the acts or practices defined in the instructions would support recovery.

Use of statutory language. The supreme court has held that jury submission in this type of case should follow the statutory language as closely as possible but may be altered somewhat to conform to the evidence of the case. *Spencer v. Eagle Star Insurance Co. of America*, 876 S.W.2d 154, 157 (Tex. 1994); *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980); *accord Regal Finance Co., Ltd. v. Tex Star Motors, Inc.*, 355 S.W.3d 595, 601 (Tex. 2010) (adopting *Spencer* and *Brown* in a UCC article 9 case). Material terms, however, should not be omitted or substituted. *See Transport Insurance Co. v. Faircloth*, 898 S.W.2d 269, 273 (Tex. 1995) (construing DTPA section 17.46(b)(23), renumbered in 2001 as DTPA § 17.46(b)(24)).

Adapt instruction for other claims. Other kinds of conduct are outlawed by chapter 541, subchapter B, of the Insurance Code, all of which are actionable under DTPA § 17.50(a)(4) and Tex. Ins. Code ch. 541, subch. D, and the instruction should be adapted to include the kind involved in the case. *See, e.g.*, Tex. Ins. Code § 541.054 ("Boycott, Coercion and Intimidation"). For sample instructions submitting other claims under chapter 541, subchapter B, see PJC 102.16, 102.18, and 102.19. For other conduct prohibited by other subparts of chapter 541, subchapter B, instructions may be drafted using the above instruction or the forms at PJC 102.16 and 102.18–102.19.

PJC 102.18 Unfair Insurance Settlement Practices (Tex. Ins. Code § 541.060)

Misrepresenting to a claimant a material fact or policy provision relating to the coverage at issue [*or*]

Failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when the insurer's liability has become reasonably clear [*or*]

Failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim under one portion of a policy, for which the insurer's liability has become reasonably clear, to influence *Paul Payne* to settle as another claim under another portion of the coverage [*or*]

Failing to provide promptly to *Paul Payne* a reasonable explanation of the factual and legal basis in the policy for an insurer's denial of the claim [or *the insurer's offer of a compromise settlement of the claim*] [*or*]

Failing to affirm or deny coverage of a claim within a reasonable time [*or*]

Failing to submit a reservation of rights letter to *Paul Payne* within a reasonable time [*or*]

Refusing [or *failing to make or unreasonably delaying*] a settlement offer under *Paul Payne*'s policy, because other coverage may have been available [or *because other parties may be responsible for the damages Paul Payne suffered*] [*or*]

Trying to enforce a full and final release of a claim by *Paul Payne*, when only a partial payment had been made, unless the release was for a doubtful or disputed claim [*or*]

Refusing to pay a claim without conducting a reasonable investigation of the claim [*or*]

Delaying [or *refusing*] to settle *Paul Payne*'s claim solely because there was other insurance available to satisfy all or any part of the loss that formed the basis of *his* claim [*or*]

Requiring that *Paul Payne* produce *his* federal income tax returns for inspection or investigation, as a condition of settling *his* claim [*or*]

COMMENT

When to use. PJC 102.18 may be used with PJC 102.14 to submit a cause of action for unfair settlement practices under Tex. Ins. Code § 541.060 (formerly Tex. Ins. Code art. 21.21, § 4(10)). Use only the subpart(s) raised by the pleadings and the evidence.

Use of "or." If used with other instructions (see PJC 102.16–102.17 and 102.19), or if more than one subpart is used, each subpart used from PJC 102.18 must be followed by the word *or*, because a finding of any one of the acts or practices defined in the instructions would support recovery.

Source of instruction. PJC 102.18 is based on Tex. Ins. Code § 541.060, which prohibits unfair settlement practices.

Use of statutory language. The supreme court has held that jury submission in this type of case should follow the statutory language as closely as possible but may be altered somewhat to conform to the evidence of the case. *Spencer v. Eagle Star Insurance Co. of America*, 876 S.W.2d 154, 157 (Tex. 1994); *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980); *accord Regal Finance Co., Ltd. v. Tex Star Motors, Inc.*, 355 S.W.3d 595, 601 (Tex. 2010) (adopting *Spencer* and *Brown* in a UCC article 9 case). Material terms, however, should not be omitted or substituted. *See Transport Insurance Co. v. Faircloth*, 898 S.W.2d 269, 273 (Tex. 1995) (construing Texas Business and Commerce Code section 17.46(b)(23) (DTPA), renumbered in 2001 as DTPA § 17.46(b)(24)). Several of the subsections in Tex. Ins. Code § 541.060 contain additional terms that may be added to the instruction or that may preclude submission of a particular practice. The bracketed language should be added or substituted to conform to the evidence in the case. *See Brown*, 601 S.W.2d at 937.

Liability insurance cases. In *Rocor International, Inc. v. National Union Fire Insurance Co.*, 77 S.W.3d 253, 260 (Tex. 2002), the supreme court held that a liability insurer may be liable to an insured under Tex. Ins. Code art. 21.21 (now codified as Tex. Ins. Code ch. 541) for failing to settle a third-party claim when the insurer's liability becomes reasonably clear. The court held that the insurer's liability becomes reasonably clear when "(1) the policy covers the claim, (2) the insured's liability is reasonably clear, (3) the claimant has made a proper settlement demand within policy limits, and (4) the demand's terms are such that an ordinarily prudent insurer would accept it." *Rocor International, Inc.*, 77 S.W.3d at 262. Element (1), in most cases, will be a question of law or will require resolution of a separate fact question. Element (3), in most cases, will involve a question of law. The following instruction would be appropriate to submit elements (2) and (4):

> You are instructed that an "insurer's liability has become reasonably clear" when the insured's liability to the claimant in the underly-

ing case is reasonably clear and the claimant's settlement demand to the insured is such that an ordinarily prudent insurer would accept it.

PJC 102.19 Misrepresentation—Insurance (Tex. Ins. Code § 541.061)

Making any misrepresentation relating to an insurance policy by—

1. making any untrue statement of a material fact; or

2. failing to state a material fact that is necessary to make other statements not misleading, considering the circumstances under which the statements are made; or

3. making any statement in a manner that would mislead a reasonably prudent person to a false conclusion of a material fact; or

4. stating that [*insert any misstatement of law*]; or

5. failing to disclose [*insert matters required by law to be disclosed*].

[or]

COMMENT

When to use. PJC 102.19 may be used with PJC 102.14 to submit a cause of action for any misrepresentation relating to an insurance policy. *See* Tex. Ins. Code § 541.061 (formerly Tex. Ins. Code art. 21.21, § 4(11)).

Use of "or." If used with other instructions (see PJC 102.16–102.18), PJC 102.19 must be followed by the word *or*, because a finding of any one of the acts or practices defined in the instructions would support recovery.

Source of instruction. PJC 102.19 is based on Tex. Ins. Code § 541.061, which prohibits misrepresentation.

Use of statutory language. The supreme court has held that jury submission in this type of case should follow the statutory language as closely as possible but may be altered somewhat to conform to the evidence of the case. *Spencer v. Eagle Star Insurance Co. of America*, 876 S.W.2d 154, 157 (Tex. 1994); *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980); *accord Regal Finance Co., Ltd. v. Tex Star Motors, Inc.*, 355 S.W.3d 595, 601 (Tex. 2010) (adopting *Spencer* and *Brown* in a UCC article 9 case). Material terms, however, should not be omitted or substituted. *See Transport Insurance Co. v. Faircloth*, 898 S.W.2d 269, 273 (Tex. 1995) (construing Texas Business and Commerce Code section 17.46(b)(23) (DTPA), renumbered in 2001 as DTPA § 17.46(b)(24)). Subparts 4 and 5 of PJC 102.19 submit questions relating to misstatements of law and failures to disclose information required by law. It is the Committee's opinion that these prohibitions require a preliminary determination by the trial court about whether the conduct was a misstatement of law or nondisclo-

sure of information required by law to be disclosed, before the jury decides whether the conduct occurred. Therefore, the instruction should be adapted to conform to the specific conduct found by the trial court.

[PJC 102.20 is reserved for expansion.]

PJC 102.21 Question and Instructions on Knowing or Intentional Conduct

If you answered "Yes" to Question _____ [*102.1, 102.7, 102.8, or 102.14*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Did *Don Davis* engage in any such conduct *knowingly* [*intentionally*]?

"Knowingly" means actual awareness, at the time of the conduct, of the falsity, deception, or unfairness of the conduct in question or actual awareness of the conduct constituting a failure to comply with a warranty. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

[And/or insert definition of "intentionally."]

In answering this question, consider only the conduct that you have found *was a producing cause of* damages to *Paul Payne.*

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 102.21 is to be used if there is evidence that the defendant knowingly or intentionally engaged in conduct that violates the DTPA or Insurance Code. *See* Tex. Bus. & Com. Code § 17.50(b)(1) (DTPA); Tex. Ins. Code § 541.152(b) (formerly Tex. Ins. Code art. 21.21, § 16(b)(1)).

The Insurance Code allows the jury to award up to three times the plaintiff's actual damages if the defendant acted "knowingly." Tex. Ins. Code § 541.152(b). In contrast, the DTPA distinguishes between economic damages and mental anguish damages. A finding that the defendant acted "knowingly" allows discretionary trebling only of the plaintiff's economic damages. Discretionary trebling of both economic damages and mental anguish damages is allowed only if the defendant acted intentionally. DTPA § 17.50(b)(1).

Broad-form submission. PJC 102.21 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex.

R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Definition of "knowingly." The definition of "knowingly" comes from DTPA § 17.45(9). The definition is different under Tex. Ins. Code § 541.002(1). In a suit brought under that statute, the definition should read:

> "Knowingly" means actual awareness of the falsity, unfairness, or deceptiveness of the act or practice on which a claim for damages is based. Actual awareness may be inferred if objective manifestations indicate that a person acted with actual awareness.

Tex. Ins. Code § 541.002(1).

Definition and use of "intentionally." The difference between "knowledge" and "intent" is that under "intent" the defendant specifically intended that the consumer act in detrimental reliance. *Compare* DTPA § 17.45(9), *with* § 17.45(13). A finding that the defendant acted knowingly allows discretionary trebling only of economic damages under the DTPA, whereas a finding of intentional conduct allows discretionary trebling of both economic and mental anguish damages. DTPA § 17.50(b)(1). If both economic damages and mental anguish damages are sought, the consumer may choose to submit separate questions on the defendant's knowledge and intent, or a single question on intent.

If the defendant's intent is submitted, the following definition should be used in addition to, or instead of, the definition of "knowingly":

> "Intentionally" means actual awareness of the falsity, deception, or unfairness of the conduct in question or actual awareness of the conduct constituting a failure to comply with a warranty, coupled with the specific intent that the consumer act in detrimental reliance on the falsity or deception [or *detrimental ignorance of the unfairness*]. Specific intent may be inferred where objective manifestations indicate that a person acted intentionally [or *may be inferred from facts showing that the person acted with such flagrant disregard of prudent and fair business practices that the person should be treated as having acted intentionally*].

DTPA § 17.45(13). The bracketed language should be added or substituted to conform to the evidence in the case. *See Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980).

Additional damages for knowing or intentional conduct. See PJC 115.11 for a question on additional damages that may be used if PJC 102.21 is answered "Yes."

Actual awareness of failure to comply with a warranty. If the case does not involve a breach of warranty, the phrase "or actual awareness of the conduct constituting a failure to comply with a warranty" should be deleted from the above definition of "knowingly." If the case does involve a breach of warranty, the words "condition," "defect," or "failure" may be substituted for the word "conduct" in the definition. DTPA § 17.45(9).

Producing cause. For cases brought under Tex. Ins. Code ch. 541, subch. D, the phrase *resulted in* should be substituted for the phrase *was a producing cause of* in the limiting instruction above. *Compare* Tex. Ins. Code § 541.151, *with* DTPA § 17.50(a).

PJC 102.22 Defenses to Deceptive Trade Practices Act and Insurance Code Chapter 541 Claims (Comment)

Common-law defenses. A primary purpose of the enactment of the DTPA was to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common-law fraud or breach-of-warranty suit. *See Smith v. Baldwin*, 611 S.W.2d 611, 614 (Tex. 1980) (common-law defense of "substantial performance" no defense to DTPA action); *see also Alvarado v. Bolton*, 749 S.W.2d 47, 48 (Tex. 1988) (doctrine of merger not applicable in warranty suit brought under DTPA); *Ojeda de Toca v. Wise*, 748 S.W.2d 449, 451 (Tex. 1988) (imputed notice under real property recording statute not a defense to DTPA action for damages); *Weitzel v. Barnes*, 691 S.W.2d 598, 600 (Tex. 1985) (parol evidence rule will not bar proof of violation of DTPA section 17.46(b)). Thus it is generally true that common-law defenses are unavailable in a DTPA suit.

The above reasoning has been extended to Insurance Code suits. *See Frank B. Hall & Co. v. Beach, Inc.*, 733 S.W.2d 251, 264 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.) (contributory negligence could not defeat recovery on Insurance Code claims).

For cases discussing the applicability of "as is" language to the DTPA, see *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*, 896 S.W.2d 156 (Tex. 1995), and *Smith v. Levine*, 911 S.W.2d 427 (Tex. App.—San Antonio 1995, writ denied).

Statutory defenses.

Third-party information. A defendant's reliance on third-party information in making the false representation may be a defense to a claim brought under DTPA section 17.50. Tex. Bus. & Com. Code § 17.506(a)–(c) (DTPA).

Complete tender. The defense of complete tender may apply if the defendant proves that he tendered to the plaintiff, within thirty days after receiving written notice of the complaint, the amount of actual damages claimed and the expenses, including attorney's fees, if any, reasonably incurred by the plaintiff in asserting his claim. DTPA § 17.506(d).

Waiver. The following elements must be proved: (1) the waiver was in writing, signed by the consumer, and in the form prescribed by DTPA § 17.42(c); (2) the consumer was not in a significantly disparate bargaining position; and (3) in seeking or acquiring the goods or services, the consumer was represented by legal counsel who was not directly or indirectly identified, suggested, or selected by the defendant or an agent of the defendant. DTPA § 17.42(a).

Comparative or proportionate responsibility. DTPA claims are subject to the proportionate responsibility provisions of chapter 33 of the Texas Civil Practice and Rem-

edies Code. Tex. Civ. Prac. & Rem. Code § 33.002(a)(2). Insurance Code claims are not mentioned in the statute. For a discussion and a sample submission of a proportionate responsibility claim, see PJC 115.36.

Notice and tender of settlement under DTPA. Though technically not a "defense," the presuit notice provisions of the DTPA can limit or delay a DTPA suit. *See* DTPA § 17.505. The notice must state the "specific complaint" and the amount of actual damages and expenses incurred. DTPA § 17.505(a). The defendant then has a statutorily prescribed time to tender a written settlement offer, which, if rejected by the consumer, may be filed with the court. At trial, if the court finds the offer is "substantially the same" as the actual damages found, the consumer may not recover any amount greater than that of the offer or the amount of actual damages. DTPA § 17.5052. Issues pertaining to notice and tender are to be decided by the court, not by the jury, so no submission is necessary. DTPA § 17.5052(g); *see also Hines v. Hash*, 843 S.W.2d 464, 466–67 (Tex. 1992).

In addition, the defendant has an opportunity to tender a settlement offer within certain times after suit is filed. *See* DTPA § 17.5052(b)–(g). Procedures for comparing the settlement offer to the amount awarded for damages and fees are also set out.

For the requirements of the notice, the timeliness and the method of objection to lack of notice, and the court action required when no notice has been given, see *Hines*, 843 S.W.2d at 467–68.

Notice and tender under Insurance Code. Actions brought under Insurance Code chapter 541, subchapter D, also require notice. The notice must state the "specific complaint" and the amount of actual damages and expenses incurred. Tex. Ins. Code § 541.154(b) (formerly Tex. Ins. Code art. 21.21, § 16(e)). The defendant may file a rejected offer of settlement with the court, and if the court finds the offer is the same as, "substantially the same" as, or more than the actual damages found, the consumer may not recover any amount greater than the lesser of the offer or the amount of actual damages. Tex. Ins. Code §§ 541.158–.159 (formerly Tex. Ins. Code art. 21.21, § 16A). Some section 541 lawsuits filed on or after September 1, 2017, are subject to additional notice defenses. The notice provisions of section 541.154 have been supplemented by chapter 542A, which applies to suits on insurance claims arising out of property damage caused by "forces of nature." *See* Tex. Ins. Code § 542A.001(2)(C). In addition to any other notice required by law or by the applicable insurance policy, not later than the sixty-first day before the date a claimant files an action to which this chapter applies, the claimant must give written notice as a prerequisite to filing suit. The notice must provide (1) a statement of the acts or omissions giving rise to the claim; (2) the specific amount alleged to be owed by the insurer on the claim for damage to or loss of covered property; and (3) the amount of reasonable and necessary attorney's fees incurred by the claimant, calculated by multiplying the number of hours actually worked by the claimant's attorney, as of the date the notice is given and as reflected in contemporaneously kept time records, by an hourly rate that is custom-

ary for similar legal services. Failure to give the required notice may give rise to an abatement or to a defense to payment of all or part of the claimant's attorney's fees. *See* Tex. Ins. Code §§ 542A.005, 542A.007. The notice is admissible in evidence. Tex. Ins. Code § 542A.003(g). If there is a factual dispute about whether or when the notice was given, or whether it was adequate, the Committee expresses no opinion on whether such matters are for the court or should be submitted to the jury.

Warranty defenses under UCC. The supreme court has stated that section 17.42 of the DTPA makes invalid a limitation or waiver of liability for violations of section 17.46 but does not do so to warranty disclaimers authorized by the UCC or common law. *Southwestern Bell Telephone Co. v. FDP Corp.*, 811 S.W.2d 572, 576–77 (Tex. 1991). If the consumer pleads a DTPA cause of action alleging violation of warranties arising under UCC article 2, several statutory defenses based on article 2 have been held to apply, including—

- buyer's waiver of implied warranties. *FDP Corp.*, 811 S.W.2d at 576–77; *Mercedes-Benz of North America, Inc. v. Dickenson*, 720 S.W.2d 844, 852 (Tex. App.—Fort Worth 1986, no writ).

- buyer's failure to give notice to seller of breach of warranty as required by Tex. Bus. & Com. Code § 2.607(c)(1) (Tex. UCC). *Ketter v. ECS Medical Systems, Inc.*, 169 S.W.3d 791, 796 (Tex. App.—Dallas 2005, no pet.).

- contractual limitation of damages in an express warranty. *Rinehart v. Sonitrol of Dallas, Inc.*, 620 S.W.2d 660, 663–64 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).

Professional services exemption. The DTPA exempts certain claims for damages based on professional services, "the essence of which is the providing of advice, judgment, opinion, or similar professional skill." The exemption does not apply to—

1. "an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion";

2. "a failure to disclose information in violation of [DTPA] Section 17.46(b)(24)";

3. "an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion";

4. "breach of an express warranty that cannot be characterized as advice, judgment, or opinion"; or

5. "a violation of [DTPA] Section 17.46(b)(26)."

DTPA § 17.49(c). The term "professional services" is not defined in the statute.

Negotiated contract exemption. The DTPA also exempts claims for damages based on a written contract with a total consideration of $100,000, if in negotiating the contract the consumer is represented by legal counsel not "directly or indirectly identi-

fied, suggested, or selected by the defendant" or the defendant's agent, and the cause of action does not involve a consumer's residence. DTPA § 17.49(f).

Transaction limit. The DTPA exempts causes of action "arising from a transaction, a project, or a set of transactions relating to the same project, involving total consideration by the consumer of more than $500,000, other than a cause of action involving a consumer's residence." DTPA § 17.49(g).

Personal injury exemption. Except as specifically provided in DTPA § 17.50(b), (h), damages for bodily injury or death or for the infliction of mental anguish are exempted from DTPA coverage. DTPA § 17.49(e).

PJC 102.23 Statute of Limitations (DTPA § 17.565; Tex. Ins. Code § 541.162)

If you answered "Yes" to Question _____ [*102.1, 102.7, 102.8, or 102.14*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

By what date should *Paul Payne*, in the exercise of reasonable diligence, have discovered all the *false, misleading, or deceptive acts or practices* of *Don Davis*?

Answer with a date in the blank below.

Answer: _____

COMMENT

When to use. PJC 102.23 is used to determine if the suit is barred by the statute of limitations. Tex. Bus. & Com. Code § 17.565 (DTPA) incorporates the "discovery rule." *See KPMG Peat Marwick v. Harrison County Housing Finance Corp.*, 988 S.W.2d 746, 749–50 (Tex. 1999); *Eshleman v. Shield*, 764 S.W.2d 776 (Tex. 1989); *see also* Tex. Ins. Code § 541.162(a) (formerly Tex. Ins. Code art. 21.21, § 16(d)). Even if the act occurred more than two years before suit was filed, the limitations defense will not apply if the plaintiff did not discover or could not reasonably have discovered the act until a date within two years before the suit was filed. To prevail, a plaintiff need prove only one act or practice that is not time-barred. Therefore, the question asks when the plaintiff discovered or should have discovered the latest act that was a producing cause of damages. If the date is within the two-year period, the limitations defense does not apply.

Source of question. The question is derived from *Willis v. Maverick*, 760 S.W.2d 642, 647 (Tex. 1988); *see also KPMG Peat Marwick*, 988 S.W.2d at 749–50 (Tex. 1999).

Broad-form submission. PJC 102.23 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Insurance Code cases. In cases brought under the Insurance Code, the phrase *unfair or deceptive acts or practices* should be used instead of the phrase *false, misleading, or deceptive acts or practices* in the above question. *See* Tex. Ins. Code § 541.162(a)(2).

Breach-of-warranty cases. In cases involving a breach of warranty, the phrase *failures to comply with a warranty* should be used in lieu of the phrase *false, misleading, or deceptive acts or practices* in the above question.

Distinct damages claims. If the plaintiff has two claims involving distinctly different damages caused by distinctly different conduct and the limitations defense is raised, the Committee recommends that separate liability, damages, and limitations questions be submitted.

Extra 180 days. Both DTPA § 17.565 and Tex. Ins. Code § 541.162(b) provide for an extra 180 days to be tacked onto the two-year period if the plaintiff can show he was induced by the defendant to refrain from filing suit. If that exception is raised, the jury would need to be asked:

> Was *Paul Payne*'s failure to file suit by [*insert date two years after date of occurrence or of plaintiff's actual or deemed discovery*] caused by *Don Davis*'s knowingly engaging in conduct solely calculated to induce *Paul Payne* to refrain from or postpone filing suit?

PJC 102.24 Counterclaim—Bad Faith or Harassment (DTPA § 17.50(c); Tex. Ins. Code ch. 541, subch. D) (Comment)

Statutory remedies. A defendant may recover attorney's fees and court costs from a plaintiff who files a groundless, bad-faith, or harassing lawsuit. Tex. Bus. & Com. Code § 17.50(c) (DTPA); Tex. Ins. Code § 541.153 (formerly Tex. Ins. Code art. 21.21, § 16(c)).

The supreme court has held that the court, not the jury, must decide the issues of groundlessness, bad faith, and harassment. *Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634, 637 (Tex. 1989) (citing Tex. Bus. & Com. Code § 17.50(c)). If the defendant seeks attorney's fees, see PJC 115.60.

PJC 102.25 Prompt Payment of Claims Act—Violation of Insurer's Duty to Acknowledge Notice of Claim, Commence Investigation, and Request Information after Receiving Notice of Claim (Tex. Ins. Code § 542.055)

QUESTION _____

Did *Don Davis* fail to do any of the following acts within fifteen days of receiving notice of a claim from *Paul Payne*?

"Notice of claim" means any written notification that reasonably apprises the insurer of the facts relating to the claim.

1. Acknowledge receipt of the claim in writing or make a record of the date, manner, and content of the acknowledgment if it was not done in writing; or

2. commence investigation of the claim; or

3. request from *Paul Payne* all items, statements, and forms that *Don Davis* reasonably believed, at that time, would be required from *Paul Payne*.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 102.25 submits the insurer's failure to perform three statutory duties within fifteen days of the date the insurer receives the notice of claim. The duties are to acknowledge the claim, start the investigation, and request necessary information from the claimant. Tex. Ins. Code § 542.055(a) states that "[n]ot later than the 15th day or, if the insurer is an eligible surplus lines insurer, the 30th business day after the date an insurer receives notice of a claim, the insurer shall: (1) acknowledge receipt of the claim; (2) commence any investigation of the claim; and (3) request from the claimant all items, statements, and forms that the insurer reasonably believes, at that time, will be required from the claimant." PJC 102.25 assumes the insurer is not an "eligible surplus lines insurer" and therefore provides for a fifteen-day time period in which the insurer is required to comply. See comment below, "Extension of deadline—'eligible surplus lines insurer,'" for changes to the question if such an insurer is involved.

Broad-form submission. PJC 102.25 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex.

R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Penalty for failing to comply with requirements. Except for claims made after September 1, 2017, that arise from damage or loss to real property or improvements caused by "forces of nature" like hail, hurricane, flood, wind, and earthquake, an insurer "liable for a claim" and "not in compliance" with the requirements of the statute is "liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages." *Compare* Tex. Ins. Code § 542.060(a) (general 18 percent rule), *with* Tex. Ins. Code § 542.060(c) ("forces of nature" real property exception). In 2017 the legislature passed H.B. 1774 creating chapter 542A of the Texas Insurance Code for real property damage claims from "forces of nature." As a result, insurers who violate the statute in handling those claims are instead subject to a penalty "determined . . . by adding five percent" to the judgment rate under section 304.003 of the Texas Finance Code. Tex. Ins. Code § 542.060(c). The judgment rate is the Federal Reserve Board prime rate, subject to a minimum of 5 percent (if the Federal Reserve Board prime rate is lower) and a maximum of 15 percent (if the Federal Reserve Board prime rate is higher). Tex. Fin. Code § 304.003(c).

Finding date of notice to determine when 18 percent interest penalty begins for claims governed by section 542.060(a). The Texas Supreme Court has not decided the date that the 18 percent penalty under Tex. Ins. Code § 542.060(a) accrues, that is, the date the penalty begins to run. The Fifth Circuit has decided the issue, however, ruling that the penalty begins on the date of the violation. *Cox Operating, L.L.C. v. St. Paul Surplus Lines Insurance Co.*, 795 F.3d 496, 505–09 (5th Cir. 2015). Thus, if the insurer has fifteen days to comply but does not, the penalty under Tex. Ins. Code § 542.060(a) accrues on the sixteenth day. If the date of compliance is disputed because the date of the insurer's receipt of the notice of claim is disputed, the jury must determine the actual date the notice was received so that the court may then properly calculate the penalty. In such cases, the following question should precede PJC 102.25 and be accompanied by the definition of "notice of claim" and, if necessary, the instruction in the comment below titled "More than one 'notice of claim'":

QUESTION _____

By what date did *Don Davis* receive a notice of claim from *Paul Payne*?

Answer with a date in the blank below.

Answer: _____

More than one "notice of claim." During the course of the claims process, the insurer may receive several communications from the claimant that "reasonably apprise[] the insurer of the facts relating to the claim" and thus meet the definition of "notice of claim" in Tex. Ins. Code § 542.051(4). If that is the case, the following instruction should be added to PJC 102.25:

> If *Don Davis* received more than one notice of claim from *Paul Payne*, answer with regard to the notice that was received on the earliest date.

Finding "the date the claim was required to be paid" to determine when interest penalty begins on "forces of nature" real property claims governed by section 542.060(c). The interest penalty for violations in handling claims for damage to real property and improvements caused by "forces of nature" begins "on the date the claim was required to be paid." Tex. Ins. Code § 542.060(c). For questions and comments on the statute's requirements for payment, see PJC 102.27 and 102.28. PJC 102.27 submits the insurer's failure to pay what the insurer agreed to pay in its written notice to the claimant accepting the claim in whole or in part. Tex. Ins. Code § 542.057. PJC 102.28 submits the insurer's failure to pay the claim within sixty days of receiving "all items, statements, and forms reasonably requested and required under Section 542.055." Tex. Ins. Code § 542.058. The comments provide questions for determining the dates when the triggering event occurred, from which can be determined "the date the claim was required to be paid."

Waiver of notice requirement. "Notice of claim" is defined as "any *written* notification" that reasonably apprises the insurer of the facts relating to the claim. Tex. Ins. Code § 542.051(4) (emphasis added); *McMillin v. State Farm Lloyds*, 180 S.W.3d 183, 207–08 (Tex. App.—Austin 2005, pet. denied) (insurer's internal phone logs of conversations with claimant are not "written notice" and actual notice does not trigger statute). Typically, however, claimants give oral notice and insurers start investigating when they receive oral notice, facts that may support submission of waiver of the notice requirements of the statute. *See Massachusetts Bonding & Insurance Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396, 401–02 (Tex. 1967) (waiver of notice requirement in policy); *Daugherty v. American Motorists Insurance Co.*, 974 S.W.2d 796, 798 n.3 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (insurer accepted oral notice and acknowledged oral notice in writing).

Act of insurer's agent is act of insurer. Notice to a person acting as an agent for the insurer is notice to the insurer, and thus the date the agent receives notice of the claim is the date the insurer receives notice of the claim. *Protective Life Insurance Co. v. Russell*, 119 S.W.3d 274; 287–88 (Tex. App.—Tyler 2003, no pet.) (citing Tex. Ins. Code art. 21.02, now Tex. Ins. Code § 4001.051, which lists the acts that constitute acting as an agent for an insurer, and holding that "[n]otice to an agent, received while the agent is acting within the scope of his authority, constitutes notice to the principal[]"). See also Tex. Ins. Code § 542A.001(1), defining "agent" as "an employee,

agent, representative, or adjuster who performs any act on behalf of an insurer." When an agent is acting on behalf of an insurer in dealing with a claim, the jury should be instructed as follows:

You are instructed that *Don Davis* includes [*name of agent*].

Act of claimant's agent is act of claimant. Notice to the insurer by a person acting as an agent for the claimant is notice by the claimant. *Dunn v. Southern Farm Bureau Casualty Insurance Co.*, 991 S.W.2d 467, 473 (Tex. App.—Tyler 1999, pet. denied) (holding that notice given by claimant's attorney is notice given by claimant because "what a principal does through an agent, he does himself"). When an agent is acting on behalf of the claimant in dealing with the insurer, the jury should be instructed as follows:

You are instructed that *Paul Payne* includes [*name of agent*].

Requests for information from claimant. The statute requires that the insurer, within fifteen days of receipt of the notice of claim (or thirty business days if an eligible surplus lines insurer), "request from the claimant all items, statements, and forms that the insurer reasonably believes, at that time, will be required from the claimant." Tex. Ins. Code § 542.055(a)(3). The insurer may make additional requests for information "if during the investigation of the claim the additional [information] requests are necessary." Tex. Ins. Code § 542.055(b). An insurer's requests for information must be reasonable and necessary to decide whether to accept or reject the claim. *See Guide-One Lloyds Insurance Co. v. First Baptist Church of Bedford*, 268 S.W.3d 822, 835 (Tex. App.—Fort Worth 2008, no pet.) (core samples of damaged roof not required to make decision to accept or reject damaged roof claim); *Colonial County Mutual Insurance Co. v. Valdez*, 30 S.W.3d 514, 523 (Tex. App.—Corpus Christi 2000, no pet.) ("Common sense indicates that materials such as service records, sets of keys, and photographs of the vehicle are irrelevant to proving the loss of the vehicle.").

Extension of deadline—"eligible surplus lines insurer." If the insurer is an "eligible surplus lines insurer," the deadline for compliance with section 542.055 is "the 30th business day" after receipt of the notice of claim rather than the "15th day" deadline applicable to insurers that the Texas Department of Insurance has authorized to do business in Texas. An "eligible surplus lines insurer" is an unauthorized insurer meeting certain minimum requirements and selling insurance that in kind or amount of coverage is not available from authorized insurers. *See* Tex. Ins. Code § 981.002(4) (definition of "eligible surplus lines insurer"); Tex. Ins. Code ch. 981 (regulation of surplus lines insurers). "'Business day' means a day other than a Saturday, Sunday, or holiday recognized by this state." Tex. Ins. Code § 542.051(1). Thus, if the claim is against an eligible surplus lines insurer, the jury should be given the following instruction using the statutory definition of "business day" with the dates of the relevant state-recognized holidays inserted in place of the words "holiday recognized by the state":

"Business day" means every day except Saturday [, / *or*] Sunday [, *or* [*insert relevant state holiday(s)*]].

See Tex. Ins. Code § 542.051(1) (defining "business day"); Tex. Gov't Code ch. 662 (listing state-recognized holidays).

Extension of deadlines by court or insurance commissioner. A court may extend the statutory deadlines for a guaranty association showing good cause and after reasonable notice to policyholders. Tex. Ins. Code § 542.059(a). The commissioner of insurance may extend the statutory deadlines by fifteen days upon determining that there is a weather-related catastrophe or major natural disaster. Tex. Ins. Code § 542.059(b).

PJC 102.26 Prompt Payment of Claims Act—Violation of Insurer's Duty to Notify Claimant of Acceptance, Rejection, or Need for More Time after Receiving All Necessary Information Reasonably Requested from Claimant (Tex. Ins. Code § 542.056)

QUESTION _____

Did *Don Davis* fail to do either of the following acts within fifteen business days from the date *he* received all items, statements, and forms reasonably requested from *Paul Payne* that were necessary to decide whether to accept or reject the claim?

"Business day" means every day except Saturday [, / *or*] Sunday [, *or* [*insert relevant state holiday(s)*]].

1. Notify *Paul Payne* in writing that the claim was accepted; or

2. notify *Paul Payne* in writing that the claim was rejected and the reason[*s*] for the rejection.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 102.26 submits the insurer's failure to give written notice of its decision on the claim within fifteen "business days" of the date of the insurer's receipt of the information the insurer reasonably requested from the claimant. If rejecting the claim, the insurer must state its reasons. Tex. Ins. Code § 542.056(a), (c). There are two exceptions that extend the deadline for notifying the claimant of acceptance or rejection: the insurer is "unable" to accept or reject within the fifteen-day period (Tex. Ins. Code § 542.056(d)) or the insurer has a "reasonable basis to believe" the loss was the result of arson (Tex. Ins. Code § 542.056(b)). Each exception raises questions to be decided by the jury. See comments below, "Extension of deadline—insurer unable to accept or reject claim within time period" and "Extension of deadline—insurer's reasonable belief of arson," for further discussion of these exceptions.

Broad-form submission. PJC 102.26 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpret-

ing 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Penalty for failing to comply with requirements. Except for claims made after September 1, 2017, that arise from damage or loss to real property or improvements caused by "forces of nature" like hail, hurricane, flood, wind, and earthquake, an insurer "liable for a claim" and "not in compliance" with the requirements of the statute is "liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages." *Compare* Tex. Ins. Code § 542.060(a) (general 18 percent rule), *with* Tex. Ins. Code § 542.060(c) ("forces of nature" real property exception). In 2017 the legislature passed H.B. 1774 creating chapter 542A of the Texas Insurance Code for real property damage claims from "forces of nature." As a result, insurers who violate the statute in handling those claims are instead subject to a penalty "determined . . . by adding five percent" to the judgment rate under section 304.003 of the Texas Finance Code. Tex. Ins. Code § 542.060(c). The judgment rate is the Federal Reserve Board prime rate, subject to a minimum of 5 percent (if the Federal Reserve Board prime rate is lower) and a maximum of 15 percent (if the Federal Reserve Board prime rate is higher). Tex. Fin. Code § 304.003(c).

Finding date of insurer's receipt of requested information to determine when 18 percent interest penalty begins for claims governed by section 542.060(a). The Texas Supreme Court has not decided the date that the 18 percent penalty under Tex. Ins. Code § 542.060(a) accrues, that is, the date the penalty begins to run. The Fifth Circuit has decided the issue, however, ruling that the penalty begins on the date of the violation. *Cox Operating, L.L.C. v. St. Paul Surplus Lines Insurance Co.*, 795 F.3d 496, 505–09 (5th Cir. 2015). Thus, if the insurer has fifteen "business days" to comply but does not, the penalty under Tex. Ins. Code § 542.060(a) accrues on the sixteenth "business day." If the date of compliance is disputed because the date of the insurer's receipt of all reasonably requested information is disputed, the jury must determine the actual date the notice was received so that the court may then properly calculate the penalty. In such cases, the following question should precede PJC 102.26:

QUESTION _____

By what date had *Don Davis* received all items, statements, and forms *he* reasonably requested from *Paul Payne* that were necessary to decide whether to accept or reject the claim?

Answer with a date in the blank below.

Answer: _____

Finding "the date the claim was required to be paid" to determine when interest penalty begins on "forces of nature" real property claims governed by section 542.060(c). The interest penalty for violations in handling claims for damage to real property and improvements caused by "forces of nature" begins "on the date the claim was required to be paid." Tex. Ins. Code § 542.060(c). For questions and comments on the statute's requirements for payment, see PJC 102.27 and 102.28. PJC 102.27 submits the insurer's failure to pay what the insurer agreed to pay in its written notice to the claimant accepting the claim in whole or in part. Tex. Ins. Code § 542.057. PJC 102.28 submits the insurer's failure to pay the claim within sixty days of receiving "all items, statements, and forms reasonably requested and required under Section 542.055." Tex. Ins. Code § 542.058. The comments provide questions for determining the dates when the triggering event occurred, from which can be determined "the date the claim was required to be paid."

Determining if insurer is "liable for a claim under an insurance policy." To be liable for breach of any of the duties imposed by the Prompt Payment of Claims Act, the insurer must be "liable for a claim under an insurance policy." Tex. Ins. Code § 542.060(a); *Progressive County Mutual Insurance Co. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005). If there is a factual dispute whether the insurer is liable for the claim under the policy, the issue must be submitted to the jury. See PJC 101.56–101.60.

Act of insurer's agent is act of insurer. Notice to a person acting as an agent for the insurer is notice to the insurer, and thus the date the agent receives notice of the claim is the date the insurer receives notice of the claim. *Protective Life Insurance Co. v. Russell*, 119 S.W.3d 274, 287–88 (Tex. App.—Tyler 2003, no pet.) (citing Tex. Ins. Code art. 21.02, now Tex. Ins. Code § 4001.051, which lists the acts that constitute acting as an agent for an insurer, and holding that "[n]otice to an agent, received while the agent is acting within the scope of his authority, constitutes notice to the principal[]"). See also Tex. Ins. Code § 542A.001(1), defining "agent" as "an employee, agent, representative, or adjuster who performs any act on behalf of an insurer." When an agent is acting on behalf of an insurer in dealing with a claim, the jury should be instructed as follows:

> You are instructed that *Don Davis* includes [*name of agent*].

Act of claimant's agent is act of claimant. Notice to the insurer by a person acting as an agent for the claimant is notice by the claimant. *Dunn v. Southern Farm Bureau Casualty Insurance Co.*, 991 S.W.2d 467, 473 (Tex. App.—Tyler 1999, pet. denied) (holding that notice given by claimant's attorney is notice given by claimant because "what a principal does through an agent, he does himself"). When an agent is acting on behalf of the claimant in dealing with the insurer, the jury should be instructed as follows:

> You are instructed that *Paul Payne* includes [*name of agent*].

Information "required by the insurer to secure final proof of loss." The insurer must notify the claimant of the disposition of the claim within fifteen business days from "the date the insurer receives all items, statements, and forms required by the insurer to secure final proof of loss." Tex. Ins. Code § 542.056(a). The statute does not define "proof of loss," though it is commonly understood to mean "documentation of loss required of a policyowner by an insurance company[] [such as] a death certificate (or copy) [that] must be submitted to the company for a life insurance death benefit to be paid to the beneficiary." H. Rubin, *Dictionary of Insurance Terms* 416 (Barron's Business Guides, 6th ed. 2013). This meaning comports with the statute's description of what the insurer must timely request of the claimant. Using the same phrase as section 542.056(a), Tex. Ins. Code § 542.055(a)(3) requires the insurer, within fifteen days of receipt of the notice of claim, to "request from the claimant *all items, statements, and forms* that the insurer *reasonably* believes, at that time, *will be required from the claimant*" (emphasis added); under Tex. Ins. Code § 542.055(b), the insurer may make "additional requests for information if during the investigation of the claim the additional requests are *necessary*" (emphasis added); and under Tex. Ins. Code § 542.058, the insurer must pay a claim within sixty days after receiving "all items, statements, and forms *reasonably requested and required under Section 542.055*" (emphasis added). In short, the statute equates what the insurer must receive from the claimant with what the insurer must timely request from the claimant—items, statements, and forms that are necessary to decide the claim. Because this is consistent with the ordinary meaning of "proof of loss," the pattern jury questions do not use that term but instead use the phrase "necessary to decide whether to accept or reject the claim" to describe what the insurer must have received to trigger its duty to notify the claimant of its decision on the claim.

Definition of "business day" and "day." The various sections of the Prompt Payment of Claims Act use either "day" or "business day" depending on the statutory deadline involved. "Business day" is defined in Tex. Ins. Code § 542.051(1). *See* Tex. Gov't Code ch. 662 (listing state-recognized holidays). To avoid confusion the court may wish to define "day" for the jury as "every day, including all Saturdays, Sundays, and holidays." The appropriate definition should be included depending on the relevant statutory deadline.

Extension of deadline—insurer unable to accept or reject claim within time period. The deadline to notify the claimant of acceptance or rejection may be extended "[i]f the insurer is unable to accept or reject the claim within the time period" and, "within that same period," the insurer "notif[ies] the claimant of the reasons that the insurer needs additional time." Tex. Ins. Code § 542.056(d). The insurer must then "accept or reject the claim not later than the 45th day after the date the insurer notifies a claimant under this subsection." Tex. Ins. Code § 542.056(d). If an insurer is relying on this exception, the following questions are appropriate. If it is undisputed that the insurer gave notice of its need for more time within fifteen business days, Question 2 below may be omitted.

QUESTION 1

Was *Don Davis* unable to accept or reject *Paul Payne*'s claim within fifteen business days of receiving all items, statements, and forms he reasonably requested from *Paul Payne* that were necessary to decide whether to accept or reject the claim?

"Business day" means every day except Saturday [, */ or*] Sunday [, *or* [*insert relevant state holiday(s)*]].

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer the following question. Otherwise, do not answer the following question.

QUESTION 2

Did *Don Davis*, within the fifteen-business-day period, notify *Paul Payne* of the reasons *Don Davis* needed more time to decide whether to accept or reject the claim?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 2, then answer the following question. Otherwise, do not answer the following question.

QUESTION 3

Did *Don Davis* fail to do either of the following acts within forty-five days after notifying *Paul Payne* of the reasons *Don Davis* needed more time to decide whether to accept or reject the claim?

1. Notify *Paul Payne* in writing that all or part of the claim was accepted; or

2. notify *Paul Payne* in writing that all or part of the claim was rejected and the reason[*s*] for the rejection.

Answer "Yes" or "No."

Answer: _____

Extension of deadline—insurer's reasonable belief of arson. If the insurer has a "reasonable basis to believe" the loss was the result of arson, the deadline to notify of acceptance, rejection, or inability to decide is thirty *days* (which *includes* Saturdays, Sundays, and holidays) rather than fifteen *business days* (which *excludes* Saturdays, Sundays, and state holidays). Tex. Ins. Code § 542.056(b). If the insurer is relying on the arson exception, the jury should be asked whether the insurer had a "reasonable basis to believe" the loss was the result of arson and whether the notice to the claimant was within thirty days of the insurer's receipt of all the requested information.

Extension of deadlines by court or insurance commissioner. A court may extend the statutory deadlines for a guaranty association showing good cause and after reasonable notice to policyholders. Tex. Ins. Code § 542.059(a) The commissioner of insurance may extend the statutory deadlines by fifteen days upon determining that there is a weather-related catastrophe or major natural disaster. Tex. Ins. Code § 542.059(b).

PJC 102.27 Prompt Payment of Claims Act—Violation of Insurer's Duty to Pay after Notice to Claimant that Insurer Will Pay All or Part of Claim (Tex. Ins. Code § 542.057)

QUESTION _____

Did *Don Davis* fail to timely pay *Paul Payne*'s claim?

An insurer "fails to timely pay" if, within five business days of notifying the claimant in writing that it will pay all or part of a claim, the insurer fails to pay as stated in the writing.

"Business day" means every day except Saturday [, */ or*] Sunday [, *or* [*insert relevant state holiday(s)*]].

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 102.27 submits the insurer's failure to pay what the insurer agreed to pay in its written notice to the claimant accepting the claim in whole or in part. Tex. Ins. Code § 542.057. If the insurer conditions its promise to pay on the performance of an act by the claimant, the insurer must pay within five business days of the performance of the act, rather than five business days of the notice to the claimant, and the question in PJC 102.27 should be modified accordingly. PJC 102.27 assumes the insurer is not an "eligible surplus lines insurer" and therefore provides for a five-day time period in which the insurer is required to comply. See comment below, "Extension of deadline—'eligible surplus lines insurer,'" for changes to the question if such an insurer is involved.

Broad-form submission. PJC 102.27 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Penalty for failing to comply with requirements. Except for claims made after September 1, 2017, that arise from damage or loss to real property or improvements caused by "forces of nature" like hail, hurricane, flood, wind, and earthquake, an insurer "liable for a claim" and "not in compliance" with the requirements of the stat-

ute is "liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages." *Compare* Tex. Ins. Code § 542.060(a) (general 18 percent rule), *with* Tex. Ins. Code § 542.060(c) ("forces of nature" real property exception). In 2017 the legislature passed H.B. 1774 creating chapter 542A of the Texas Insurance Code for real property damage claims from "forces of nature." As a result, insurers who violate the statute in handling those claims are instead subject to a penalty "determined . . . by adding five percent" to the judgment rate under section 304.003 of the Texas Finance Code. Tex. Ins. Code § 542.060(c). The judgment rate is the Federal Reserve Board prime rate, subject to a minimum of 5 percent (if the Federal Reserve Board prime rate is lower) and a maximum of 15 percent (if the Federal Reserve Board prime rate is higher). Tex. Fin. Code § 304.003(c).

Finding date of insurer's notice that it would pay all or part of claim to determine when 18 percent interest penalty begins for claims governed by section 542.060(a). The Texas Supreme Court has not decided the date that the 18 percent penalty under Tex. Ins. Code § 542.060(a) accrues, that is, the date the penalty begins to run. The Fifth Circuit has decided the issue, however, ruling that the penalty begins on the date of the violation. *Cox Operating, L.L.C. v. St. Paul Surplus Lines Insurance Co.*, 795 F.3d 496, 505–09 (5th Cir. 2015). Thus, if the insurer has five "business days" to comply but does not, the penalty under Tex. Ins. Code § 542.060(a) accrues on the sixth "business day." If the date of the insurer's notice to the claimant is disputed, the jury must determine the actual date of the notice so that the court may then properly calculate the penalty. In such cases, the following question should precede PJC 102.27:

QUESTION _____

By what date did *Don Davis* notify *Paul Payne* in writing that *Don Davis* would pay all or part of *Paul Payne*'s claim?

Answer with a date in the blank below.

Answer: _____

Finding "the date the claim was required to be paid" to determine when interest penalty begins on "forces of nature" real property claims governed by section 542.060(c). The interest penalty for violations in handling claims for damage to real property and improvements caused by "forces of nature" begins "on the date the claim was required to be paid." Tex. Ins. Code § 542.060(c). Under section 542.057 the claim is "required to be paid" within five days of the insurer's written notification of its willingness to do so. If the date of the insurer's written notification is disputed, the question in the preceding comment asking the date should be submitted.

Determining if insurer is "liable for a claim under an insurance policy." To be liable for breach of any of the duties imposed by the Prompt Payment of Claims Act, the insurer must be "liable for a claim under an insurance policy." Tex. Ins. Code § 542.060(a); *Progressive County Mutual Insurance Co. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005). If there is a factual dispute whether the insurer is liable for the claim under the policy, the issue must be submitted to the jury. See PJC 101.56–101.60.

Definition of "business day" and "day." The various sections of the Prompt Payment of Claims Act use either "day" or "business day" depending on the statutory deadline involved. "Business day" is defined in Tex. Ins. Code § 542.051(1). *See* Tex. Gov't Code ch. 662 (listing state-recognized holidays). To avoid confusion the court may wish to define "day" for the jury as "every day, including all Saturdays, Sundays, and holidays." The appropriate definition should be included depending on the relevant statutory deadline.

Act of insurer's agent is act of insurer. Notice to a person acting as an agent for the insurer is notice to the insurer, and thus the date the agent receives notice of the claim is the date the insurer receives notice of the claim. *Protective Life Insurance Co. v. Russell*, 119 S.W.3d 274, 287–88 (Tex. App.—Tyler 2003, no pet.) (citing Tex. Ins. Code art. 21.02, now Tex. Ins. Code § 4001.051, which lists the acts that constitute acting as an agent for an insurer, and holding that "[n]otice to an agent, received while the agent is acting within the scope of his authority, constitutes notice to the principal[]"). See also Tex. Ins. Code § 542A.001(1), defining "agent" as "an employee, agent, representative, or adjuster who performs any act on behalf of an insurer." When an agent is acting on behalf of an insurer in dealing with a claim, the jury should be instructed as follows:

You are instructed that *Don Davis* includes [*name of agent*].

Act of claimant's agent is act of claimant. Notice to the insurer by a person acting as an agent for the claimant is notice by the claimant. *Dunn v. Southern Farm Bureau Casualty Insurance Co.*, 991 S.W.2d 467, 473 (Tex. App.—Tyler 1999, pet. denied) (holding that notice given by claimant's attorney is notice given by claimant because "what a principal does through an agent, he does himself"). When an agent is acting on behalf of the claimant in dealing with the insurer, the jury should be instructed as follows:

You are instructed that *Paul Payne* includes [*name of agent*].

Extension of deadline—"eligible surplus lines insurer." If the insurer is an "eligible surplus lines insurer," the deadline for compliance with section 542.057 is "the 20th business day" after the insurer notifies the claimant that it will pay all or part of the claim or after the claimant's performance of the act the insurer requires as a condition of payment, whichever is applicable. Tex. Ins. Code § 542.057(c). An "eligible surplus lines insurer" is an unauthorized insurer meeting certain minimum requirements and selling insurance that in kind or amount of coverage is not available from

authorized insurers. *See* Tex. Ins. Code § 981.002(4) (definition of "eligible surplus lines insurer"); Tex. Ins. Code ch. 981 (regulation of surplus lines insurers). "'Business day' means a day other than a Saturday, Sunday, or holiday recognized by this state." Tex. Ins. Code § 542.051(1). Thus, if the claim is against an eligible surplus lines insurer, the jury should be given the following instruction using the statutory definition of "business day" with the dates of the relevant state-recognized holidays inserted in place of the words "holiday recognized by the state":

> "Business day" means every day except Saturday [, / *or*] Sunday [, *or* [*insert relevant state holiday(s)*]].

See Tex. Ins. Code § 542.051(1) (defining "business day"); Tex. Gov't Code ch. 662 (listing state-recognized holidays).

Extension of deadlines by court or insurance commissioner. A court may extend the statutory deadlines for a guaranty association showing good cause and after reasonable notice to policyholders. Tex. Ins. Code § 542.059(a). The commissioner of insurance may extend the statutory deadlines by fifteen days upon determining that there is a weather-related catastrophe or major natural disaster. Tex. Ins. Code § 542.059(b).

PJC 102.28 Prompt Payment of Claims Act—Violation of Insurer's Duty to Pay Claim within Sixty Days of Receipt of All Necessary Information Reasonably Requested from Claimant (Tex. Ins. Code § 542.058)

QUESTION _____

Did *Don Davis* fail to pay *Paul Payne*'s claim within sixty days of receiving all items, statements, and forms *he* reasonably requested from *Paul Payne* that were necessary to decide whether to accept or reject the claim?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 102.28 submits the insurer's failure to pay the claim within sixty days of receiving "all items, statements, and forms reasonably requested and required under Section 542.055." Tex. Ins. Code § 542.058.

Broad-form submission. PJC 102.28 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Penalty for failing to comply with requirements. Except for claims made after September 1, 2017, that arise from damage or loss to real property or improvements caused by "forces of nature" like hail, hurricane, flood, wind, and earthquake, an insurer "liable for a claim" and "not in compliance" with the requirements of the statute is "liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages." *Compare* Tex. Ins. Code § 542.060(a) (general 18 percent rule), *with* Tex. Ins. Code § 542.060(c) ("forces of nature" real property exception). In 2017 the legislature passed H.B. 1774 creating chapter 542A of the Texas Insurance Code for real property damage claims from "forces of nature." As a result, insurers who violate the statute in handling those claims are instead subject to a penalty "determined . . . by adding five percent" to the judgment rate under section 304.003 of the Texas Finance Code. Tex. Ins. Code § 542.060(c). The judgment rate

is the Federal Reserve Board prime rate, subject to a minimum of 5 percent (if the Federal Reserve Board prime rate is lower) and a maximum of 15 percent (if the Federal Reserve Board prime rate is higher). Tex. Fin. Code § 304.003(c).

Finding date insurer received all reasonably requested information to determine when 18 percent interest penalty begins for claims governed by section 542.060(a). The Texas Supreme Court has not decided the date that the 18 percent penalty accrues, that is, the date the penalty begins to run. The Fifth Circuit has decided the issue, however, ruling that the penalty begins on the date of the violation. *Cox Operating, L.L.C. v. St. Paul Surplus Lines Insurance Co.*, 795 F.3d 496, 505–09 (5th Cir. 2015). Thus, if the insurer has sixty days to comply but does not, the penalty accrues on the sixty-first day. If the date of the insurer's receipt of the requested information is disputed, the jury must determine the actual date of receipt so that the court may then properly calculate the penalty. In such cases, the following question should precede PJC 102.28:

QUESTION _____

By what date had *Don Davis* received all items, statements, and forms *he* reasonably requested from *Paul Payne* that were necessary to decide whether to accept or reject the claim?

Answer with a date in the blank below.

Answer: _____

Finding "the date the claim was required to be paid" to determine when interest penalty begins on "forces of nature" real property claims governed by section 542.060(c). The interest penalty for violations in handling claims for damage to real property and improvements caused by "forces of nature" begins "on the date the claim was required to be paid." Tex. Ins. Code § 542.060(c). Under Section 542.058, the claim is "required to be paid" within sixty days of receiving all information reasonably requested from the claimant that is necessary to decide the claim. If the date by which this information was received is disputed, the question in the preceding comment asking the date should be submitted.

Determining if insurer is "liable for a claim under an insurance policy." To be liable for breach of any of the duties imposed by the Prompt Payment of Claims Act, the insurer must be "liable for a claim under an insurance policy." Tex. Ins. Code § 542.060(a); *Progressive County Mutual Insurance Co. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005). If there is a factual dispute whether the insurer is liable for the claim under the policy, the issue must be submitted to the jury. See PJC 101.56–101.60. Consistent with the requirement that the policy cover the claim, Tex. Ins. Code § 541.058(a)'s requirement to pay within sixty days expressly does not apply if as a

result of arbitration or litigation "the claim is invalid and should not be paid by the insurer." Tex. Ins. Code § 542.058(b).

Definition of "business day" and "day." The various sections of the Prompt Payment of Claims Act use either "day" or "business day" depending on the statutory deadline involved. "Business day" is defined in Tex. Ins. Code § 542.051(1). *See* Tex. Gov't Code ch. 662 (listing state-recognized holidays). To avoid confusion the court may wish to define "day" for the jury as "every day, including all Saturdays, Sundays, and holidays." The appropriate definition should be included depending on the relevant statutory deadline.

Partial payment. An unconditional offer to pay part of the claim limits the 18 percent penalty to the difference between the tendered amount and the full amount found to be owed by the insurer. *Republic Underwriters Insurance Co. v. Mex-Tex, Inc.*, 150 S.W.3d 423, 425–26 (Tex. 2004).

"Items, statements, and forms reasonably requested and required." For a discussion of the information the insurer may request and receive from the claimant, see the comments "Requests for information from claimant" in PJC 102.25 and "Information 'required by the insurer to secure final proof of loss'" in PJC 102.26.

Interpleader by life insurer. A life insurer may avoid the penalty of failing to pay by the deadline if it files an interpleader action beforehand. The insurer must have received an "adverse, bona fide claim to all or part of the proceeds," must "properly file an interpleader action," and must pay the policy proceeds into the court registry within ninety days of receiving "all items, statements, and forms reasonably requested and required under Section 542.055." Tex. Ins. Code § 542.058(c). The insurer remains liable for the penalty, however, if it delays the filing of an interpleader and tender of policy proceeds for more than ninety days.

Act of insurer's agent is act of insurer. Notice to a person acting as an agent for the insurer is notice to the insurer, and thus the date the agent receives notice of the claim is the date the insurer receives notice of the claim. *Protective Life Insurance Co. v. Russell*, 119 S.W.3d 274, 287–88 (Tex. App.—Tyler 2003, no pet.) (citing Tex. Ins. Code art. 21.02, now Tex. Ins. Code § 4001.051, which lists the acts that constitute acting as an agent for an insurer, and holding that "[n]otice to an agent, received while the agent is acting within the scope of his authority, constitutes notice to the principal[]"). See also Tex. Ins. Code § 542A.001(1), defining "agent" as "an employee, agent, representative, or adjuster who performs any act on behalf of an insurer." When an agent is acting on behalf of an insurer in dealing with a claim, the jury should be instructed as follows:

You are instructed that *Don Davis* includes [*name of agent*].

Act of claimant's agent is act of claimant. Notice to the insurer by a person acting as an agent for the claimant is notice by the claimant. *Dunn v. Southern Farm Bureau Casualty Insurance Co.*, 991 S.W.2d 467, 473 (Tex. App.—Tyler 1999, pet.

denied) (holding that notice given by claimant's attorney is notice given by claimant because "what a principal does through an agent, he does himself"). When an agent is acting on behalf of the claimant in dealing with the insurer, the jury should be instructed as follows:

You are instructed that *Paul Payne* includes [*name of agent*].

Extension of deadlines by court or insurance commissioner. A court may extend the statutory deadlines for a guaranty association showing good cause and after reasonable notice to policyholders. Tex. Ins. Code § 542.059(a). The commissioner of insurance may extend the statutory deadlines by fifteen days upon determining that there is a weather-related catastrophe or major natural disaster. Tex. Ins. Code § 542.059(b).

PJC 103.1 Common-Law Duty of Good Faith and Fair Dealing—Question and Instruction on Insurance Claim Denial or Delay in Payment

QUESTION _____

Did *Don Davis Insurance Company* fail to comply with its duty of good faith and fair dealing to *Paul Payne*?

An insurer fails to comply with its duty of good faith and fair dealing by—

Failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when the insurer's liability has become reasonably clear [*or*]

Refusing to pay a claim without conducting a reasonable investigation of the claim [*or*]

Canceling an insurance policy without a reasonable basis.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 103.1 may be used to submit a breach of the common-law duty of good faith and fair dealing by an insurer.

Broad-form submission. PJC 103.1 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Source of duty. The supreme court has held, as a matter of law, that a special relationship exists between an insurer and the insured arising out of the parties' unequal bargaining power and the exclusive control that the insurer exercises over the processing of claims and the canceling of insurance contracts. *Union Bankers Insurance Co. v. Shelton*, 889 S.W.2d 278, 283 (Tex. 1994) (policy cancellation); *Arnold v. National County Mutual Fire Insurance Co.*, 725 S.W.2d 165, 167 (Tex. 1987) (claim denial). The supreme court has held that the duty does not extend past the rendition of a money judgment against an insurer. *Mid-Century Insurance Co. of Texas v. Boyte*, 80 S.W.3d 546, 548–49 (Tex. 2002).

This duty is nondelegable. Therefore, persons and entities providing claims-handling services other than the insurer cannot be liable for breach of this common-law duty. *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 698 (Tex. 1994). However, in appropriate cases, the Texas Insurance Code provides a statutory claim against such parties for unfair insurance practices. *See Liberty Mutual Insurance Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 484–86 (Tex. 1998). Questions submitting statutory liability are found at PJC 102.14–102.24.

A liability insurer investigating and defending a claim brought against its insured by a third party owes no common-law duty of good faith and fair dealing to its insured in the investigation and payment of the claim; however, an insured may have a statutory claim against a liability insurer in this context. See PJC 102.18. *See also Rocor International, Inc. v. National Union Fire Insurance Co.*, 77 S.W.3d 253, 260 (Tex. 2002).

Source of instruction. In *Arnold*, the supreme court held that an insurer breaches its common-law duty by denying a claim without a reasonable basis or by failing to conduct a reasonable investigation. *Arnold*, 725 S.W.2d at 167. In *Aranda v. Insurance Co. of North America*, the supreme court "imposed the holding of *Arnold* onto the workers' compensation system and held that an injured employee was entitled to assert a claim against a workers' compensation carrier for breach of the duty of good faith and fair dealing." *Texas Mutual Insurance Co. v. Ruttiger*, 381 S.W.3d 430, 446 (Tex. 2012) (citing *Aranda v. Insurance Co. of North America*, 748 S.W.2d 210, 212–13 (Tex. 1988)). In *Shelton*, the supreme court extended the duty to include an insurer's unreasonable cancellation of an insurance policy. *Shelton*, 889 S.W.2d at 283. PJC 103.1 submits each of these elements of the duty. In *Universe Life Insurance Co. v. Giles*, 950 S.W.2d 48 (Tex. 1997), the supreme court revised the common-law duty to track the statutory prohibition on unfair refusal to settle. *Giles*, 950 S.W.2d at 55–56; *see* Tex. Ins. Code § 541.060(a)(2)(A) (formerly Tex. Ins. Code art. 21.21, § 4(10)(a)(ii)). The first definition is taken from this statutory language and parallels PJC 102.18. By extension, the duty of good faith and fair dealing with respect to failing to conduct a reasonable investigation has been recast in the statutory language of Tex. Ins. Code § 541.060(a)(7) (formerly Tex. Ins. Code art. 21.21, § 4(10)(a)(viii)). This language also parallels the statutory submission in PJC 102.18. The third definition is based on *Shelton* and has no statutory counterpart.

Elimination of instruction for workers' compensation claims. In its 1988 decision in *Aranda*, the supreme court held that a workers' compensation carrier owes a common-law duty of good faith and fair dealing to an injured employee. *Aranda*, 748 S.W.2d at 212–13. In 2012, the supreme court explained that, through the 1989 amendments to the Workers' Compensation Act, the legislature addressed the "serious shortcomings in the old [workers' compensation] law," including the prior "deficiencies underlying *Aranda*." *Ruttiger*, 381 S.W.3d at 447–49. Given these amendments, as well as its observation that *Aranda* now often operates in "direct opposition to . . . the Act's goals," the court overruled *Aranda*. *Ruttiger*, 381 S.W.3d at 450–51. Accord-

ingly, the court held that "an injured employee may not assert a common-law claim for breach of the duty of good faith and fair dealing against a workers' compensation carrier." *Ruttiger*, 381 S.W.3d at 433.

Causation. A finding of a breach of the common-law duty of good faith and fair dealing entitles a plaintiff to recovery of all damages proximately caused by the wrongful conduct. *Chitsey v. National Lloyds Insurance Co.*, 738 S.W.2d 641, 643 (Tex. 1987). Causation is incorporated into the damages instruction. See PJC 115.14.

Exemplary damages. Exemplary damages are allowed for breach of the duty of good faith and fair dealing and are governed by the same principles applicable to other tort actions. *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 23 & n.16 (Tex. 1994); *Arnold*, 725 S.W.2d at 168. Fraud, malice, and gross negligence are grounds for recovery of exemplary damages. Tex. Civ. Prac. & Rem. Code § 41.003(a). For questions submitting exemplary damages, see PJC 115.37 and 115.38 and the Comments accompanying those questions.

Noninsurance cases. The courts have been reluctant to impose a special relationship on parties to an arm's-length business transaction outside the insurance area. *See, e.g., City of Midland v. O'Bryant*, 18 S.W.3d 209, 215–16 (Tex. 2000) (employer-employee relationship); *FDIC v. Coleman*, 795 S.W.2d 706, 708–09 (Tex. 1990) (secured creditor/guarantor and receiver/guarantor); *Texstar North America, Inc. v. Ladd Petroleum Corp.*, 809 S.W.2d 672, 678 (Tex. App.—Corpus Christi 1991, writ denied) (working-interest owners/parties to joint operating agreement); *Nautical Landings Marina, Inc. v. First National Bank*, 791 S.W.2d 293, 299 (Tex. App.—Corpus Christi 1990, writ denied) (lender/borrower); *Adolph Coors Co. v. Rodriguez*, 780 S.W.2d 477, 481 (Tex. App.—Corpus Christi 1989, writ denied) (supplier/distributor); *City of San Antonio v. Forgy*, 769 S.W.2d 293, 296–98 (Tex. App.—San Antonio 1989, writ denied) (city/contractor); *Lovell v. Western National Life Insurance Co.*, 754 S.W.2d 298, 303 (Tex. App.—Amarillo 1988, writ denied) (mortgagor/mortgagee). *But see Subaru of America, Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 225–26 (Tex. 2002) (statutory special relationship existed in automobile dealership franchise agreement); *Sanus/New York Life Health Plan, Inc. v. Dube-Seybold-Sutherland Management, Inc.*, 837 S.W.2d 191, 199 (Tex. App.—Houston [1st Dist.] 1992, writ dism'd by agr.) (special relationship existed between health maintenance organization and health-care provider).

PJC 103.2 Duty of Good Faith under the Uniform Commercial Code (Comment)

The basic question in PJC 101.2 should be used with one of the appropriate instructions set out in the comment titled "UCC good-faith obligation."

PJC 103.3 Duty of Good Faith by Express Contract (Comment)

Parties may create a duty of good faith and fair dealing by the express terms of a contract not governed by the Uniform Commercial Code. The basic question in PJC 101.2 should be used to submit all contractual provisions including the express duty of good faith and fair dealing.

PJC 104.1 Question and Instruction—Existence of Relationship of Trust and Confidence

QUESTION _____

Did a relationship of trust and confidence exist between *Don Davis* and *Paul Payne*?

A relationship of trust and confidence existed if *Paul Payne* justifiably placed trust and confidence in *Don Davis* to act in *Paul Payne*'s best interest. *Paul Payne*'s subjective trust and feelings alone do not justify transforming arm's-length dealings into a relationship of trust and confidence.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 104.1 submits the existence of an informal fiduciary relationship, commonly referred to as a "relationship of trust and confidence" or a "confidential relationship." This relationship may arise from moral, social, domestic, or purely personal relationships. *Ritchie v. Rupe*, 443 S.W.3d 856, 874 n.27 (Tex. 2014); *Meyer v. Cathey*, 167 S.W.3d 327, 330–31 (Tex. 2005); *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962); *MacDonald v. Follett*, 180 S.W.2d 334, 337 (Tex. 1944). Informal fiduciary duties are not owed in business transactions unless the special relationship of trust and confidence existed prior to, and apart from, the transaction(s) at issue in the case. *Ritchie*, 443 S.W.3d at 874 n.27. Informal fiduciary relationships are distinguished from technical or formal fiduciary relationships such as attorney-client, principal-agent, officer/director-corporation, partner-partner, trustee–cestui que trust, or guardian-ward, which as a matter of law are relationships of trust and confidence. *Thigpen*, 363 S.W.2d at 253; *see also Ritchie*, 443 S.W.3d at 868 (holding that officers and directors, or those acting as such, owe a fiduciary duty to the corporation in their directorial actions). The existence of an informal relationship of trust and confidence is usually a question of fact. *Crim Truck & Tractor Co. v. Navistar International Transportation Corp.*, 823 S.W.2d 591, 594 (Tex. 1992).

Broad-form submission. PJC 104.1 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance

in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Formal fiduciary relationships. If the existence of a formal fiduciary relationship is disputed, a question should be submitted inquiring whether the formal fiduciary relationship exists at the time of the occurrence or transaction at issue, or with respect to the occurrence or transaction at issue, or both. *See National Plan Administrators, Inc. v. National Health Insurance Co.*, 235 S.W.3d 695, 700–704 (Tex. 2007); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200–203 (Tex. 2002); *Schiller v. Elick*, 240 S.W.2d 997, 999–1000 (Tex. 1951); see also the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products* PJC 61.3 (form question when the existence of a professional relationship is in dispute).

When the existence of an informal fiduciary relationship is a question of law. Although the existence of an informal relationship of trust and confidence is ordinarily a question of fact, if the issue is one of no evidence, it becomes a question of law. *Crim Truck & Tractor Co.*, 823 S.W.2d at 594. Similarly, if the facts are undisputed, the question is one of law. *Meyer*, 167 S.W.3d at 330. The supreme court has held that the following situations, for example, do not rise to the level of a relationship of trust and confidence:

- One businessman trusts another and relies on his promise to perform a contract. *Consolidated Gas & Equipment Co. v. Thompson*, 405 S.W.2d 333, 336 (Tex. 1966); *Thigpen*, 363 S.W.2d at 253.

- The relationship has been a cordial one and of long duration. *Thigpen*, 363 S.W.2d at 253.

- People have had prior dealings with each other and one party subjectively trusts the other. *Meyer*, 167 S.W.3d at 331; *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex. 1997); *Consolidated Gas & Equipment Co.*, 405 S.W.2d at 336; *Thigpen*, 363 S.W.2d at 253.

- The plaintiff has always done everything requested by the defendant. *Crim Truck & Tractor Co.*, 823 S.W.2d at 596 n.6.

If commencement or termination of relationship is at issue. If there is a dispute about whether the relationship had begun or had terminated at the time of the alleged breach, the Committee suggests adding to the question the phrases, "on [*date*]" or "at the time of the [*occurrence or transaction*]." *See Meyer*, 167 S.W.3d at 331 (quoting *Associated Indemnity Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 287 (Tex. 1998)); *Swanson*, 959 S.W.2d at 177 (in business transaction, special relationship of trust and confidence must have existed before, and apart from, agreement made basis of suit); *Schiller*, 240 S.W.2d at 1000 (relationship must not have been terminated before time of occurrence or transaction giving rise to cause of action).

Source of question and instruction. PJC 104.1 is derived from *Thigpen*, 363 S.W.2d at 253 (confidential relationship exists if beneficiary is justified in placing trust and confidence in fiduciary to act in beneficiary's best interest); *Crim Truck & Tractor Co.*, 823 S.W.2d at 594–95 (subjective trust alone does not transform arm's-length transaction into fiduciary relationship); and *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 261 (Tex. 1951) (informal relationship may arise where one person trusts and relies on another).

PJC 104.2 Question and Instruction—Breach of Fiduciary Duty Defined by Common Law—Burden on Fiduciary

QUESTION _____

Did *Don Davis* comply with *his* fiduciary duty to *Paul Payne*?

[*Because a relationship of trust and confidence existed between them,*] [*As Paul Payne's attorney,*] [*As Paul Payne's agent,*] *Don Davis* owed *Paul Payne* a fiduciary duty. To prove *he* complied with *his* duty, *Don Davis* must show—

1. the transaction[*s*] in question [*was/were*] fair and equitable to *Paul Payne*; and

2. *Don Davis* made reasonable use of the confidence that *Paul Payne* placed in *him*; and

3. *Don Davis* acted in the utmost good faith and exercised the most scrupulous honesty toward *Paul Payne*; and

4. *Don Davis* placed the interests of *Paul Payne* before *his* own and did not use the advantage of *his* position to gain any benefit for *himself* at the expense of *Paul Payne*; and

5. *Don Davis* fully and fairly disclosed all important information to *Paul Payne* concerning the transaction[*s*].

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 104.2 submits the question of breach of fiduciary duty defined by the common law, whether the duty is based on a formal or an informal relationship, when the fiduciary bears the burden of proof. The burden of proof is on the fiduciary when the fiduciary has profited or benefited from a transaction with the beneficiary or has placed himself in a position in which his self-interest might conflict with the beneficiary. For cases in which the beneficiary has the burden of proof, see PJC 104.3.

If the fiduciary duty is defined by a statute or an agreement, see PJC 104.4 or 104.5. If the duty is defined by a trust agreement or the Texas Trust Code (Tex. Prop. Code tit. 9, subtit. B), see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Family & Probate* PJC 235.9–235.15. If the duty is defined by an agreement relating to oil and gas exploration or production, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Oil & Gas* PJC 304.1–304.2. If the duty

arises from an attorney-client relationship, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products* PJC 61.7.

If the existence of a formal fiduciary relationship is disputed, a preliminary question should be submitted. *Schiller v. Elick*, 240 S.W.2d 997, 999 (Tex. 1951) (dispute whether defendant was plaintiff's agent); *see also Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 202–03 (Tex. 2002) (whether to impose fiduciary duty on employee depends on whether he was agent with respect to particular transaction). See also the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products* PJC 61.3. PJC 104.1 submits the existence of an informal fiduciary relationship. PJC 104.2 should be conditioned on an affirmative answer to either PJC 104.1 or the preliminary question asking whether the formal fiduciary relationship exists.

Source of question and instruction. The question and instruction are based on principles stated in *Crim Truck & Tractor Co. v. Navistar International Transportation Corp.*, 823 S.W.2d 591, 594 (Tex. 1992) (fiduciary duty requires party to place interest of other party before his own); *Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d 257, 261 (Tex. 1974) (material issues are whether fiduciary made reasonable use of trust and confidence placed in him and whether transactions were ultimately fair and equitable to beneficiary); *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 264–65 (Tex. 1951) (fiduciaries owe utmost good faith and most scrupulous honesty); *Slay v. Burnett Trust*, 187 S.W.2d 377, 387–88 (Tex. 1945) (duty of loyalty prohibits trustee from using advantage of his position to gain any benefit for himself at expense of his cestui que trust and from placing himself in any position where his self-interest will or may conflict with his obligations as trustee); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 512–14 (Tex. 1942) (it is duty of fiduciary to deal openly and to make full disclosure to party with whom he stands in such relationship); *Johnson v. Peckham*, 120 S.W.2d 786, 787 (Tex. 1938) (fiduciaries required to make full disclosure of all material facts within their knowledge relating to fiduciary relationship; it is necessary to make disclosure of all important information), *cited in Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171, 175, 181 (Tex. 1997); and *Lundy v. Masson*, 260 S.W.3d 482, 503–04 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (fiduciaries owe utmost good faith and most scrupulous honesty).

Broad-form submission. PJC 104.2 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Presumption of unfairness shifts burden of proof. When a fiduciary profits or benefits in any way from a transaction with the beneficiary, a presumption of unfairness arises that shifts the burden of persuasion to the fiduciary or the party claiming the validity or benefits of the transaction to show that the transaction was fair and equitable to the beneficiary. *Keck, Mahin & Cate v. National Union Fire Insurance Co. of Pittsburgh*, 20 S.W.3d 692, 699 (Tex. 2000); *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 509 (Tex. 1980); *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964).

A presumption of unfairness also arises and the burden of proof shifts to the fiduciary if the fiduciary places himself in a position in which his self-interest might conflict with his obligations as a fiduciary. *Stephens County Museum, Inc.*, 517 S.W.2d at 260–61 (fiduciary's positions as trusted business advisor, holding a power of attorney for donors, and as director and officer of donee created presumption of unfairness in transactions); *Slay*, 187 S.W.2d at 387–88 (duty of loyalty prohibits trustee from placing himself in any position in which his self-interest will or may conflict with his obligations as trustee).

The presumption may be rebutted by the fiduciary. *Stephens County Museum, Inc.*, 517 S.W.2d at 261; *see also Texas Bank & Trust Co.*, 595 S.W.2d at 509. Normally, a rebuttable presumption shifts the burden of producing evidence to the party against whom it operates but does not shift the burden of persuasion to that party. *General Motors Corp. v. Saenz*, 873 S.W.2d 353, 359 (Tex. 1993). In fiduciary duty cases, however, the presumption of unfairness operates to shift both the burden of producing evidence and the burden of persuasion to the fiduciary. *Sorrell v. Elsey*, 748 S.W.2d 584, 586 (Tex. App.—San Antonio 1988, writ denied); *Miller v. Miller*, 700 S.W.2d 941, 945–46 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); *Fillion v. Troy*, 656 S.W.2d 912, 914 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Cole v. Plummer*, 559 S.W.2d 87, 89 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.); *see also Peckham*, 120 S.W.2d at 788 (issue of whether beneficiary of fiduciary relationship relied on fiduciary to perform his duties was immaterial).

If there is no evidence rebutting the presumption, no breach of fiduciary duty question is necessary. *Texas Bank & Trust Co.*, 595 S.W.2d at 509.

Liability questions normally place the burden of proof on the plaintiff, who is required to obtain an affirmative finding. When the burden is shifted to the fiduciary, however, a "No" answer supports liability. Thus, when the burden is on the fiduciary to prove compliance with his fiduciary duties, subsequent questions that depend on a finding of breach of fiduciary duty may need to be conditioned on a "No" answer to PJC 104.2. See, e.g., PJC 115.15–115.18.

If there is a dispute about whether the fiduciary profited or benefited from a transaction with the beneficiary, or whether the fiduciary placed himself in a position in which his self-interest might conflict with his obligations as a fiduciary, a jury question may be necessary to decide that issue. PJC 104.2, placing the burden on the fidu-

ciary, would be conditioned on an affirmative answer. PJC 104.3, placing the burden on the beneficiary, would be conditioned on a negative answer.

Modification of question or instruction. The instruction may require modification based on the specific facts involved. Not every fiduciary relationship creates a general fiduciary duty. *See KCM Financial LLC v. Bradshaw*, 457 S.W.3d 70, 74, 80–82 (Tex. 2015) (holding that scope of executive-right holder's fiduciary duty to non-executive-right holder is to act with utmost good faith and fair dealing, but scope of duty does not require executive to wholly subordinate its interests to non-executive's interests when their interests conflict); *National Plan Administrators, Inc. v. National Health Insurance Co.*, 235 S.W.3d 695, 700–704 (Tex. 2007) (recognizing parties' agreement to limit fiduciary duties that would otherwise exist between agent and principal); *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 846–47 (Tex. 2005) (sustaining objection to jury instruction for failure to reflect contractual limitation of fiduciary duties); *Brewer & Pritchard, P.C.*, 73 S.W.3d at 200–205 (limiting associate lawyer's fiduciary duty to employer law firm when acting as employer's agent in pursuit of business opportunities). In such cases, it may be appropriate to modify the list of duties in PJC 104.2 to define the scope of the fiduciary duty.

If there are specific duties inherent in a particular formal fiduciary relationship, those duties at issue should be defined. For example, if the fiduciary duty claim is against a corporate officer or director, depending on the facts of the case, in addition to some or all of the duties set out in PJC 104.2 it may be appropriate to instruct that the officer's or director's fiduciary duty includes the obligation not to usurp corporate opportunities for personal gain and to exercise uncorrupted business judgment for the sole benefit of the corporation. *See Ritchie v. Rupe*, 443 S.W.3d 856, 883, 886–87 (Tex. 2014).

Similarly, an agent entrusted with funds owes the principal a duty to exercise a high degree of care to conserve the principal's money and pay it only to those entitled to receive it. *City of Fort Worth v. Pippen*, 439 S.W.2d 660, 665 (Tex. 1969); *IQ Holdings, Inc. v. Stewart Title Guaranty Co.*, 451 S.W.3d 861, 871 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

If multiple and distinct breaches of fiduciary duty are alleged involving more than one transaction or action, it may be appropriate to modify the question or instructions in certain circumstances. *See, e.g., Holland v. Lovelace*, 352 S.W.3d 777, 789 (Tex. App.—Dallas 2011, pet. denied) (holding that even if some breaches of fiduciary duty occurred beyond limitations period, where jury charge failed to ask dates of different acts breaching fiduciary duty, entire judgment was affirmed based on finding of breach of fiduciary duty that was submitted broadly, because record contained some evidence of misconduct occurring within limitations period) (citing *Fleet v. Fleet*, 711 S.W.2d 1, 2 (Tex. 1986) (stating jury charge submitted all allegations of breach of fiduciary duty in one issue, but with each different act lettered "A" through "K") and *First City National Bank of Paris v. Haynes*, 614 S.W.2d 605, 608 (Tex. Civ. App.—

Texarkana 1981, no writ) (stating "[a] separate inquiry in checklist fashion as to specific acts of . . . breaches of duty, . . . in the manner submitted in this case, is perfectly proper")).

Knowing participation. An additional question or instruction may be required when the plaintiff alleges that a defendant is liable because it knowingly participated in another's breach of fiduciary duty. *See Kinzbach Tool Co.*, 160 S.W.2d at 513–14.

Caveat. If the burden of persuasion is on the fiduciary, it is unclear which party bears the burden of requesting the compliance question. *Compare Moore v. Texas Bank & Trust Co.*, 576 S.W.2d 691, 695 (Tex. Civ. App.—Eastland 1979), *rev'd on other grounds*, 595 S.W.2d 502 (Tex. 1980) (burden to properly request issue rests on plaintiff-beneficiary because it "is an element of the plaintiff's theory of recovery"), *with Cole*, 559 S.W.2d at 89 (fiduciary has burden of "securing a finding the confidential relationship was not breached").

Remedies. See PJC 115.15 regarding equitable remedies and damages for breach of fiduciary duty; PJC 115.16 for a question on the amount of profit disgorgement; PJC 115.17 for a question on the amount of forfeiture of fees; and PJC 115.18 for a question on actual damages for breach of fiduciary duty. For a discussion of breach of fiduciary duty and fee forfeiture in the attorney-client context, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products* PJC 84.7.

PJC 104.3 Question and Instruction—Breach of Fiduciary Duty Defined by Common Law—Burden on Beneficiary

QUESTION _____

Did *Don Davis* fail to comply with *his* fiduciary duty to *Paul Payne*?

[*Because a relationship of trust and confidence existed between them,*] [*As Paul Payne's attorney,*] [*As Paul Payne's agent,*] *Don Davis* owed *Paul Payne* a fiduciary duty. To prove *Don Davis* failed to comply with *his* fiduciary duty, *Paul Payne* must show—

1. the transaction[*s*] in question [*was/were*] not fair and equitable to *Paul Payne*; or

2. *Don Davis* did not make reasonable use of the confidence that *Paul Payne* placed in *him*; or

3. *Don Davis* failed to act in the utmost good faith or exercise the most scrupulous honesty toward *Paul Payne*; or

4. *Don Davis* placed *his* own interests before *Paul Payne*'s, used the advantage of *his* position to gain a benefit for *himself* at the expense of *Paul Payne*, or placed *himself* in a position where *his* self-interest might conflict with *his* obligations as a fiduciary; or

5. *Don Davis* failed to fully and fairly disclose all important information to *Paul Payne* concerning the transaction[*s*].

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 104.3 submits the question of breach of fiduciary duty defined by the common law, whether the duty is based on a formal or informal relationship, when a presumption of unfairness does not arise and the burden of persuasion therefore does not shift to the fiduciary.

If the fiduciary duty is defined by a statute or an agreement, see PJC 104.4 or 104.5. If the duty is defined by a trust agreement or the Texas Trust Code (Tex. Prop. Code tit. 9, subtit. B), see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Family & Probate* PJC 235.9–235.15. If the duty is defined by an agreement relating to oil and gas exploration or production, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Oil & Gas* PJC 304.1–304.2. If the duty

arises from an attorney-client relationship, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products* PJC 61.7.

Source of question and instruction. The question and instruction are based on principles stated in *Crim Truck & Tractor Co. v. Navistar International Transportation Corp.*, 823 S.W.2d 591, 594 (Tex. 1992) (fiduciary duty requires party to place interest of other party before his own); *Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d 257, 261 (Tex. 1974) (material issues are whether fiduciary made reasonable use of trust and confidence placed in him and whether transactions were ultimately fair and equitable to beneficiary); *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 264–65 (Tex. 1951) (fiduciaries owe utmost good faith and most scrupulous honesty); *Slay v. Burnett Trust*, 187 S.W.2d 377, 387–88 (Tex. 1945) (duty of loyalty prohibits trustee from using advantage of his position to gain any benefit for himself at expense of his cestui que trust and from placing himself in any position where his self-interest will or may conflict with his obligations as trustee); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 512–14 (Tex. 1942) (it is duty of fiduciary to deal openly and to make full disclosure to party with whom he stands in such relationship); *Johnson v. Peckham*, 120 S.W.2d 786, 787 (Tex. 1938) (fiduciaries required to make full disclosure of all material facts within their knowledge relating to fiduciary relationship; it is necessary to make disclosure of all important information), *cited in Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171, 175, 181 (Tex. 1997); and *Lundy v. Masson*, 260 S.W.3d 482, 503–04 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (fiduciaries owe utmost good faith and most scrupulous honesty).

Broad-form submission. PJC 104.3 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Modification of question or instruction. The instruction may require modification based on the specific facts involved. Not every fiduciary relationship creates a general fiduciary duty. *See KCM Financial LLC v. Bradshaw*, 457 S.W.3d 70, 74, 80–82 (Tex. 2015) (holding that scope of executive-right holder's fiduciary duty to non-executive-right holder is to act with utmost good faith and fair dealing, but scope of duty does not require executive to wholly subordinate its interests to non-executive's interests when their interests conflict); *National Plan Administrators, Inc. v. National Health Insurance Co.*, 235 S.W.3d 695, 700–704 (Tex. 2007) (recognizing parties' agreement to limit fiduciary duties that would otherwise exist between agent and principal); *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 846–47 (Tex. 2005) (sustaining objection to jury instruction for failure to reflect contractual limitation of fiduciary

duties); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200–205 (Tex. 2002) (limiting associate lawyer's fiduciary duty to employer law firm when acting as employer's agent in pursuit of business opportunities). In such cases, it may be appropriate to modify the list of duties in PJC 104.3 to define the scope of the fiduciary duty.

If there are specific duties inherent in a particular formal fiduciary relationship, those duties at issue should be defined. For example, if the fiduciary duty claim is against a corporate officer or director, depending on the facts of the case, in addition to some or all of the duties set out in PJC 104.3 it may be appropriate to instruct that the officer's or director's fiduciary duty includes the obligation not to usurp corporate opportunities for personal gain and to exercise uncorrupted business judgment for the sole benefit of the corporation. *See Ritchie v. Rupe*, 443 S.W.3d 856, 883, 886–87 (Tex. 2014).

Similarly, an agent entrusted with funds owes the principal a duty to exercise a high degree of care to conserve the principal's money and pay it only to those entitled to receive it. *City of Fort Worth v. Pippen*, 439 S.W.2d 660, 665 (Tex. 1969); *IQ Holdings, Inc. v. Stewart Title Guaranty Co.*, 451 S.W.3d 861, 871 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

If multiple and distinct breaches of fiduciary duty are alleged involving more than one transaction or action, it may be appropriate to modify the question or instructions in certain circumstances. *See, e.g., Holland v. Lovelace*, 352 S.W.3d 777, 789 (Tex. App.—Dallas 2011, pet. denied) (holding that even if some breaches of fiduciary duty occurred beyond limitations period, where jury charge failed to ask dates of different acts breaching fiduciary duty, entire judgment was affirmed based on finding of breach of fiduciary duty that was submitted broadly, because record contained some evidence of misconduct occurring within limitations period) (citing *Fleet v. Fleet*, 711 S.W.2d 1, 2 (Tex. 1986) (stating jury charge submitted all allegations of breach of fiduciary duty in one issue, but with each different act lettered "A" through "K") and *First City National Bank of Paris v. Haynes*, 614 S.W.2d 605, 608 (Tex. Civ. App.—Texarkana 1981, no writ) (stating "[a] separate inquiry in checklist fashion as to specific acts of . . . breaches of duty, . . . in the manner submitted in this case, is perfectly proper")).

Knowing participation. An additional question or instruction may be required when the plaintiff alleges that a defendant is liable because it knowingly participated in another's breach of fiduciary duty. *See Kinzbach Tool Co.*, 160 S.W.2d at 513–14.

Remedies. See PJC 115.15 regarding equitable remedies and damages for breach of fiduciary duty; PJC 115.16 for a question on the amount of profit disgorgement; PJC 115.17 for a question on the amount of forfeiture of fees; and PJC 115.18 for a question on actual damages for breach of fiduciary duty. For a discussion of breach of fiduciary duty and fee forfeiture in the attorney-client context, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products* PJC 84.7.

PJC 104.4 Question and Instruction—Breach of Fiduciary Duty Defined by Statute or Agreement—Burden on Fiduciary

QUESTION _____

Did *Don Davis* comply with all of the following duties?

[List duties alleged to have been breached and the standard of care using language from the applicable statute or agreement or both. Also list any applicable common-law duties as provided in PJC 104.2.]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 104.4 submits the question of breach of fiduciary duty defined by a statute or an agreement when the fiduciary bears the burden of proof. *See National Plan Administrators, Inc. v. National Health Insurance Co.*, 235 S.W.3d 695, 700–704 (Tex. 2007); *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 846–47 (Tex. 2005). See, e.g., Tex. Bus. Orgs. Code §§ 152.203–.207 ("TBOC," which replaced the Texas Revised Partnership Act ("TRPA")) regarding duties applicable to partners. If the duty is defined by a trust agreement or the Texas Trust Code (Tex. Prop. Code tit. 9, subtit. B), see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Family & Probate* PJC 235.9–235.15. If the duty is defined by an agreement relating to oil and gas exploration or production, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Oil & Gas* PJC 304.1–304.2. If the duty arises from an attorney-client relationship, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products* PJC 61.7.

The burden of proof is on the fiduciary when the fiduciary has profited or benefited from a transaction with the beneficiary and a presumption of unfairness therefore arises. For cases arising from a statute or an agreement in which the beneficiary has the burden of proof, see PJC 104.5.

Source of duty instructions. Insert the language from the statute or agreement when defining the duty or duties. The duties created by an agreement will vary on a case-by-case basis. *National Plan Administrators, Inc.*, 235 S.W.3d at 702–04. In a given case, some or all of the duties listed in PJC 104.2 may also apply. If so, those duties should also be listed in the instruction.

In the context of a partnership, the Texas Supreme Court has stated that the duties owed by partners under the TRPA are "in the nature of a fiduciary duty in the conduct

and winding up of partnership business." *M.R. Champion, Inc. v. Mizell*, 904 S.W.2d 617, 618 (Tex. 1995). While partnership duties are fiduciary in character, the TBOC has refined their nature and scope and allows, by agreement, limitations of certain duties. *In re Gupta*, 394 F.3d 347 (5th Cir. 2004) (noting TRPA "significantly amended" partnership law in 1994 to "refine the nature and scope of partners' duties to each other"); *see* Tex. Bus. Orgs. Code § 152.002. While the scope of partnership duties can be altered by agreement, partners cannot entirely eliminate the duties of loyalty and care, and these duties must be discharged in good faith and in a manner the partner reasonably believes to be in the best interest of the partnership. *See* Tex. Bus. Orgs. Code §§ 152.002, 152.204–.207.

Broad-form submission. PJC 104.4 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Presumption of unfairness shifts burden of proof. When a fiduciary profits or benefits in any way from a transaction with the beneficiary, a presumption of unfairness arises that shifts the burden of persuasion to the fiduciary or the party claiming the validity or benefits of the transaction to show that the transaction was fair and equitable to the beneficiary. *Keck, Mahin & Cate v. National Union Fire Insurance Co. of Pittsburgh*, 20 S.W.3d 692, 699 (Tex. 2000); *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 509 (Tex. 1980); *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964).

The presumption may be rebutted by the fiduciary. *Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d 257, 261 (Tex. 1974); *see also Texas Bank & Trust Co.*, 595 S.W.2d at 509. Normally, a rebuttable presumption shifts the burden of producing evidence to the party against whom it operates but does not shift the burden of persuasion to that party. *General Motors Corp. v. Saenz*, 873 S.W.2d 353, 359 (Tex. 1993). In fiduciary duty cases, however, the presumption of unfairness operates to shift both the burden of producing evidence and the burden of persuasion to the fiduciary. *Sorrell v. Elsey*, 748 S.W.2d 584, 586 (Tex. App.—San Antonio 1988, writ denied); *Miller v. Miller*, 700 S.W.2d 941, 945–46 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); *Fillion v. Troy*, 656 S.W.2d 912, 914 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Cole v. Plummer*, 559 S.W.2d 87, 89 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.); *see also Johnson v. Peckham*, 120 S.W.2d 786, 788 (Tex. 1938) (issue of whether beneficiary of fiduciary relationship relied on fiduciary to perform his duties was immaterial).

If there is no evidence rebutting the presumption, no breach of fiduciary duty question is necessary. *Texas Bank & Trust Co.*, 595 S.W.2d at 509.

Liability questions normally place the burden of proof on the plaintiff, who is required to obtain an affirmative finding. When the burden is shifted to the fiduciary, however, a "No" answer supports liability. Thus, when the burden is on the fiduciary to prove compliance with his fiduciary duties, subsequent questions that depend on a finding of breach of fiduciary duty may need to be conditioned on a "No" answer to PJC 104.4. See, e.g., PJC 115.15–115.18.

If there is a dispute about whether the fiduciary profited or benefited from a transaction with the beneficiary, or whether the fiduciary placed himself in a position in which his self-interest might conflict with his obligations as a fiduciary, a jury question may be necessary to decide that issue. PJC 104.4, placing the burden on the fiduciary, would be conditioned on an affirmative answer. PJC 104.5, placing the burden on the beneficiary, would be conditioned on a negative answer.

Caveat. If the burden of persuasion is on the fiduciary, it is unclear which party bears the burden of requesting the compliance question. *Compare Moore v. Texas Bank & Trust Co.*, 576 S.W.2d 691, 695 (Tex. Civ. App.—Eastland 1979), *rev'd on other grounds*, 595 S.W.2d 502 (Tex. 1980) (burden to properly request issue rests on plaintiff-beneficiary because it "is an element of the plaintiff's theory of recovery"), *with Cole*, 559 S.W.2d at 89 (fiduciary has burden of "securing a finding the confidential relationship was not breached").

Remedies. See PJC 115.15 regarding equitable remedies and damages for breach of fiduciary duty; PJC 115.16 for a question on the amount of profit disgorgement; PJC 115.17 for a question on the amount of forfeiture of fees; and PJC 115.18 for a question on actual damages for breach of fiduciary duty. The statute or agreement that is the source of the fiduciary duty may define the remedies and damages for a breach of that duty. For a discussion of breach of fiduciary duty and fee forfeiture in the attorney-client context, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products* PJC 84.7.

PJC 104.5 Question and Instruction—Breach of Fiduciary Duty Defined by Statute or Agreement—Burden on Beneficiary

QUESTION _____

Did *Don Davis* fail to comply with one or more of the following duties?

[List duties alleged to have been breached and the standard of care using language from the applicable statute or agreement or both. Also list any applicable common-law duties as provided in PJC 104.3.]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 104.5 submits the question of breach of fiduciary duty defined by a statute or an agreement when the beneficiary bears the burden of proof. *See National Plan Administrators, Inc. v. National Health Insurance Co.*, 235 S.W.3d 695, 700–704 (Tex. 2007); *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 846–47 (Tex. 2005). See, e.g., Tex. Bus. Orgs. Code §§ 152.203–.207 ("TBOC," which replaced the Texas Revised Partnership Act ("TRPA")) regarding duties applicable to partners. If the duty is one arising from a trust agreement or the Texas Trust Code (Tex. Prop. Code tit. 9, subtit. B), see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Family & Probate* PJC 235.9–235.15. If the duty is defined by an agreement relating to oil and gas exploration or production, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Oil & Gas* PJC 304.1–304.2. If the duty arises from an attorney-client relationship, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products* PJC 61.7.

Source of duty instructions. Insert the language from the statute or agreement when defining the duty or duties. The duties created by an agreement will vary on a case-by-case basis. *National Plan Administrators, Inc.*, 235 S.W.3d at 702–04. In a given case, some or all of the duties listed in PJC 104.3 may also apply. If so, those duties should also be listed in the instruction.

In the context of a partnership, the Texas Supreme Court has stated that the duties owed by partners under the TRPA are "in the nature of a fiduciary duty in the conduct and winding up of partnership business." *M.R. Champion, Inc. v. Mizell*, 904 S.W.2d 617, 618 (Tex. 1995). While partnership duties are fiduciary in character, the TBOC has refined their nature and scope and allows, by agreement, limitations of certain duties. *In re Gupta*, 394 F.3d 347 (5th Cir. 2004) (noting TRPA "significantly

amended" partnership law in 1994 to "refine the nature and scope of partners' duties to each other"); *see* Tex. Bus. Orgs. Code § 152.002. While the scope of partnership duties can be altered by agreement, partners cannot entirely eliminate the duties of loyalty and care, and these duties must be discharged in good faith and in a manner the partner reasonably believes to be in the best interest of the partnership. *See* Tex. Bus. Orgs. Code §§ 152.002, 152.204–.207.

Broad-form submission. PJC 104.5 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Remedies. See PJC 115.15 regarding equitable remedies and damages for breach of fiduciary duty; PJC 115.16 for a question on the amount of profit disgorgement; PJC 115.17 for a question on the amount of forfeiture of fees; and PJC 115.18 for a question on actual damages for breach of fiduciary duty. The statute or agreement that is the source of the fiduciary duty may define the remedies and damages for a breach of that duty. For a discussion of breach of fiduciary duty and fee forfeiture in the attorney-client context, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products* PJC 84.7.

PJC 105.1 Question on Common-Law Fraud—Intentional Misrepresentation

QUESTION _____

Did *Don Davis* commit fraud against *Paul Payne*?

[Insert appropriate instructions.]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 105.1 is appropriate for use in most cases involving claims for fraud and can be used to submit both affirmative claims for damages and affirmative defenses.

Broad-form submission. PJC 105.1 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Accompanying instructions and definitions. PJC 105.1 should be accompanied by appropriate instructions and definitions. See PJC 105.2–105.4.

Damages. Damages questions are set out in chapter 115. PJC 115.19 submits direct damages in fraud cases, and PJC 115.20 submits consequential damages in such cases. For recovery of exemplary damages, see PJC 115.37 and 115.38.

PJC 105.2 Instruction on Common-Law Fraud—Intentional Misrepresentation

Fraud occurs when—

1. a party makes a material misrepresentation, and

2. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion, and

3. the misrepresentation is made with the intention that it should be acted on by the other party, and

4. the other party relies on the misrepresentation and thereby suffers injury.

"Misrepresentation" means—

[Insert appropriate definitions from PJC 105.3A–105.3E.]

COMMENT

When to use. PJC 105.2 should be used in a common-law fraud case if there is a claim of intentional misrepresentation.

Accompanying question, definitions. PJC 105.2 is designed to follow PJC 105.1 and to be accompanied by one or more of the definitions of misrepresentation at PJC 105.3A–105.3E.

Use of "or." If more than one definition of misrepresentation is used, each must be separated by the word *or*, because a finding of any one type of misrepresentation would support recovery. *See Lundy v. Masson*, 260 S.W.3d 482, 494 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (approving the use of "or").

Source of instruction. The supreme court has repeatedly identified these elements of common-law fraud. *See, e.g., Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 211 n.45 (Tex. 2002) (identifying the recognized elements of common-law fraud); *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998) (discussing recoverable damages sounding in tort); *Oilwell Division, United States Steel Corp. v. Fryer*, 493 S.W.2d 487, 491 (Tex. 1973) (first announcing the recognized elements of common-law fraud and discussing fraudulent inducement as an affirmative defense).

Reliance. In *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 923–24 (Tex. 2010), the supreme court explained that "fraud . . . require[s] that the plaintiff show actual and justifiable reliance" and held there was no evidence that the plaintiffs had justifiably relied on an audit report because they had knowledge of the company's true condition. *See Grant Thornton LLP*, 314 S.W.3d at 923 (measuring justifiability "given a fraud plaintiff's individual characteristics, abilities, and appreciation of facts and circumstances at or before the time of the alleged fraud") (quoting *Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014, 1026 (5th Cir. 1990)); *see also Ernst & Young, L.L.P. v. Pacific Mutual Life Insurance Co.*, 51 S.W.3d 573, 577 (Tex. 2001). The supreme court has rejected the argument that a party's failure to use due diligence bars a claim of fraud. *See Koral Industries v. Security-Connecticut Life Insurance Co.*, 802 S.W.2d 650, 651 (Tex. 1990); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 933 (Tex. 1983) (defendant in fraud case cannot complain that plaintiff failed to discover truth through exercise of care).

PJC 105.3 Definitions of Misrepresentation—Intentional Misrepresentation

PJC 105.3A Factual Misrepresentation

A false statement of fact [*or*]

COMMENT

When to use. PJC 105.3A should be used in cases involving an allegation that the defendant made an affirmative statement of fact that was false. *See Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983) (false statement of fact actionable as fraud). Whether a statement is one of fact or merely one of opinion often depends on the circumstances in which the statement is made. *Italian Cowboy Partners, Ltd. v. Prudential Insurance Co. of America*, 341 S.W.3d 323, 338 (Tex. 2011). For example, special or one-sided knowledge may lead to the conclusion that a statement is one of fact rather than opinion. *Italian Cowboy Partners, Ltd.*, 341 S.W.3d at 338.

Accompanying question and instruction. PJC 105.3A is designed to accompany the broad-form fraud question at PJC 105.1 and the basic elements of fraud at PJC 105.2. For other definitions of misrepresentation, see PJC 105.3B–105.3E.

Use of "or." If more than one definition of misrepresentation is used, each must be separated by the word *or*, because a finding of any one type of misrepresentation would support recovery. *See Lundy v. Masson*, 260 S.W.3d 482, 494 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (approving the use of "or").

PJC 105.3B Promise of Future Action

A promise of future performance made with an intent, at the time the promise was made, not to perform as promised [*or*]

COMMENT

When to use. PJC 105.3B should be used if the alleged fraud is a promise made with intent not to perform. *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018); *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 46–48 (Tex. 1998); *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 222 (Tex. 1992); *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434–35 (Tex. 1986).

Accompanying question and instruction. PJC 105.3B is designed to accompany the broad-form fraud question at PJC 105.1 and the basic elements of fraud at PJC 105.2. For other definitions of misrepresentation, see PJC 105.3A and 105.3C–105.3E.

Use of "or." If more than one definition of misrepresentation is used, each must be separated by the word *or*, because a finding of any one type of misrepresentation would support recovery. *See Lundy v. Masson*, 260 S.W.3d 482, 494 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (approving the use of "or").

PJC 105.3C Opinion Mixed with Fact

A statement of opinion based on a false statement of fact [*or*]

COMMENT

When to use. PJC 105.3C should be used in cases involving an allegation that the defendant represented to the plaintiff an opinion based on a fact that the defendant knew was false. This type of statement constitutes an exception to the general rule that only false statements of fact can be actionable as fraud. *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983).

Accompanying question and instruction. PJC 105.3C is designed to accompany the broad-form fraud question at PJC 105.1 and the basic elements of fraud at PJC 105.2. For other definitions of misrepresentation, see PJC 105.3A–105.3B and 105.3D–105.3E.

Use of "or." If more than one definition of misrepresentation is used, each must be separated by the word *or*, because a finding of any one type of misrepresentation would support recovery. *See Lundy v. Masson*, 260 S.W.3d 482, 494 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (approving the use of "or").

PJC 105.3D False Statement of Opinion

A statement of opinion that the maker knows to be false [*or*]

COMMENT

When to use. PJC 105.3D should be used in cases involving an allegation that the defendant represented to the plaintiff an opinion that the defendant knew to be false. This type of statement constitutes an exception to the general rule that only false statements of fact can be actionable as fraud. *Transport Insurance Co. v. Faircloth*, 898 S.W.2d 269, 276 (Tex. 1995); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983).

Accompanying question and instruction. PJC 105.3D is designed to accompany the broad-form fraud question at PJC 105.1 and the basic elements of fraud at PJC 105.2. For other definitions of misrepresentation, see PJC 105.3A–105.3C and 105.3E.

Use of "or." If more than one definition of misrepresentation is used, each must be separated by the word *or*, because a finding of any one type of misrepresentation would support recovery. *See Lundy v. Masson*, 260 S.W.3d 482, 494 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (approving the use of "or").

PJC 105.3E Opinion Made with Special Knowledge

An expression of opinion that is false, made by one who has, or purports to have, special knowledge of the subject matter of the opinion.

"Special knowledge" means knowledge or information superior to that possessed by the other party and to which the other party did not have equal access.

[or]

COMMENT

When to use. PJC 105.3E should be used in cases involving an allegation that the defendant had, or purported to have, special knowledge of facts and represented to the plaintiff an opinion based on that special knowledge. *Italian Cowboy Partners, Ltd. v. Prudential Insurance Co. of America*, 341 S.W.3d 323, 338 (Tex. 2011); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983).

Accompanying question and instruction. PJC 105.3E is designed to accompany the broad-form fraud question at PJC 105.1 and the basic elements of fraud at PJC 105.2. For other definitions of misrepresentation, see PJC 105.3A–105.3D.

Use of "or." If more than one definition of misrepresentation is used, each must be separated by the word *or*, because a finding of any one type of misrepresentation would support recovery. *See Lundy v. Masson*, 260 S.W.3d 482, 494 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (approving the use of "or").

PJC 105.4 Instruction on Common-Law Fraud—Failure to Disclose When There Is Duty to Disclose

Fraud occurs when—

1. a party fails to disclose a material fact within the knowledge of that party, and

2. the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth, and

3. the party intends to induce the other party to take some action by failing to disclose the fact, and

4. the other party suffers injury as a result of acting without knowledge of the undisclosed fact.

COMMENT

When to use. PJC 105.4 should accompany PJC 105.1 if the court finds that there is a duty to disclose.

Source of instruction. PJC 105.4 is based on the elements of fraud by nondisclosure set forth in *Bradford v. Vento*, 48 S.W.3d 749, 754–55 (Tex. 2001). *See also New Process Steel Corp. v. Steel Corp. of Texas*, 703 S.W.2d 209, 214 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) (court's charge adequately instructed jury on fraud, including nondisclosure). Instruction 4 submits the reliance element of fraud. *See Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171, 181–82 (Tex. 1997); *Custom Leasing, Inc. v. Texas Bank & Trust Co.*, 516 S.W.2d 138, 143 (Tex. 1974).

Inducing inaction. If the evidence shows an intent to induce inaction, elements 3 and 4 may be appropriately modified. *See, e.g., Horizon Shipbuilding, Inc. v. BLyn II Holding, LLC*, 324 S.W.3d 840, 850 (Tex. App.—Houston [14th Dist.] 2010, no pet.) ("[B]y failing to disclose the facts, the defendant intended to induce the plaintiff to take some action *or refrain from acting* . . . .") (emphasis added); *Blankinship v. Brown*, 399 S.W.3d 303, 308 (Tex. App.—Dallas 2013, pet. denied) (same).

Silence as misrepresentation. "As a general rule, a failure to disclose information does not constitute fraud unless there is a duty to disclose the information." *Bradford*, 48 S.W.3d at 755. "Whether such a duty exists is a question of law." *Bradford*, 48 S.W.3d at 755. The supreme court has concluded that a duty to disclose arises when there is a confidential or fiduciary relationship. *Insurance Co. of North America v. Morris*, 981 S.W.2d 667, 674–75 (Tex. 1998). The court has also held that a duty to disclose arises in other circumstances. *See Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986) (specific representations about bonus plan gave rise to

duty to disclose adoption of an alternate plan); *Smith v. National Resort Communities, Inc.*, 585 S.W.2d 655, 658 (Tex. 1979) (seller of real estate has duty to disclose material facts not reasonably discoverable by purchaser).

Courts of appeals have concluded that a duty to disclose may arise when (1) there is a special or fiduciary relationship, (2) a person voluntarily discloses partial information but fails to disclose the whole truth, (3) a person makes a representation but fails to disclose new information that makes the earlier representation misleading or untrue, or (4) a person makes a partial disclosure and conveys a false impression. *See, e.g., Columbia/HCA Healthcare Corp. v. Cottey*, 72 S.W.3d 735, 744–45 (Tex. App.—Waco 2002, no pet.); *Anderson, Greenwood & Co. v. Martin*, 44 S.W.3d 200, 212–13 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Lesikar v. Rappeport*, 33 S.W.3d 282, 299 (Tex. App.—Texarkana 2000, pet. denied); *Hoggett v. Brown*, 971 S.W.2d 472, 487 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).

Section 551 of the *Restatement (Second) of Torts* (1977) recognizes a general duty to disclose facts in a commercial setting. In *Bradford*, however, the supreme court stated "[w]e have never adopted section 551." *Bradford*, 48 S.W.3d at 756; *see also SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 352 (Tex. 1995).

Concealment. Active concealment of material facts may also be as actionable as false statements. *Campbell v. Booth*, 526 S.W.2d 167, 172 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.). PJC 105.4 element 1 may need to be modified to include concealment. *See GXG, Inc. v. Texacal Oil & Gas*, 977 S.W.2d 403, 409 (Tex. App.—Corpus Christi 1998, pet. denied).

Fraud as a ground for exemplary damages. Constructive fraud cannot serve as a predicate for recovery of exemplary charges. Tex. Civ. Prac. & Rem. Code § 41.001(6). Accordingly, if fraud is an underlying theory of liability as well as a predicate for recovery of exemplary damages, constructive fraud should be submitted separately from intentional or statutory fraud. See PJC 115.37 comment, "Fraud as a ground for exemplary damages."

PJC 105.5 Question on Statute of Limitations—Common-Law Fraud

If you answered "Yes" to Question _____ [*105.1*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

By what date should *Paul Payne*, in the exercise of reasonable diligence, have discovered the fraud of *Don Davis*?

Answer with a date in the blank below.

Answer: _____

COMMENT

When to use. PJC 105.5 is to be used to determine if a cause of action for common-law fraud is barred by the statute of limitations. Actions for fraud are governed by a four-year limitations period. Tex. Civ. Prac. & Rem. Code § 16.004(a)(4).

Broad-form submission. PJC 105.5 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Source of question. PJC 105.5 is derived from *ExxonMobil Corp. v. Lazy R Ranch, LP*, 511 S.W.3d 538, 544 n.21 (Tex. 2017) (citing *KPMG Peat Marwick v. Harrison County Housing Finance Corp.*, 988 S.W.2d 746, 750 (Tex. 1999)), and *Computer Associates International, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1994).

Continuing fraud. In a case involving continuing fraud resulting in a continuing or ongoing injury, PJC 105.5 may need to be modified to ask when the plaintiff should have discovered the latest fraudulent act. See PJC 102.23 and its Comment.

Distinct damages claims. If the plaintiff has two claims involving distinctly different conduct and the limitations defense is raised, the Committee recommends that separate liability, damages, and limitations questions be submitted.

Caveat. The supreme court has identified two doctrines that may toll limitations or delay accrual of a cause of action: (1) the discovery rule and (2) fraudulent conceal-

ment. *Valdez v. Hollenbeck*, 465 S.W.3d 217, 229 (Tex. 2015). In cases involving fraudulent concealment, limitations are tolled until the fraud is discovered or could have been discovered with reasonable diligence. *Valdez*, 465 S.W.3d at 229. In cases implicating the discovery rule, accrual of the cause of action is deferred "until the injury was or could have been reasonably discovered." *Valdez*, 465 S.W.3d at 229. The discovery rule "applies on a categorical basis to injuries that are both inherently undiscoverable and objectively verifiable." *Valdez*, 465 S.W.3d at 229.

The supreme court has not addressed the appropriate jury submission for the discovery rule in nonfraud cases. Its opinions discussing the elements of the discovery rule have used varying language. The supreme court has most often defined the discovery rule as deferring the accrual of a cause of action until the plaintiff knew or should have known of its injury and that it was likely caused by the wrongful acts of another. *See KPMG Peat Marwick*, 988 S.W.2d at 749; *Childs v. Haussecker*, 974 S.W.2d 31, 37, 40 (Tex. 1998). If the discovery rule is submitted in terms of the plaintiff's discovery of a wrongfully caused injury, it may be necessary to define "injury" and "wrongful acts"; otherwise, the jury might be impermissibly allowed to speculate on the meaning of those terms. Because Texas courts have not consistently defined the elements of fraudulent concealment for limitations purposes, the Committee expresses no opinion on the appropriate submission.

[PJC 105.6 is reserved for expansion.]

PJC 105.7 Question on Statutory Fraud (Real Estate or Stock Transaction)

QUESTION _____

Did *Don Davis* commit [*statutory*] fraud against *Paul Payne*?

[Insert appropriate instructions.]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 105.7 is appropriate for use in most cases involving claims for fraud in connection with a stock or real estate transaction under Tex. Bus. & Com. Code § 27.01. The Committee recommends obtaining independent findings when there are allegations of both common-law and statutory fraud because of the different remedies available.

Broad-form submission. PJC 105.7 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Accompanying instructions and definitions. PJC 105.7 should be accompanied by appropriate instructions and definitions. See PJC 105.8 and 105.9.

Damages. Damages questions are set out in chapter 115. PJC 115.19 submits direct damages in fraud cases, and PJC 115.20 submits consequential damages in such cases. Although the statute does not require actual awareness of the falsity to recover actual damages, Tex. Bus. & Com. Code § 27.01(b), actual awareness of the falsity must be established to recover exemplary damages. Tex. Bus. & Com. Code § 27.01(c), (d); *Woodlands Land Development Co., L.P. v. Jenkins*, 48 S.W.3d 415, 426 (Tex. App.—Beaumont 2001, no pet.). For recovery of exemplary damages, see Tex. Bus. & Com. Code § 27.01(c), (d); see also PJC 105.11 and 115.37–115.38.

PJC 105.8 Instruction on Statutory Fraud—Factual Misrepresentation

Fraud occurs when—

1. there is a false representation of a past or existing material fact, and

2. the representation is made to a person for the purpose of inducing that person to enter into a contract, and

3. the representation is relied on by that person in entering into that contract.

[or]

COMMENT

When to use. PJC 105.8 is based on Tex. Bus. & Com. Code § 27.01(a)(1), which applies only to fraud in a transaction involving real estate or stock in a corporation or joint stock company. If there is a dispute about whether the transaction involves real estate or stock in a corporation or joint stock company, additional instructions may be necessary.

Accompanying question. PJC 105.8 is designed to follow PJC 105.7.

Use of "or." If more than one instruction is used, each must be separated by the word *or*, because a finding of any one type of misrepresentation would support recovery. *See Lundy v. Masson*, 260 S.W.3d 482, 494 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (approving the use of "or").

PJC 105.9 Instruction on Statutory Fraud—False Promise

Fraud occurs when—

1. a party makes a false promise to do an act, and
2. the promise is material, and
3. the promise is made with the intention of not fulfilling it, and
4. the promise is made to a person for the purpose of inducing that person to enter into a contract, and
5. that person relies on the promise in entering into that contract.

[or]

COMMENT

When to use. PJC 105.9 is based on Tex. Bus. & Com. Code § 27.01(a)(2), which applies only to fraud in a transaction involving real estate or stock in a corporation or joint stock company. If there is a dispute about whether the transaction involves real estate or stock in a corporation or joint stock company, additional instructions may be necessary.

Accompanying question. PJC 105.9 is designed to accompany the broad-form question at PJC 105.7 in cases involving an allegation of a false promise to perform an act with the present intent not to perform it.

Use of "or." If more than one instruction is used, each must be separated by the word *or*, because a finding of any one type of misrepresentation would support recovery. *See Lundy v. Masson*, 260 S.W.3d 482, 494 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (approving the use of "or").

PJC 105.10 Question and Instructions on Benefiting from Statutory Fraud

If you answered "Yes" to Question _____ [*105.7 used with 105.8 or 105.9*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Did *Deborah Dennis* commit fraud against *Paul Payne*?

Fraud occurs when—

1. a person has actual awareness of the falsity of a representation or promise made by another person, and

2. fails to disclose the falsity of the representation or promise to the person defrauded, and

3. benefits from the false representation or promise.

Actual awareness may be inferred where objective manifestations indicate a person acted with actual awareness.

"Representation or promise" means the representation or promise you found to be fraud in response to Question _____ [*105.7 used with 105.8 or 105.9*].

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 105.10 submits liability under Tex. Bus. & Com. Code § 27.01(d) when the fraud of another person is separately submitted. If the underlying fraud of another person is not separately submitted under Tex. Bus. & Com. Code § 27.01(a), additional instructions for finding a false representation or promise under Tex. Bus. & Com. Code § 27.01(a) are required as part of this submission.

Broad-form submission. PJC 105.10 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance

in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

PJC 105.11 Question and Instruction on Actual Awareness of Statutory Fraud

If you unanimously answered "Yes" to Question _____ [*105.7 used with 105.8 or 105.9*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Did *Don Davis* have actual awareness of the falsity of the representation or promise you found to be fraud in Question _____ [*105.7 used with 105.8 or 105.9*]?

Actual awareness may be inferred where objective manifestations indicate a person acted with actual awareness.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. Tex. Bus. & Com. Code § 27.01(c) provides for recovery of exemplary damages if the person making the false representation or promise does so with actual awareness of its falsity. For the appropriate question on exemplary damages, see PJC 115.38. PJC 105.11 should not be used in connection with the question or instruction regarding benefiting from statutory fraud at PJC 105.10.

Broad-form submission. PJC 105.11 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Actions filed before September 1, 2003. Unanimity is not required in actions filed before September 1, 2003. In such cases, substitute the following conditioning instruction:

> If you answered "Yes" to Question _____ [*105.7 used with 105.8 or 105.9*], then answer the following question. Otherwise, do not answer the following question.

PJC 105.12 Question and Instructions on Violation of Texas Securities Act—Factual Misrepresentation

QUESTION _____

Did *Don Davis* commit a securities law violation against *Paul Payne*?

A securities law violation occurred if—

1. *Don Davis* [*sold or offered to sell/bought or offered to buy*] a security by means of either—

   a. an untrue statement of a material fact; or

   b. an omission to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading; and

2. *Paul Payne* [*purchased the security from/sold the security to*] *him*; and

3. *Paul Payne* suffered injury.

A fact is "material" if there is a substantial likelihood that a reasonable investor would consider it important in deciding whether to [*purchase/sell*] a security, because it would significantly alter the total mix of information made available.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 105.12 is based on Tex. Rev. Civ. Stat. art. 581–33A(2), 33B, which applies only to fraud in a transaction involving the sale or purchase of a security.

In a case involving an alleged registration violation of Tex. Rev. Civ. Stat. art. 581–33A(1) or 33C, parts a and b of element 1 of this instruction should be modified as necessary to reflect the statutory elements of such a violation.

Broad-form submission. PJC 105.12 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpret-

ing 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Source of instruction. The elements of the claim are derived from Tex. Rev. Civ. Stat. art. 581–33A(2), 33B; *Duperier v. Texas State Bank*, 28 S.W.3d 740, 745–46 (Tex. App.—Corpus Christi 2000, pet. dism'd by agr.); and *Anderson v. Vinson Exploration, Inc.*, 832 S.W.2d 657, 661–62 (Tex. App.—El Paso 1992, writ denied). Regarding the definition of "material," see *Duperier*, 28 S.W.3d at 745, and *Weatherly v. Deloitte & Touche*, 905 S.W.2d 642, 649 (Tex. App.—Houston [14th Dist.] 1995, writ dism'd w.o.j.), *abrogated on other grounds by Tracker Marine, L.P. v. Ogle*, 108 S.W.3d 349, 351–52 (Tex. App.—Houston [14th Dist.] 2003, no pet.), and compare *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). For the requirement of privity between buyer and seller, see *Frank v. Bear, Stearns & Co.*, 11 S.W.3d 380, 383 (Tex. App.—Houston [14th Dist.] 2000, pet. denied), and *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 258 F. Supp. 2d 576, 602–07 (S.D. Tex. 2003). Although injury is required in rescission cases under the common law of fraud, *see Adickes v. Andreoli*, 600 S.W.2d 939, 946 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ dism'd), "[a] finding of actual damages is not required for equitable rescission" under the Texas Securities Act. *See Texas Capital Securities Management, Inc. v. Sandefer*, 58 S.W.3d 760, 776 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

"Sold or offered to sell." The Texas Securities Act broadly defines "sell," as well as "sale" and "offer for sale," in Tex. Rev. Civ. Stat. art. 581–4E. *See In re Enron Corp.*, 258 F. Supp. 2d at 603–04. If there is a dispute about whether a sale occurred or an offer was made, additional instructions may be necessary.

If the person who allegedly committed fraud sold the security, then *sold or offered to sell* should be used in element 1 of this instruction, and *purchased the security from* should be used in element 2. If the person who allegedly committed fraud bought the security, then *bought or offered to buy* should be used in element 1, and *sold the security to* should be used in element 2.

Person. The Texas Securities Act broadly defines "person" to include "a corporation, person, joint stock company, partnership, limited partnership, association, company, firm, syndicate, trust, incorporated or unincorporated," as well as "a government, or a political subdivision or agency thereof." Tex. Rev. Civ. Stat. art. 581–4B.

Security. The Texas Securities Act defines the term "security" or "securities" to include—

> any limited partner interest in a limited partnership, share, stock, treasury stock, stock certificate under a voting trust agreement, collateral trust certificate, equipment trust certificate, preorganization certificate or receipt, subscription or reorganization certificate, note, bond, debenture, mortgage

> certificate or other evidence of indebtedness, any form of commercial paper, certificate in or under a profit sharing or participation agreement, certificate or any instrument representing any interest in or under an oil, gas or mining lease, fee or title, or any certificate or instrument representing or secured by an interest in any or all of the capital, property, assets, profits or earnings of any company, investment contract, or any other instrument commonly known as a security, whether similar to those herein referred to or not.

The term applies "regardless of whether the 'security' or 'securities' are evidenced by a written instrument." The definition of "security" does not apply to any insurance policy, endowment policy, annuity contract, optional annuity contract, or any contract or agreement in relation to and in consequence of any similar policy or contract, issued by an insurance company subject to the supervision or control of the Texas Department of Insurance, when the form of the policy or contract has been duly filed with the department as required by law. Tex. Rev. Civ. Stat. art. 581–4A.

Whether something constitutes a "security" under the Texas Securities Act will usually be a question of law for the court. *See Grotjohn Precise Connexiones International, S.A. v. JEM Financial, Inc.*, 12 S.W.3d 859, 868 (Tex. App.—Texarkana 2000, no pet.); *Campbell v. C.D. Payne & Geldermann Securities, Inc.*, 894 S.W.2d 411, 417–18 (Tex. App.—Amarillo 1995, writ. denied). However, in some cases there may be predicate factual disputes for the jury to resolve regarding whether something is a security under the Act. For example, the Act lists an "investment contract" as a security, but the definition of "investment contract" includes multiple elements that may raise a factual dispute. *See Anderson*, 832 S.W.2d at 662.

Damages. PJC 115.19, which addresses direct damages in fraud cases, may be modified to submit damages resulting from a securities law violation. The Comment to PJC 115.19 explains the necessary modifications and also addresses the remedy of rescission.

PJC 105.13 Instruction on Violation of Texas Securities Act—Material Fact—Prediction or Statement of Belief

A [*prediction/projection/statement of belief*] in connection with the sale of a security is an untrue statement of a material fact when it is material and—

1. the speaker did not genuinely believe the statement was accurate, or

2. there was no reasonable basis for the speaker's belief that the statement was accurate, or

3. the speaker was aware of any undisclosed facts that would tend to seriously undermine the accuracy of the statement.

COMMENT

When to use. PJC 105.13 should be used with PJC 105.12 in cases in which a person offers or sells a security by means of an alleged untrue statement rather than by an omission and the statement implies, rather than states, factual assertions such as projections, predictions, opinions, or beliefs. "[A] pure expression of opinion will not support an action for [securities] fraud." *Transport Insurance Co. v. Faircloth*, 898 S.W.2d 269, 276 (Tex. 1995); *see also In re Westcap Enterprises*, 230 F.3d 717, 728 (5th Cir. 2000) ("[The buyer knew the seller's] expression of opinion or prediction was based on unpredictable interest rate changes, or in other words, was just a best guess."); *Texas Capital Securities Management, Inc. v. Sandefer*, 58 S.W.3d 760, 776 (Tex. App.—Houston [1st Dist] 2001, pet. denied) ("[P]uffing or dealer's talk . . . do not amount to actionable misrepresentation."); *Paull v. Capital Resource Management, Inc.*, 987 S.W.2d 214, 218 (Tex. App.—Austin 1999, pet. denied) (explaining that "[statements] of opinion, including opinion regarding value," are generally not actionable under Texas Securities Act).

> Whether a statement is an actionable statement of "fact" or merely one of "opinion" often depends on the circumstances in which the statement is made. Among the relevant circumstances are the statement's specificity, the speaker's knowledge, the comparative levels of the speaker's and the hearer's knowledge, and whether the statement relates to the present or to the future.

In re Westcap Enterprises, 230 F.3d at 726 (quoting *Faircloth*, 898 S.W.2d at 276 (involving a common-law fraud claim)). However, predictions and statements of belief may be actionable if they are made with knowledge of their inaccuracy or falseness. *See Paull*, 987 S.W.2d at 219; *cf. Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1090–94 (1991).

The statement may be oral or written, and the use of the term "speaker" in the instruction is not intended to limit this instruction to oral communications.

Source of instruction. PJC 105.13 is based on *Duperier v. Texas State Bank*, 28 S.W.3d 740, 745–46 (Tex. App.—Corpus Christi 2000, pet. dism'd by agr.). For a similar analysis, see *Paull*, 987 S.W.2d at 220 (citing *Rubinstein v. Collins*, 20 F.3d 160, 166 (5th Cir. 1994)).

PJC 105.14 Question on Defenses to Violation of Texas Securities Act—Factual Misrepresentation

If you answered "Yes" to Question _____ [*105.12*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Do you find that *Paul Payne* knew, by the time of the [*purchase/sale*], of the untruth or omission found by you in your answer to Question _____ [*105.12*]?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 105.14 submits one of the two affirmative defenses to liability for a securities violation. *See* Tex. Rev. Civ. Stat. art. 581–33A(2), 33B; *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 843 (Tex. 2005); *Williams v. Khalaf*, 802 S.W.2d 651, 656 n.3 (Tex. 1990). PJC 105.15 submits the other defense. An affirmative answer to either question is a defense to liability. *See Sterling Trust Co.*, 168 S.W.3d at 843.

Broad-form submission. PJC 105.14 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")).

PJC 105.15 Question on Defenses to Violation of Texas Securities Act—Buyer

If you answered "Yes" to Question _____ [*105.12*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Do you find that *Don Davis* did not know, and in the exercise of reasonable care could not have known, of the untruth or omission found by you in your answer to Question _____ [*105.12*]?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 105.15 submits one of the two affirmative defenses to liability for a securities violation. *See* Tex. Rev. Civ. Stat. art. 581–33A(2), 33B; *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 843 (Tex. 2005); *Williams v. Khalaf*, 802 S.W.2d 651, 656 n.3 (Tex. 1990). PJC 105.14 submits the other defense. An affirmative answer to either question is a defense to liability. *See Sterling Trust Co.*, 168 S.W.3d at 843.

To determine whether an issuer is entitled to this defense, see Tex. Rev. Civ. Stat. art. 581–33A(2), 33C & cmts.

Broad-form submission. PJC 105.15 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")).

PJC 105.16 Violation of Texas Securities Act—Control-Person Liability (Comment)

When to use. A question with appropriate instructions should be submitted when "control-person" liability is alleged under Tex. Rev. Civ. Stat. art. 581–33F, which imposes liability on persons who control a seller, buyer, or issuer of a security who commits a securities violation as defined by the Texas Securities Act. The trial court must condition the submission of such questions on a finding of a securities violation by the primary seller, buyer, or issuer.

Definition of "control person." The Committee believes that "control person" should be defined. However, because of uncertainty in the law regarding the requirements for control-person status, the Committee expresses no opinion about the proper definition.

Under the Texas Securities Act—

> [a] person who directly or indirectly controls a seller, buyer, or issuer of a security is liable under Section 33A, 33B, or 33C jointly and severally with the seller, buyer, or issuer, and to the same extent as if he were the seller, buyer, or issuer, unless the controlling person sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

Tex. Rev. Civ. Stat. art. 581–33F(1). The Act does not provide a definition of "control." However, the comments to the statute provide that, "[d]epending on the circumstances, a control person might include an employer, an officer or director, a large shareholder, a parent company, and a management company." Tex. Rev. Civ. Stat. Ann. art. 581–33F cmt. (West 2010). *See Busse v. Pacific Cattle Feeding Fund # 1, Ltd.*, 896 S.W.2d 807, 815 (Tex. App.—Texarkana 1995, writ denied) ("Major shareholders . . . and directors . . . are control persons."); *Texas Capital Securities Management, Inc. v. Sandefer*, 80 S.W.3d 260, 268 n.3 (Tex. App.—Texarkana 2002, pet. struck) ("Although in [*Busse*] we found Busse, who was a majority shareholder and a director, to be a control person, we do not construe this case to mean evidence solely of status creates a prima facie showing of control person.").

The comments also provide that "[c]ontrol is used in the same broad sense as in federal securities law," Tex. Rev. Civ. Stat. Ann. art. 581–33F cmt., and the Texas Supreme Court has recognized that the legislature "intended the [Texas Securities Act] to be interpreted in harmony with federal securities law." *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 840–41 (Tex. 2005). Accordingly, some Texas courts of appeals cite to the definition of "control" found in the federal securities laws, under which control "means the possession, direct or indirect, of the power to direct or cause the direction of the management or policies of a person, whether through the ownership of

voting securities, by contract, or otherwise." *Frank v. Bear, Stearns & Co.*, 11 S.W.3d 380, 384 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Barnes v. SWS Financial Services, Inc.*, 97 S.W.3d 759, 763 (Tex. App.—Dallas 2003, no pet.). *See* 17 C.F.R. § 230.405.

In analyzing control-person liability, Texas courts of appeals have articulated different tests. Some courts apply a two-prong test requiring proof that the defendant (1) exercised control over the operations of the corporation in general and (2) had the power to control the specific transaction or activity on which the primary violation is predicated. *See Frank*, 11 S.W.3d at 384 (citing *Abbott v. Equity Group, Inc.*, 2 F.3d 613, 620 (5th Cir. 1993)); *see also Darocy v. Abildtrup*, 345 S.W.3d 129, 137 (Tex. App.—Dallas 2011, no pet.); *Barnes*, 97 S.W.3d at 764. The Texarkana court of appeals requires a showing that the defendant (1) had actual power or influence over the controlled person and (2) induced or participated in the alleged violation. *Sandefer*, 80 S.W.3d at 268 (relying on *Dennis v. General Imaging, Inc.*, 918 F.2d 496, 509 (5th Cir. 1990)). *But see Abbott*, 2 F.3d at 620 n.18 ("We note that *Dennis* does not accurately reflect our rejection in [*G.A. Thompson & Co., Inc. v. Partridge*, 636 F.2d 945, 957–58 (5th Cir. 1981)] of a 'culpable participation' requirement. . . . We need not resolve this inconsistency, because our holding turns on [the plaintiffs'] failure to establish [the defendants'] power to control [the controlled person]."). *See also* Bromberg & Lowenfels, 4 *Securities Fraud & Commodities Fraud* § 7:340 (2008) (discussing additional differences among the federal circuit courts of appeals regarding the proper test for control-person liability under the federal securities laws). The Austin court of appeals recently joined the Dallas and Houston fourteenth courts of appeals in rejecting a "culpable participation" requirement for control-person liability. *Fernea v. Merrill Lynch Pierce Fenner & Smith, Inc.*, No. 03-09-00566-CV, 2011 WL 2769838, at *15 & n.10 (Tex. App.—Austin July 12, 2011, no pet. h.). However, the Austin court articulated the two-part control-person test differently from the Dallas and Houston fourteenth courts of appeals: "[T]he plaintiff must prove that the alleged controlling person (1) had actual power or influence over the controlled person, and (2) had the power to control or influence the specific transaction or activity that gave rise to the underlying violation." *Fernea*, 2011 WL 2769839, at *15.

Parties. It is unnecessary to join the seller, buyer, or issuer as a party to a suit against alleged control persons as long as the evidence shows the defendant's control over the seller, buyer, or issuer and a violation of the Texas Securities Act by the seller, buyer, or issuer. *Summers v. WellTech, Inc.*, 935 S.W.2d 228, 231 (Tex. App.—Houston [1st Dist.] 1996, no writ). If the seller, buyer, or issuer is not a party to the suit, a predicate jury question (such as PJC 105.12) is still required if the material facts are disputed as to the seller's, buyer's, or issuer's violation of the Act. If the seller's, buyer's, or issuer's violation is undisputed, the jury should be instructed about the violation and element 2 of PJC 105.12 should be modified to focus on the undisputed violation. In such a case, no predicate is required.

Damages. PJC 115.19, which addresses direct damages in fraud cases, may be modified to submit damages resulting from a securities law violation. The Comment to PJC 115.19 explains the necessary modifications and also addresses the remedy of rescission.

PJC 105.17 Question on Defense to Control-Person Liability

If you answered "Yes" to Question _____ [*question about liability of control person*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Do you find that *Deborah Dennis* did not know, and in the exercise of reasonable care could not have known, of the existence of the facts that you found to be a violation in Question _____ [*105.12*]?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 105.17 may accompany a question regarding control-person liability (see PJC 105.16) if the defendant raises the defense that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the primary actor's liability is alleged to exist. Tex. Rev. Civ. Stat. art. 581–33F(1).

Broad-form submission. PJC 105.17 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")).

Source of instruction. PJC 105.17 is based on Tex. Rev. Civ. Stat. art. 581–33F(1).

PJC 105.18 Question and Instructions on Violation of Texas Securities Act—Aiding Violation

If you answered "Yes" to Question _____ [*105.12*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Did *Deborah Dennis* materially aid *Don Davis* in committing the securities law violation that you found in Question _____ [*105.12*]?

Deborah Dennis materially aided a securities law violation if *she*—

1. directly or indirectly,

2. with an intent to deceive or defraud or with a reckless disregard for the truth or the law,

3. materially assisted *Don Davis* in committing a securities law violation.

Deborah Dennis acted with a "reckless disregard for the truth or the law" if *she* provided material assistance to *Don Davis* with a general awareness that *her* assistance would facilitate *his* untruthful or illegal activity.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 105.18 is based on Tex. Rev. Civ. Stat. art. 581–33F(2), which imposes liability on persons who aid or abet a seller, buyer, or issuer of a security who commits fraud as defined by the Texas Securities Act. The trial court must condition the submission of PJC 105.18 on a finding of a securities violation by the primary seller, buyer, or issuer.

Broad-form submission. PJC 105.18 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Source of instruction. For the elements of the claim, see Tex. Rev. Civ. Stat. art. 581–33F(2). Regarding the definition of "reckless disregard," see *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 842 (Tex. 2005).

PJC 105.19 Question and Instruction on Negligent Misrepresentation

QUESTION _____

Did *Don Davis* make a negligent misrepresentation on which *Paul Payne* justifiably relied?

Negligent misrepresentation occurs when—

1. a party makes a representation in the course of his business or in a transaction in which he has a pecuniary interest, and

2. the representation supplies false information for the guidance of others in their business, and

3. the party making the representation did not exercise reasonable care or competence in obtaining or communicating the information.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 105.19 is appropriate for use in most cases involving a claim of negligent misrepresentation if the court, as a matter of law, or the jury, as a matter of fact, has found that the plaintiff is within the class of persons allowed to bring this cause of action. *See Federal Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991) (adopting tort of negligent misrepresentation in *Restatement (Second) of Torts* § 552 (1977)). *Compare McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791, 794 (Tex. 1999) (lawyer may be liable for negligent misrepresentation to nonclient who justifiably relies on lawyer's representation of material fact), *with LAN/STV v. Eby*, 435 S.W.3d 234, 235–36, 246–47 (Tex. 2014) (economic loss rule did not allow general contractor to recover for negligent misrepresentation by project architect).

Broad-form submission. PJC 105.19 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Source of question and instruction. The question and instruction are patterned after the supreme court's opinion in *Sloane*, 825 S.W.2d at 442.

Damages. Economic damages for negligent misrepresentation are limited to those necessary to compensate the party for the pecuniary loss caused by the misrepresentation. Benefit-of-the-bargain and lost-profit damages are not available. *Sloane*, 825 S.W.2d at 442–43 (adopting *Restatement (Second) of Torts* § 552B (1977)); *see also D.S.A., Inc. v. Hillsboro Independent School District*, 973 S.W.2d 662, 663–64 (Tex. 1998). In *D.S.A., Inc.*, the court also recognized that under *Restatement (Second) of Torts* § 311 (1965), "[a] party may recover for negligent misrepresentations involving a risk of physical harm only if actual physical harm results." *D.S.A., Inc.*, 973 S.W.2d at 664; *accord Sloane*, 825 S.W.2d at 443 n.4. For submission of negligent misrepresentation damages, see PJC 115.21.

[PJC 105.20–105.24 are reserved for expansion.]

PJC 105.25 Question and Instruction on Transfers Fraudulent as to Present and Future Creditors—Actual Fraud (Tex. Bus. & Com. Code § 24.005(a)(1))

QUESTION _____

Did *Dean Debtor* transfer any of the assets [*or incur any of the obligations*] listed below with actual intent to hinder, delay, or defraud any creditor?

In determining actual intent, you may consider, among other factors, whether—

1. The transfer [*or obligation*] was to an insider.

2. *Dean Debtor* retained possession or control of the property transferred after the transfer.

3. The transfer [*or obligation*] was concealed.

4. Before the transfer was made [*or the obligation was incurred*], *Dean Debtor* had been sued or threatened with suit.

5. The transfer was of substantially all of *Dean Debtor*'s assets.

6. *Dean Debtor* absconded.

7. *Dean Debtor* removed or concealed assets.

8. The value of the consideration received by *Dean Debtor* was reasonably equivalent to the value of the asset transferred [*or the amount of the obligation incurred*].

9. *Dean Debtor* was insolvent or became insolvent shortly after the transfer was made [*or the obligation was incurred*].

10. The transfer occurred shortly before or shortly after a substantial debt was incurred.

11. *Dean Debtor* transferred the essential assets of the business to a lienor who transferred the assets to an insider of *Dean Debtor*.

Answer "Yes" or "No" for each asset [*or obligation*] listed below.

1. [*Asset or obligation 1.*]

Answer: _____

2. [*Asset or obligation 2.*]

Answer: _____

3. [*Asset or obligation 3.*]

Answer: _____

COMMENT

When to use. PJC 105.25 should be used when the plaintiff alleges that a transfer was made or obligation incurred with actual intent to hinder, delay, cr defraud a creditor of the debtor. *See* Tex. Bus. & Com. Code § 24.005(a)(1).

Broad-form submission. PJC 105.25 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Source of question. The question and list of factors used in determining actual intent are based on Tex. Bus. & Com. Code § 24.005(a)(1), (b).

Debtor and creditor. If there is a factual dispute regarding the status of a pertinent person or entity as a debtor or creditor, a predicate question should be submitted to determine that status. Appropriate definitions of "debtor" and "debt," or "creditor" and "claim," should accompany the question. *See* Tex. Bus. & Com. Code § 24.002(3)–(6). The defrauded creditor need not be the plaintiff, and defendants may include the debtor and the transferee. *See* Tex. Bus. & Com. Code §§ 24.005(a)(1), 24.008. If there is a dispute regarding when the creditor's claim arose, a predicate question should be submitted to determine whether the creditor's claim arose before or within a reasonable time after the transfer was made or the obligation was incurred. *See* Tex. Bus. & Com. Code § 24.005(a).

Asset. The question assumes the thing transferred is an asset of the debtor. If there is a factual dispute about the thing's status as an asset, a predicate question should be submitted to determine that status. *See* Tex. Bus. & Com. Code §§ 24.002(2) (defining "asset" as "property of a debtor" but excluding certain property), 24.002(10) (defining "property" as "anything that may be the subject of ownership"). Whether one of the exclusions from the asset definition applies in a given case may present a question of law for the court. If there is no dispute regarding what the asset or obligation at issue is, it may be preferable not to list it or to specifically identify the asset or obligation in the text of the question, as opposed to listing the potential assets or obligations in the instruction.

Insider. The statute includes a lengthy, nonexclusive definition of "insider," parts of which incorporate definitions of "affiliate" and "relative." *See* Tex. Bus. & Com. Code § 24.002(1), (7), (11). If there is no factual dispute that a pertinent person or entity is an insider, or that no insiders participated in the relevant transactions, the court may instruct the jury accordingly. If there is a factual dispute regarding insider status, the relevant parts of the following definition should be submitted:

"Insider" includes—

[Insert the following if Dean Debtor is an individual.]

1. a relative of *Dean Debtor* or a general partner of *Dean Debtor*;

2. a partnership in which *Dean Debtor* is a general partner;

3. a general partner in a partnership in which *Dean Debtor* is a general partner; or

4. a corporation in which *Dean Debtor* is a director, officer, or person in control.

[Insert the following if Dean Debtor is a corporation.]

1. a director, officer, or person in control of *Debtor, Inc.*;

2. a partnership in which *Debtor, Inc.* is a general partner;

3. a general partner in a partnership in which *Debtor, Inc.* is a general partner; or

4. a relative of a general partner, director, officer, or person in control of *Debtor, Inc.*

[Insert the following if Dean Debtor is a partnership.]

1. a general partner of *Debtor Partners*;

2. a relative of a general partner in, a general partner of, or a person in control of *Debtor Partners*;

3. another partnership in which *Debtor Partners* is a general partner;

4. a general partner in another partnership in which *Debtor Partners* is a general partner; or

5. a person in control of *Debtor Partners*.

"Insider" also includes a managing agent of [*Debtor, Inc./Debtor Partners*], or an affiliate, or an insider of an affiliate as if the affiliate were [*Debtor, Inc./Debtor Partners*].

Relative. The term "relative" in the definition of "insider" is defined in Code section 24.002(11). If no relatives participated in the relevant transactions, the portions of the definition of insider that refer to "relative" should not be submitted. If there is no factual dispute that a relative did participate in a relevant transaction, the court may instruct the jury that the relative is an insider.

Affiliate. The term "affiliate" in the definition of "insider" is defined in Code section 24.002(1). If no affiliates participated in the relevant transactions, the portions of the definition of insider that refer to "affiliate" should not be submitted. If there is no factual dispute that an affiliate did participate in a relevant transaction, the court may instruct the jury that the affiliate is an insider. If there is a factual dispute regarding whether a particular entity is an affiliate, the relevant parts of the following definition should be submitted:

"Affiliate" means a person or entity—

1. who directly or indirectly owns, controls, or holds with power to vote 20 percent or more of the outstanding voting securities of *Debtor, Inc.*, other than a person or entity who holds the securities—

   a. as a fiduciary or agent without sole discretionary power to vote the securities or

   b. solely to secure a debt, if the person or entity has not exercised the power to vote;

2. whose business is operated by *Dean Debtor* under a lease or other agreement, or a person or entity substantially all of whose assets are controlled by *Dean Debtor*; or

3. who operates *Dean Debtor*'s business under a lease or other agreement or controls substantially all of *Dean Debtor*'s assets.

[If the alleged affiliate is a corporation, the following additional definition may be included.]

"Affiliate" also means a corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by *Dean Debtor*.

Insolvent. PJC 105.25 assumes insolvency is undisputed. If insolvency is undisputed, the court may instruct the jury regarding the fact and date of insolvency. If insolvency is disputed, the following instruction (which is derived from Code section 24.003) should be submitted:

> A debtor is "insolvent" if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation. A debtor who is generally not paying the debtor's debts as they become due is presumed to be insolvent.

Transfer. If there is a fact issue regarding whether an asset was transferred, the relevant portions of the following definition (which is taken from Code section 24.002(12)) should be submitted:

> "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

PJC 105.26 Question on Reasonably Equivalent Value—Constructive Fraud (Tex. Bus. & Com. Code §§ 24.005(a)(2), 24.006(a))

QUESTION _____

Did *Dean Debtor* transfer any of the assets [*or incur any of the obligations*] listed below without receiving reasonably equivalent value?

Answer "Yes" or "No" for each asset [*or obligation*] listed below.

1. [*Asset or obligation 1.*]

Answer: _____

2. [*Asset or obligation 2.*]

Answer: _____

3. [*Asset or obligation 3.*]

Answer: _____

COMMENT

When to use. PJC 105.26 should be used when the plaintiff alleges a constructively fraudulent transfer as to present or future creditors based, at least in part, on the debtor's not receiving reasonably equivalent value for the transfer made or obligation incurred. *See* Tex. Bus. & Com. Code §§ 24.005(a)(2), 24.006(a).

Broad-form submission. PJC 105.26 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Source of question. The question is derived from Tex. Bus. & Com. Code §§ 24.005(a)(2), 24.006(a).

Debtor and creditor. If there is a factual dispute regarding the status of a pertinent person or entity as a debtor or creditor, a predicate question should be submitted to determine that status. Appropriate definitions of "debtor" and "debt," or "creditor" and "claim," should accompany the question. *See* Tex. Bus. & Com. Code § 24.002(3)–(6). The defrauded creditor need not be the plaintiff, and defendants may

include the debtor and the transferee. *See* Tex. Bus. & Com. Code §§ 24.005(a)(2), 24.006(a), 24.008. If there is a dispute regarding when the creditor's claim arose, a predicate question should be submitted to determine whether the creditor's claim arose before or within a reasonable time after the transfer was made or the obligation incurred. *See* Tex. Bus. & Com. Code §§ 24.005(a), 24.006.

Asset. The question assumes the thing transferred is an asset of the debtor. If there is a factual dispute about the thing's status as an asset, a predicate question should be submitted to determine that status. *See* Tex. Bus. & Com. Code §§ 24.002(2) (defining "asset" as "property of a debtor" but excluding certain property), 24.002(10) (defining "property" as "anything that may be the subject of ownership"). Whether one of the exclusions from the asset definition applies in a given case may present a question of law for the court. If there is no dispute regarding what the asset or obligation at issue is, it may be preferable not to list it or to specifically identify the asset or obligation in the text of the question, as opposed to listing the potential assets or obligations in the instruction.

Reasonably equivalent value. "Value" and "reasonably equivalent value" are addressed in Code section 24.004. Whether a debtor obtained reasonably equivalent value in a particular transaction is determined from a reasonable creditor's perspective at the time of the exchange, without regard to the subjective needs or perspectives of the debtor or transferee and without the wisdom hindsight often brings. *Janvey v. The Golf Channel, Inc.*, 487 S.W.3d 560, 582 (Tex. 2016). The requirement of reasonably equivalent value can be satisfied with evidence that the transferee (1) fully performed under a lawful, arm's-length contract for fair market value, (2) provided consideration that had objective value at the time of the transaction, and (3) made the exchange in the ordinary course of the transferee's business. *Janvey*, 487 S.W.3d at 564. Other instructions or definitions may be necessary depending on the facts of the case. For example, if there is evidence regarding a range of values, the following instruction regarding reasonably equivalent value may be appropriate:

> "Reasonably equivalent value" means an amount that at the time of the transfer was within the range of values for which such transfers [*or obligations*] would occur in an arm's-length transaction.

Transfer. If there is a fact issue regarding whether an asset was transferred, the relevant portions of the following definition (which is taken from Code section 24.002(12)) should be submitted:

> "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

PJC 105.27 Question on Constructive Fraud (Tex. Bus. & Com. Code §§ 24.005(a)(2), 24.006(a))

If you answered "Yes" to an asset [*or obligation*] in Question _____ [*105.26*], then answer the following question as to the asset [*or obligation*]. Otherwise, do not answer the following question.

QUESTION _____

At the time the asset was transferred [*or the obligation was incurred*]—

1. was *Dean Debtor* engaged in or about to engage in a business or a transaction for which *his* remaining assets were unreasonably small in relation to the business or transaction; or

2. did *Dean Debtor* intend to incur or believe that *he* would incur, or should *he* reasonably have believed that *he* would incur, debts beyond *his* ability to pay as they became due; or

3. was *Dean Debtor* insolvent or did *he* become insolvent as a result of the transfer [*or obligation*]?

Answer "Yes" or "No" for each asset [*or obligation*] as to which you answered "Yes" in Question _____ [*105.26*].

1. [*Asset or obligation 1.*]

Answer: _____

2. [*Asset or obligation 2.*]

Answer: _____

3. [*Asset or obligation 3.*]

Answer: _____

COMMENT

When to use. PJC 105.27 should be used in conjunction with PJC 105.26 to submit a cause of action for fraudulent transfer based on constructive fraud under Tex. Bus. & Com. Code §§ 24.005(a)(2) and 24.006(a). Elements 1 and 2 may apply whether the plaintiff is a present creditor whose claim arose before the transfer was made or the obligation was incurred or is a future creditor whose claim arose within a reasonable time after the transfer was made or the obligation was incurred. Tex. Bus.

& Com. Code § 24.005(a). However, element 3 should be submitted only if the plaintiff is a present creditor whose claim arose before the transfer was made or the obligation was incurred. Tex. Bus. & Com. Code § 24.006(a).

Broad-form submission. PJC 105.27 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Source of question. Elements 1 and 2 of PJC 105.27 are derived from Tex. Bus. & Com. Code § 24.005(a)(2), Element 3 is derived from Tex. Bus. & Com. Code § 24.006(a).

Use of "or." Each of elements 1, 2, and 3 should be used only when raised by the evidence. If more than one of the alternative instructions listed above is used, each must be separated by the word *or*, because a finding of any one of the circumstances defined in the instructions would support recovery under the Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code tit. 3, ch. 24.

Debtor and creditor. If there is a factual dispute regarding the status of a pertinent person or entity as a debtor or creditor, a predicate question should be submitted to determine that status. Appropriate definitions of "debtor" and "debt," or "creditor" and "claim," should accompany the question. *See* Tex. Bus. & Com. Code § 24.002(3)–(6). The defrauded creditor need not be the plaintiff, and defendants may include the debtor and the transferee. *See* Tex. Bus. & Com. Code §§ 24.005(a)(2), 24.006(a), 24.008. If there is a dispute regarding when the creditor's claim arose, a predicate question should be submitted to determine whether the creditor's claim arose before or within a reasonable time after the transfer was made or the obligation was incurred. *See* Tex. Bus. & Com. Code §§ 24.005(a), 24.006.

Asset. The question assumes the thing transferred is an asset of the debtor. If there is a factual dispute about the thing's status as an asset, a predicate question should be submitted to determine that status. *See* Tex. Bus. & Com. Code §§ 24.002(2) (defining "asset" as "property of a debtor" but excluding certain property), 24.002(10) (defining "property" as "anything that may be the subject of ownership"). Whether one of the exclusions from the asset definition applies in a given case may present a question of law for the court. If there is no dispute regarding what the asset or obligation at issue is, it may be preferable not to list it or to specifically identify the asset or obligation in the text of the question, as opposed to listing the potential assets or obligations in the instruction.

Insolvent. PJC 105.27 assumes insolvency is undisputed. If insolvency is undisputed, the court may instruct the jury regarding the fact and date of insolvency. If insolvency is disputed, the following instruction (which is derived from Code section 24.003) should be submitted:

> A debtor is "insolvent" if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation. A debtor who is generally not paying the debtor's debts as they become due is presumed to be insolvent.

PJC 105.28 Question on Constructive Fraud—Transfer to Insider (Tex. Bus. & Com. Code § 24.006(b))

QUESTION _____

Did *Dean Debtor* transfer any of the assets listed below to an insider for a debt that existed prior to the alleged transfer, at a time when *Dean Debtor* was insolvent and the insider had reasonable cause to believe that *Dean Debtor* was insolvent?

[Insert instructions, if appropriate.]

Answer "Yes" or "No" for each asset listed below.

1. [*Asset 1.*]

Answer: _____

2. [*Asset 2.*]

Answer: _____

3. [*Asset 3.*]

Answer: _____

COMMENT

When to use. PJC 105.28 should be used when the plaintiff alleges that a transfer was made to an insider for a preexisting debt when the debtor was insolvent and the insider had reasonable cause to believe that the debtor was insolvent. *See* Tex. Bus. & Com. Code § 24.006(b).

Broad-form submission. PJC 105.28 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Source of question. The question is based on Tex. Bus. & Com. Code § 24.006(b).

Debtor and creditor. If there is a factual dispute regarding the status of a pertinent person or entity as a debtor or creditor, a predicate question should be submitted to determine that status. Appropriate definitions of "debtor" and "debt," or "creditor" and "claim," should accompany the question. *See* Tex. Bus. & Com. Code § 24.002(3)–(6). The defrauded creditor need not be the plaintiff, and defendants may include the debtor and the transferee. *See* Tex. Bus. & Com. Code §§ 24.006(b), 24.008. If there is a dispute regarding when the creditor's claim arose, a predicate question should be submitted to determine whether the creditor's claim arose before the transfer was made. *See* Tex. Bus. & Com. Code § 24.006(b).

Asset. The question assumes the thing transferred is an asset of the debtor. If there is a factual dispute about the thing's status as an asset, a predicate question should be submitted to determine that status. *See* Tex. Bus. & Com. Code §§ 24.002(2) (defining "asset" as "property of a debtor" but excluding certain property), 24.002(10) (defining "property" as "anything that may be the subject of ownership"). Whether one of the exclusions from the asset definition applies in a given case may present a question of law for the court. If there is no dispute regarding what the asset or obligation at issue is, it may be preferable not to list it or to specifically identify the asset or obligation in the text of the question, as opposed to listing the potential assets or obligations in the instruction.

Insider. The statute includes a lengthy, nonexclusive definition of "insider," parts of which incorporate definitions of "affiliate" and "relative." *See* Tex. Bus. & Com. Code § 24.002(1), (7), (11). If there is no factual dispute that a pertinent person or entity is an insider, or that no insiders participated in the relevant transactions, the court may instruct the jury accordingly. If there is a factual dispute regarding insider status, the relevant parts of the following definition should be submitted:

"Insider" includes—

[Insert the following if Dean Debtor is an individual.]

1. a relative of *Dean Debtor* or a general partner of *Dean Debtor*;

2. a partnership in which *Dean Debtor* is a general partner;

3. a general partner in a partnership in which *Dean Debtor* is a general partner; or

4. a corporation in which *Dean Debtor* is a director, officer, or person in control.

[Insert the following if Dean Debtor is a corporation.]

1. a director, officer, or person in control of *Debtor, Inc.*;

2. a partnership in which *Debtor, Inc.* is a general partner;

3. a general partner in a partnership in which *Debtor, Inc.* is a general partner; or

4. a relative of a general partner, director, officer, or person in control of *Debtor, Inc.*

[Insert the following if Dean Debtor is a partnership.]

1. a general partner of *Debtor Partners*;

2. a relative of a general partner in, a general partner of, or a person in control of *Debtor Partners*;

3. another partnership in which *Debtor Partners* is a general partner;

4. a general partner in another partnership in which *Debtor Partners* is a general partner; or

5. a person in control of *Debtor Partners*.

"Insider" also includes a managing agent of [*Debtor, Inc./Debtor Partners*], or an affiliate, or an insider of an affiliate as if the affiliate were [*Debtor, Inc./Debtor Partners*].

Relative. The term "relative" in the definition of "insider" is defined in Code section 24.002(11). If no relatives participated in the relevant transactions, the portions of the definition of insider that refer to "relative" should not be submitted. If there is no factual dispute that a relative did participate in a relevant transaction, the court may instruct the jury that the relative is an insider.

Affiliate. The term "affiliate" in the definition of "insider" is defined in Code section 24.002(1). If no affiliates participated in the relevant transactions, the portions of the definition of insider that refer to "affiliate" should not be submitted. If there is no factual dispute that an affiliate did participate in a relevant transaction, the court may instruct the jury that the affiliate is an insider. If there is a factual dispute regarding whether a particular entity is an affiliate, the relevant parts of the following definition should be submitted:

"Affiliate" means a person or entity—

1. who directly or indirectly owns, controls, or holds with power to vote 20 percent or more of the outstanding voting securities of *Debtor, Inc.*, other than a person or entity who holds the securities—

a. as a fiduciary or agent without sole discretionary power to vote the securities or

b. solely to secure a debt, if the person or entity has not exercised the power to vote;

2. whose business is operated by *Dean Debtor* under a lease or other agreement, or a person or entity substantially all of whose assets are controlled by *Dean Debtor*; or

3. who operates *Dean Debtor*'s business under a lease or other agreement or controls substantially all of *Dean Debtor*'s assets.

[If the alleged affiliate is a corporation, the following additional definition may be included.]

"Affiliate" also means a corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by *Dean Debtor*.

Insolvent. PJC 105.28 assumes insolvency is undisputed. If insolvency is undisputed, the court may instruct the jury regarding the fact and date of insolvency. If insolvency is disputed, the following instruction (which is derived from Code section 24.003) should be submitted:

A debtor is "insolvent" if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation. A debtor who is generally not paying the debtor's debts as they become due is presumed to be insolvent.

Transfer. If there is a fact issue regarding whether an asset was transferred, the relevant portions of the following definition (which is taken from Code section 24.002(12)) should be submitted:

"Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

PJC 105.29 Question and Instruction on Good Faith and Reasonably Equivalent Value—Affirmative Defense to Fraudulent Transfer Based on Actual Fraud (Tex. Bus. & Com. Code § 24.009(a))

If you answered "Yes" to any part of Question _____ [*105.25*], then answer the corresponding part of the following question. Otherwise, do not answer the following question.

QUESTION _____

Did *Barry Buyer* take any of the assets [*or incur any of the obligations*] listed below in good faith and for a reasonably equivalent value?

A party takes an asset [*or incurs an obligation*] in good faith if the party (1) had no actual notice of the fraudulent intent of the debtor and (2) lacked knowledge of such facts as would cause a person of ordinary prudence to question whether the debtor had fraudulent intent.

Answer "Yes" or "No" for any of the following for which you answered "Yes" in Question _____ [*105.25*].

1. [*Asset or obligation 1.*]

   Answer: _____

2. [*Asset or obligation 2.*]

   Answer: _____

3. [*Asset or obligation 3.*]

   Answer: _____

COMMENT

When to use. PJC 105.29 submits a statutory defense available in two instances: (1) to the original transferee if the jury finds a debtor acted with actual intent to hinder, delay, or defraud a creditor, and (2) to a subsequent transferee against whom the creditor seeks a money judgment. *See* Tex. Bus. & Com. Code § 24.009(a), (b).

Broad-form submission. PJC 105.29 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas*

Department of Human Services v. E.B., 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")).

Good faith. Notice of fraudulent intent can be either actual or constructive. *Hahn v. Love*, 394 S.W.3d 14, 31 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). A transferee who takes property with knowledge of such facts as would excite the suspicions of a person of ordinary prudence and put him on inquiry of the fraudulent nature of an alleged transfer does not take the property in good faith. *Hahn*, 394 S.W.3d at 31. *See also GE Capital Commercial, Inc. v. Worthington National Bank*, 754 F.3d 297, 312–13 (5th Cir. 2014).

Burden of proof. Like other affirmative defenses, the burden of proof is on the defendant transferee/obligee. *See Hahn*, 394 S.W.3d at 30.

Subsequent transferees. Even if a transfer from the debtor is voidable, no judgment can be entered against subsequent transferees (those following the first transferee) if they took in good faith for value. *See* Tex. Bus. & Com. Code § 24.009(b)(2). In suits against subsequent transferees, the above question may be used with appropriate modifications to submit that question.

Reasonably equivalent value. "Value" and "reasonably equivalent value" are addressed in Code section 24.004. Whether a debtor obtained reasonably equivalent value in a particular transaction is determined from a reasonable creditor's perspective at the time of the exchange, without regard to the subjective needs or perspectives of the debtor or transferee and without the wisdom hindsight often brings. *Janvey v. The Golf Channel, Inc.*, 487 S.W.3d 560, 582 (Tex. 2016). The requirement of reasonably equivalent value can be satisfied with evidence that the transferee (1) fully performed under a lawful, arm's-length contract for fair market value, (2) provided consideration that had objective value at the time of the transaction, and (3) made the exchange in the ordinary course of the transferee's business. *Janvey*, 487 S.W.3d at 564. Other instructions or definitions may be necessary depending on the facts of the case. For example, if there is evidence regarding a range of values, the following instruction regarding reasonably equivalent value may be appropriate:

> "Reasonably equivalent value" means an amount that at the time of the transfer was within the range of values for which such transfers [*or obligations*] would occur in an arm's-length transaction.

PJC 105.30 Question on Affirmative Defense for Insider (Tex. Bus. & Com. Code § 24.009(f))

If you answered "Yes" to any part of Question _____ [*105.28*], then answer the corresponding part of the following question. Otherwise, do not answer the following question.

QUESTION _____

Was the transfer made under any of the circumstances listed below?

1. After the transfer, the insider gave new value, not secured by a valid lien, to or for the benefit of *Dean Debtor*;

2. the transfer was made in the ordinary course of business or financial affairs of *Dean Debtor* and the insider; or

3. the transfer was made pursuant to a good-faith effort to rehabilitate *Dean Debtor* and the transfer secured present value given for that purpose as well as an antecedent debt of *Dean Debtor*.

Answer "Yes" or "No" for any of the following for which you answered "Yes" in Question _____ [*105.28*].

1. [*Asset 1.*]

Answer: _____

2. [*Asset 2.*]

Answer: _____

3. [*Asset 3.*]

Answer: _____

COMMENT

When to use. PJC 105.30 submits the statutory affirmative defense available if the jury finds a voidable insider transaction under PJC 105.28. *See* Tex. Bus. & Com. Code § 24.009(f).

Broad-form submission. PJC 105.30 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas*

Department of Human Services v. E.B., 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")).

Burden of proof. Like other affirmative defenses, the burden of proof is on the defendant transferee/obligee. *See Hahn v. Love*, 394 S.W.3d 14, 30 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).

PJC 105.31 Question on Extinguishment of Cause of Action (Tex. Bus. & Com. Code § 24.010)

If you answered "Yes" to Question _____ [*105.25–105.28*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

By what date could *Paul Payne* reasonably have discovered the [*transfer made/obligation incurred*] by *Dean Debtor*?

Answer with a date in the blank below.

Answer: _____

COMMENT

When to use. In most cases, the timeliness of a suit for fraudulent conveyance is a question of law measured from the date the transfer was made or obligation was incurred. Tex. Bus. & Com. Code § 24.010. But in certain cases the Uniform Fraudulent Transfer Act extends the deadline to a date one year after the transfer or obligation was or could reasonably have been discovered by the claimant. Tex. Bus. & Com. Code §§ 24.010(a)(1), 24.010(b)(1). PJC 105.31 submits that question when it applies.

Broad-form submission. PJC 105.31 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")).

Tolling provisions limited. Section 24.010 is a statute of repose rather than a statute of limitations, so tolling statutes applicable to "limitations" do not apply. *See Nathan v. Whittington*, 408 S.W.3d 870, 874 (Tex. 2013) (holding TUFTA suit not saved by statute applicable to suits dismissed for lack of jurisdiction, Tex. Civ. Prac. & Rem. Code § 16.064). But section 24.010(c) tolls accrual for creditors under legal disability due to minority or unsound mind if the disability existed when the statutory time period starts. There is no tolling for a disability arising thereafter, and a creditor may not tack one legal disability to another.

PJC 105.32 Remedies for Fraudulent Transfers (Tex. Bus. & Com. Code § 24.008) (Comment)

The remedy for a fraudulent transfer will often be a question of law for the court. This comment describes the remedies available, the circumstances in which additional jury findings may be appropriate to support those remedies, and the questions that should then be submitted. The defrauded creditor need not be the plaintiff, and defendants may include the debtor and the transferee. *See* Tex. Bus. & Com. Code §§ 24.005(a)(1), 24.008.

Remedies for fraudulent transfers generally. A creditor affected by a fraudulent transfer can seek equitable remedies under section 24.008 or money damages under section 24.009(b). Tex. Bus. & Com. Code §§ 24.008, 24.009(b); *Chu v. Hong*, 249 S.W.3d 441, 446 (Tex. 2008) ("[T]he Act provides for equitable remedies to rescind the fraudulent transfer, or a damage assessment limited to the amount of the property transferred.").

Equitable remedies under Code section 24.008. The equitable remedies allowed under section 24.008 are "avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim" (Tex. Bus. & Com. Code § 24.008(a)(1)); "an attachment or other provisional remedy against the asset transferred or other property of the transferee" (§ 24.008(a)(2)); "an injunction against further disposition . . . of the asset transferred or of other property" (§ 24.008(a)(3)(A)); "appointment of a receiver" (§ 24.008(a)(3)(B)); "any other relief the circumstances may require" (§ 24.008(a)(3)(C)); or, if the creditor has obtained a judgment against the debtor, permission to "levy execution on the asset transferred or its proceeds" (§ 24.008(b)).

Additional jury findings not generally required for equitable remedies under Code section 24.008. While litigants are entitled to a trial by jury when pursuing equitable remedies, the jury may decide only factual questions that predicate the availability of equitable relief and not the ultimate question of whether and what form of equitable relief should be granted. The latter question is reserved for the court. *Longview Energy Co. v. Huff Energy Fund LP*, 533 S.W.3d 866, 874 (Tex. 2017).

In most cases, the factual questions that predicate the availability of equitable relief under section 24.008 will be submitted in the liability questions. *Cf. Caballero v. Central Power & Light Co.*, 858 S.W.2d 359, 361 (Tex. 1993) (analogous statutory scheme under Texas Commission on Human Rights Act, in which juries find liability and judges craft equitable relief). A separate remedies question is thus rarely required if the creditor seeks relief under only section 24.008.

In particular, and with one exception, additional jury findings are not required to support equitable relief under section 24.008. For example, a jury finding on the value of the fraudulently transferred asset is not required to support relief under section 24.008 because none of the remedies in section 24.008 is predicated on such a finding.

Flores v. Robinson Roofing & Construction Co., 161 S.W.3d 750, 756–57 (Tex. App.—Fort Worth 2005, pet. denied).

The exception is that, when a creditor seeks avoidance of a transfer or obligation under section 24.008(a)(1), a jury finding of the amount necessary to satisfy the creditor's claim is required if that amount is factually disputed. This is because section 24.008(a)(1) allows avoidance only "to the extent necessary to satisfy the creditor's claim." When this finding is required, the following question, predicated on liability, should be submitted:

QUESTION _____

What is the amount necessary to satisfy *Craig Creditor*'s claim?

Answer in dollars and cents, if any.

Answer: _____

This question assumes that the creditor's claim is either clear in the context of the case or defined in an earlier liability question. If neither of these is true, then an instruction should be included defining the creditor's claim.

Money damages under Code section 24.009(b). A creditor affected by a fraudulent transfer may seek money damages from the person for whose benefit the transfer was made, the first transferee, or any subsequent transferee who did not take in good faith and for value. Tex. Bus. & Com. Code § 24.009(b). Once a subsequent transferee takes in good faith and for value, the creditor may not seek money damages from that transferee or any subsequent transferees. Tex. Bus. & Com. Code § 24.009(b)(2).

The measure of damages is the lesser of "the amount necessary to satisfy the creditor's claim" and "the value of the asset transferred . . . at the time of the transfer, subject to adjustment as the equities may require." Tex. Bus. & Com. Code § 24.009(b), (c)(1). When findings on these damages measures are required, the following questions, predicated on liability, should be submitted:

QUESTION _____

What is the amount necessary to satisfy *Craig Creditor*'s claim?

Answer in dollars and cents, if any.

Answer: _____

QUESTION _____

What was the value of the asset transferred at the time of the transfer?

Answer in dollars and cents, if any.

Answer: _____

The first question assumes that the creditor's claim is either clear in the context of the case or defined in an earlier liability question. If neither of these is true, then an instruction should be included defining the creditor's claim. If the first question is submitted in connection with section 24.008(a)(1), it should not be submitted again. The second question seeks a jury finding on the value of the asset transferred at the time of the transfer but leaves any equitable adjustment of that number to the court. The judgment should equal the lesser of the answer to the first question and the equitably adjusted answer to the second question.

The amount necessary to satisfy the creditor's claim is measured as of the time judgment is rendered under section 24.009(b), even if this amount is greater than or less than the amount that would have satisfied the creditor's claim at the time of the fraudulent transfer. *Citizens National Bank of Texas v. NXS Construction, Inc.*, 387 S.W.3d 74, 90–91 (Tex. App.—Houston [14th Dist.] 2012, no pet.). But the amount necessary to satisfy the creditor's claim includes only amounts necessary to satisfy the claim itself, not reimbursement for costs incurred in the course of pursuing the claim, such as court costs. *NXS Construction, Inc.*, 387 S.W.3d at 90–91.

Multiple assets or claims. If the case involves multiple assets or claims, each asset and claim should be listed separately. For example:

QUESTION _____

What is the amount necessary to satisfy *Craig Creditor*'s claims?

Answer separately in dollars and cents, if any.

1. [*Describe claim 1.*]

Answer: _____

2. [*Describe claim 2.*]

Answer: _____

QUESTION _____

What were the values of the assets transferred at the time of each transfer?

Answer separately in dollars and cents, if any.

1. [*Describe asset 1.*]

Answer: _____

2. [*Describe asset 2.*]

Answer: _____

PJC 106.1 Question and Instruction—Intentional Interference with Existing Contract

QUESTION _____

Did *Don Davis* intentionally interfere with [*identify contract*]?

Interference is intentional if committed with the desire to interfere with the contract or with the belief that interference is substantially certain to result.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. An existing contract is a necessary element of a claim of intentional interference with contract. PJC 106.1 should be used in cases involving claims for intentional interference with a contract if the existence of the contract is not in dispute. If the existence of the contract is in dispute, additional jury questions or instructions may be required. See chapter 101 of this volume.

Source of question and instruction. The four elements of intentional interference with a contract are (1) the existence of a contract subject to interference, (2) an act of interference that was willful and intentional, (3) the act was a proximate cause of the plaintiff's damage, and (4) actual damage or loss occurred. *Prudential Insurance Co. of America v. Financial Review Services, Inc.*, 29 S.W.3d 74, 77 (Tex. 2000); *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997); *Holloway v. Skinner*, 898 S.W.2d 793, 795–96 (Tex. 1995); *see also Southwestern Bell Telephone Co. v. John Carlo Texas, Inc.*, 843 S.W.2d 470, 472 (Tex. 1992). The third and fourth elements are submitted together with the question and instructions on damages in PJC 115.22.

Broad-form submission. PJC 106.1 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Intent required. Interference is tortious only if it is intentional, and the intent required is the intent to interfere, not just an intent to do the particular acts done. *Southwestern Bell Telephone Co.*, 843 S.W.2d at 472.

Nature of interference. Interference can include conduct that prevents performance of a contract or makes performance of a contract impossible, more burdensome, more difficult, or of less or no value to the one entitled to performance. *AKB Hendrick, LP v. Musgrave Enterprises, Inc.*, 380 S.W.3d 221, 236 (Tex. App.—Dallas 2012, no pet.) (citing *Tippet v. Hart*, 497 S.W.2d 606, 610 (Tex. Civ. App.—Amarillo), *writ ref'd n.r.e. per curiam*, 501 S.W.2d 874 (Tex. 1973)). However, "[o]rdinarily, merely inducing a contract obligor to do what it has the right to do . . . is not actionable interference." *See ACS Investors, Inc.*, 943 S.W.2d at 430.

Damages. Damages questions are set forth in chapter 115. PJC 115.22 submits actual damages in cases involving existing contracts and in cases involving prospective contractual relations.

Exemplary damages. For questions submitting exemplary damages, see PJC 115.37 and 115.38 and the Comments accompanying those questions.

PJC 106.2 Question—Defense of Legal Justification

If you answered "Yes" to Question _____ [*106.1*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Did *Don Davis* have a good-faith belief that [*describe colorable legal right*]?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 106.2 submits the affirmative defense of justification. The justification defense applies to intentional interference with an existing contract. *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 211 (Tex. 1996).

Source of question and instruction. PJC 106.2 is derived from *Texas Beef Cattle Co.*, 921 S.W.2d at 211, and *Southwestern Bell Telephone Co. v. John Carlo Texas, Inc.*, 843 S.W.2d 470, 472 (Tex. 1992). *See also Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 689–91 (Tex. 1989).

Broad-form submission. PJC 106.2 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")).

Burden of proof. The defendant has the burden of proof on a justification defense. *Texas Beef Cattle Co.*, 921 S.W.2d at 211; *see also Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 725 (Tex. 2001).

Questions of law or fact. Whether the defendant has established a legal right to interfere is a question of law for the court. If no legal right exists as a matter of law, the court must then make a threshold determination if a mistaken but colorable legal right was asserted. If a colorable legal right was asserted, then the jury is to determine whether the defendant exercised that colorable legal right in good faith. *Texas Beef Cattle Co.*, 921 S.W.2d at 211.

Scope of instruction. Interference may be justified under circumstances other than those addressed in PJC 106.2. *See, e.g., Eloise Bauer & Associates, Inc. v. Electronic Realty Associates, Inc.*, 621 S.W.2d 200, 203 (Tex. Civ. App.—Texarkana 1981,

writ ref'd n.r.e.) (employee acting in good faith to further interests of employer); *see also Russell v. Edgewood Independent School District*, 406 S.W.2d 249, 252 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.) (principal in confidential relationship with school board); *Restatement (Second) of Torts* §§ 769–772 (1979). Although *Texas Beef Cattle Co.* omitted reference to "interests that a party possesses in the subject matter equal or superior to that of the other party," the Committee believes that such interests are subsumed in the term *colorable legal right. Compare Texas Beef Cattle Co.*, 921 S.W.2d at 211 (citing *Sakowitz, Inc. v. Steck*, 669 S.W.2d 105, 107 (Tex. 1984), *overruled on other grounds by Sterner*, 767 S.W.2d at 690)), *with John Carlo Texas, Inc.*, 843 S.W.2d at 472.

Colorable legal right. The question should be limited to any right that (1) the defendant alleges it was exercising when it interfered and (2) the trial court determined was a colorable legal right. The legal right should replace the bracketed phrase in PJC 106.2. The form of the question and answer may require modification if more than one colorable legal right is asserted.

Definition of "good faith." In *Texas Beef Cattle Co.*, the supreme court held that motive was irrelevant to a justification defense based on a legal right or a good-faith claim to a colorable legal right. *Texas Beef Cattle Co.*, 921 S.W.2d at 211. The court, however, did not define "good faith." *See Texas Beef Cattle Co.*, 921 S.W.2d at 210–12, 216. The law uses different definitions of "good faith" in different contexts. *Compare Wichita County v. Hart*, 917 S.W.2d 779, 784–85 (Tex. 1996) (acknowledging variations in "good faith" definitions and adopting objective and subjective component of "good faith" under Whistleblower Act), *with City of Lancaster v. Chambers*, 883 S.W.2d 650, 656 (Tex. 1994) (objective good faith required for official immunity), *and La Sara Grain Co. v. First National Bank of Mercedes*, 673 S.W.2d 558, 563 (Tex. 1984) ("actual [subjective] belief of the party in question, not the reasonableness of that belief" under UCC). If a definition of "good faith" is necessary to guide the jury, the Committee expresses no opinion on the proper definition of "good faith" in the justification context. *See Bennett v. Computer Associates International*, 932 S.W.2d 197, 202–03 (Tex. App.—Amarillo 1996, writ denied) (recognizing that the supreme court has not given a clear definition of good faith in this context).

Defenses to interference with prospective business relations. In *Sturges*, the supreme court held that "[j]ustification and privilege are defenses in a claim for tortious interference with prospective relations only to the extent that they are defenses to the independent tortiousness of the defendant's conduct. Otherwise, the plaintiff need not prove that the defendant's conduct was not justified or privileged, nor can a defendant assert such defenses." *Sturges*, 52 S.W.3d at 727.

Exercise of privilege by illegal or tortious means. "A party may not exercise an otherwise legitimate privilege by resort to illegal or tortious means." *Prudential Insurance Co. of America v. Financial Review Services, Inc.*, 29 S.W.3d 74, 81 (Tex. 2000). Thus, even if a defendant establishes a legal right or privilege, "if the plaintiff pleads

and proves methods of interference that are tortious in themselves, then the issue of privilege or justification never arises." *Prudential Insurance Co. of America*, 29 S.W.3d at 81; *see also Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 207 (Tex. 2002) (exercise of contractual right of first refusal that violates statutory prohibition may establish lack of justification). The Committee expresses no opinion on whether in the context of a claim for intentional interference with an existing contract a defendant may nevertheless raise "defenses to the wrongfulness of the alleged [tortious or wrongful] conduct." *Sturges*, 52 S.W.3d at 727.

PJC 106.3 Wrongful Interference with Prospective Contractual or Business Relations (Comment)

The supreme court has recognized the existence of the cause of action of tortious interference with a prospective contract or business relationship. *See Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711 (Tex. 2001). The supreme court has defined the elements as (1) a reasonable probability that the plaintiff would have entered into a business relationship with a third party, (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct, (3) the defendant's conduct was independently tortious or unlawful, (4) the interference proximately caused the plaintiff injury, and (5) the plaintiff suffered actual damage or loss as a result. *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 923 (Tex. 2013).

Where a contract or business relationship is delayed but eventually arises, there can be no claim for tortious interference with prospective contracts or business relationships. *Texas Disposal Systems Landfill, Inc. v. Waste Management Holdings, Inc.*, 219 S.W.3d 563, 590–91 (Tex. App.—Austin 2007, pet. denied).

As with the claim of intentional interference with an existing contract, interference as contemplated by this cause is intentional if committed with the desire to interfere with the contract or with the belief that interference is substantially certain to result. *Bradford v. Vento*, 48 S.W.3d 749, 757 (Tex. 2001) (quoting *Restatement (Second) of Torts* § 766B cmt. d (1979)). However, according to the supreme court, if the actor had no desire to effectuate the interference by his conduct but knew that interference would be a mere incidental result, then the interference may not be improper. *Bradford*, 48 S.W.3d at 757.

The applicable damages questions are set forth in PJC 115.22, 115.37, and 115.38.

PJC 106.4 Contracts Terminable at Will or on Notice (Comment)

The supreme court has recognized that contracts terminable at will or on notice may be protected from tortious interference. *See Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 689 (Tex. 1989) (terminable-at-will employment contract); *Juliette Fowler Homes, Inc. v. Welch Associates, Inc.*, 793 S.W.2d 660, 666 (Tex. 1990) (terminable-on-notice fundraising contract).

In *Sterner*, the supreme court recognized the contractual nature of an at-will employment relationship for purposes of a tortious-interference claim, and Texas intermediate courts have followed *Sterner* in this respect. *See, e.g., In re Swift Transportation Co.*, 311 S.W.3d 484, 489 (Tex. App.—El Paso 2009, no pet.) ("Texas courts have for many years considered an employment-at-will agreement to be a contract."); *Whitehead v. University of Texas Health Science Center at San Antonio*, 854 S.W.2d 175, 180 (Tex. App.—San Antonio 1993, no writ) ("We do not disagree with the argument that all employment relationships are implicitly contractual."). Recently, the supreme court stated that, for purposes of determining the damages available to a prevailing plaintiff in a *Sabine Pilot* retaliation case, there is no contract between at-will employees and their employers. *See Safeshred, Inc. v. Martinez*, 365 S.W.3d 655, 660 (Tex. 2012). The supreme court in *Safeshred* did not address *Sterner* or its progeny, which recognized the contractual nature of an at-will relationship in the tortious-interference context.

Although third persons are not free to interfere tortiously with a valid and subsisting at-will contract, *Sterner*, 767 S.W.2d at 689, not all interference is tortious. "Ordinarily, merely inducing a contract obligor to do what it has the right to do is not actionable interference." *See ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997). Thus, tortious interference with an at-will employment contract cannot be premised "merely on the hiring of an at-will employee." *Lazer Spot, Inc. v. Hiring Partners, Inc.*, 387 S.W.3d 40, 53 (Tex. App.—Texarkana 2012, no pet.) (at-will employees had the right to terminate their employment, and Lazer Spot had the right to hire them). However, where inducement involves conduct by the defendant that is itself a contractual violation of a separate agreement, *see Sterner*, 767 S.W.2d at 691 (Marathon's directive to fire Sterner violated Marathon's separate agreement with Sterner's employer); *Lazer Spot*, 387 S.W.3d, at 51 (analyzing *Sterner*), or that causes a contracting party to violate a term of the employment contract, *see Graham v. Mary Kay, Inc.*, 25 S.W.3d 749 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (Mary Kay consultants induced to breach direct sales clause in Mary Kay employment agreement), such inducement may constitute actionable interference.

In *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711 (Tex. 2001), the supreme court clarified that a claim for wrongful interference with a prospective contractual or business relationship requires proof that the defendant's conduct was "independently tortious or wrongful." *Sturges*, 52 S.W.3d at 726. The Fourteenth Court of Appeals has

held that a tortious interference claim arising out of a contract terminable on notice involves primarily the prospect of a continuing business relationship and therefore is properly characterized as a claim for tortious interference with a prospective business relationship, requiring proof of an independently tortious or wrongful act. *Faucette v. Chantos*, 322 S.W.3d 901, 914–16 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citing *Restatement (Second) of Torts* § 766 cmt. g (1979)). The supreme court recently implied that this is correct. In *El Paso Healthcare System, Ltd. v. Murphy*, 518 S.W.3d 412 (Tex. 2017), the court acknowledged that, in *Sturges*, it "suggested that *Sterner* [terminable-at-will employment contract] and *Juliette Fowler* [terminable-on-notice sales representative contract] involved claims for interference with *prospective* business relations." *Murphy*, 518 S.W.3d at 421 n.6.

CHAPTER 107 EMPLOYMENT

PJC 107.1 Breach of Employment Agreement (Comment)

Subject to general contract rules. PJC chapter 101 governs the submission of breach of employment agreement cases. An express agreement limiting the employer's right to discharge an employee at will is subject to general rules governing contracts. *See, e.g., Goodyear Tire & Rubber Co. v. Portilla*, 879 S.W.2d 47, 50–51 (Tex. 1994) (agreement to waive anti-nepotism policy); *Mansell v. Texas & Pacific Railway Co.*, 137 S.W.2d 997, 999–1000 (Tex. 1940) (agreement that employment could not be terminated without a fair investigation). The supreme court has expressly reserved the question of whether an oral agreement is sufficient to modify an employment-at-will relationship. *Portilla*, 879 S.W.2d at 51–52 n.8.

If an express agreement exists between an employer and an employee limiting the employer's right to discharge an employee and breach of that agreement is alleged, PJC 101.2 should be submitted. If there is a dispute about the existence of an agreement or its terms, PJC 101.1 should be submitted, with PJC 101.2 predicated on an affirmative answer to PJC 101.1. Any defense to breach of the employment agreement should be submitted under PJC 101.21.

If there is no specific contract term or express agreement to the contrary, the rule that either party may terminate the employment relationship at will with or without cause will control. *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 582 (Tex. 2017) (quoting *Montgomery County Hospital District v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998)).

Property interest. A "for cause" or "good cause" limitation on dismissal of a public employee creates a property right in continued employment that is protected by procedural due process under the U.S. Constitution. *County of Dallas v. Wiland*, 216 S.W.3d 344, 354 (Tex. 2007). If a property interest in not being discharged without good cause exists, the Committee suggests the following jury question with a modified definition of PJC 107.2's "good cause":

Did *Don Davis* terminate *Paul Payne* without good cause?

Accompanying instructions. Depending on the nature of the specific contract terms or any defenses, additional instructions may be necessary for use with PJC 101.2 and 101.21. See PJC 107.2 (instruction on good cause as defense to early discharge) and chapter 101 (general instructions on contracts).

PJC 107.2 Instruction on Good Cause as Defense to Early Discharge

Failure to comply by *Don Davis* is excused if there was good cause for discharging *Paul Payne* before the agreed term of employment expired. "Good cause" means that the employee failed to perform those duties in the scope of his employment as a person of ordinary prudence would have done under the same or similar circumstances, or that the employee committed acts in the scope of his employment that a person of ordinary prudence would not have done under the same or similar circumstances.

COMMENT

When to use. PJC 107.2 submits the defense of "good cause" to breach of an agreement to employ for a definite term. *See, e.g., McGee v. Abrams Technical Service*, No. 01-06-00590-CV, 2008 WL 597192, at *3 (Tex. App.—Houston [1st Dist.] Mar. 6, 2008, no pet.) (mem. op.); *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572, 578 (Tex. App.—Houston [1st Dist.] 1992, no writ). This instruction should be used with PJC 101.21, the basic contract defense question.

Source of instruction. PJC 107.2 is derived from *Winograd v. Willis*, 789 S.W.2d 307, 311 (Tex. App.—Houston [14th Dist.] 1990, writ denied); *see also Dixie Glass Co. v. Pollak*, 341 S.W.2d 530, 541–42 (Tex. Civ. App.—Houston 1960) (defining "good cause"), *writ ref'd n.r.e. per curiam*, 347 S.W.2d 596 (Tex. 1961).

"Good cause" defined in agreement. If "good cause" or a similar term, such as "just cause" or "proper cause," is explicitly defined in the agreement or if specific grounds for termination are recited in the agreement, PJC 107.2 should not be submitted.

PJC 107.3 Question on Wrongful Discharge for Refusing to Perform an Illegal Act

QUESTION _____

Was *Paul Payne* discharged for the sole reason that *he* refused to perform an illegal act?

As used in this question, an "illegal act" means any of the following:

[Insert appropriate instructions.]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 107.3 should be used for a claim that the employee was discharged for the sole reason that he refused to perform an illegal act.

Source of question. PJC 107.3 is derived from *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985). *See Ed Rachal Foundation v. D'Unger*, 207 S.W.3d 330 (Tex. 2006) (*Sabine Pilot* protects employees who are asked to *commit* a crime, not those who are asked not to *report* one). *Burt v. City of Burkburnett*, 800 S.W.2d 625, 627 (Tex. App.—Fort Worth 1990, writ denied), interpreted *Sabine Pilot*'s use of the word "refused" to include a requirement that the employer, in some manner, must order, require, or request the employee to commit an illegal act.

Broad-form submission. PJC 107.3 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Illegal act. The trial court should make a threshold determination as a matter of law whether the act the employee refused to commit was illegal. In *Hancock v. Express One International, Inc.*, 800 S.W.2d 634, 636–37 (Tex. App.—Dallas 1990, writ denied), the court refused to extend the *Sabine Pilot* exception to illegal acts that carry only civil penalties.

After-acquired evidence of employee misconduct. If the employer has pleaded the discovery of evidence of employee misconduct acquired only after the employee's employment was terminated, see PJC 107.7 for the applicable question.

PJC 107.4 Question and Instruction on Retaliation under Texas Whistleblower Act

QUESTION _____

Was *Paul Payne*'s report [*insert matter reported*] made in good faith and a cause of *Don Davis*'s [*terminating, suspending, or (describe other discriminatory action)*] *Paul Payne*?

The report was a cause of the [*termination, suspension, or (describe other discriminatory action)*] if it would not have occurred when it did but for the report's being made. *Paul Payne* does not have to prove the report was the sole cause of the [*termination, suspension, or (describe other discriminatory action)*].

If you do not believe the reason[*s*] *Don Davis* has given for [*terminating, suspending, or (describe other discriminatory action)*] *Paul Payne*, you may, but are not required to, infer that *Don Davis* would not have [*terminated, suspended, or (describe other discriminatory action)*] *Paul Payne* but for *his* report.

"Good faith" means that (1) *Paul Payne* believed that the conduct reported was a violation of law and (2) *his* belief was reasonable in light of *his* training and experience.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 107.4 should be used if a violation of Tex. Gov't Code § 554.002 is alleged. If the existence of an adverse personnel action is in dispute, a finding in addition to PJC 107.4 is necessary.

Source of question and instruction. PJC 107.4 is derived from Tex. Gov't Code § 554.002 and *Texas Department of Human Services v. Hinds*, 904 S.W.2d 629 (Tex. 1995). The substance of the instruction was adopted by the supreme court in *Wichita County v. Hart*, 917 S.W.2d 779, 784–85 (Tex. 1996). *See El Paso Healthcare System, Ltd. v. Murphy*, 518 S.W.3d 412, 419 (Tex. 2017). The question specifically requires the jury to find causation. *See City of Fort Worth v. Zimlich*, 29 S.W.3d 62 (Tex. 2000).

The substance of the permissive inference portion of the question is derived from *Ratliff v. City of Gainsville*, 256 F.3d 355, 360–62 (5th Cir. 2001), and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 US 133, 148 (2000).

Broad-form submission. PJC 107.4 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Provisions of Whistleblower Act. The Texas Whistleblower Act is found at Tex. Gov't Code §§ 554.001–.010. A state or local governmental body may not terminate, suspend, or otherwise discriminate against a public employee who in good faith reports a violation of law to an appropriate law enforcement authority. Tex. Gov't Code § 554.002; *University of Texas Southwestern Medical Center v. Gentilello*, 398 S.W.3d 680, 683 (Tex. 2013); *see also Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723 (Tex. 1990) (declining to extend Whistleblower Act to private sector employees); *accord Austin v. Healthtrust, Inc.—The Hospital Co.*, 967 S.W.2d 400 (Tex. 1998) (reaffirming *Winters*'s refusal to recognize common-law whistleblower action).

Appropriate law enforcement authority. Whether the person or entity to which the employee made the report is "an appropriate law enforcement authority" is a question of law. *Texas Department of Transportation v. Needham*, 82 S.W.3d 314, 318–20 (Tex. 2002); *see also University of Houston v. Barth*, 403 S.W.3d 851, 857 (Tex. 2013); *Town of Flower Mound v. Teague*, 111 S.W.3d 742, 753 (Tex. App.—Fort Worth 2003, pet. denied) (citing PJC 107.4). However, an employee may pursue a cause of action if he had a good-faith belief that the governmental entity to which he reported a violation of law was the appropriate law enforcement authority as the statute defines the terms even if the entity, as a matter of law, is not an appropriate law enforcement authority. Tex. Gov't Code § 554.002; *Needham*, 82 S.W.3d at 320–21. If a fact question exists about whether the employee had such a good-faith belief, the Committee recommends that the following question and instruction be submitted to the jury:

QUESTION _____

Did *Paul Payne* have a good-faith belief that the governmental entity to which *he* reported a violation of a law was an appropriate law enforcement authority?

"Good-faith belief" in this question means that—

1. *Paul Payne* believed that the governmental entity was authorized to (a) regulate under or enforce the law alleged to be violated in the report or (b) investigate or prosecute a violation of criminal law; and

2. *his* belief was reasonable in light of *his* training and experience.

Answer "Yes" or "No."

Answer: _____

See City of Houston v. Levingston, 221 S.W.3d 204, 218–19 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (citing *Needham*, 82 S.W.3d at 321, and discussing the requirements for establishing a good-faith belief that the governmental entity to which an employee reported a violation of law was an appropriate law enforcement authority in the context of Tex. Gov't Code § 554.002(b)).

Good faith. PJC 107.4 specifically applies to lawsuits against public employers pursuant to the Texas Whistleblower Act, which provides that a "state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." Tex. Gov't Code § 554.002(a). Actions may be brought against private employers pursuant to statutes such as the Texas Commission on Human Rights Act (now Texas Labor Code chapter 21), the Texas Workers' Compensation Act, and the Texas Health and Safety Code. *See* Tex. Lab. Code ch. 21 (formerly Texas Commission on Human Rights Act); Tex. Lab. Code §§ 451.001–.003 (Texas Workers' Compensation Act); Tex. Health & Safety Code § 161.134. However, these statutes do not contain the "good faith" language. There is a split of authority about whether "good faith" is required in a whistleblower action against private employers. *Compare Goodman v. Page*, 984 S.W.2d 299, 303 (Tex. App.—Fort Worth 1998, pet. denied) (listing elements of section 242.133 of Texas Health and Safety Code without "good faith" requirement), *with Tomhave v. Oaks Psychiatric Hospital*, 82 S.W.3d 381, 385 (Tex. App.—Austin 2002, pet. denied) (listing "good faith" reporting as element of cause of action under section 161.134 of Texas Health and Safety Code), *overruled on other grounds by Binur v. Jacobo*, 135 S.W.3d 646, 651 (Tex. 2004); *see also Dallas Metrocare Services v. Pratt*, 124 S.W.3d 147 (Tex. 2003); *Healthtrust, Inc.*, 967 S.W.2d at 401–02; *Winters*, 795 S.W.2d at 724; *Simmons Airlines v. Lagrotte*, 50 S.W.3d 748, 751–52 n.5 (Tex. App.—Dallas 2001, pet. denied).

Other retaliation statutes. The Committee has not provided pattern jury charges for every statutory prohibition against retaliatory discharge. Other such statutes include—

- Tex. Agric. Code § 125.013(b) (agricultural laborer for reporting violation of Agricultural Hazard Communication Act);
- Tex. Civ. Prac. & Rem. Code § 122.001 (jury duty; criminal statute);
- Tex. Elec. Code § 276.001 (voting for certain candidate or proposition or refusing to reveal how one voted);
- Tex. Fam. Code § 158.209 (child support or child custody order or writ relating to an employee);
- Tex. Health & Safety Code § 161.134 (employees of hospital, mental health facility, or treatment facility reporting violation of law or rule);
- Tex. Lab. Code § 52.041 (employee refusing to make purchases from a specific place or store or refusing to engage in dealings with a specific person or business; criminal statute);
- Tex. Lab. Code § 52.051 (compliance with subpoena);
- Tex. Lab. Code § 101.052 (union membership or nonmembership);
- Tex. Lab. Code §§ 411.082–.083 (using telephone service to report in good faith a violation of occupational health or safety law);
- Tex. Loc. Gov't Code § 160.006 (county employee exercising right or participating in grievance procedures established under Local Government Code);
- Tex. Occ. Code § 160.012 (physician reporting acts of another physician that pose threat to public welfare); *see also* Tex. Occ. Code §§ 160.002–.004;
- 29 U.S.C. § 158(a)(1), (3), (4) (engaging in union activities);
- 29 U.S.C. § 215(a)(3) (exercising rights to a minimum wage and overtime compensation);
- 29 U.S.C. § 1140 (exercising rights under employee benefit plan);
- 42 U.S.C. § 5851 (federal whistleblower provision).

Caveat: causes of action accruing on or after June 15, 1995. If the adverse personnel action occurred on or after June 15, 1995, it is an affirmative defense to a Whistleblower Act suit that the state or local governmental entity would have taken the action against the employee "based solely on information, observation, or evidence that is not related to the fact that the employee made a report" of a violation of law. Tex. Gov't Code § 554.004(b). In *Hinds*, 904 S.W.2d at 637, the supreme court noted that it expressed no opinion on whether the amended statute shifted the burden of proof.

After-acquired evidence of employee misconduct. If the employer has pleaded the discovery of evidence of employee misconduct acquired only after the employee's employment was terminated, see PJC 107.7 for the applicable question.

PJC 107.5 Question and Instruction on Retaliation for Seeking Workers' Compensation Benefits

QUESTION _____

Did *Don Davis* [*discharge or (describe other discriminatory action)*] *Paul Payne* because *he* [*filed a workers' compensation claim in good faith, hired a lawyer to represent him in a workers' compensation claim, instituted or caused to be instituted a workers' compensation claim in good faith, testified or is about to testify in a workers' compensation proceeding*]?

There may be more than one cause for an employment decision. An employer does not [*discharge or (describe other discriminatory action)*] an employee for [*filing a workers' compensation claim in good faith, hiring a lawyer to represent him in a workers' compensation claim, instituting or causing to be instituted a workers' compensation claim in good faith, testifying or intending to testify in a workers' compensation proceeding*] if the employer would have [*insert employment decision—e.g., discharged*] the employee when he did even if the employee had not [*filed a workers' compensation claim in good faith, hired a lawyer to represent him in a workers' compensation claim, instituted or caused to be instituted a workers' compensation claim in good faith, testified or was about to testify in a workers' compensation proceeding*].

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 107.5 should be used for a claim that the employer has committed an unlawful practice under Tex. Lab. Code § 451.001.

Source of question and instruction. PJC 107.5 is derived from Tex. Lab. Code § 451.001 and *Azar Nut Co. v. Caille*, 720 S.W.2d 685, 687 (Tex. App.—El Paso 1986), *aff'd*, 734 S.W.2d 667 (Tex. 1987); *see also Southwestern Bell Telephone Co. v. Garza*, 164 S.W.3d 607, 615–16 (Tex. 2004) (discussing PJC 107.5 and noting that the court's charge would have been more accurate if it had asked whether the defendant discriminated against the plaintiff, thereby retaining the statutory language). The instruction is derived from *Continental Coffee Products Co. v. Cazarez*, 937 S.W.2d 444, 450–51 (Tex. 1996). *See also Haggar Clothing Co. v. Hernandez*, 164 S.W.3d 386, 388 (Tex. 2005).

Broad-form submission. PJC 107.5 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Institution of proceeding. If an employee has been discharged after injury, but before claim paperwork has been filed, the following instruction may be given:

> "Instituting or causing to be instituted a workers' compensation proceeding" includes an employee reporting an on-the-job injury to *Don Davis*, *Don Davis* completing an on-the-job accident report for an employee, or the employee receiving weekly compensation benefits related to an on-the-job injury.

See Worsham Steel Co. v. Arias, 831 S.W.2d 81, 84 (Tex. App.—El Paso 1992, no writ) (employee informed supervisor of employee's on-the-job injury prior to his termination); *Mid-South Bottling Co. v. Cigainero*, 799 S.W.2d 385, 389 (Tex. App.—Texarkana 1990, writ denied) (employee's supervisor completed on-the-job accident report on behalf of injured employee); *Texas Steel Co. v. Douglas*, 533 S.W.2d 111, 116 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.) (injured employee received two weeks of workers' compensation benefits).

After-acquired evidence of employee misconduct. If the employer has pleaded the discovery of evidence of employee misconduct acquired only after the employee's employment was terminated, see PJC 107.7 for the applicable question.

PJC 107.6 Question and Instruction on Unlawful Employment Practices

QUESTION _____

Was [*race, color, disability, religion, sex, national origin, or age*] a motivating factor in *Don Davis*'s decision to [*fail or refuse to hire, discharge, or (describe other discriminatory action)*] *Paul Payne*?

A "motivating factor" in an employment decision is a reason for making the decision at the time it was made. There may be more than one motivating factor for an employment decision.

If you do not believe the reason *Don Davis* has given for [*failing or refusing to hire, discharge, or (describe other discriminatory action)*], you may, but are not required to, infer that *Don Davis* was motivated by *Paul Payne*'s [*race, color, disability, religion, sex, national origin, or age*].

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 107.6 should be used for a claim that the employer has committed an unlawful employment practice as set out in Tex. Lab. Code §§ 21.001–.556 (chapter 21) (formerly Texas Commission on Human Rights Act). PJC 107.6 applies to employment practices prohibited by Tex. Lab. Code § 21.051(1) and will need to be modified according to the facts of the case. If there is a fact issue concerning the existence of an adverse employment action, an additional instruction or question may be necessary. See, e.g., PJC 107.10 (constructive discharge).

Broad-form submission. PJC 107.6 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Use of federal law. Chapter 21 of the Labor Code is expressly intended to implement policies of title VII of the Civil Rights Act of 1964, 42 U.S.C §§ 2000e to e–17; title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213; and

the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621–634, and their subsequent amendments. Tex. Lab. Code § 21.001(1), (3). *See also B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276, 279 (Tex. 2017) (title VII); *Morrison v. Pinkerton, Inc.*, 7 S.W.3d 851, 854 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (ADA). "As such, federal case law may be cited as authority in cases relating to the Texas Act." *Hoffmann-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 446 (Tex. 2004); *Steak N Shake*, 512 S.W.3d at 279.

Chapter 21 is not, however, always identical to federal law. *See, e.g., Prairie View A&M University v. Chatha*, 381 S.W.3d 500, 507 (Tex. 2012) (declining to follow the federal Ledbetter Act extending limitations). *Compare Quantum Chemical Corp. v. Toennies*, 47 S.W.3d 473, 479–80 (Tex. 2001), *with Gross v. FBL Financial Services*, 557 U.S. 167, 177–78 (2009) (causation standard differs in age discrimination cases).

Source of question and definition. PJC 107.6 is derived from Tex. Lab. Code § 21.051(1), which parallels 42 U.S.C. § 2000e–2(a)(1) and prohibits intentional discriminatory practices. *See also Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (all discussing title VII's purpose); *see also Quantum Chemical Corp.*, 47 S.W.3d 473.

The definition of "motivating factor" is derived from the following: (1) Tex. Lab. Code § 21.125(a), which provides that "an unlawful employment practice is established when the complainant demonstrates that race, color, sex, national origin, religion, age, or disability was a motivating factor for an employment practice, even if other factors also motivated the practice"; and (2) section 709 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e.

The substance of the permissive inference portion of the question is derived from *Ratliff v. City of Gainsville*, 256 F.3d 355, 360–62 (5th Cir. 2001), and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 US 133, 148 (2000).

Circumstantial evidence. A circumstantial evidence instruction may be appropriate. See PJC 100.8. *See also Ratliff*, 256 F.3d at 359–62; *Quantum Chemical Corp.*, 47 S.W.3d at 481–82.

Race and color. Discrimination because of or on the basis of race or color is prohibited by Tex. Lab. Code § 21.051. Though often intertwined, race and color are distinct bases of discrimination prohibited by the statute. *Cf. Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 609 (1987); *see also Wiltz v. Christus Hospital St. Mary*, No. 1:09-CV-925, 2011 WL 1576932, at *4 (E.D. Tex. Mar. 10, 2011).

National origin. Discrimination because of or on the basis of national origin includes discrimination because of the national origin of an ancestor. Tex. Lab. Code § 21.110. It may also include, but is not limited to, the denial of equal employment because of an individual's, or his ancestor's, place of origin; or because an individual

has the physical, cultural, or linguistic characteristics of a national origin group. 29 C.F.R. § 1606.1.

Age. Discrimination because of or on the basis of age applies only to discrimination against an individual forty years of age or older. Tex. Lab. Code § 21.101. There are, however, limited exceptions. *See* Tex. Lab. Code § 21.054(b) (relating to training programs), § 21.103 (compulsory retirement for certain key and pensioned employees), § 21.104 (peace officers and firefighters).

Sex. Discrimination because of or on the basis of sex includes discrimination because of pregnancy, childbirth, or a related medical condition. Tex. Lab. Code § 21.106. See PJC 107.15. Title VII's prohibition of sex discrimination encompasses "the entire spectrum of disparate treatment of men and women in employment," including sexual harassment. *Alamo Heights Independent School District v. Clark*, 544 S.W.3d 755, 771 (Tex. 2018) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)).

Moreover, title VII's protection against workplace discrimination on the basis of sex applies to harassment between members of different genders as well as the same gender. *Clark*, 544 S.W.3d at 771–72 (citing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998)).

Religion. Discrimination because of or on the basis of religion may include discrimination on the basis of religious observance, practice, or belief. Tex. Lab. Code § 21.108. See PJC 107.16.

Disability. For discrimination because of or on the basis of disability, see the questions and instructions in PJC 107.11, 107.12, 107.13, and 107.14.

Disparate treatment versus disparate impact. There is a difference between disparate treatment (Tex. Lab. Code § 21.051(1)) and disparate impact (Tex. Lab. Code §§ 21.051(2), 21.122) cases. PJC 107.6 submits disparate treatment. In a disparate impact case, an employer may be held liable for unintentional discrimination where an employment practice or criterion, neutral on its face, has a disproportionate effect or impact on a protected group. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Chapter 21 defines "disparate impact" as a practice where the employer "limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee." Tex. Lab. Code § 21.051(2). For example, height and weight requirements may unlawfully discriminate against women and some ethnic or racial minorities. *Dothard v. Rawlinson*, 433 U.S. 321 (1977). Education requirements may impact impermissibly on historically disadvantaged minority groups. *See Griggs*, 401 U.S. at 431–33. Disparate impact is not restricted to objective criteria or written tests with a discriminatory effect. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 989–91 (1988).

"Business necessity" is an affirmative defense to a disparate impact claim, except in the case of age-related claims (see below), if an employer can show that the job requirement is job-related and justified by a valid business necessity. Tex. Lab. Code § 21.115. "Business necessity" is never a justification, however, for intentional discrimination (disparate treatment). Tex. Lab. Code § 21.123.

Submission of disparate impact cases. Tex. Lab. Code § 21.122 sets forth the elements and burden of proof necessary in a disparate impact case and is the basis of the Committee's following suggested questions and instructions:

QUESTION _____

Did *Don Davis*'s requirement that [*describe specific employment practice*] have a disparate impact on [*name of protected group, e.g., women, racial minorities*]?

"Disparate impact" is established if an employer uses a particular employment practice, even if apparently neutral, that has a significant adverse effect on the basis of [*race, color, sex, national origin, etc.*].

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question _____ [*disparate impact question*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was *Don Davis*'s requirement that [*describe specific employment practice*] job-related to the position in question and consistent with business necessity?

An employment practice is job-related if the practice clearly relates to skills, knowledge, or ability required for successful performance on the job. For an employment practice to be consistent with business necessity, it must be necessary to safe and efficient job performance.

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question _____ [*employment practice question*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Has *Don Davis* refused to adopt an "alternative employment practice" to the job requirement inquired about in Question _____ [*disparate impact question*]?

An "alternative employment practice" is an employment practice that serves the employer's legitimate interest in an equally effective manner, but which does not have a disparate impact on [*name of protected group, e.g., women, racial minorities*].

Answer "Yes" or "No."

Answer: _____

"Disparate impact" was defined by the Supreme Court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). The "significant adverse effect" language originated in *Connecticut v. Teal*, 457 U.S. 440, 448 (1982) (holding that a disparate impact claim under title VII is established when "an employer uses a nonjob-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant adverse effect on minorities or women"). That language has not been expressly used by Texas courts. The Austin court of appeals has described disparate impact cases as those that involve facially neutral practices "that operate to exclude a disproportionate percentage of persons in a protected group and cannot be justified by business necessity." *Wal-Mart Stores, Inc. v. Davis*, 979 S.W.2d 30, 44 (Tex. App.—Austin 1998, pet. denied). The requirements of business necessity are set forth in Tex. Lab. Code §§ 21.115, 21.122(a)(1). Tex. Lab. Code § 21.122(a)(2) states the burden of proof with respect to showing an alternative employment practice to be that "in accordance with federal law as that law existed [on] June 4, 1989"—a reference to the 1991 amendments to title VII that codified those burdens following the June 5, 1989, Supreme Court decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Therefore, the burden of proof, on a showing of disparate impact, is on the employer to demonstrate that the practice is "job-related" and consistent with business necessity. *Dothard*, 433 U.S. at 329. The instruction on "job-relatedness" is derived from *Albemarle Paper Co.*, 422 U.S. at 425; *Contreras v. City of Los Angeles*, 656 F.2d 1267 (9th Cir. 1981); and 29 C.F.R. § 1607. *See also* Tex. Lab. Code § 21.115; *Davis v. Richmond, Fredericksburg & Potomac Railroad Co.*, 803 F.2d 1322, 1327–28 (4th Cir. 1986); *EEOC v. Rath Packing Co. Creditors' Trust*, 787 F.2d 318, 328 (8th Cir. 1986). The "alternative employment practice" definition is derived from *Watson*, 487 U.S. at 998.

Disparate impact cases: age. Like race, color, disability, religion, sex, and national origin, age is a protected category under the Texas Labor Code. Tex. Lab. Code § 21.051; *see also* Tex. Lab. Code § 21.101. Under federal law, age discrimination is governed by the Age Discrimination in Employment Act of 1967 (ADEA) and its subsequent amendments (29 U.S.C. §§ 621–634). Tex. Lab. Code § 21.122(b) states that to determine the availability of and burden of proof applicable to a disparate impact case involving age discrimination, the court shall apply the judicial interpretation of the ADEA and its subsequent amendments.

"Disparate impact" claims based on age discrimination were first recognized by the Supreme Court in *Smith v. City of Jackson*, 544 U.S. 228 (2005). The scope of disparate impact under the ADEA is significantly narrower than disparate impact under title VII. *Smith*, 544 U.S. at 240–41. This is in part because the ADEA includes a narrowing provision providing that it is not unlawful for an employer "to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f).

Unlike the business-necessity test articulated under title VII, the reasonableness inquiry does not inquire whether there are other means by which an employer can accomplish its goals. *Smith*, 544 U.S. at 243. The U.S. Supreme Court held that whether the challenged employment action is based on reasonable factors other than age (RFOA) is an affirmative defense on which the defendant bears both the burdens of production and persuasion. *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84, 94–95 (2008). Adopting *Meacham*, the Third Court of Appeals has held that in order to establish the affirmative defense of RFOA, the employer has the burden to prove that (1) its decision was based on a factor other than age and (2) that factor is reasonable. *City of Austin v. Chandler*, 428 S.W.3d 398, 411 (Tex. App.—Austin 2014, no pet.). The definition of a reasonable factor other than age is taken from 29 C.F.R. § 1625.7(e)(1).

For submission of a disparate impact case based on age discrimination, the Committee recommends the following question and instruction:

QUESTION _____

Did *Don Davis*'s requirement that [*describe specific employment practice*] have a disparate impact on [*name of protected group, e.g., persons age forty or over*]?

"Disparate impact" is established if the identified and challenged practice has a significantly adverse effect compared to [*name of those outside the protected group, e.g., persons under forty*].

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question _____ [*disparate impact question*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was *Don Davis*'s requirement that [*describe specific employment practice*] based on a reasonable factor other than age?

A reasonable factor other than age is a non-age factor that is objectively reasonable when viewed from the position of a prudent employer mindful of its legal responsibilities under like circumstances.

Answer "Yes" or "No."

Answer: _____

Damages. See PJC 115.30 for the question submitting actual damages and PJC 115.31 regarding exemplary damages.

After-acquired evidence of employee misconduct. If the employer has pleaded the discovery of evidence of employee misconduct acquired only after the employee's employment was terminated, see PJC 107.7 for the applicable question.

PJC 107.7 Question on After-Acquired Evidence of Employee Misconduct

QUESTION _____

Did *Paul Payne* engage in misconduct for which *Don Davis* would have legitimately discharged *him* solely on that basis?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 107.7 should be used if the employer pleads that evidence of the employee's misconduct, acquired after the employee's discharge, should limit the employee's recovery, because the employer either would not have hired or would have terminated the employee on legitimate and lawful grounds had the evidence been discovered before discharge. The Committee believes that PJC 107.7 is appropriate to submit if after-acquired evidence is pleaded by the defendant in any wrongful discharge claim. *See McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995) (age discrimination); *Trico Technologies Corp. v. Montiel*, 949 S.W.2d 308 (Tex. 1997) (per curiam) (workers' compensation retaliation); *Norwood v. Litwin Engineers & Constructors, Inc.*, 962 S.W.2d 220 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (disability discrimination).

Broad-form submission. PJC 107.7 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

PJC 107.8 Instruction on Damages Reduction for After-Acquired Evidence of Employee Misconduct

If you answered "Yes" to Question _____ [*107.7*], do not include any damages suffered past the date *Don Davis* discovered that *Paul Payne* engaged in the conduct you found in answer to Question _____ [*107.7*].

COMMENT

When to use. PJC 107.8 should be predicated on a "Yes" answer to PJC 107.7. It should be used as the last sentence of the preliminary instruction in PJC 115.26–115.28 or 115.30.

Source of instruction. PJC 107.8 is derived from *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995); *Trico Technologies Corp. v. Montiel*, 949 S.W.2d 308 (Tex. 1997) (per curiam); and *Norwood v. Litwin Engineers & Constructors, Inc.*, 962 S.W.2d 220 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

PJC 107.9 Question and Instruction on Retaliation

QUESTION _____

Did *Don Davis* [*fail or refuse to hire, discharge, or (describe other discriminatory or retaliatory action)*] *Paul Payne* because of *Paul Payne*'s [*opposition to a discriminatory practice; making or filing a charge of discrimination; filing a complaint; or testifying, assisting, or participating in any manner in a discrimination investigation, proceeding, or hearing under chapter 21 of the Texas Labor Code (formerly Texas Commission on Human Rights Act)*]?

Paul Payne must establish that without *his* [*opposition to a discriminatory practice; making or filing a charge of discrimination; filing a complaint; or testifying, assisting, or participating in any manner in a discrimination investigation, proceeding, or hearing under chapter 21 of the Texas Labor Code (formerly Texas Commission on Human Rights Act)*], if any, *Don Davis*'s [*failure or refusal to hire, discharge, or (describe other discriminatory or retaliatory action)*], if any, would not have occurred when it did. There may be more than one cause for an employment decision. *Paul Payne* need not establish that *his* [*opposition to a discriminatory practice; making or filing a charge of discrimination; filing a complaint; or testifying, assisting, or participating in any manner in a discrimination investigation, proceeding, or hearing under chapter 21 of the Texas Labor Code (formerly Texas Commission on Human Rights Act)*], if any, was the sole cause of *Don Davis*'s [*failure or refusal to hire, discharge, or (describe other discriminatory or retaliatory action)*], if any.

If you do not believe the reason *Don Davis* has given for [*failing or refusing to hire, discharge, or (describe other discriminatory or retaliatory action)*], you may, but are not required to, infer that *Don Davis* would not have [*failed or refused to hire, discharge, or (describe other discriminatory or retaliatory action)*] *Paul Payne* but for *his* [*opposition to a discriminatory practice; making or filing a charge of discrimination; filing a complaint; or testifying, assisting, or participating in any manner in a discrimination investigation, proceeding, or hearing under chapter 21 of the Texas Labor Code (formerly Texas Commission on Human Rights Act)*].

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 107.9 should be used for a claim that an employer retaliated or discriminated against an employee for engaging in conduct protected by Tex. Lab. Code § 21.055. *See also Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 61–64 (2006) (holding antiretaliation provision under title VII not limited to discriminatory actions that affect terms and conditions of employment).

Source of question. PJC 107.9 is derived from Tex. Lab. Code § 21.055. The substance of the permissive inference portion of the question is derived from *Ratliff v. City of Gainsville*, 256 F.3d 355, 360–62 (5th Cir. 2001), and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 US 133, 148 (2000).

Broad-form submission. PJC 107.9 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Causation standard. Tex. Lab. Code § 21.055 contains no express standard of causation in retaliation cases. Courts have adopted a "but for" causation standard. *See Pineda v. United Parcel Service, Inc.*, 360 F.3d 483, 488–89 (5th Cir. 2004) (holding that the "motivating factor" causation standard applicable to claims under Tex. Lab. Code § 21.125 does not apply to retaliation claims under section 21.055); *Herbert v. City of Forest Hill*, 189 S.W.3d 369, 377 (Tex. App.—Fort Worth 2006, no pet.) ("A plaintiff asserting a retaliation claim must establish . . . a 'but for' causal nexus between the protected activity and the employer's prohibited conduct."); *Thomann v. Lakes Regional MHMR Center*, 162 S.W.3d 788, 799 (Tex. App.—Dallas 2005, no pet.) ("To prove a causal connection between her filing the complaint and the termination of her employment, Thomann must show that 'but for' filing the complaint, her employment would not have been terminated when it was."). If there is a dispute about whether an adverse employment action occurred or whether the plaintiff undertook a protected activity, a predicate question may be required on these fact issues.

PJC 107.10 Instruction on Constructive Discharge

An employee is considered to have been discharged when an employer makes conditions so intolerable that a reasonable person in the employee's position would have felt compelled to resign.

COMMENT

When to use. PJC 107.10 should be used with PJC 107.6 if an employee alleges that the conditions of his employment amounted to a constructive discharge. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141 (2004) (outlining the proper inquiry in a constructive discharge analysis); *Dillard Department Stores v. Gonzales*, 72 S.W.3d 398, 409 (Tex. App.—El Paso 2002, pet. denied) (discussing constructive discharge in sexual harassment case); *Wal-Mart Stores, Inc. v. Itz*, 21 S.W.3d 456, 475 (Tex. App.—Austin 2000, pet. denied) (same).

Source of instruction. PJC 107.10 is derived from *Suders* and its predecessors, including *Gonzales* and *Itz*. *See also Baylor University v. Coley*, 221 S.W.3d 599, 604–05 (Tex. 2007) (citing PJC 107.10).

Constructive discharge not resulting from an official act. In *Suders*, the Court held that an employer in a hostile work environment constructive discharge case retains its affirmative defense "when an official act does not underlie the constructive discharge." *Suders*, 542 U.S. at 148 (relying on *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)). The Court concluded in *Suders* that a court may preclude assertion of the affirmative defense when a plaintiff's decision to resign "resulted, at least in part," from an official action. *Suders*, 542 U.S. at 150 (quoting *Robinson v. Sappington*, 351 F.3d 317, 337 (7th Cir. 2003)). *Suders* does not define an official act or action.

PJC 107.11 Instruction on Disability

"Disability" means—

1. a mental or physical impairment that substantially limits at least one major life activity;

2. a record of such an impairment; or

3. being regarded as having such an impairment.

"Mental or physical impairment" means [*any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory (including speech organs); cardiovascular; reproductive; digestive; genitourinary; immune; circulatory; hemic; lymphatic; skin; and endocrine; or any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities*].

"Mental or physical impairment" includes an impairment that is episodic or in remission, if it would substantially limit a major life activity when active.

"Major life activity" includes [*caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, or working. The term also includes the operation of a major bodily function, including, but not limited to, functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions*].

"Substantially limits a major life activity" means an impairment that substantially limits the ability to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a "disability."

"Record of such an impairment" means that an individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

"Regarded as having such an impairment" means being regarded as having an actual or perceived mental or physical impairment, other than an impairment that is minor and is expected to last or actually lasts less than six months,

regardless of whether the impairment limits or is perceived to limit a major life activity.

Disability is not a motivating factor in an employment decision if an individual's disability impairs the individual's ability to reasonably perform the job in question, even with a reasonable accommodation.

COMMENT

When to use. PJC 107.11 is to be used with PJC 107.6 if disability (other than failure to accommodate) is alleged to be the basis of an employer's commission of an unlawful employment practice. If failure to accommodate is the claim, PJC 107.12 should be used.

The instruction includes three definitions of disability, but only the definition(s) raised by the pleadings and evidence should be submitted.

In most cases the issue of whether a given activity is a major life activity or whether a particular condition is a mental or physical impairment is not in dispute. In such cases, or if the court determines these issues as a matter of law, the list need not be submitted. Instead, the jury should be instructed that the particular activity in question is a major life activity or that a physical or mental impairment exists. If there is a factual dispute about major life activity or physical or mental impairment, only the terms in brackets that are raised by the pleadings and evidence should be submitted.

Source of instruction. PJC 107.11 is derived from the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213, as amended by the ADA Amendments Act of 2008 (ADAAA), and from amendments to the Texas Labor Code. *See* Tex. Lab. Code ch. 21. The definitions are contained in the Equal Employment Opportunity Commission (EEOC) regulations implementing the equal employment provisions of the ADAAA, 29 C.F.R. §§ 1630.1–.16 Effective September 1, 2009, the disability discrimination provisions of chapter 21 of the Texas Labor Code were amended to conform to the amendments to the federal ADA. The implementing federal regulations relating to the federal amendments are effective May 24, 2011. *See* 29 C.F.R. §§ 1630.1–.16.

Additional instruction: substance addiction or communicable disease status. In the appropriate case, use the following instruction:

> "Disability" does not include [*a current condition of addiction to the use of alcohol, a drug, an illegal substance, or a federally controlled substance or a currently communicable disease or infection that constitutes a direct threat to the health or safety of other persons or that makes the affected person unable to perform the duties of the person's employment*].

See Tex. Lab. Code § 21.002(6).

Additional instruction—effect of mitigating measures on disability determination. Congress and the Texas legislature overturned the holding in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), that mitigating measures must be taken into account in determining whether an impairment constitutes a substantial limitation on a major life activity. 42 U.S.C. § 12102(4)(E); Tex. Lab. Code § 21.0021(b). Therefore, in circumstances where mitigating measures impact major life activities, the jury should be instructed as follows:

> In determining whether an individual has an impairment that substantially limits a major life activity, you must not consider the ameliorative effects of mitigating measures, including—
>
> 1. medication, medical supplies, medical equipment, medical appliances, prosthetic limbs and devices, hearing aids, cochlear implants and other implantable hearing devices, mobility devices, and oxygen therapy equipment;
>
> 2. devices that magnify, enhance, or otherwise augment a visual image, other than eyeglasses and contact lenses that are intended to fully correct visual acuity or eliminate refractive error;
>
> 3. the use of assistive technology;
>
> 4. reasonable accommodations and auxiliary aids or services; and
>
> 5. learned behavioral or adaptive neurological modifications.

Submission of "regarded as" cases. The amendments to chapter 21 of the Texas Labor Code broadened the coverage for individuals with respect to "regarded as" claims. Under the previous version of the statute, plaintiffs were required to prove that the perceived impairment was one that is or would be a substantial limitation of a major life activity. The amendments dispense with this requirement. The amendments are the basis for the Committee's suggested instructions. Tex. Lab. Code § 21.002(12–a).

Transitory and minor. Neither the ADAAA nor the amendments to the Texas Labor Code cover impairments that are transitory and minor. *See* 42 U.S.C. § 12102(3)(B); Tex. Lab. Code § 21.002(12–a). Under both provisions, if the impairment lasts or is expected to last six months or less, it is "transitory." The statutory language of the Texas Labor Code differs from that of the ADAAA. *Compare* 42 U.S.C. § 12102(3)(B), *with* Tex. Lab. Code § 21.002(12–a). Under state law, the burden is on the plaintiff to prove that the disability is either not transitory or not minor. *Okpere v. National Oilwell Varco, L.P.*, 524 S.W.3d 818, 835 (Tex. App.—Houston [14th Dist.]

2017, pet. denied). Federal law places the burden of proving "transitory and minor" on the defendant as an affirmative defense. *See Willis v. Noble Environmental Power, LLC*, 143 F. Supp. 3d 475, 484 (N.D. Tex. 2015) (citing 29 C.F.R. § 1630.15(f)).

Qualified individual. Pursuant to Texas Labor Code section 21.105, disability-based discrimination is actionable only when such discrimination occurs because of or on the basis of a physical or mental condition that does not impair an individual's ability to reasonably perform a job. A qualified individual is an individual "who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8); *City of Houston v. Proler*, 437 S.W.3d 529, 532 (Tex. 2014) (although decided under the law prior to the 2009 amendments to Texas Labor Code chapter 21, the definition of "qualified individual" did not change).

PJC 107.12 Question and Instruction on Failure to Make Reasonable Workplace Accommodation

QUESTION _____

Did *Don Davis* fail to provide a reasonable workplace accommodation to *Paul Payne*?

An employer may not refuse or fail to make a reasonable workplace accommodation to a known physical or mental limitation of an otherwise qualified individual with a disability.

"Disability" means a mental or physical impairment that substantially limits at least one major life activity.

[Insert applicable definitions such as "mental or physical impairment," "major life activity," and "substantially limits a major life activity" from PJC 107.11 and its Comment.]

The term "reasonable workplace accommodation" means [*select one or more as applicable*]—

1. modifications or adjustments to a job application process that enables an applicant with a disability to be considered for the position that the applicant desires; or

2. modifications or adjustments to the work environment, or to the manner or circumstances in which the position held or desired is customarily performed, that enables an individual with a disability to perform the essential functions of that position; or

3. modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without disabilities.

There may be more than one reasonable workplace accommodation.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 107.12 is to be used if the discrimination alleged is a claim that the employer refused or failed to make a reasonable workplace accommodation to a

known disability. This is charged separately from PJC 107.6 because the definition of disability in accommodation cases is different from that in other disability discrimination cases. There is no duty to accommodate unless the person has an actual disability, as distinct from a perceived disability. *See* Tex. Lab. Code § 21.128(d). Some of the actual disability instructions included in the Comment to PJC 107.11 can also apply to PJC 107.12 and may be submitted in conjunction with this question in an appropriate case.

Source of instruction. PJC 107.12 is derived from Tex. Lab. Code § 21.128 and 29 C.F.R. § 1630.2(o) (Equal Employment Opportunity Commission (EEOC) regulations implementing the equal employment provisions of the Americans with Disabilities Act, including a nonexclusive list of potential reasonable accommodations).

Broad-form submission. PJC 107.12 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

PJC 107.13 Question and Instruction on Undue Hardship Defense

If you answered "Yes" to Question _____ [*107.12*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Would a reasonable workplace accommodation to *Paul Payne*'s known disability have caused undue hardship to the operation of *Don Davis*'s business?

"Reasonable workplace accommodation" is defined in Question _____ [*107.12*].

"Undue hardship" means a significant difficulty or expense incurred by an employer in light of the reasonableness of the costs of any necessary workplace accommodation considered in light of the availability of all alternatives or other appropriate relief.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 107.13 should be used if the employer presents evidence of undue hardship in defense to a claim of lack of reasonable workplace accommodation under Tex. Lab. Code § 21.128.

Source of question and instructions. PJC 107.13 is derived from Tex. Lab. Code § 21.128(b) and 29 C.F.R. § 1630.2(p) (Equal Employment Opportunity Commission (EEOC) regulations implementing the equal employment provisions of the Americans with Disabilities Act).

Broad-form submission. PJC 107.13 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")).

PJC 107.14 Question on Good-Faith Effort to Make Reasonable Workplace Accommodation

If you answered "Yes" to Question _____ [*107.12*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Did *Don Davis* consult with *Paul Payne* in good faith in an effort to identify and make a reasonable workplace accommodation to *Paul Payne*'s disability that would not cause an undue hardship to the operation of *Don Davis*'s business?

"Reasonable workplace accommodation" and "undue hardship" are defined in Questions _____ [*107.12*] and _____ [*107.13*].

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 107.14 should be used if the employer presents evidence that it has made a good-faith effort to identify and accommodate a known disability in defense to a claim of lack of reasonable accommodation under Tex. Lab. Code § 21.128(c). The inquiry in PJC 107.14 is for use by the judge in determining available remedies in the entry of a judgment. *See* Tex. Lab. Code §§ 21.258, 21.2585, 21.259. The employer bears the burden of proof on the issue.

Broad-form submission. PJC 107.14 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")).

PJC 107.15 Instruction on Sex Discrimination

In determining whether sex was a motivating factor, "sex" includes discrimination because of or on the basis of pregnancy, childbirth, or a related medical condition.

COMMENT

When to use. PJC 107.15 is to be used with PJC 107.6 if pregnancy, childbirth, or a related medical condition is alleged to be the basis of an employer's commission of an unlawful employment practice.

Source of instruction. PJC 107.15 is derived from Tex. Lab. Code § 21.106. *See also Young v. United Parcel Service, Inc.*, ___U.S.___, 135 S. Ct. 1338 (2015) (interpreting corresponding federal provision 42 U.S.C. § 2000e(k)).

PJC 107.16 Instruction on Religious Observance or Practice

Religion is a motivating factor if the decision to [*fail or refuse to hire, discharge, or (describe other discriminatory action)*] *Paul Payne* was made because of or on the basis of any aspect of religious [*observance, practice, or belief*].

COMMENT

When to use. PJC 107.16 is to be used with PJC 107.6 if some aspect of observance of a religion, such as inability to work on a Sabbath, is alleged to be the basis of an employer's commission of an unlawful employment practice. This instruction, however, should not be used if religious preference alone is at issue. See PJC 107.6.

Source of instruction. PJC 107.16 is derived from Tex. Lab. Code § 21.108. *See also EEOC v. Abercrombie & Fitch Stores, Inc.*, ___U.S.___, 135 S. Ct. 2028 (2015) (interpreting corresponding federal provision 42 U.S.C. § 2000e(j)).

PJC 107.17 Question and Instruction on Defense of Undue Hardship to Accommodate Religious Observances or Practices

QUESTION _____

Was *Don Davis* unable to reasonably accommodate *Paul Payne*'s religious observance or practice without undue hardship to the conduct of *his* business?

A reasonable accommodation to an employee's religious observances or practices constitutes an undue hardship when it requires the employer to bear more than a minimal cost, such cost including both monetary costs and burdens in conducting business.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 107.17 should be used if the employer alleges that reasonable accommodation to religious observances or practices would cause undue hardship.

Source of question and instruction. PJC 107.17 is derived from Tex. Lab. Code § 21.108 and *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84–85 & n.15 (1977).

Broad-form submission. PJC 107.17 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")).

PJC 107.18 Question Limiting Relief in Unlawful Employment Practices

If you answered "Yes" to Question _____ [*107.6*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Would *Don Davis* have taken the same action inquired about in Question _____ [*107.6*] when *he* did, in the absence of the impermissible motivating factor?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 107.18 should be used if an employer claims that its employment decision would have been made in the absence of an impermissible motive. Tex. Lab. Code § 21.125(b); *see also Quantum Chemical Corp. v. Toennies*, 47 S.W.3d 473, 475–76 (Tex. 2001). In such a mixed-motive case, a plaintiff may be entitled to declaratory or injunctive relief, attorney's fees, and costs, although not entitled to back pay or reinstatement. Tex. Lab. Code § 21.125(b); *see also* 42 U.S.C. § 2000e–5(g)(2)(B). *But see Peterson v. Bell Helicopter Textron, Inc.*, 806 F.3d 335, 342–43 (5th. Cir. 2015), *reh'g denied*, 807 F.3d 650, *cert. denied*, 136 S. Ct. 1714 (2016) (in reading Tex. Lab. Code § 21.125(b) and § 21.259 together, if no declaratory or injunctive relief is awarded, then the plaintiff is not a prevailing party and no attorney's fees can be awarded). PJC 107.18 should not be submitted to the jury based on after-acquired evidence. *See McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995).

Source of question. PJC 107.18 is derived from Tex. Lab. Code § 21.125(b).

Broad-form submission. PJC 107.18 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")).

PJC 107.19 Question and Instruction on Bona Fide Occupational Qualification Defense

QUESTION _____

Was *Don Davis*'s [*failure or refusal to hire, discharge, or (describe other discriminatory action)*] *Paul Payne* based on a bona fide occupational qualification reasonably necessary to the normal operation of *Don Davis*'s business?

"Bona fide occupational qualification" means a qualification (1) reasonably related to the satisfactory performance of the duties of a job, and (2) for which a factual basis exists for the belief that no person of an excluded group would be able to satisfactorily perform the duties of the job with safety or efficiency.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 107.19 is to be used if an employer asserts a bona fide occupational qualification as the basis for any discrimination based on disability, religion, sex, national origin, or age of an employee. Tex. Lab. Code § 21.119.

Source of instruction. PJC 107.19 is derived from Tex. Lab. Code §§ 21.002(1), 21.119.

Broad-form submission. PJC 107.19 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")).

PJC 107.20 Question on Harassment

QUESTION _____

Was *Paul Payne* subjected to harassment based on [*sex, national origin, race, age, or other protected category*] by *Don Davis*?

[Insert appropriate instruction.]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 107.20 should be used if there is an allegation of actionable harassment.

Source of question and instruction. PJC 107.20 is derived from the principles recognized in *Union Pacific Railroad Co. v. Loa*, 153 S.W.3d 162, 168–69 (Tex. App.—El Paso 2004, no pet.), and *Nagel Manufacturing & Supply Co. v. Ulloa*, 812 S.W.2d 78, 80–81 (Tex. App.—Austin 1991, writ denied). *See also Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Benavides v. Moore*, 848 S.W.2d 190 (Tex. App.—Corpus Christi 1992, writ denied).

Broad-form submission. PJC 107.20 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Accompanying instructions. Instructions to accompany PJC 107.20 are at PJC 107.21–107.23. If more than one instruction is used, each should be separated by the word *or*.

PJC 107.21 Instruction on Sexual Harassment by Supervisor Involving Tangible Employment Action (*Quid Pro Quo*)

"Sexual harassment" occurred if—

1. *Paul Payne* was subjected to unwelcome sexual advance[*s*] or demand[*s*]; and

2. submission to or refusal to submit to the unwelcome sexual advance[*s*] or demand[*s*] resulted in [*describe tangible employment action*]; and

3. the conduct was committed by an employee who had authority over hiring, advancement, dismissals, discipline, or other employment decisions affecting *Paul Payne*.

[or]

COMMENT

When to use. PJC 107.21 should be used with PJC 107.20 if it is alleged that the employee was subjected to what has traditionally been referred to as *quid pro quo* sexual harassment, which involves harassment by a supervisor of the employee and a tangible employment action.

Source of instruction. PJC 107.21 is derived from the principles recognized in *Wal-Mart Stores, Inc. v. Itz*, 21 S.W.3d 456, 471 (Tex. App.—Austin 2000, pet. denied).

Same-sex harassment. Title VII's prohibition of sex discrimination encompasses "the entire spectrum of disparate treatment of men and women in employment," including sexual harassment. *Alamo Heights Independent School District v. Clark*, 544 S.W.3d 755, 771 (Tex. 2018) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)).

Moreover, title VII's protection against workplace discrimination on the basis of sex applies to harassment between members of different genders as well as the same gender. *Clark*, 544 S.W.3d at 771–72 (citing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998)).

Tangible employment action. The U.S. Supreme Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998), defined "tangible employment action" as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *See also Itz*, 21 S.W.3d at 475.

Vicarious liability. If a supervisor's harassment culminates in tangible employment action, the employer is vicariously liable for the supervisor's conduct. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998). In that instance, the affirmative defense in PJC 107.24 is not available.

Constructive discharge not resulting from an official act. The U.S. Supreme Court held that an employer in a hostile work environment constructive discharge case retains its affirmative defense "when an official act does not underlie the constructive discharge." *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148 (2004) (relying on *Ellerth*, 524 U.S. 742, and *Faragher*, 524 U.S. 775). The Court concluded in *Suders* that a court may preclude assertion of the affirmative defense when a plaintiff's decision to resign "resulted, at least in part," from an official action. *Suders*, 542 U.S. at 150 (quoting *Robinson v. Sappington*, 351 F.3d 317, 337 (7th Cir. 2003)).

PJC 107.22 Instruction on Harassment by Nonsupervisory Employee (Hostile Environment)

"Harassment based on [*sex, national origin, race, age, or other protected category*]" occurred if—

1. *Paul Payne* [*was subjected to ridicule or insult or other improper conduct*] based on *Paul Payne*'s [*sex, national origin, race, age, or other appropriate protected category*] that was unwelcome and undesirable or offensive to *Paul Payne*; and

2. the harassment complained of altered a term, condition, or privilege of employment; and

3. *Don Davis* knew or should have known of the harassment and *Don Davis* failed to take prompt, remedial action to eliminate the harassment.

Harassment alters a term, condition, or privilege of employment when a reasonable person would find that the harassment created an abusive working environment. In determining whether an abusive working environment existed, consider the following: the frequency of the conduct; its severity; whether it was physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

[or]

COMMENT

When to use. PJC 107.22 should be used with PJC 107.20 if it is alleged that the plaintiff has been subjected to what is commonly referred to as "a hostile environment" that involves harassment by an employee who is not a supervisor of the employee.

Source of instruction. PJC 107.22 is derived from *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 753–54 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993); and *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). *See also Nash v. Electrospace System, Inc.*, 9 F.3d 401, 404 (5th Cir. 1993); *Jones v. Flagship International*, 793 F.2d 714, 719–20 (5th Cir. 1986); *Ewald v. Wornick Family Foods Corp.*, 878 S.W.2d 653, 659 (Tex. App.—Corpus Christi 1994, writ denied).

Same-sex harassment. For cases involving allegations of same-sex harassment, see the Comment to PJC 107.21.

Constructive discharge not resulting from an official act. The U.S. Supreme Court held that an employer in a hostile work environment constructive discharge case retains its affirmative defense "when an official act does not underlie the constructive discharge." *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148 (2004) (relying on *Ellerth*, 524 U.S. 742, and *Faragher*, 524 U.S. 775). The Court concluded in *Suders* that a court may preclude assertion of the affirmative defense when a plaintiff's decision to resign "resulted, at least in part," from an official action. *Suders*, 542 U.S. at 150 (quoting *Robinson v. Sappington*, 351 F.3d 317, 337 (7th Cir. 2003)).

PJC 107.23 Instruction on Harassment by Supervisory Employee Not Involving Tangible Employment Action (Hostile Environment)

"Harassment based on [*sex, national origin, race, age, or other protected category*]" occurred if—

1. *Paul Payne* [*was subjected to ridicule or insult or other improper conduct*] based on *Paul Payne*'s [*sex, national origin, race, age, or other appropriate category*] that was unwelcome and undesirable or offensive to *Paul Payne*; and

2. the harassment complained of altered a term, condition, or privilege of employment; and

3. the conduct was committed by a supervisor who had authority over hiring, advancement, dismissals, discipline, or other employment decisions affecting *Paul Payne*.

Harassment alters a term, condition, or privilege of employment when a reasonable person would find that the harassment created an abusive working environment. In determining whether an abusive working environment existed, consider the following: the frequency of the conduct; its severity; whether it was physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

[or]

COMMENT

When to use. PJC 107.23 should be used with PJC 107.20 if it is alleged that the plaintiff has been subjected to what is commonly referred to as "a hostile environment" that involves harassment by a supervisor of the employee but no tangible employment action. In sexual harassment cases, it may be proper to substitute the following for paragraph 1 above:

"Harassment based on sex" occurred if—

1. *Paul Payne* [*was subjected to sexual advances, requests for sexual favors, or other conduct of a sexual nature*] that was unwelcome and undesirable or offensive to *Paul Payne*; and

Source of instruction. PJC 107.23 is derived from *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S.

742, 753–54 (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *City of Houston v. Fletcher*, 166 S.W.3d 479, 490–91 (Tex. App.—Eastland 2005, pet. denied) (claim of hostile work environment based on age); *Union Pacific Railroad Co. v. Loa*, 153 S.W.3d 162, 169 (Tex. App.—El Paso 2004, no pet.); *Dillard Department Stores v. Gonzales*, 72 S.W.3d 398, 407 (Tex. App.—El Paso 2002, pet. denied); and *Wal-Mart Stores, Inc. v. Itz*, 21 S.W.3d 456, 472–73 (Tex. App.—Austin 2000, pet. denied).

Same-sex harassment. For cases involving allegations of same-sex harassment, see the Comment to PJC 107.21.

Affirmative defense. An employer is entitled to submission of the affirmative defense of reasonable care under PJC 107.24 if the supervisor's harassment does not culminate in a tangible employment action. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. If the existence of a tangible employment action is in dispute, a separate question may need to be submitted.

Constructive discharge not resulting from an official act. The U.S. Supreme Court held that an employer in a hostile work environment constructive discharge case retains its affirmative defense "when an official act does not underlie the constructive discharge." *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148 (2004) (relying on *Ellerth*, 524 U.S. 742, and *Faragher*, 524 U.S. 775). The Court concluded in *Suders* that a court may preclude assertion of the affirmative defense when a plaintiff's decision to resign "resulted, at least in part," from an official action. *Suders*, 542 U.S. at 150 (quoting *Robinson v. Sappington*, 351 F.3d 317, 337 (7th Cir. 2003)).

PJC 107.24 Question and Instruction on Affirmative Defense to Harassment Where No Tangible Employment Action Occurred

If you answered "Yes" to Question _____ [*107.20*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Is *Don Davis* legally excused from responsibility for the conduct of [*name(s) of supervisor(s)*] found in Question _____ [*107.20*]?

Don Davis is legally excused if—

1. *Don Davis* exercised reasonable care to prevent and correct promptly any harassment behavior; and

2. *Paul Payne* unreasonably failed to take advantage of any preventive or corrective opportunities by *his* employer or to avoid harm otherwise.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 107.24 should be used if the defendant employer alleges the affirmative defense of reasonable care and there has been no tangible employment action taken by the employer against the employee alleging harassment. Tangible employment action includes discharge, demotion, or undesirable reassignment. *Dillard Department Stores v. Gonzales*, 72 S.W.3d 398, 410 (Tex. App.—El Paso 2002, pet. denied); *Wal-Mart Stores, Inc. v. Itz*, 21 S.W.3d 456, 472–73 (Tex. App.—Austin 2000, pet. denied) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998)).

Source of question. PJC 107.24 is derived from *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998), and *Faragher*, 524 U.S. at 807–08; *see also Padilla v. Flying J, Inc.*, 119 S.W.3d 911, 915 (Tex. App.—Dallas 2003, no pet.); *Gulf States Toyota, Inc. v. Morgan*, 89 S.W.3d 766, 770–71 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Dillard Department Stores*, 72 S.W.3d at 410–11.

Broad-form submission. PJC 107.24 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas*

Department of Human Services v. E.B., 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")).

Constructive discharge not resulting from an official act. The U.S. Supreme Court held that an employer in a hostile work environment constructive discharge case retains its affirmative defense "when an official act does not underlie the constructive discharge." *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148 (2004) (relying on *Ellerth*, 524 U.S. 742, and *Faragher*, 524 U.S. 775). The Court concluded in *Suders* that a court may preclude assertion of the affirmative defense when a plaintiff's decision to resign "resulted, at least in part," from an official action. *Suders*, 542 U.S. at 150 (quoting *Robinson v. Sappington*, 351 F.3d 317, 337 (7th Cir. 2003)).

PJC 107.25 Question Limiting Relief for Retaliation under Texas Whistleblower Act

If you answered "Yes" to Question _____ [*107.4*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Would *Don Davis* have taken the same action inquired about in Question _____ [*107.4*] when *he* did, based solely on information, observation, or evidence that is not related to *Paul Payne*'s report of a violation of law?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 107.25 should be used if an employer claims that its employment decision was made solely on information, observation, or evidence that is not related to the fact that the employee has made a report of a violation of the law protected under the Texas Whistleblower Act. Tex. Gov't Code § 554.004(b); *see Fort Worth Independent School District v. Palazzolo*, 498 S.W.3d 674, 683–86 (Tex. App.—Fort Worth 2016, pet. denied) (error not to submit issue as affirmative defense instead of as inferential rebuttal).

Source of question. PJC 107.25 is derived from Tex. Gov't Code § 554.004(b).

Broad-form submission. PJC 107.25 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")).

CHAPTER 108 PIERCING THE CORPORATE VEIL

PJC 108.1 Basic Question

QUESTION _____

Is *Don Davis* responsible for the conduct of [*name of corporation*]?

Don Davis is "responsible" for the conduct of [*name of corporation*] if—

[Insert appropriate instruction(s); see PJC 108.2–108.7.]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 108.1 is a basic question that is appropriate to submit when the claimant seeks to disregard the corporate fiction and pierce the corporate veil.

Broad-form submission. PJC 108.1 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Accompanying instructions. PJC 108.1 should be accompanied by appropriate instructions and definitions informing the jury of the applicable bases for disregarding the corporate fiction. Disregarding the corporate fiction is "an equitable doctrine [that] takes a flexible fact-specific approach focusing on equity." *Castleberry v. Branscum*, 721 S.W.2d 270, 273–76 (Tex. 1986); *see also Stewart & Stevenson Services, Inc. v. Serv-Tech, Inc.*, 879 S.W.2d 89, 110 (Tex. App.—Houston [14th Dist.] 1994, writ denied). Instructions to accompany PJC 108.1, informing the jury what type of conduct should be considered under the question, are at PJC 108.2–108.7.

Use of "or." If more than one instruction is used, each must be separated by the word *or*, because a finding of any one of the theories for disregarding the corporate fiction defined in the instructions would support an affirmative answer to the question.

PJC 108.2 Instruction on Alter Ego

[*Name of corporation*] was organized and operated as a mere tool or business conduit of *Don Davis*; there was such unity between [*name of corporation*] and *Don Davis* that the separateness of [*name of corporation*] had ceased and holding only [*name of corporation*] responsible would result in injustice; and *Don Davis* caused [*name of corporation*] to be used for the purpose of perpetrating and did perpetrate an actual fraud on *Paul Payne* primarily for the direct personal benefit of *Don Davis*.

In deciding whether there was such unity between [*name of corporation*] and *Don Davis* that the separateness of [*name of corporation*] had ceased, you are to consider the total dealings of [*name of corporation*] and *Don Davis*, including—

1. the degree to which [*name of corporation*]'s property had been kept separate from that of *Don Davis*;

2. the amount of financial interest, ownership, and control *Don Davis* maintained over [*name of corporation*]; and

3. whether [*name of corporation*] had been used for personal purposes of *Don Davis*.

[or]

COMMENT

When to use. PJC 108.2 should be used as an instruction accompanying the question in PJC 108.1 if it is alleged that a holder of shares, an owner of any beneficial interest in shares, a subscriber for shares whose subscription has been accepted, any of their affiliates, or affiliates of the corporation is the alter ego of the corporation, in a case relating to or arising from a contractual obligation. See comment below, "Cases not covered by statute," for charge language to be used in other cases.

Use of "or." If used with other instructions (see PJC 108.3–108.7), PJC 108.2 must be followed by the word *or*, because a finding of any one of the theories for disregarding the corporate fiction defined in the instructions would support an affirmative answer to the question.

Source of instruction. PJC 108.2 is based on the supreme court's discussion of alter ego in *Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex. 1986). The language of *Castleberry* has been modified to reflect the enactment of Tex. Bus. Corp. Act art. 2.21(A) (the "Act") (expired Jan. 1, 2010, subsequently codified as Tex. Bus. Orgs.

Code § 21.223(a) (the "Code")), which eliminated constructive fraud as a consideration for piercing the corporate veil in contract-based claims against holders, owners, subscribers, or affiliates. *See Willis v. Donnelly*, 199 S.W.3d 262, 271–72 & n.12 (Tex. 2006). The Act further modified *Castleberry* by eliminating the failure to observe corporate formalities as a consideration for piercing the corporate veil in all claims against holders, owners, subscribers, or affiliates. Tex. Bus. Corp. Act art. 2.21(A)(3) (expired Jan. 1, 2010); Tex. Bus. Orgs. Code § 21.223(a)(3); *see also Aluminum Chemicals (Bolivia), Inc. v. Bechtel Corp.*, 28 S.W.3d 64, 67 n.3 (Tex. App.—Texarkana 2000, no pet.).

"Injustice." No Texas case has stated whether "injustice" must be defined in alter ego cases. In *SSP Partners v. Gladstrong Investments (USA) Corp.*, the Texas Supreme Court discussed the term "injustice" and equated it with "abuse of the corporate structure." *SSP Partners v. Gladstrong Investments (USA) Corp.*, 275 S.W.3d 444, 454–55 (Tex. 2008). The court said that "injustice" does not mean "a subjective perception of unfairness by an individual judge or juror"; rather, it is a "shorthand reference[] for the kinds of abuse . . . that the corporate structure should not shield—fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like." *SSP Partners*, 275 S.W.3d at 455. For additional cases discussing the term "injustice" in an alter ego context, see *Wilson v. Davis*, 305 S.W.3d 57, 68–72 (Tex. App.—Houston [1st Dist.] 2009, no pet.), and *Mancorp, Inc. v. Culpepper*, 836 S.W.2d 844 (Tex. App.—Houston [1st Dist.] 1992), *on remand from* 802 S.W.2d 226 (Tex. 1990).

"Actual fraud." The term "actual fraud" appearing in Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010) and Tex. Bus. Orgs. Code § 21.223(b) is not defined in either statute. In *Castleberry*, decided before article 2.21(A)(2) and section 21.223(b) were enacted, the supreme court defined actual fraud in the context of piercing the corporate veil as "involv[ing] dishonesty of purpose or intent to deceive." 721 S.W.2d at 273 (quoting *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964)). Courts have held that the fraud must relate to the transaction at issue. *Viajes Gerpa, S.A. v. Fazeli*, 522 S.W.3d 524, 534 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *see also, e.g., Menetti v. Chavers*, 974 S.W.2d 168, 175 (Tex. App.—San Antonio 1998, no pet.).

"Actual fraud" is not defined in section 21.223(b), but recent opinions have endorsed the *Castleberry* definition that it means "dishonesty of purpose or intent to deceive." *See, e.g., AvenueOne Properties, Inc. v. KP5 Ltd. Partnership*, 540 S.W.3d 643, 648–49 (Tex. App.—Amarillo 2018, no pet.); *TransPecos Banks v. Strobach*, 487 S.W.3d 722, 730 (Tex. App.—El Paso 2016, no pet.); *Tryco Enterprises, Inc. v. Robinson*, 390 S.W.3d 497, 508 (Tex. App.—Houston [1st Dist.] 2012, pet. dism'd); *Dick's Last Resort of West End, Inc. v. Market/Ross, Ltd.*, 273 S.W.3d 905, 908–10 (Tex. App.—Dallas 2008, pet. denied).

Application to limited liability companies. In 2011, the Texas legislature added section 101.002 to the Texas Business Organizations Code, specifying that the Code sections regulating and restricting veil piercing of corporations also apply to limited liability companies ("LLCs") and their members, owners, assignees, affiliates, and subscribers. Tex. Bus. Orgs. Code § 101.002 (applying sections 21.223 and 21.224 to LLCs and their members, owners, assignees, affiliates, and subscribers). For cases governed by the prior law, case law holds that claimants seeking to pierce the veil of an LLC must meet the same requirements as they would if the entity were a corporation. *See, e.g., Shook v. Walden*, 368 S.W.3d 604, 622 (Tex. App.—Austin 2012, pet. denied); *Metroplex Mailing Services, LLC v. RR Donnelley & Sons*, 410 S.W.3d 889, 896 (Tex. App.—Dallas 2013, no pet.).

Cases not covered by statute. For cases not involving contract-based claims against holders, owners, subscribers, or affiliates, use the following instruction:

> [*Name of corporation*] was organized and operated as a mere tool or business conduit of *Don Davis* and there was such unity between [*name of corporation*] and *Don Davis* that the separateness of [*name of corporation*] had ceased and holding only [*name of corporation*] responsible would result in injustice.
>
> In deciding whether there was such unity between [*name of corporation*] and *Don Davis* that the separateness of [*name of corporation*] had ceased, you are to consider the total dealings of [*name of corporation*] and *Don Davis*, including—
>
> 1. the degree to which [*name of corporation*]'s property had been kept separate from that of *Don Davis*;
>
> 2. the amount of financial interest, ownership, and control *Don Davis* maintained over [*name of corporation*]; and
>
> 3. whether [*name of corporation*] had been used for personal purposes of *Don Davis*.

This instruction is derived from *Castleberry*, 721 S.W.2d at 271–73. By their terms, the actual fraud requirements of Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010) and Tex. Bus. Orgs. Code § 21.223(a)(2) apply only to claims relating to or arising from contractual obligations. *See Farr v. Sun World Savings Ass'n*, 810 S.W.2d 294, 296 (Tex. App.—El Paso 1991, no writ); *see also Menetti*, 974 S.W.2d at 173–74 (discussing when a showing of actual fraud is necessary after the 1997 amendments to the Texas Business Corporation Act); *Stewart & Stevenson Services, Inc. v. Serv-Tech, Inc.*, 879 S.W.2d 89, 110 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (recommending that trial courts follow an alter ego instruction that came verbatim from *Castleberry*).

If the corporation whose veil is sought to be pierced is a close corporation organized under Tex. Bus. Orgs. Code §§ 21.701–.702, one or more of the indicia of unity may not apply.

1997 amendments to Business Corporation Act. Tex. Bus. Corp. Act art. 2.21 was amended in 1997 as follows:

1. the list of persons or entities protected from liability (except for actual fraud) was expanded to include "affiliates" (Tex. Bus. Corp. Act art. 2.21 (expired Jan. 1, 2010));

2. not only contractual obligations of the corporation but "matter[s] relating to or arising from" contractual obligations were excluded as grounds for disregarding the corporate fiction unless actual fraud was proved (Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010)); and

3. failure of the corporation to observe a corporate formality is no longer a ground for piercing the corporate veil in any case, not just contract cases (Tex. Bus. Corp. Act art. 2.21(A)(3) (expired Jan. 1, 2010)).

The Act further preempted liability "under common law or otherwise" for holders, owners, subscribers, and affiliates by providing the exclusive mechanism for imposing liability on such persons for obligations limited by the Act, subject to the exceptions stated in the Act. Tex. Bus. Corp. Act art. 2.21(B). Article 2.21 of the Act expired January 1, 2010, but this preemption has been carried over into the Code. *See* Tex. Bus. Orgs. Code §§ 21.224–.225; *see also SSP Partners*, 275 S.W.3d at 454–56 (holding single business enterprise liability theory for disregarding the corporate structure is fundamentally inconsistent with article 2.21 of the Act); *Willis*, 199 S.W.3d at 272–73 (refusing to impose liability against shareholders under a common-law theory of implied ratification where doing so would contravene statute precluding shareholder liability for contractual obligations of the corporation in the absence of actual fraud or an express agreement to assume personal liability); *Southern Union Co. v. City of Edinburg*, 129 S.W.3d 74, 87 (Tex. 2003) (article 2.21 controls action based on single business enterprise theory); *Country Village Homes, Inc. v. Patterson*, 236 S.W.3d 413, 432 (Tex. App.—Houston [1st Dist.] 2007, pet. dism'd, judgm't vacated by agr.) (finding of actual fraud is required to prove single business enterprise theory).

Application of Texas Business Organizations Code. In 2003, Texas enacted the Texas Business Organizations Code, which codified the Texas Business Corporation Act. The Texas Business Corporation Act expired January 1, 2010, and, as of that date, all Texas corporations are governed by the Code, regardless of when the corporation was formed. Tex. Bus. Orgs. Code § 402.005.

PJC 108.3 Instruction on Sham to Perpetrate a Fraud

Don Davis used [*name of corporation*] for the purpose of perpetrating and did perpetrate an actual fraud on *Paul Payne* primarily for the direct personal benefit of *Don Davis*.

[or]

COMMENT

When to use. PJC 108.3 should be used as an instruction accompanying the question in PJC 108.1 if it is alleged that a corporation has been used by a holder of shares, an owner of any beneficial interest in shares, a subscriber for shares whose subscription has been accepted, any of their affiliates, or affiliates of the corporation as a sham to perpetrate a fraud in a case relating to or arising from a contractual obligation. Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010); Tex. Bus. Orgs. Code § 21.223(a)(2), (b). See comment below, "Cases not covered by statute," for charge language to be used in other cases.

Use of "or." If used with other instructions (see PJC 108.2 and 108.4–108.7), PJC 108.3 must be followed by the word *or*, because a finding of any one of the theories for disregarding the corporate fiction defined in the instructions would support an affirmative answer to the question.

Source of instruction. PJC 108.3 is based on the supreme court's discussion of the theories for disregarding the corporate fiction in *Castleberry v. Branscum*, 721 S.W.2d 270, 271–73 (Tex. 1986). The language of *Castleberry* has been modified to reflect the enactment of Tex. Bus. Corp. Act art. 2.21(A) (the "Act") (expired Jan. 1, 2010, subsequently codified as Tex. Bus. Orgs. Code § 21.223(a) (the "Code")), which eliminated constructive fraud as a consideration for piercing the corporate veil in contract-based claims against holders, owners, subscribers, or affiliates. *See Willis v. Donnelly*, 199 S.W.3d 262, 271–72 & n.12 (Tex. 2006). The Act further modified *Castleberry* by eliminating the failure to observe corporate formalities as a consideration for piercing the corporate veil in all claims against holders, owners, subscribers, or affiliates. Tex. Bus. Corp. Act art. 2.21(A)(3) (expired Jan. 1, 2010); Tex. Bus. Orgs. Code § 21.223(a)(3); *see also Aluminum Chemicals (Bolivia), Inc. v. Bechtel Corp.*, 28 S.W.3d 64, 67–68 nn.3, 4 (Tex. App.—Texarkana 2000, no pet.).

"Actual fraud." The term "actual fraud" appearing in Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010) and Tex. Bus. Orgs. Code § 21.223(b) is not defined in either statute. In *Castleberry*, decided before article 2.21(A)(2) and section 21.223(b) were enacted, the supreme court defined actual fraud in the context of piercing the corporate veil as "involv[ing] dishonesty of purpose or intent to deceive." 721

S.W.2d at 273 (quoting *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964)). Courts have held that the fraud must relate to the transaction at issue. *Viajes Gerpa, S.A. v. Fazeli*, 522 S.W.3d 524, 534 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *see also, e.g., Menetti v. Chavers*, 974 S.W.2d 168, 175 (Tex. App.—San Antonio 1998, no pet.).

"Actual fraud" is not defined in section 21.223(b), but recent opinions have endorsed the *Castleberry* definition that it means "dishonesty of purpose or intent to deceive." *See, e.g., AvenueOne Properties, Inc. v. KP5 Ltd. Partnership*, 540 S.W.3d 643, 648–49 (Tex. App.—Amarillo 2018, no pet.); *TransPecos Banks v. Strobach*, 487 S.W.3d 722, 730 (Tex. App.—El Paso 2016, no pet.); *Tryco Enterprises, Inc. v. Robinson*, 390 S.W.3d 497, 508 (Tex. App.—Houston [1st Dist.] 2012, pet. dism'd); *Dick's Last Resort of West End, Inc. v. Market/Ross, Ltd.*, 273 S.W.3d 905, 908–10 (Tex. App.—Dallas 2008, pet. denied).

Application to limited liability companies. In 2011, the Texas legislature added section 101.002 to the Texas Business Organizations Code, specifying that the Code sections regulating and restricting veil piercing of corporations also apply to limited liability companies ("LLCs") and their members, owners, assignees, affiliates, and subscribers. Tex. Bus. Orgs. Code § 101.002 (applying sections 21.223 and 21.224 to LLCs and their members, owners, assignees, affiliates, and subscribers). For cases governed by the prior law, case law holds that claimants seeking to pierce the veil of an LLC must meet the same requirements as they would if the entity were a corporation. *See, e.g., Shook v. Walden*, 368 S.W.3d 604, 622 (Tex. App.—Austin 2012, pet. denied); *Metroplex Mailing Services, LLC v. RR Donnelley & Sons*, 410 S.W.3d 889, 896 (Tex. App.—Dallas 2013, no pet.).

Cases not covered by statute. For cases not involving contract-based claims against holders, owners, subscribers, or affiliates, use the following instruction:

> *Don Davis* used [*name of corporation*] as a sham to perpetrate a fraud, and holding only [*name of corporation*] responsible would result in injustice.

This instruction is derived from *Castleberry*, 721 S.W.2d at 271–73, 275. "[C]onstructive fraud, not intentional fraud, is the standard for disregarding the corporate fiction on the basis of a sham to perpetrate a fraud" in cases not covered by Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010) or Tex. Bus. Orgs. Code § 21.223(a)(2). *Castleberry*, 721 S.W.2d at 275. *See also Menetti*, 974 S.W.2d at 173–74 (discussing when a showing of actual fraud is necessary after the 1997 amendments to the Texas Business Corporation Act); *Farr v. Sun World Savings Ass'n*, 810 S.W.2d 294, 296 (Tex. App.—El Paso 1991, no writ). Under *Castleberry*, "constructive fraud is the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests." *Castleberry*, 721 S.W.2d at 273 (quoting *Archer*, 390

S.W.2d at 740); *see also Seaside Industries, Inc. v. Cooper*, 766 S.W.2d 566, 568 (Tex. App.—Dallas 1989, no writ). The standard for disregarding the corporate fiction is flexible in this context, and additional questions, instructions, or definitions may be needed depending on the facts in dispute. *See Castleberry*, 721 S.W.2d at 273 ("Because disregarding the corporate fiction is an equitable doctrine, Texas takes a flexible fact-specific approach focusing on equity.").

"Injustice." No Texas case has stated whether "injustice" must be defined in cases of the type covered by the above alternate instruction. In *SSP Partners v. Gladstrong Investments (USA) Corp.*, the Texas Supreme Court discussed the term "injustice" and equated it with "abuse of the corporate structure." *SSP Partners v. Gladstrong Investments (USA) Corp.*, 275 S.W.3d 444, 454–55 (Tex. 2008). The court said that "injustice" does not mean "a subjective perception of unfairness by an individual judge or juror"; rather, it is a "shorthand reference[] for the kinds of abuse . . . that the corporate structure should not shield—fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like." *SSP Partners*, 275 S.W.3d at 455. For additional cases discussing the term "injustice" in the context of piercing the corporate veil, see *Wilson v. Davis*, 305 S.W.3d 57, 68–72 (Tex. App.—Houston [1st Dist.] 2009, no pet.), and *Mancorp, Inc. v. Culpepper*, 836 S.W.2d 844 (Tex. App.—Houston [1st Dist.] 1992), *on remand from* 802 S.W.2d 226 (Tex. 1990).

1997 amendments to Business Corporation Act. Tex. Bus. Corp. Act art. 2.21 was amended in 1997 as follows:

1. the list of persons or entities protected from liability (except for actual fraud) was expanded to include "affiliates" (Tex. Bus. Corp. Act art. 2.21 (expired Jan. 1, 2010));

2. not only contractual obligations of the corporation but "matter[s] relating to or arising from" contractual obligations were excluded as grounds for disregarding the corporate fiction unless actual fraud was proved (Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010)); and

3. failure of the corporation to observe a corporate formality is no longer a ground for piercing the corporate veil in any case, not just contract cases (Tex. Bus. Corp. Act art. 2.21(A)(3) (expired Jan. 1, 2010)).

The Act further preempted liability "under common law or otherwise" for holders, owners, subscribers, and affiliates by providing the exclusive mechanism for imposing liability on such persons for obligations limited by the Act, subject to the exceptions stated in the Act. Tex. Bus. Corp. Act art. 2.21(B). Article 2.21 of the Act expired January 1, 2010, but this preemption has been carried over into the Code. *See* Tex. Bus. Orgs. Code §§ 21.224–.225; *see also SSP Partners*, 275 S.W.3d at 454–56 (holding single business enterprise liability theory for disregarding the corporate structure is fundamentally inconsistent with article 2.21 of the Act); *Willis*, 199 S.W.3d at 272–73

(refusing to impose liability against shareholders under a common-law theory of implied ratification where doing so would contravene statute precluding shareholder liability for contractual obligations of the corporation in the absence of actual fraud or an express agreement to assume personal liability); *Southern Union Co. v. City of Edinburg*, 129 S.W.3d 74, 87 (Tex. 2003) (article 2.21 controls action based on single business enterprise theory); *Country Village Homes, Inc. v. Patterson*, 236 S.W.3d 413, 432 (Tex. App.—Houston [1st Dist.] 2007, pet. dism'd, judgm't vacated by agr.) (finding of actual fraud is required to prove single business enterprise theory).

Application of Texas Business Organizations Code. In 2003, Texas enacted the Texas Business Organizations Code, which codified the Texas Business Corporation Act. The Texas Business Corporation Act expired January 1, 2010, and, as of that date, all Texas corporations are governed by the Code, regardless of when the corporation was formed. Tex. Bus. Orgs. Code § 402.005.

PJC 108.4 Instruction on Evasion of Existing Legal Obligation

Don Davis used [*name of corporation*] as a means of evading an existing legal obligation for the purpose of perpetrating and did perpetrate an actual fraud on *Paul Payne* primarily for the direct personal benefit of *Don Davis*.

[or]

COMMENT

When to use. PJC 108.4 should be used as an instruction accompanying the question in PJC 108.1 if it is alleged that a corporation has been used by a holder of shares, an owner of any beneficial interest in shares, a subscriber for shares whose subscription has been accepted, any of their affiliates, or affiliates of the corporation to evade an existing legal obligation in a case relating to or arising from a contractual obligation. Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010); Tex. Bus. Orgs. Code § 21.223(a)(2), (b). See comment below, "Cases not covered by statute," for charge language to be used in other cases.

Use of "or." If used with other instructions (see PJC 108.2–108.3 and 108.5–108.7), PJC 108.4 must be followed by the word *or*, because a finding of any one of the theories for disregarding the corporate fiction defined in the instructions would support an affirmative answer to the question.

Source of instruction. PJC 108.4 is based on the supreme court's discussion of the theories for disregarding the corporate fiction in *Castleberry v. Branscum*, 721 S.W.2d 270, 271–73 (Tex. 1986). The language of *Castleberry* has been modified to reflect the enactment of Tex. Bus. Corp. Act art. 2.21(A) (the "Act") (expired Jan. 1, 2010, subsequently codified as Tex. Bus. Orgs. Code § 21.223(a), (b) (the "Code")), which eliminated constructive fraud as a consideration for piercing the corporate veil in contract-based claims against holders, owners, subscribers, or affiliates. *See Willis v. Donnelly*, 199 S.W.3d 262, 271–72 & n.12 (Tex. 2006). The Act further modified *Castleberry* by eliminating the failure to observe corporate formalities as a consideration for piercing the corporate veil in all claims against holders, owners, subscribers, or affiliates. Tex. Bus. Corp. Act art. 2.21(A)(3) (expired Jan. 1, 2010); Tex. Bus. Orgs. Code § 21.223(a)(3); *see also Aluminum Chemicals (Bolivia), Inc. v. Bechtel Corp.*, 28 S.W.3d 64, 67–68 nn.3, 4 (Tex. App.—Texarkana 2000, no pet.).

"Actual fraud." The term "actual fraud" appearing in Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010) and Tex. Bus. Orgs. Code § 21.223(b) is not defined in either statute. In *Castleberry*, decided before article 2.21(A)(2) and section 21.223(b) were enacted, the supreme court defined actual fraud in the context of piercing the corporate veil as "involv[ing] dishonesty of purpose or intent to deceive." 721

S.W.2d at 273 (quoting *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964)). Courts have held that the fraud must relate to the transaction at issue. *Viajes Gerpa, S.A. v. Fazeli*, 522 S.W.3d 524, 534 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *see also, e.g., Menetti v. Chavers*, 974 S.W.2d 168, 175 (Tex. App.—San Antonio 1998, no pet.).

"Actual fraud" is not defined in section 21.223(b), but recent opinions have endorsed the *Castleberry* definition that it means "dishonesty of purpose or intent to deceive." *See, e.g., AvenueOne Properties, Inc. v. KP5 Ltd. Partnership*, 540 S.W.3d 643, 648–49 (Tex. App.—Amarillo 2018, no pet.); *TransPecos Banks v. Strobach*, 487 S.W.3d 722, 730 (Tex. App.—El Paso 2016, no pet.); *Tryco Enterprises, Inc. v. Robinson*, 390 S.W.3d 497, 508 (Tex. App.—Houston [1st Dist.] 2012, pet. dism'd); *Dick's Last Resort of West End, Inc. v. Market/Ross, Ltd.*, 273 S.W.3d 905, 908–10 (Tex. App.—Dallas 2008, pet. denied).

Application to limited liability companies. In 2011, the Texas legislature added section 101.002 to the Texas Business Organizations Code, specifying that the Code sections regulating and restricting veil piercing of corporations also apply to limited liability companies ("LLCs") and their members, owners, assignees, affiliates, and subscribers. Tex. Bus. Orgs. Code § 101.002 (applying sections 21.223 and 21.224 to LLCs and their members, owners, assignees, affiliates, and subscribers). For cases governed by the prior law, case law holds that claimants seeking to pierce the veil of an LLC must meet the same requirements as they would if the entity were a corporation. *See, e.g., Shook v. Walden*, 368 S.W.3d 604, 622 (Tex. App.—Austin 2012, pet. denied); *Metroplex Mailing Services, LLC v. RR Donnelley & Sons*, 410 S.W.3d 889, 896 (Tex. App.—Dallas 2013, no pet.).

Cases not covered by statute. For cases not involving contract-based claims against holders, owners, subscribers, or affiliates, use the following instruction:

> *Don Davis* used [*name of corporation*] as a means of evading an existing legal obligation, and holding only [*name of corporation*] responsible would result in injustice.

This instruction is derived from *Castleberry*, 721 S.W.2d at 271–73. By their terms, the actual fraud requirements of Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010) and Tex. Bus. Orgs. Code § 21.223(a)(2) apply only to claims relating to or arising from contractual obligations against holders, owners, subscribers, and affiliates. *See Menetti*, 974 S.W.2d at 173–74 (discussing when a showing of actual fraud is necessary after the 1997 amendments to the Texas Business Corporation Act).

"Injustice." No Texas case has stated whether "injustice" must be defined in cases of the type covered by the above alternate instruction. In *SSP Partners v. Gladstrong Investments (USA) Corp.*, the Texas Supreme Court discussed the term "injustice" and equated it with "abuse of the corporate structure." *SSP Partners v. Gladstrong Investments (USA) Corp.*, 275 S.W.3d 444, 454–55 (Tex. 2008). The court

said that "injustice" does not mean "a subjective perception of unfairness by an individual judge or juror"; rather, it is a "shorthand reference[] for the kinds of abuse . . . that the corporate structure should not shield—fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like." *SSP Partners*, 275 S.W.3d at 455. For additional cases discussing the term "injustice" in the context of piercing the corporate veil, see *Wilson v. Davis*, 305 S.W.3d 57, 68–72 (Tex. App.—Houston [1st Dist.] 2009, no pet.), and *Mancorp, Inc. v. Culpepper*, 836 S.W.2d 844 (Tex. App.—Houston [1st Dist.] 1992), *on remand from* 802 S.W.2d 226 (Tex. 1990).

1997 amendments to Business Corporation Act. Tex. Bus. Corp. Act art. 2.21 was amended in 1997 as follows:

1. the list of persons or entities protected from liability (except for actual fraud) was expanded to include "affiliates" (Tex. Bus. Corp. Act art. 2.21 (expired Jan. 1, 2010));

2. not only contractual obligations of the corporation but "matter[s] relating to or arising from" contractual obligations were excluded as grounds for disregarding the corporate fiction unless actual fraud was proved (Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010)); and

3. failure of the corporation to observe a corporate formality is no longer a ground for piercing the corporate veil in any case, not just contract cases (Tex. Bus. Corp. Act art. 2.21(A)(3) (expired Jan. 1, 2010)).

The Act further preempted liability "under common law or otherwise" for holders, owners, subscribers, and affiliates by providing the exclusive mechanism for imposing liability on such persons for obligations limited by the Act, subject to the exceptions stated in the Act. Tex. Bus. Corp. Act art. 2.21(B). Article 2.21 of the Act expired January 1, 2010, but this preemption has been carried over into the Code. *See* Tex. Bus. Orgs. Code §§ 21.224–.225; *see also SSP Partners*, 275 S.W.3d at 454–56 (holding single business enterprise liability theory for disregarding the corporate structure is fundamentally inconsistent with article 2.21 of the Act); *Willis*, 199 S.W.3d at 272–73 (refusing to impose liability against shareholders under a common-law theory of implied ratification where doing so would contravene statute precluding shareholder liability for contractual obligations of the corporation in the absence of actual fraud or an express agreement to assume personal liability); *Southern Union Co. v. City of Edinburg*, 129 S.W.3d 74, 87 (Tex. 2003) (article 2.21 controls action based on single business enterprise theory); *Country Village Homes, Inc. v. Patterson*, 236 S.W.3d 413, 432 (Tex. App.—Houston [1st Dist.] 2007, pet. dism'd, judgm't vacated by agr.) (finding of actual fraud is required to prove single business enterprise theory).

Application of Texas Business Organizations Code. In 2003, Texas enacted the Texas Business Organizations Code, which codified the Texas Business Corporation Act. The Texas Business Corporation Act expired January 1, 2010, and, as of that date,

all Texas corporations are governed by the Code, regardless of when the corporation was formed. Tex. Bus. Orgs. Code § 402.005.

PJC 108.5 Instruction on Circumvention of a Statute

Don Davis used [*name of corporation*] to circumvent a statute for the purpose of perpetrating and did perpetrate an actual fraud on *Paul Payne* primarily for the direct personal benefit of *Don Davis*.

[or]

COMMENT

When to use. PJC 108.5 should be used as an instruction accompanying the question in PJC 108.1 if it is alleged that a corporation has been used by a holder of shares, an owner of any beneficial interest in shares, a subscriber for shares whose subscription has been accepted, any of their affiliates, or affiliates of the corporation to circumvent a statute in a case relating to or arising from a contractual obligation. Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010); Tex. Bus. Orgs. Code § 21.223(a)(2), (b). See comment below, "Cases not covered by statute," for charge language to be used in other cases.

Use of "or." If used with other instructions (see PJC 108.2–108.4 and 108.6–108.7), PJC 108.5 must be followed by the word *or*, because a finding of any one of the theories for disregarding the corporate fiction defined in the instructions would support an affirmative answer to the question.

Source of instruction. PJC 108.5 is based on the supreme court's discussion of the theories for disregarding the corporate fiction in *Castleberry v. Branscum*, 721 S.W.2d 270, 271–73 (Tex. 1986). The language of *Castleberry* has been modified to reflect the enactment of Tex. Bus. Corp. Act art. 2.21(A) (the "Act") (expired Jan. 1, 2010, subsequently codified as Tex. Bus. Orgs. Code § 21.223(a), (b) (the "Code")), which eliminated constructive fraud as a consideration for piercing the corporate veil in contract-based claims against holders, owners, subscribers, or affiliates. *See Willis v. Donnelly*, 199 S.W.3d 262, 271–72 & n.12 (Tex. 2006). The Act further modified *Castleberry* by eliminating the failure to observe corporate formalities as a consideration for piercing the corporate veil in all claims against holders, owners, subscribers, or affiliates. Tex. Bus. Corp. Act art. 2.21(A)(3) (expired Jan. 2, 2010); Tex. Bus. Orgs. Code § 21.223(a)(3); *see also Aluminum Chemicals (Bolivia), Inc. v. Bechtel Corp.*, 28 S.W.3d 64, 67–68 nn.3, 4 (Tex. App.—Texarkana 2000, no pet.).

"Actual fraud." The term "actual fraud" appearing in Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010) and Tex. Bus. Orgs. Code § 21.223(b) is not defined in either statute. In *Castleberry*, decided before article 2.21(A)(2) and section 21.223(b) were enacted, the supreme court defined actual fraud in the context of piercing the corporate veil as "involv[ing] dishonesty of purpose or intent to deceive." 721

S.W.2d at 273 (quoting *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964)). Courts have held that the fraud must relate to the transaction at issue. *Viajes Gerpa, S.A. v. Fazeli*, 522 S.W.3d 524, 534 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *see also, e.g., Menetti v. Chavers*, 974 S.W.2d 168, 175 (Tex. App.—San Antonio 1998, no pet.).

"Actual fraud" is not defined in section 21.223(b), but recent opinions have endorsed the *Castleberry* definition that it means "dishonesty of purpose or intent to deceive." *See, e.g., AvenueOne Properties, Inc. v. KP5 Ltd. Partnership*, 540 S.W.3d 643, 648–49 (Tex. App.—Amarillo 2018, no pet.); *TransPecos Banks v. Strobach*, 487 S.W.3d 722, 730 (Tex. App.—El Paso 2016, no pet.); *Tryco Enterprises, Inc. v. Robinson*, 390 S.W.3d 497, 508 (Tex. App.—Houston [1st Dist.] 2012, pet. dism'd); *Dick's Last Resort of West End, Inc. v. Market/Ross, Ltd.*, 273 S.W.3d 905, 908–10 (Tex. App.—Dallas 2008, pet. denied).

Application to limited liability companies. In 2011, the Texas legislature added section 101.002 to the Texas Business Organizations Code, specifying that the Code sections regulating and restricting veil piercing of corporations also apply to limited liability companies ("LLCs") and their members, owners, assignees, affiliates, and subscribers. Tex. Bus. Orgs. Code § 101.002 (applying sections 21.223 and 21.224 to LLCs and their members, owners, assignees, affiliates, and subscribers). For cases governed by the prior law, case law holds that claimants seeking to pierce the veil of an LLC must meet the same requirements as they would if the entity were a corporation. *See, e.g., Shook v. Walden*, 368 S.W.3d 604, 622 (Tex. App.—Austin 2012, pet. denied); *Metroplex Mailing Services, LLC v. RR Donnelley & Sons*, 410 S.W.3d 889, 896 (Tex. App.—Dallas 2013, no pet.).

Cases not covered by statute. For cases not involving contract-based claims against holders, owners, subscribers, or affiliates, use the following instruction:

> *Don Davis* used [*name of corporation*] as a means of circumventing a statute, and holding only [*name of corporation*] responsible would result in injustice.

This instruction is derived from *Castleberry*, 721 S.W.2d at 271–73. By their terms, the actual fraud requirements of Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010) and Tex. Bus. Orgs. Code § 21.223(a)(2) apply only to claims relating to or arising from contractual obligations against holders, owners, subscribers, and affiliates. *See Menetti*, 974 S.W.2d at 173–74 (discussing when a showing of actual fraud is necessary after the 1997 amendments to the Texas Business Corporation Act).

"Injustice." No Texas case has stated whether "injustice" must be defined in cases of the type covered by the above alternate instruction. In *SSP Partners v. Gladstrong Investments (USA) Corp.*, the Texas Supreme Court discussed the term "injustice" and equated it with "abuse of the corporate structure." *SSP Partners v. Gladstrong Investments (USA) Corp.*, 275 S.W.3d 444, 454–55 (Tex. 2008). The court

said that "injustice" does not mean "a subjective perception of unfairness by an individual judge or juror"; rather, it is a "shorthand reference[] for the kinds of abuse . . . that the corporate structure should not shield—fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like." *SSP Partners*, 275 S.W.3d at 455. For additional cases discussing the term "injustice" in the context of piercing the corporate veil, see *Wilson v. Davis*, 305 S.W.3d 57, 68–72 (Tex. App.—Houston [1st Dist.] 2009, no pet.), and *Mancorp, Inc. v. Culpepper*, 836 S.W.2d 844 (Tex. App.—Houston [1st Dist.] 1992), *on remand from* 802 S.W.2d 226 (Tex. 1990).

1997 amendments to Business Corporation Act. Tex. Bus. Corp. Act art. 2.21 was amended in 1997 as follows:

1. the list of persons or entities protected from liability (except for actual fraud) was expanded to include "affiliates" (Tex. Bus. Corp. Act art. 2.21 (expired Jan. 1, 2010));

2. not only contractual obligations of the corporation but "matter[s] relating to or arising from" contractual obligations were excluded as grounds for disregarding the corporate fiction unless actual fraud was proved (Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010)); and

3. failure of the corporation to observe a corporate formality is no longer a ground for piercing the corporate veil in any case, not just contract cases (Tex. Bus. Corp. Act art. 2.21(A)(3) (expired Jan. 1, 2010)).

The Act further preempted liability "under common law or otherwise" for holders, owners, subscribers, and affiliates by providing the exclusive mechanism for imposing liability on such persons for obligations limited by the Act, subject to the exceptions stated in the Act. Tex. Bus. Corp. Act art. 2.21(B). Article 2.21 of the Act expired January 1, 2010, but this preemption has been carried over into the Code. *See* Tex. Bus. Orgs. Code §§ 21.224–.225; *see also SSP Partners*, 275 S.W.3d at 454–56 (holding single business enterprise liability theory for disregarding the corporate structure is fundamentally inconsistent with article 2.21 of the Act); *Willis*, 199 S.W.3d at 272–73 (refusing to impose liability against shareholders under a common-law theory of implied ratification where doing so would contravene statute precluding shareholder liability for contractual obligations of the corporation in the absence of actual fraud or an express agreement to assume personal liability); *Southern Union Co. v. City of Edinburg*, 129 S.W.3d 74, 87 (Tex. 2003) (article 2.21 controls action based on single business enterprise theory); *Country Village Homes, Inc. v. Patterson*, 236 S.W.3d 413, 432 (Tex. App.—Houston [1st Dist.] 2007, pet. dism'd, judgm't vacated by agr.) (finding of actual fraud is required to prove single business enterprise theory).

Application of Texas Business Organizations Code. In 2003, Texas enacted the Texas Business Organizations Code, which codified the Texas Business Corporation Act. The Texas Business Corporation Act expired January 1, 2010, and, as of that date,

all Texas corporations are governed by the Code, regardless of when the corporation was formed. Tex. Bus. Orgs. Code § 402.005.

PJC 108.6 Instruction on Protection of Crime or Justification of Wrong

Don Davis used [*name of corporation*] to protect a crime or to justify a wrong for the purpose of perpetrating and did perpetrate an actual fraud on *Paul Payne* primarily for the direct personal benefit of *Don Davis*.

[or]

COMMENT

When to use. PJC 108.6 should be used as an instruction accompanying the question in PJC 108.1 if it is alleged that a corporation has been used by a holder of shares, an owner of any beneficial interest in shares, a subscriber for shares whose subscription has been accepted, any of their affiliates, or affiliates of the corporation to protect a crime or to justify a wrong in a case relating to or arising from a contractual obligation. Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010); Tex. Bus. Orgs. Code § 21.223(a)(2), (b). See comment below, "Cases not covered by statute," for charge language to be used in other cases.

Use of "or." If used with other instructions (see PJC 108.2–108.5 and 108.7), PJC 108.6 must be followed by the word *or*, because a finding of any one of the theories for disregarding the corporate fiction defined in the instructions would support an affirmative answer to the question.

Source of instruction. PJC 108.6 is based on the supreme court's discussion of the theories for disregarding the corporate fiction in *Castleberry v. Branscum*, 721 S.W.2d 270, 271–73 (Tex. 1986). The language of *Castleberry* has been modified to reflect the enactment of Tex. Bus. Corp. Act art. 2.21(A) (the "Act") (expired Jan. 1, 2010, subsequently codified as Tex. Bus. Orgs. Code § 21.223(a), (b) (the "Code")), which eliminated constructive fraud as a consideration for piercing the corporate veil in contract-based claims against holders, owners, subscribers, or affiliates. *See Willis v. Donnelly*, 199 S.W.3d 262, 271–72 & n.12 (Tex. 2006). The Act further modified *Castleberry* by eliminating the failure to observe corporate formalities as a consideration for piercing the corporate veil in all claims against holders, owners, subscribers, or affiliates. Tex. Bus. Corp. Act art. 2.21(A)(3) (expired Jan. 1, 2010); Tex. Bus. Orgs. Code § 21.223(a)(3); *see also Aluminum Chemicals (Bolivia), Inc. v. Bechtel Corp.*, 28 S.W.3d 64, 67–68 nn.3, 4 (Tex. App.—Texarkana 2000, no pet.).

"Actual fraud." The term "actual fraud" appearing in Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010) and Tex. Bus. Orgs. Code § 21.223(b) is not defined in either statute. In *Castleberry*, decided before article 2.21(A)(2) and section 21.223(b) were enacted, the supreme court defined actual fraud in the context of pierc-

ing the corporate veil as "involv[ing] dishonesty of purpose or intent to deceive." 721 S.W.2d at 273 (quoting *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964)). Courts have held that the fraud must relate to the transaction at issue. *Viajes Gerpa, S.A. v. Fazeli*, 522 S.W.3d 524, 534 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *see also, e.g., Menetti v. Chavers*, 974 S.W.2d 168, 175 (Tex. App.—San Antonio 1998, no pet.).

"Actual fraud" is not defined in section 21.223(b), but recent opinions have endorsed the *Castleberry* definition that it means "dishonesty of purpose or intent to deceive." *See, e.g., AvenueOne Properties, Inc. v. KP5 Ltd. Partnership*, 540 S.W.3d 643, 648–49 (Tex. App.—Amarillo 2018, no pet.); *TransPecos Banks v. Strobach*, 487 S.W.3d 722, 730 (Tex. App.—El Paso 2016, no pet.); *Tryco Enterprises, Inc. v. Robinson*, 390 S.W.3d 497, 508 (Tex. App.—Houston [1st Dist.] 2012, pet. dism'd); *Dick's Last Resort of West End, Inc. v. Market/Ross, Ltd.*, 273 S.W.3d 905, 908–10 (Tex. App.—Dallas 2008, pet. denied).

"Protection of crime." "Protection of crime" is one of the grounds given by the supreme court in *Castleberry* for disregarding the corporate fiction. This phrase appears to include but not be limited to "perpetration of crime." Its scope includes, therefore, not only those situations in which the party commits a crime but also situations in which a crime has been abetted or the criminal has otherwise received assistance. The practitioner should amend this question as appropriate to reflect the facts of the case.

Application to limited liability companies. In 2011, the Texas legislature added section 101.002 to the Texas Business Organizations Code, specifying that the Code sections regulating and restricting veil piercing of corporations also apply to limited liability companies ("LLCs") and their members, owners, assignees, affiliates, and subscribers. Tex. Bus. Orgs. Code § 101.002 (applying sections 21.223 and 21.224 to LLCs and their members, owners, assignees, affiliates, and subscribers). For cases governed by the prior law, case law holds that claimants seeking to pierce the veil of an LLC must meet the same requirements as they would if the entity were a corporation. *See, e.g., Shook v. Walden*, 368 S.W.3d 604, 622 (Tex. App.—Austin 2012, pet. denied); *Metroplex Mailing Services, LLC v. RR Donnelley & Sons*, 410 S.W.3d 889, 896 (Tex. App.—Dallas 2013, no pet.).

Cases not covered by statute. For cases not involving contract-based claims against holders, owners, subscribers, or affiliates, use the following instruction:

> *Don Davis* used [*name of corporation*] to protect a crime or to justify a wrong, and holding only [*name of corporation*] responsible would result in injustice.

This instruction is derived from *Castleberry*, 721 S.W.2d at 271–73. By their terms, the actual fraud requirements of Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010) and Tex. Bus. Orgs. Code § 21.223(a)(2) apply only to claims relating to or aris-

ing from contractual obligations against holders, owners, subscribers, and affiliates. *See Menetti*, 974 S.W.2d at 173–74 (discussing when a showing of actual fraud is necessary after the 1997 amendments to the Texas Business Corporation Act).

"Injustice." No Texas case has stated whether "injustice" must be defined in cases of the type covered by the above alternate instruction. In *SSP Partners v. Gladstrong Investments (USA) Corp.*, the Texas Supreme Court discussed the term "injustice" and equated it with "abuse of the corporate structure." *SSP Partners v. Gladstrong Investments (USA) Corp.*, 275 S.W.3d 444, 454–55 (Tex. 2008). The court said that "injustice" does not mean "a subjective perception of unfairness by an individual judge or juror"; rather, it is a "shorthand reference[] for the kinds of abuse . . . that the corporate structure should not shield—fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like." *SSP Partners*, 275 S.W.3d at 455. For additional cases discussing the term "injustice" in the context of piercing the corporate veil, see *Wilson v. Davis*, 305 S.W.3d 57, 68–72 (Tex. App.—Houston [1st Dist.] 2009, no pet.), and *Mancorp, Inc. v. Culpepper*, 836 S.W.2d 844 (Tex. App.—Houston [1st Dist.] 1992), *on remand from* 802 S.W.2d 226 (Tex. 1990).

1997 amendments to Business Corporation Act. Tex. Bus. Corp. Act art. 2.21 was amended in 1997 as follows:

1. the list of persons or entities protected from liability (except for actual fraud) was expanded to include "affiliates" (Tex. Bus. Corp. Act art. 2.21 (expired Jan. 1, 2010));

2. not only contractual obligations of the corporation but "matter[s] relating to or arising from" contractual obligations were excluded as grounds for disregarding the corporate fiction unless actual fraud was proved (Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010)); and

3. failure of the corporation to observe a corporate formality is no longer a ground for piercing the corporate veil in any case, not just contract cases (Tex. Bus. Corp. Act art. 2.21(A)(3) (expired Jan. 1, 2010)).

The Act further preempted liability "under common law or otherwise" for holders, owners, subscribers, and affiliates by providing the exclusive mechanism for imposing liability on such persons for obligations limited by the Act, subject to the exceptions stated in the Act. Tex. Bus. Corp. Act art. 2.21(B). Article 2.21 of the Act expired January 1, 2010, but this preemption has been carried over into the Code. *See* Tex. Bus. Orgs. Code §§ 21.224–.225; *see also SSP Partners*, 275 S.W.3d at 454–56 (holding single business enterprise liability theory for disregarding the corporate structure is fundamentally inconsistent with article 2.21 of the Act); *Willis*, 199 S.W.3d at 272–73 (refusing to impose liability against shareholders under a common-law theory of implied ratification where doing so would contravene statute precluding shareholder liability for contractual obligations of the corporation in the absence of actual fraud or

an express agreement to assume personal liability); *Southern Union Co. v. City of Edinburg*, 129 S.W.3d 74, 87 (Tex. 2003) (article 2.21 controls action based on single business enterprise theory); *Country Village Homes, Inc. v. Patterson*, 236 S.W.3d 413, 432 (Tex. App.—Houston [1st Dist.] 2007, pet. dism'd, judgm't vacated by agr.) (finding of actual fraud is required to prove single business enterprise theory).

Application of Texas Business Organizations Code. In 2003, Texas enacted the Texas Business Organizations Code, which codified the Texas Business Corporation Act. The Texas Business Corporation Act expired January 1, 2010, and, as of that date, all Texas corporations are governed by the Code, regardless of when the corporation was formed. Tex. Bus. Orgs. Code § 402.005.

PJC 108.7 Instruction on Monopoly

Don Davis used [*name of corporation*] to achieve a monopoly for the purpose of perpetrating and did perpetrate an actual fraud on *Paul Payne* primarily for the direct personal benefit of *Don Davis*.

[or]

COMMENT

When to use. PJC 108.7 should be used as an instruction accompanying the question in PJC 108.1 if it is alleged that a corporation has been used by a holder of shares, an owner of any beneficial interest in shares, a subscriber for shares whose subscription has been accepted, any of their affiliates, or affiliates of the corporation to achieve or perpetrate a monopoly in a case relating to or arising from a contractual obligation. Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010); Tex. Bus. Orgs. Code § 21.223(a)(2), (b). See comment below, "Cases not covered by statute," for charge language to be used in other cases.

Use of "or." If used with other instructions (see PJC 108.2–108.6), PJC 108.7 must be followed by the word *or*, because a finding of any one of the theories for disregarding the corporate fiction defined in the instructions would support an affirmative answer to the question.

Source of instruction. PJC 108.7 is based on the supreme court's discussion of the theories for disregarding the corporate fiction in *Castleberry v. Branscum*, 721 S.W.2d 270, 271–73 (Tex. 1986). The language of *Castleberry* has been modified to reflect the enactment of Tex. Bus. Corp. Act art. 2.21(A) (the "Act") (expired Jan. 1, 2010, subsequently codified as Tex. Bus. Orgs. Code § 21.223(a), (b) (the "Code")), which eliminated constructive fraud as a consideration for piercing the corporate veil in contract-based claims against holders, owners, subscribers, or affiliates. *See Willis v. Donnelly*, 199 S.W.3d 262, 271–72 & n.12 (Tex. 2006). The Act further modified *Castleberry* by eliminating the failure to observe corporate formalities as a consideration for piercing the corporate veil in all claims against holders, owners, subscribers, or affiliates. Tex. Bus. Corp. Act art. 2.21(A)(3) (expired Jan. 1, 2010); Tex. Bus. Orgs. Code § 21.223(a)(3); *see also Aluminum Chemicals (Bolivia), Inc. v. Bechtel Corp.*, 28 S.W.3d 64, 67–68 nn.3, 4 (Tex. App.—Texarkana 2000, no pet.).

"Actual fraud." The term "actual fraud" appearing in Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010) and Tex. Bus. Orgs. Code § 21.223(b) is not defined in either statute. In *Castleberry*, decided before article 2.21(A)(2) and section 21.223(b) were enacted, the supreme court defined actual fraud in the context of piercing the corporate veil as "involv[ing] dishonesty of purpose or intent to deceive." 721

S.W.2d at 273 (quoting *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964)). Courts have held that the fraud must relate to the transaction at issue. *Viajes Gerpa, S.A. v. Fazeli*, 522 S.W.3d 524, 534 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *see also, e.g., Menetti v. Chavers*, 974 S.W.2d 168, 175 (Tex. App.—San Antonio 1998, no pet.).

"Actual fraud" is not defined in section 21.223(b), but recent opinions have endorsed the *Castleberry* definition that it means "dishonesty of purpose or intent to deceive." *See, e.g., AvenueOne Properties, Inc. v. KP5 Ltd. Partnership*, 540 S.W.3d 643, 648–49 (Tex. App.—Amarillo 2018, no pet.); *TransPecos Banks v. Strobach*, 487 S.W.3d 722, 730 (Tex. App.—El Paso 2016, no pet.); *Tryco Enterprises, Inc. v. Robinson*, 390 S.W.3d 497, 508 (Tex. App.—Houston [1st Dist.] 2012, pet. dism'd); *Dick's Last Resort of West End, Inc. v. Market/Ross, Ltd.*, 273 S.W.3d 905, 908–10 (Tex. App.—Dallas 2008, pet. denied).

Application to limited liability companies. In 2011, the Texas legislature added section 101.002 to the Texas Business Organizations Code, specifying that the Code sections regulating and restricting veil piercing of corporations also apply to limited liability companies ("LLCs") and their members, owners, assignees, affiliates, and subscribers. Tex. Bus. Orgs. Code § 101.002 (applying sections 21.223 and 21.224 to LLCs and their members, owners, assignees, affiliates, and subscribers). For cases governed by the prior law, case law holds that claimants seeking to pierce the veil of an LLC must meet the same requirements as they would if the entity were a corporation. *See, e.g., Shook v. Walden*, 368 S.W.3d 604, 622 (Tex. App.—Austin 2012, pet. denied); *Metroplex Mailing Services, LLC v. RR Donnelley & Sons*, 410 S.W.3d 889, 896 (Tex. App.—Dallas 2013, no pet.).

Cases not covered by statute. For cases not involving contract-based claims against holders, owners, subscribers, or affiliates, use the following instruction:

> *Don Davis* used [*name of corporation*] to achieve or perpetrate a monopoly, and holding only [*name of corporation*] liable would result in injustice.

This instruction is derived from *Castleberry*, 721 S.W.2d at 271–73. By their terms, the actual fraud requirements of Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010) and Tex. Bus. Orgs. Code § 21.223(a)(2) apply only to claims relating to or arising from contractual obligations against holders, owners, subscribers, and affiliates. *See Menetti*, 974 S.W.2d at 173–74 (discussing when a showing of actual fraud is necessary after the 1997 amendments to the Texas Business Corporation Act).

"Injustice." No Texas case has stated whether "injustice" must be defined in cases of the type covered by the above alternate instruction. In *SSP Partners v. Gladstrong Investments (USA) Corp.*, the Texas Supreme Court discussed the term "injustice" and equated it with "abuse of the corporate structure." *SSP Partners v. Gladstrong Investments (USA) Corp.*, 275 S.W.3d 444, 454–55 (Tex. 2008). The court

said that "injustice" does not mean "a subjective perception of unfairness by an individual judge or juror"; rather, it is a "shorthand reference[] for the kinds of abuse . . . that the corporate structure should not shield—fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like." *SSP Partners*, 275 S.W.3d at 455. For additional cases discussing the term "injustice" in the context of piercing the corporate veil, see *Wilson v. Davis*, 305 S.W.3d 57, 68–72 (Tex. App.—Houston [1st Dist.] 2009, no pet.), and *Mancorp, Inc. v. Culpepper*, 836 S.W.2d 844 (Tex. App.—Houston [1st Dist.] 1992), *on remand from* 802 S.W.2d 226 (Tex. 1990).

1997 amendments to Business Corporation Act. Tex. Bus. Corp. Act art. 2.21 was amended in 1997 as follows:

1. the list of persons or entities protected from liability (except for actual fraud) was expanded to include "affiliates" (Tex. Bus. Corp. Act art. 2.21 (expired Jan. 1, 2010));

2. not only contractual obligations of the corporation but "matter[s] relating to or arising from" contractual obligations were excluded as grounds for disregarding the corporate fiction unless actual fraud was proved (Tex. Bus. Corp. Act art. 2.21(A)(2) (expired Jan. 1, 2010)); and

3. failure of the corporation to observe a corporate formality is no longer a ground for piercing the corporate veil in any case, not just contract cases (Tex. Bus. Corp. Act art. 2.21(A)(3) (expired Jan. 1, 2010)).

The Act further preempted liability "under common law or otherwise" for holders, owners, subscribers, and affiliates by providing the exclusive mechanism for imposing liability on such persons for obligations limited by the Act, subject to the exceptions stated in the Act. Tex. Bus. Corp. Act art. 2.21(B). Article 2.21 of the Act expired January 1, 2010, but this preemption has been carried over into the Code. *See* Tex. Bus. Orgs. Code §§ 21.224–.225; *see also SSP Partners*, 275 S.W.3d at 454–56 (holding single business enterprise liability theory for disregarding the corporate structure is fundamentally inconsistent with article 2.21 of the Act); *Willis*, 199 S.W.3d at 272–73 (refusing to impose liability against shareholders under a common-law theory of implied ratification where doing so would contravene statute precluding shareholder liability for contractual obligations of the corporation in the absence of actual fraud or an express agreement to assume personal liability); *Southern Union Co. v. City of Edinburg*, 129 S.W.3d 74, 87 (Tex. 2003) (article 2.21 controls action based on single business enterprise theory); *Country Village Homes, Inc. v. Patterson*, 236 S.W.3d 413, 432 (Tex. App.—Houston [1st Dist.] 2007, pet. dism'd, judgm't vacated by agr.) (finding of actual fraud is required to prove single business enterprise theory).

Application of Texas Business Organizations Code. In 2003, Texas enacted the Texas Business Organizations Code, which codified the Texas Business Corporation Act. The Texas Business Corporation Act expired January 1, 2010, and, as of that date,

all Texas corporations are governed by the Code, regardless of when the corporation was formed. Tex. Bus. Orgs. Code § 402.005.

PJC 109.1 Question and Instruction on Conspiracy

QUESTION _____

[Conditioned on findings of a statutory violation or a tort (other than negligence) that proximately caused damages.]

Was *Connie Conspirator* part of a conspiracy that damaged *Paul Payne*?

To be part of a conspiracy, *Connie Conspirator* and another person or persons must have had knowledge of, agreed to, and intended a common objective or course of action that resulted in the damages to *Paul Payne*. One or more persons involved in the conspiracy must have performed some act or acts to further the conspiracy.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 109.1 submits the question of conspiracy to accomplish the unlawful objective of harming another by committing a statutory violation or a tort (other than negligence). See comment below, "Conspiracy to accomplish lawful objective by unlawful means," for the situation involving a conspiracy to employ an unlawful means to accomplish a lawful objective. Civil conspiracy to unlawfully harm another is a derivative tort. Liability must be dependent on participation in some underlying statutory violation or a tort (other than negligence). *Chu v. Hong*, 249 S.W.3d 441, 444 n.4 (Tex. 2008). It is a means for imposing joint and several liability on persons in addition to the actual perpetrator(s) of the underlying tort.

Source of question and instruction. A civil conspiracy is "a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." *Firestone Steel Products Co. v. Barajas*, 927 S.W.2d 608, 614 (Tex. 1996). The elements of civil conspiracy have been stated as "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result." *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 222 (Tex. 2017); *Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005); *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996); *see also Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 719–20 (Tex. 1995) (explaining elements of conspiracy claim).

Broad-form submission. PJC 109.1 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that

"the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Knowledge, intent, and agreement. To be liable for conspiracy, a party must be shown to have intended to do more than engage in the conduct that resulted in the injury. It must be shown that from the inception of the combination or agreement the party intended to cause the injury or was aware of the harm likely to result from the wrongful conduct. *Triplex Communications, Inc.*, 900 S.W.2d at 720; *Great National Life Insurance Co. v. Chapa*, 377 S.W.2d 632, 635 (Tex. 1964); *see First United*, 514 S.W.3d at 222 (parties must be aware of intended harm or proposed wrongful conduct at onset of combination or agreement). Thus, a party must be shown to have known the object and purpose of the conspiracy and to have had a meeting of the minds with the other conspirators to accomplish that object and purpose, intending to bring about the resulting injury. *First United*, 514 S.W.3d at 222–23; *see also Firestone Steel*, 927 S.W.2d at 614 ("gist of civil conspiracy" is injury conspirators intend to cause).

Unlawful act. A defendant's liability for conspiracy is based on participation in the statutory violation or underlying tort (other than negligence) that would have been actionable against at least one of the conspirators individually. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996); *International Bankers Life Insurance Co. v. Holloway*, 368 S.W.2d 567, 581 (Tex. 1963). An act or declaration by a conspirator not in pursuance of the common objective is not actionable against coconspirators. *Chapa*, 377 S.W.2d at 635. Likewise, an improper motive in performing a lawful action will not support liability for conspiracy. *Kingsbery v. Phillips Petroleum Co.*, 315 S.W.2d 561, 576 (Tex. Civ. App.—Austin 1958, writ ref'd n.r.e.). The injury must have been caused by the tort or statutory violation that the conspirator agreed with the perpetrator to bring about while intending the resulting harm. *First United*, 514 S.W.3d at 224; *Triplex Communications, Inc.*, 900 S.W.2d at 720. Once a civil conspiracy is found, each coconspirator is responsible for the actions of any coconspirator in furtherance of the conspiracy. Thus, each element of the underlying tort or violation is imputed to each participant. *Akin v. Dahl*, 661 S.W.2d 917, 921 (Tex. 1983).

Conspiracy to accomplish lawful objective by unlawful means. PJC 109.1 submits the proper question if a court or jury has established the existence of an unlawful objective, that is, a statutory violation or a tort (other than negligence). The supreme court's opinions regarding conspiracy also define a conspiracy cause of action arising when the conspirators pursue a lawful objective by unlawful means. *First United*, 514 S.W.3d at 222; *Triplex Communications, Inc.*, 900 S.W.2d at 719–20; *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983); *Chapa*, 377 S.W.2d at 635. The Commit-

tee believes PJC 109.1 can be used to submit either theory but that it may need modification in some instances depending on the facts of the case.

Liability. The damages recoverable in an action for civil conspiracy are those damages resulting from the commission of the wrong, not the conspiratorial agreement. *Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922, 925 (Tex. 1979); *see also Triplex Communications, Inc.*, 900 S.W.2d at 720; *Walker v. Hartman*, 516 S.W.3d 71, 81 (Tex. App.—Beaumont 2017, pet. denied). Therefore, the Committee recommends that PJC 109.1 be submitted after, and conditioned on, an affirmative finding of damages caused by the statutory violation or underlying tort (other than negligence). In those instances in which the evidence suggests that divisible damages arose from multiple underlying torts only some of which were the subject of the conspiracy, the court should consider obtaining findings to determine which underlying statutory violations or torts were the subject of the conspiracy and the damages and submitting a separate issue on damages caused by those underlying violations or torts. *See THPD, Inc. v. Continental Imports, Inc.*, 260 S.W.3d 593, 604–05 (Tex. App.—Austin 2008, no pet.).

For conspirators to be individually liable as a result of a conspiracy, the actions agreed to by the conspirators must cause the damages claimed. *First United*, 514 S.W.3d at 224; *ERI Consulting Engineers, Inc. v. Swinnea*, 318 S.W.3d 867, 881 (Tex. 2010).

Exemplary damages. An affirmative finding on an underlying cause of action that includes a finding sufficient to impose exemplary damages may be imputed to all participants in the conspiracy on an affirmative conspiracy finding. *Akin*, 661 S.W.2d at 921. For questions submitting exemplary damages, see PJC 115.37 and 115.38 and the Comments accompanying those questions.

PJC 110.1 Libel and Slander (Comment on Broad Form)

Explanatory note. Chapter 110 governs submission of libel and slander cases. The following general comments should be considered when using the pattern submissions in chapter 110.

Libel and slander distinguished. Defamation includes both libel and slander. Libel is a publication by writing or some other graphic means (including broadcasting). *See* Tex. Civ. Prac. & Rem. Code § 73.001; *Neely v. Wilson*, 418 S.W.3d 52, 60 (Tex. 2013) ("[T]he broadcasting of defamatory statements read from a script is libel rather than slander."). Slander is orally communicated defamatory words. *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995). Libel in Texas, when the common law still prevailed, was codified in a statute, now Tex. Civ. Prac. & Rem. Code §§ 73.001–.006. Slander remains controlled by the common law, subject to constitutional standards in an appropriate case. *Cain v. Hearst Corp.*, 878 S.W.2d 577, 580 (Tex. 1994).

Broad-form submission. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). Defamation claims involve multiple elements and defenses, all of which may not apply to every case, and many publications give rise to multiple allegedly defamatory statements. That many defamation cases involve constitutional issues further complicates the trial court's task in crafting a jury charge. Therefore, the drafting of a broad-form pattern charge in defamation cases was deemed not feasible by the Committee. Instead, the questions and instructions in chapter 110 assume as their subject a single allegedly defamatory statement and provide patterns from which to select those elements or defenses that apply in a particular case. Broad-form submission, however, may be feasible in some cases, and the questions and instructions in chapter 110 may be combined as appropriate. For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

PJC 110.2 Question and Instruction on Publication

QUESTION _____

Did *Don Davis* publish the following: [*insert alleged defamatory matter*]?

"Publish" means intentionally or negligently to communicate the matter to a person other than *Paul Payne* who is capable of understanding its meaning.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. "To maintain a defamation cause of action, the plaintiff must prove that the defendant: (1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private party, regarding the truth of the statement." *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998); *see also Bedford v. Spassoff*, 520 S.W.3d 901, 905 (Tex. 2017). The allegedly defamatory statement must be directed at the plaintiff; that is, it must appear that the plaintiff is the person with reference to whom the allegedly defamatory statement was made. *Huckabee v. Time Warner Entertainment Co.*, 19 S.W.3d 413, 429 (Tex. 2000); *Newspapers, Inc. v. Matthews*, 339 S.W.2d 890, 893 (Tex 1960). Regarding the plaintiff's burden to prove falsity, see PJC 110.4. PJC 110.2 submits the element of publication if it is in dispute.

Source of definition. The definition of "publish" is derived from *Kelley v. Rinkle*, 532 S.W.2d 947, 948 (Tex. 1976), and *AccuBanc Mortgage Corp. v. Drummonds*, 938 S.W.2d 135, 147 (Tex. App.—Fort Worth 1996, writ denied).

Self-defamation. In *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 581 (Tex. 2017), the Texas Supreme Court expressly declined to recognize a theory of self-publication.

PJC 110.3 Question and Instructions on Defamatory

If you answered "Yes" to Question _____ [*110.2*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was the statement in Question _____ [*110.2*] defamatory concerning *Paul Payne*?

"Defamatory" means an ordinary person would interpret the statement in a way that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach the person's honesty, integrity, virtue, or reputation.

In deciding whether a statement is defamatory, you must construe the [*article/broadcast/other context*] as a whole and in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. Whether a statement is capable of a defamatory meaning is a threshold question for the court. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex. 2000); *Gartman v. Hedgpeth*, 157 S.W.2d 139, 141 (Tex. 1941). Only when the court determines that the language is ambiguous or of doubtful meaning should the jury determine the statement's meaning and effect on an ordinary person. *Hancock v. Variyam*, 400 S.W.3d 59 (Tex. 2013); *Musser v. Smith Protective Services, Inc.*, 723 S.W.2d 653, 655 (Tex. 1987). This question submits the element of whether the matter was defamatory concerning the plaintiff.

Conditioning. If publication is not in dispute and PJC 110.2 is not submitted, the conditioning language should be deleted and the question should be modified as follows:

> Was the following defamatory concerning *Paul Payne*: [*insert alleged defamatory matter*]?

Source of definition and instruction. The definition of "defamatory" is taken from Tex. Civ. Prac. & Rem. Code § 73.001 and *Turner*, 38 S.W.3d at 115. Although section 73.001 includes the phrase "blacken the memory of the dead," that phrase has not been included in light of authority holding that the legislature did not intend

merely by codifying a definition to create by implication a cause of action for defaming the dead. *See Renfro Drug Co. v. Lawson*, 160 S.W.2d 246, 249 (Tex. 1942); *see also Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 940 n.1 (Tex. 1988) ("While one cannot bring a cause of action for the defamation of a person already dead, one who is alive while he was defamed and later dies, has a cause of action for defamation which survives his death."). The instruction on construing the statement is taken from *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964); *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 154 (Tex. 2004); and *Turner*, 38 S.W.3d at 113–15.

Corporations and other entities. Corporations and other entities may bring actions for defamation. *Neely v. Wilson*, 418 S.W.3d 52, 72 (Tex. 2013) (recognizing professional associations share the same rights as for-profit corporations as to maintaining defamation claims). *See also Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc.*, 434 S.W.3d 142 (Tex. 2014); *General Motors Acceptance Corp. v. Howard*, 487 S.W.2d 708, 712–13 (Tex. 1972). In cases involving a corporate plaintiff, the definition of "defamatory" should be adjusted by changing "living person" to an appropriate descriptive term. A corporation may suffer reputation damages; such damages are noneconomic in nature. *Waste Management of Texas*, 434 S.W.3d at 147. Defamation injures the corporation's reputation, not its business. *Waste Management of Texas*, 434 S.W.3d at 151 & n.35. Business disparagement and defamation are distinct causes of action. *Waste Management of Texas*, 434 S.W.3d at 155. *See also Burbage v. Burbage*, 447 S.W.3d 249, 261 n.6 (Tex. 2014). See PJC 110.15 for jury instructions concerning business disparagement.

Natural defects. Libel encompasses the publication of "natural defects" of an individual when that publication exposes the individual to public hatred, ridicule, or financial injury. Tex. Civ. Prac. & Rem. Code § 73.001. The few cases addressing "natural defects" involve accusations of a mental problem. *See, e.g., Enterprise Co. v. Ellis*, 98 S.W.2d 452 (Tex. Civ. App.—Beaumont 1936, no writ) (accusation that plaintiff was "goofey" or suffering from mental imbalance); *Hibdon v. Moyer*, 197 S.W. 1117 (Tex. Civ. App.—El Paso 1917, no writ) (accusation that plaintiff suffered from "brainstorms"); *see also Raymer v. Doubleday & Co., Inc.*, 615 F.2d 241, 243 (5th Cir. 1980) (accusation involving physical appearance, i.e., baldness or pudginess, did not implicate a natural defect according to the court). Because this category of defamation remains viable but has rarely been used as the basis for a cause of action, the Committee removed reference to "natural defects" from the statutory definition of "defamatory" in the pattern instruction.

Defamation injurious in office, profession, or occupation. Historically, a statement injuring one in his office, profession, or occupation has been classified as defamatory per se. In *Hancock*, 400 S.W.3d at 67, the court, relying on *Restatement (Second) of Torts* § 573 (1977), held that disparagement of a general character, equally discreditable to all persons, is not enough to make it defamatory per se unless the particular quality disparaged is of such character that it is peculiarly valuable in the plaintiff's

business or profession. *Hancock*, 400 S.W.3d at 63 (statements that a physician professor had a "reputation for lack of veracity" and "deals in half truths" were not defamatory per se as affecting the plaintiff in his profession); *Bedford v. Spassoff*, 520 S.W.3d 901, 904 (Tex. 2017) (statement that a youth baseball team coach was a "home wrecker" was not defamatory per se because moral judgment is not a "peculiar or unique skill related to baseball or to running a baseball organization").

PJC 110.4 Question and Instruction on Falsity

If you answered "Yes" to Question _____ [*110.3*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was the statement [*insert matter alleged to be defamatory*] false at the time it was made as it related to *Paul Payne*?

"False" means that a statement is not substantially true. A statement is "substantially true" if it varies from the literal truth in only minor details or if, in the mind of the average person, the gist of the statement is no more damaging to the person affected by it than a literally true statement would have been.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. The question and instruction in PJC 110.4 should be used when the plaintiff is required to establish that the publication is false. At common law, falsity is presumed and substantial truth is an affirmative defense. *See* Tex. Civ. Prac. & Rem. Code § 73.005 ("The truth of the statement in the publication on which an action for libel is based is a defense to the action."). But a series of cases has limited the application of this presumption on constitutional grounds. A public official or public figure must prove that defamatory statements made about him were false. *Bentley v. Bunton*, 94 S.W.3d 561, 586 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)). And if the defamatory speech is of public concern and the defendant is a member of the media, the plaintiff must prove falsity. *Brady v. Klentzman*, 515 S.W.3d 878, 883 (Tex. 2017).

The common-law presumption continues to apply in cases brought by private plaintiffs involving matters of private concern. *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995) ("In suits brought by private individuals, truth is an affirmative defense to slander.") See PJC 110.8 for guidance on how to submit substantial truth as an affirmative defense.

Falsity must be proved by a preponderance of the evidence. *Bentley*, 94 S.W.3d at 587; *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 117 (Tex. 2000). The definition of falsity is based on the discussion of substantial truth in *McIlvain v. Jacobs*, 794 S.W.2d 14, 16 (Tex. 1990).

Questions of law. Whether a publication is false presents a question of law "[i]f the underlying facts as to the gist of the defamatory charge are undisputed." *McIlvain*, 794 S.W.2d at 16. Whether a plaintiff is a public figure or public official is a question of constitutional law to be decided by the court. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998) (citing *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966)). Whether the subject matter of a publication is a matter of public concern is a question of law for the court. *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983).

Statements of opinion, fair comment, and rhetorical hyperbole are protected by both the state and federal constitutions. *Bentley*, 94 S.W.3d at 579–80 (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19–21 (1990)); *Neely v. Wilson*, 418 S.W.3d 52, 62 (Tex. 2013). The protection for statements of opinion in *Bentley* and *Milkovich* appears to be broader than the "fair comment" statutory privilege in Tex Civ. Prac. & Rem. Code § 73.002(b)(2). Determination of whether a statement is protected as opinion, fair comment, or rhetorical hyperbole is generally a question of law for the court. *Bentley*, 94 S.W.3d at 580. *But see Restatement (Second) of Torts* § 566 cmt. c (1977) (noting uncertain treatment of opinion in private party cases not involving matters of public concern).

Fair comment privilege. The fair comment privilege afforded by Tex Civ. Prac. & Rem. Code § 73.002(b)(2) cannot rest on a false statement of fact. Comments that assert or affirm false statements of fact are not within the privilege. *Neely*, 418 S.W.3d at 70. In an appropriate case, the court may submit an issue inquiring about the truth of a statement of fact essential to the existence of the privilege. A publication conveying a substantially false meaning by omitting material facts or juxtaposing facts that, viewed in isolation, are true may not be protected by the fair comment privilege. *Neely*, 418 S.W.3d at 70. See PJC 110.9.

Official/judicial proceeding privilege. Texas law recognizes a privilege to give a fair, true, and impartial report of certain public proceedings (Tex Civ. Prac. & Rem. Code § 73.002(b)). The official/judicial proceedings privilege assesses whether the published account of the proceedings (not the underlying allegations made in those proceedings) was fair, true, and impartial. *KBMT Operating Co. v. Toledo*, 492 S.W.3d 710, 711 (Tex. 2016). Where there are no fact questions on the substantial truth of the account of the proceeding, the privilege is a question of law. Where the facts are contested, the official/judicial proceeding defense may require a question whether the publication was a fair, true, and impartial account of the public proceeding involved. *Neely*, 418 S.W.3d at 68.

Accurate reporting defense. Texas law recognizes a defense for newspapers, other periodicals, or broadcasters to accurately report allegations made by a third party regarding a matter of public concern. Tex. Civ. Prac. & Rem. Code § 73.005(b). In an appropriate case, the court may submit an issue inquiring about the accuracy of the media party's report to determine applicability of the defense. In such a situation, the Committee expresses no opinion about which party assumes the burden of proof.

Affirmative defense of truth should not be submitted when plaintiff bears burden of falsity. Where the plaintiff bears the burden to prove the falsity of a publication, there should be no submission of a question on the affirmative defense of truth. *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 441 (Tex. 2017) (Anti-SLAPP case).

PJC 110.5 Question and Instruction on Negligence

If you answered "Yes" to Question _____ [*110.4*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Did *Don Davis* know or should *he* have known, in the exercise of ordinary care, that the [*article/broadcast/other context*] contained in Question _____ [*110.3*] was false and had the potential to be defamatory?

"Ordinary care" concerning the truth of the statement and its potential to be defamatory means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. Fault is an element of defamation, but the level of fault required can be either negligence or "actual malice," depending on the circumstances of the case. *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015). When negligence is required, PJC 110.5 should be submitted. When actual malice is required, PJC 110.6 should be submitted.

Actual malice is required when the plaintiff is a public official and the defamatory statement relates to his official duties or fitness for office. *Greer v. Abraham*, 489 S.W.3d 440, 444, 447 (Tex. 2016); *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 811–15 (Tex. 1976). Actual malice is also required when the plaintiff is a public figure, either generally or with respect to the subject of the defamatory statement. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 116 (Tex. 2000); *Foster*, 541 S.W.2d at 816–17. And actual malice is required when the plaintiff is a private figure, but the defendant is a media defendant and the subject of the defamatory statement is a matter of public concern. *Brady v. Klentzman*, 515 S.W.3d 878, 883 (Tex. 2017).

In all other cases, negligence is required. *In re Lipsky*, 460 S.W.3d at 593 ("The status of the person allegedly defamed determines the requisite degree of fault. A private individual need only prove negligence, whereas a public figure or official must prove actual malice."); *Hancock v. Variyam*, 400 S.W.3d 59, 65 n.7 (2013).

To establish negligence, the plaintiff must prove that (1) the defendant knew or should have known that the statement was false and (2) the content of the publication would warn a reasonably prudent person of its defamatory potential. *See Foster*, 541 S.W.2d at 819–20.

"Defamatory" should be defined in this question or elsewhere in the charge as appropriate. See PJC 110.3. If the case involves a defamatory impression created by the defendant, use PJC 110.9.

Source of instruction. The instruction is based on *Foster*, 541 S.W.2d at 819–20 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974)) ("We hold that a private individual may recover damages from a publisher or broadcaster of a defamatory falsehood as compensation for actual injury upon a showing that the publisher or broadcaster knew or should have known that the defamatory statement was false. In addition, the liability of a publisher or broadcaster of a defamatory falsehood about a private individual may not be predicated upon 'a factual misstatement whose content [would] not warn a reasonably prudent editor or broadcaster of its defamatory potential.'").

PJC 110.6 Question and Instructions on Actual Malice

If you answered "Yes" to Question _____ [*110.5*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Do you find by clear and convincing evidence that, at the time *Don Davis* made the statement in Question _____ [*110.3*]—

1. *Don Davis* knew it was false as it related to *Paul Payne*, or

2. *Don Davis* made the statement with a high degree of awareness that it was probably false, to an extent that *Don Davis* in fact had serious doubts as to the truth of the statement?

"Clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the jury a firm belief or conviction as to the truth of the allegations sought to be established.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. Fault is an element of defamation, but the level of fault required can be either negligence or "actual malice," depending on the circumstances of the case. *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015). When negligence is required, PJC 110.5 should be submitted. When actual malice is required, PJC 110.6 should be submitted. For a discussion of the circumstances under which each level of fault is required, see the Comment to PJC 110.5.

Because the U.S. Supreme Court has expressed remorse over the use of "actual malice" to describe the standard, and chapter 41 of the Texas Civil Practice and Remedies Code uses "malice" in connection with exemplary damages, the instruction avoids the use of the phrases "actual malice" and "reckless disregard." *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666 n.7 (1989); *see also* Tex. Civ. Prac. & Rem. Code § 41.003.

In a case brought by a private figure involving a matter of public concern, the plaintiff must prove actual malice by clear and convincing evidence to recover exemplary damages. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760–61 (1985) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)). Actual malice may

also be a fact issue in a case involving a qualified privilege defense. *Dun & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896, 900 (Tex. 1970).

Questions of law. Determination of whether the plaintiff is a public official or public figure is a matter of law for the court to decide. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). Whether the subject matter of a publication is a matter of public concern is a question of law for the court. *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983).

Source of definition and instruction. The instruction is derived from *Bentley v. Bunton*, 94 S.W.3d 561, 591, 600 (Tex. 2002). *See also St. Amant v. Thompson*, 390 U.S. 727 (1968). The definition of clear and convincing evidence is based on *Bentley*, 94 S.W.3d at 596–97. *See also* Tex. Civ. Prac. & Rem. Code § 41.001(2).

Organizations. When an organization is accused of defamation in a case requiring proof of actual malice, an instruction directing the jury to those persons within the organization whose state of mind is at issue may be appropriate. In determining whether an organization had actual malice, the U.S. Supreme Court observed in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), that it was not enough that the *New York Times* had stories in its files showing that a proposed advertisement was false. The court instead noted that "[t]here was testimony that the persons handling the advertisement saw nothing in it that would render it unacceptable." *New York Times Co.*, 376 U.S. at 287. Accordingly, for the organization to be liable, "the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement." *New York Times Co.*, 376 U.S. at 287.

PJC 110.7 Actual Malice in Cases of Qualified Privilege (Comment)

When the facts are undisputed and the language used in the publication is not ambiguous, the question whether a publication is protected by a qualified privilege is one of law for the court. *Burbage v. Burbage*, 447 S.W.3d 249, 254 (Tex. 2014) (citing *Fitzjarrald v. Panhandle Publishing Co.*, 228 S.W.2d 499, 505 (1950)). Once the qualified privilege is shown to exist, the burden is on the plaintiff to show the privilege is lost. Privilege is an affirmative defense in the nature of confession and avoidance; and, except where the plaintiff's petition shows on its face that the alleged defamatory publication is protected by a privilege, the defendant has the burden of pleading and proving that the publication is privileged. *Denton Publishing Co. v. Boyd*, 460 S.W.2d 881, 884 (Tex. 1970).

The plaintiff may overcome the qualified privilege only by establishing that the publication was made with actual malice. *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995); *Dun & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896, 900–901 (Tex. 1970). It is unclear whether the plaintiff's burden of proof to defeat the privilege by showing actual malice is by a preponderance of the evidence or by clear and convincing evidence. *Compare Hagler v. Proctor & Gamble Manufacturing Co.*, 884 S.W.2d 771 (Tex. 1994) (actual malice in qualified privilege context requires knowing falsity or reckless disregard for truth, citing cases indicating that such matters must be proved by clear and convincing evidence), *with Ellis County State Bank v. Keever*, 888 S.W.2d 790, 792–93 n.5 (Tex. 1994) (stating that preponderance of the evidence standard is firmly established in Texas civil cases; a more onerous burden is required only in extraordinary circumstances, such as when mandated by the U.S. Supreme Court). If the court concludes that actual malice provides the standard, the question in PJC 110.6 would be appropriate. If the court concludes that a preponderance burden of proof applies, the question in PJC 110.6 should be modified accordingly.

Whether a qualified privilege exists can depend on whether the publication of the alleged defamation was limited to certain persons. *See Randall's Food Markets, Inc.*, 891 S.W.2d at 646 ("The privilege remains intact as long as communications pass only to persons having an interest or duty in the matter to which the communications relate."). If the evidence raises a fact issue whether the defendant communicated the statement to persons not covered by the privilege, the court should submit that issue to the jury. *Mitre v. Brooks Fashion Stores Inc.*, 840 S.W.2d 612, 619 (Tex. App.—Corpus Christi 1992, writ denied), *overruled on other grounds by Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994).

PJC 110.8 Question and Instructions on Defense of Substantial Truth

QUESTION _____

Was the statement in Question _____ [*110.3*] substantially true at the time it was made as it related to *Paul Payne*?

A statement is "substantially true" if it varies from the literal truth in only minor details or if, in the mind of the average person, the gist of it is no more damaging to the person affected by it than a literally true statement would have been.

In connection with this question, you are instructed that *Don Davis* has the burden to prove substantial truth by a preponderance of the evidence.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 110.8 should be submitted only in cases when the common-law presumption of falsity applies; in such cases substantial truth is an affirmative defense. *See* Tex. Civ. Prac. & Rem. Code § 73.005(a); *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995). PJC 110.8 should not be submitted when the common-law presumption does not apply and the plaintiff is required to prove falsity. For a discussion of the circumstances under which the common-law presumption of falsity applies, see the Comment to PJC 110.4.

Source of instruction. The definition of falsity is based on the discussion of substantial truth in *McIlvain v. Jacobs*, 794 S.W.2d 14, 16 (Tex. 1990).

PJC 110.9 Question and Instructions on Defamatory False Impression

QUESTION _____

Did the [*article/broadcast/other context*] as a whole and not merely individual statements contained in it, either by omitting material facts or suggestively juxtaposing facts in a misleading way, create the substantially false and defamatory impression that *Paul Payne* [*insert alleged false and defamatory impression*]?

"False" means that the impression created, if any, is not substantially true. An impression is not "substantially true" if, in the mind of the average person, the gist of the impression is more damaging to the person affected by it than a literally true impression would have been.

"Defamatory" means that an ordinary person would be left with an impression that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach the person's honesty, integrity, virtue, or reputation.

In deciding whether an impression is defamatory, you must construe the [*article/broadcast/other context*] as a whole and in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. A defendant may defame a person where all the statements in a publication are true when read in isolation but the publication conveys a substantially false and defamatory impression by omitting material facts or suggestively juxtaposing true facts. *See Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 113–14 (Tex. 2000). Since defamation by an otherwise accurate publication requires that the publication create both "a substantially false and defamatory impression," a private party plaintiff in a case involving an exclusively private matter must establish the falsity of the impression by a preponderance of the evidence. *Turner*, 38 S.W.3d at 113–14. This question submits the basic inquiry in a false impression case about whether the publication created the false and defamatory impression complained of.

Source of definition and instruction. The definitions and instructions in PJC 110.9 are adapted from *Turner*, 38 S.W.3d at 113–14.

Corporations and other entitites. Corporations and other entities may bring actions for defamation. *Neely v. Wilson*, 418 S.W.3d 52, 72 (Tex. 2013) (recognizing professional associations share the same rights as for-profit corporations as to maintaining defamation clames). *See also Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc.*, 434 S.W.3d 142 (Tex. 2014); *General Motors Acceptance Corp. v. Howard*, 487 S.W.2d 708, 712–13 (Tex. 1972). In cases involving a corporate plaintiff, the definition of "defamatory" should be adjusted by changing "living person" to an appropriate descriptive term. A corporation may suffer reputation damages; such damages are noneconomic in nature. *Waste Management of Texas*, 434 S.W.3d at 147. Defamation injures the corporation's reputation, not its business. *Waste Management of Texas*, 434 S.W.3d at 151 & n.35. Business disparagement and defamation are distinct causes of action. *Waste Management of Texas*, 434 S.W.3d at 155. *See also Burbage v. Burbage*, 447 S.W.3d 249, 261 n.6 (Tex. 2014). See PJC 110.15 for jury instructions concerning business disparagement.

Natural defects. Libel encompasses the publication of "natural defects" of an individual when that publication exposes the individual to public hatred, ridicule, or financial injury. Tex. Civ. Prac. & Rem. Code § 73.001. The few cases addressing "natural defects" involve accusations of a mental problem. *See, e.g., Enterprise Co. v. Ellis*, 98 S.W.2d 452 (Tex. Civ. App.—Beaumont 1936, no writ) (accusation that plaintiff was "goofey" or suffering from mental imbalance); *Hibdon v. Moyer*, 197 S.W. 1117 (Tex. Civ. App.—El Paso 1917, no writ) (accusation that plaintiff suffered from "brainstorms"); *see also Raymer v. Doubleday & Co., Inc.*, 615 F.2d 241, 243 (5th Cir. 1980) (accusation involving physical appearance, i.e., baldness or pudginess, did not implicate a natural defect according to the court). Because this category of defamation remains viable but has rarely been used as the basis for a cause of action, the Committee removed reference to "natural defects" from the statutory definition of "defamatory" in the pattern instruction.

PJC 110.10 Question and Instruction on Negligence (Defamatory False Impression)

If you answered "Yes" to Question _____ [*110.9*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Did *Don Davis* know or should *he* have known, in the exercise of ordinary care, that the impression created by the [*article/broadcast/other context*] contained in Question _____ [*110.9*] was false and had the potential to be defamatory?

"Ordinary care" concerning the truth of the impression and its potential to be defamatory means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 110.10 or 110.11 should be used instead of PJC 110.5 or PJC 110.6 when the claim is one for a defamatory impression created by a publication taken as a whole (PJC 110.9) rather than for specific defamatory statements (PJC 110.3).

Fault is an element of all defamation claims, but the level of fault required can be either negligence or "actual malice," depending on the circumstances of the case. *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015). When negligence is required, PJC 110.10 should be submitted. When actual malice is required, PJC 110.11 should be submitted. For a discussion of the circumstances under which each level of fault is required, see the Comment to PJC 110.5.

To establish negligence, the plaintiff must prove that (1) the defendant knew or should have known that the impression was false and (2) the content of the publication would warn a reasonably prudent person of its defamatory potential. *See Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 819–20 (Tex. 1976).

"Defamatory" should be defined in this question or elsewhere in the charge as appropriate. See PJC 110.9 (defamatory impression).

Source of instruction. The instruction is based on *Foster*, 541 S.W.2d at 819–20 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974)) ("We hold that a pri-

vate individual may recover damages from a publisher or broadcaster of a defamatory falsehood as compensation for actual injury upon a showing that the publisher or broadcaster knew or should have known that the defamatory statement was false. In addition, the liability of a publisher or broadcaster of a defamatory falsehood about a private individual may not be predicated upon 'a factual misstatement whose content [would] not warn a reasonable prudent editor or broadcaster of its defamatory potential.'").

PJC 110.11 Question and Instructions on Actual Malice (Defamatory False Impression)

If you answered "Yes" to Question _____ [*110.9*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Do you find by clear and convincing evidence that at the time *Don Davis* [*published/broadcast/made*] the [*article/broadcast/other context*] in Question _____ [*110.9*] that *Don Davis* knew or strongly suspected that the [*article/broadcast/other context*] presented a substantially false and defamatory impression?

"Strongly suspected" means had a high degree of awareness.

"Clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the jury a firm belief or conviction as to the truth of the allegations sought to be established.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 110.10 or 110.11 should be used instead of PJC 110.5 or 110.6 when the claim is one for a defamatory impression created by a publication taken as a whole (PJC 110.9) rather than for specific defamatory statements (PJC 110.3).

Fault is an element of all defamation claims, but the level of fault required can be either negligence or "actual malice," depending on the circumstances of the case. *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015). When negligence is required, PJC 110.10 should be submitted. When actual malice is required, PJC 110.11 should be submitted. For a discussion of the circumstances under which each level of fault is required, see the Comment to PJC 110.5.

Because the U.S. Supreme Court has expressed remorse over the use of "actual malice" to describe the standard, and chapter 41 of the Texas Civil Practice and Remedies Code uses "malice" in connection with exemplary damages, the instruction avoids the use of the phrases "actual malice" and "reckless disregard." *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666 n.7 (1989); *see also* Tex. Civ. Prac. & Rem. Code § 41.003.

Questions of law. Determination of whether the plaintiff is a public official or public figure is a matter of law for the court to decide. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). Whether the subject matter of a publication is a matter of public concern is a question of law for the court. *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983).

Source of definition and instruction. The instruction is derived from *Bentley v. Bunton*, 94 S.W.3d 561, 587 n.62 (Tex. 2002), and *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 120–21 (Tex. 2000). The phrase "strongly suspected," instead of "serious doubts," is used based on the holding in *Turner*, 38 S.W.3d at 120–21. The definition of clear and convincing evidence is based on *Bentley*, 94 S.W.3d at 596–97. *See also* Tex. Civ. Prac. & Rem. Code § 41.001(2).

Organizations. When an organization is accused of defamation in a case requiring proof of actual malice, an instruction directing the jury to those persons within the organization whose state of mind is at issue may be appropriate. In determining whether an organization had actual malice, the U.S. Supreme Court observed in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), that it was not enough that the *New York Times* had stories in its files showing that a proposed advertisement was false. The court instead noted that "[t]here was testimony that the persons handling the advertisement saw nothing in it that would render it unacceptable." *New York Times Co.*, 376 U.S. at 287. Accordingly, for the organization to be liable, "the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement." *New York Times Co.*, 376 U.S. at 287.

PJC 110.12 Question on Defamatory Parody or Satire

QUESTION _____

Would the [*article/broadcast/other context*], in context and as a whole, be reasonably understood by a person of ordinary intelligence as stating as actual fact that *Paul Payne* [*insert alleged false and defamatory fact*]?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. A defendant may defame a person by satire or parody where the complained of matter is defamatory and may reasonably be interpreted as stating actual fact concerning the plaintiff. *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 156–58 (Tex. 2004). PJC 110.12 submits the issue of whether the allegedly defamatory matter may reasonably be interpreted as stating actual fact concerning the plaintiff. All remaining contested fact issues also should be submitted. See PJC 110.2 (publication), 110.3 (defamatory), and the comments titled "Falsity" at 110.13 and 110.14 as applicable.

Source of instruction. The instruction is adapted from *Isaacks*, 146 S.W.3d at 158.

PJC 110.13 Question and Instruction on Negligence (Defamatory Parody or Satire)

If you answered "Yes" to Question _____ [*110.12*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Did *Don Davis* know or should *he* have known, in the exercise of ordinary care, that the [*article/broadcast/other context*] contained in Question _____ [*110.12*] would be reasonably understood by a person of ordinary intelligence as stating actual fact and that the [*article/broadcast/other context*] had the potential to be defamatory?

"Ordinary care" means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 110.13 should be submitted in the following cases in which the negligence standard of care is submitted to the jury regarding the false and defamatory satire or parody: (1) when a private figure sues a media defendant about an impression that involves a private or public issue or (2) when a public official, who is not a public figure, sues a media defendant about an impression unrelated to his performance or fitness for office. *See Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 819–20 (Tex. 1976); *see also New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 156–58 (Tex. 2004) (recognizing defamation by parody or satire).

It is uncertain whether a private party plaintiff is required to establish negligence when the case involves a matter of exclusively private concern. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986) ("When the speech is of exclusively private concern and the plaintiff is a private figure . . . the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape."); *see also Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325, 1329–30 (5th Cir. 1993); *Leyendecker & Associates v. Wechter*, 683 S.W.2d 369 (Tex. 1985) (affirming plaintiff's verdict and applying common-law principles to private parties in a purely private concern case without discussion of constitutional issues); *Peshak v. Greer*, 13 S.W.3d 421, 425–26 (Tex. App.—Corpus Christi 2000, no pet.). *But see Restatement (Second) of Torts* §§ 558, 580A, 580B (1977); Robert D. Sack,

Sack on Defamation: Libel, Slander, and Related Problems §§ 6.5, 6.6 (3d ed. 1999). In *Hancock v. Variyam*, 400 S.W.3d 59, 65 n.7 (Tex. 2013), a case involving private parties and matters involving private concern, the Texas Supreme Court said that the First Amendment requires "a showing of fault in a defamation *per se* claim between private parties over a matter of private concern." *Hancock*, 400 S.W.3d at 65 n.7. The court cited *Restatement (Second) of Torts* § 580B (1977), which notes that "[a]s a practical matter, in order to meet the constitutional obligation of showing defendant's fault as to truth or falsity, the plaintiff will necessarily find that he must show the falsity of the defamatory communication." *Restatement (Second) of Torts* § 580B cmt. j (1977). Because fault and falsity were not directly involved in the case, the statement may be dicta.

To establish negligence, the plaintiff must prove that (1) the defendant knew or should have known that the statement was false and (2) the content of the publication would warn a reasonably prudent person of its defamatory potential. *See Foster*, 541 S.W.2d at 819–20.

"Defamatory" should be defined in this question or elsewhere in the charge as appropriate. See PJC 110.3.

Falsity. PJC 110.13 assumes that falsity is not disputed; however, if falsity is disputed, and the plaintiff is required to prove falsity, substitute the following question:

> Did *Don Davis* know or should *he* have known, in the exercise of ordinary care, that the [*article/broadcast/other context*] contained in Question _____ [*110.12*] would be reasonably understood by a person of ordinary intelligence as stating actual fact, that the fact was false, and that the [*article/broadcast/other context*] had the potential to be defamatory?

Source of instruction. The instruction is based on *Foster*, 541 S.W.2d at 819–20 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974)) ("We hold that a private individual may recover damages from a publisher or broadcaster of a defamatory falsehood as compensation for actual injury upon a showing that the publisher or broadcaster knew or should have known that the defamatory statement was false. In addition, the liability of a publisher or broadcaster of a defamatory falsehood about a private individual may not be predicated upon 'a factual misstatement whose content [would] not warn a reasonable prudent editor or broadcaster of its defamatory potential.'").

PJC 110.14 Question and Instruction on Actual Malice (Defamatory Parody or Satire)

If you answered "Yes" to Question _____ [*110.12*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Do you find by clear and convincing evidence that at the time *Don Davis* published the [*article/broadcast/other context*] *he* knew or had a high degree of awareness that the [*article/broadcast/other context*] would reasonably be interpreted as stating actual fact?

"Clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the jury a firm belief or conviction as to the truth of the allegations sought to be established.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 110.14 should be submitted in cases in which a public figure or public official seeks recovery based on satire or parody. *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 156–58 (Tex. 2004). Because the U.S. Supreme Court has expressed remorse over the use of "actual malice" to describe the standard, and chapter 41 of the Texas Civil Practice and Remedies Code uses "malice" in connection with exemplary damages, the instruction avoids the use of the phrases "actual malice" and "reckless disregard." *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666 n.7 (1989); *see also* Tex. Civ. Prac. & Rem. Code § 41.003. In a case brought by a public figure or public official, the plaintiff must prove actual malice by clear and convincing evidence to establish liability. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998).

Questions of law. Determination of whether the plaintiff is a public official or public figure is a matter of law for the court to decide. *WFAA-TV, Inc.*, 978 S.W.2d at 571. Whether the subject matter of a publication is a matter of public concern is a question of law for the court. *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983).

Falsity. PJC 110.14 assumes that falsity is not disputed; however, if falsity is disputed, the phrase "and that the fact was false" should be inserted at the end of the question.

Source of question and instruction. The question is derived from *Isaacks*, 146 S.W.3d at 156. The definition of clear and convincing evidence is based on *Bentley v. Bunton*, 94 S.W.3d 561, 596–97 (Tex. 2002). *See also* Tex. Civ. Prac. & Rem. Code § 41.001(2).

Organizations. When an organization is accused of defamation in a case requiring proof of actual malice, an instruction directing the jury to those persons within the organization whose state of mind is at issue may be appropriate. In determining whether an organization had actual malice, the U.S. Supreme Court observed in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), that it was not enough that the *New York Times* had stories in its files showing that a proposed advertisement was false. The court instead noted that "[t]here was testimony that the persons handling the advertisement saw nothing in it that would render it unacceptable." *New York Times Co.*, 376 U.S. at 287. Accordingly, for the organization to be liable, "the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement." *New York Times Co.*, 376 U.S. at 287.

PJC 110.15 Question and Instructions on Business Disparagement

QUESTION _____

Did *Don Davis* disparage the business of *Paul Payne*?

A person disparages the business of another if he publishes a disparaging false statement about the business, and, when he publishes the statement, he [*knows the falsity of the statement or acts with reckless disregard of whether the statement is false/acts with ill will or intends to interfere with the economic interest of Paul Payne*], and his publication of the statement played a substantial part in inducing others not to do business with *Paul Payne* and resulted in a specific pecuniary loss to *Paul Payne*.

A statement is "published" if it is intentionally communicated to a person other than *Paul Payne* who is capable of understanding its meaning.

Answer "Yes" or "No" for each statement listed below.

In answering this question, you may consider only the following statements: [*statements defined by pleadings and proof*]

Answer: _____

COMMENT

When to use. PJC 110.15 is used for business disparagement instead of defamation. Business disparagement is a species of tort similar to defamation, because both involve the imposition of liability for injury sustained through publication to third parties of a false statement affecting the plaintiff. *In re Lipsky*, 460 S.W.3d 579, 591 (Tex. 2015); *Astoria Industries of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 624–25 (Tex. App.—Fort Worth 2007, pet. denied). But business disparagement and defamation protect different interests. "The action for defamation is to protect the personal reputation of the injured party, whereas the action for injurious falsehood or business disparagement is to protect the economic interests of the injured party against pecuniary loss." *Hurlbut v. Gulf Atlantic Life Insurance Co.*, 749 S.W.2d 762, 766 (Tex. 1987); *see also In re Lipsky*, 460 S.W.3d at 591. In *Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc.*, 434 S.W.3d 142, 155 (Tex. 2014), the supreme court further explained the distinction between defamation and trade disparagement and the damages recoverable in the two causes of action. *See also Burbage v. Burbage*, 447 S.W.3d 249, 261 n.6 (Tex. 2014).

The supreme court explained in *Hurlbut* that, unlike in common-law libel, the plaintiff in a business disparagement claim must plead and prove the falsity of the statement

as part of his cause of action; the defendant in an action for business disparagement is subject to liability "only if he knew of the falsity or acted with reckless disregard concerning it, or if he acted with ill will or intended to interfere in the economic interest of the plaintiff in an unprivileged fashion"; and the plaintiff must always prove pecuniary loss to establish a cause of action for business disparagement. *Hurlbut*, 749 S.W.2d at 766. Unlike defamation, where the submission of the different elements depends on many variables and may require separate questions, business disparagement lends itself to a global submission.

If the alleged disparaging statement involves a product or service rather than a business, the question and instruction should be modified accordingly.

Source of instruction. The instruction is based on *Prudential Insurance Co. of America v. Financial Review Services, Inc.*, 29 S.W.3d 74, 82 (Tex. 2000), which stated that business disparagement requires proof of "publication by the defendant of the disparaging words, falsity, malice, lack of privilege, and special damages." *See also Hurlbut*, 749 S.W.2d at 766.

Form of publication. The supreme court has not considered whether a negligent publication will suffice for business disparagement. Given the intentional nature of the business disparagement tort, the Committee suggests that only intentional publication will suffice.

Fact vs. opinion. Statements of opinion, fair comment, and rhetorical hyperbole are protected by both the state and federal constitutions. *Bentley v. Bunton*, 94 S.W.3d 561, 579–80 (Tex. 2002) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19–21 (1990)). Statements of opinion, fair comment, and rhetorical hyperbole that assert or reasonably imply false statements of fact are not protected. In an appropriate case, the court may be required to submit an issue inquiring about the falsity of a statement of fact essential to the existence of the privilege claimed. *Neely v. Wilson*, 418 S.W.3d 52, 72 (Tex. 2013). Whether a statement is protected as opinion, fair comment, or rhetorical hyperbole is generally a question of law for the court. *Bentley*, 94 S.W.3d at 580; *see also MKC Energy Investments, Inc. v. Sheldon*, 182 S.W.3d 372, 377 (Tex. App.—Beaumont 2005, no pet.); *Delta Air Lines, Inc. v. Norris*, 949 S.W.2d 422, 426 (Tex. App.—Waco 1997, writ denied).

Business disparagement vs. injurious falsehood. PJC 110.15 is limited to business disparagement. The Texas Supreme Court and courts of appeals have used the terms "business disparagement" and "injurious falsehood" interchangeably. However, these are distinct torts with different elements. Business disparagement requires that the words at issue be disparaging as well as false. *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003); *Prudential Insurance Co. of America*, 29 S.W.3d at 82; *Hurlbut*, 749 S.W.2d at 766. This requirement does not appear in the *Restatement*'s description of injurious falsehood, which requires only a false statement that is injurious; the statement need not contain any opprobrium. *See Restatement*

(Second) of Torts § 623A (1977) ("One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if [describing the malice requirement]."). However, no Texas case has yet recognized a claim for injurious falsehood where the words at issue are not disparaging but are false and, as a result, harm the business of the plaintiff. *See, e,g., Delta Air Lines, Inc.*, 949 S.W.2d 422 (rejecting business disparagement claim where words were not defamatory); *MKC Energy Investments, Inc.*, 182 S.W.3d 372 (same).

Lack of privilege. While lack of privilege is a required element in business disparagement, only absolute privilege is relevant. Because a "Yes" answer to PJC 110.15 requires a finding of malice that defeats qualified privileges, qualified privileges are irrelevant in business disparagement cases. *See Hurlbut*, 749 S.W.2d at 768. The issue of absolute privilege is a legal question that the court will determine as a matter of law before the submission to the jury. *See Galveston County Fair & Rodeo, Inc. v. Glover*, 880 S.W.2d 112, 120 (Tex. App.—Texarkana 1994), *writ denied per curiam*, 940 S.W.2d 585 (Tex. 1996); *Arant v. Jaffe*, 436 S.W.2d 169, 178 (Tex. App.—Dallas 1968, no writ).

Standard of proof of defendant's fault. The common-law standard for business disparagement required a plaintiff to prove the defendant's "malice" in making the statement. As noted above, the malice standard at common law could be met by proof of knowing falsity, reckless disregard of falsity, or acting with ill will or intent to interfere with the plaintiff's interests. *Hurlbut*, 749 S.W.2d at 766; *Restatement (Second) of Torts* § 623A (1977).

With the constitutionalization of speech-related torts when they involve speech on matters of public concern, there is some uncertainty regarding the standard for malice. When the object of the allegedly disparaging speech is a public figure such as a large, publicly traded company, the U.S. Supreme Court precedents point to a constitutional requirement that the plaintiff must prove "actual malice"—knowing falsity or reckless disregard for the truth—to prevail against a media defendant. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511–14 (1984). Such proof clearly meets some of the alternative proofs of malice—knowing falsity—under the common law. *See Forbes, Inc.*, 124 S.W.3d 167, in which the Texas Supreme Court assumed, without deciding, "that the *New York Times* actual-malice standard applies in a public figure's business disparagement suit against a media defendant." *Forbes, Inc.*, 124 S.W.3d at 171.

Where the matter discussed is of public concern but the plaintiff is not a public official or public figure, the Texas Supreme Court has not spoken on the standard of fault in business disparagement cases.

It is not clear whether the common-law standard or some different standard will apply when the party allegedly disparaged is not a public figure, the defendant is not a media outlet, or the disparagement does not involve a matter of public concern. Proof

of knowing falsity or reckless disregard for the truth will always suffice, since those were ways to prove malice under the common law. *See, e.g., Prudential Insurance Co. of America*, 29 S.W.3d at 82–83 (reviewing summary judgment evidence and finding some evidence that defendant disparaged plaintiff's business by accusing it of fraud, knowing the accusation was baseless). *See also Hurlbut*, 749 S.W.2d at 766 ("In the present case there is evidence to support findings that the statements of Gulf Atlantic were false and malicious in the sense that Gulf Atlantic knew them to be false.").

Ill will. Malice still appears to qualify as a basis for liability in cases where the common law controls. In *Hurlbut* and later in *Forbes, Inc.*, the supreme court still recited ill will as part of the "malice" standard. *Hurlbut*, 749 S.W.2d at 766; *Forbes, Inc.*, 124 S.W.3d at 170. *See also Graham Land & Cattle Co. v. The Independent Bankers Bank*, 205 S.W.3d 21, 27 (Tex. App.—Corpus Christi 2006, no pet.). Unless the supreme court chooses to change this standard, it will likely be applied to common-law cases.

Special damages. A business disparagement plaintiff must offer proof of special damages. *Waste Management of Texas*, 434 S.W.3d 142; *Forbes, Inc.*, 124 S.W.3d 167. In *Hurlbut*, the court explained that this element obligated the plaintiff to prove a realized or liquidated pecuniary loss, and "the communication must play a substantial part in inducing others not to deal with the plaintiff." *Hurlbut*, 749 S.W.2d at 767. Given the court's comments, the Committee has included the special damages element in the liability question. While the fact of special damages is submitted in this question, the amount of damages incurred would still be determined in the separate damages question addressing this element. See PJC 115.34.

PJC 110.16 Question and Instruction on Intrusion

QUESTION _____

Did *Don Davis* intentionally intrude into *Paul Payne*'s solitude, seclusion, or private affairs or concerns in a manner that would be highly offensive to a reasonable person?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 110.16 submits the liability issue for invasion of privacy by intrusion, which the supreme court recognized in *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973). The court described the claim as a willful tort constituting legal injury that does not require proof of physical injury to support an award of mental anguish damages. *Billings*, 489 S.W.2d at 861. The invasion-of-privacy tort includes a physical invasion of a person's property or eavesdropping on another's conversation with the aid of wiretaps, microphones, or spying. *Clayton v. Wisener*, 190 S.W.3d 685, 696 (Tex. App.—Tyler 2005, pet. denied). It may also include stalking, harassment, or any other intentional intrusion on the plaintiff's personal life. *Kramer v. Downey*, 680 S.W.2d 524 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (evidence that defendant's pattern of conduct, thrusting herself into plaintiff's presence, disrupted plaintiff's domestic and professional life and was sufficient to constitute invasion of privacy).

Source of definition. The elements of a cause of action for invasion of privacy by intrusion are (1) the defendant intentionally intruded on the plaintiff's solitude, seclusion, or private affairs or concerns and (2) the intrusion would be highly offensive to a reasonable person. *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993).

PJC 110.17 Question and Instruction on Publication of Private Facts

QUESTION _____

Did *Don Davis* publicize a matter concerning *Paul Payne*'s private life, the publication of which would be highly offensive to a reasonable person?

"Publicize" means to communicate the information to more than a small group of persons so that the matter is communicated to the public at large, such that the matter becomes one of public knowledge.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 110.17 submits the liability issue for invasion of privacy by public disclosure of private facts after a court has determined that the information disclosed was not of legitimate concern to the public.

Legitimate public concern. If a matter is of legitimate concern to the public, there is no claim for a public disclosure tort. Whether the matters disclosed were of no legitimate public concern is most often a legal issue. *See, e.g., Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 474–75 (Tex. 1995) (upholding defense summary judgment that newspaper's coverage of police report that allegedly identified rape victim was report on matter of legitimate public concern and therefore not actionable). "The determination whether a given matter is one of legitimate public concern must be made in the factual context of each particular case, considering the nature of the information and the public's legitimate interest in its disclosure." *Star-Telegram, Inc.*, 915 S.W.2d at 474; *see also Anonsen v. Donahue*, 857 S.W.2d 700, 704 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (recognizing that "newsworthiness" is often question of law but acknowledging cases where possible fact questions might arise when private facts about plaintiff are unrelated to general topics clearly of legitimate public concern). Resolution of this issue in favor of the defense would mean that an essential element of the plaintiff's claim was negated, and the issue would not be submitted. Similarly, if the court rules that, as a matter of law, the matters disclosed were not of legitimate concern to the public, then the question is limited to the submission of the first two elements. In the rare circumstance in which the court determines that the issue of legitimate concern to the public should be submitted to the jury, the question should be rephrased as follows:

> Did *Don Davis* publicize a matter concerning *Paul Payne*'s private life—

1. the publication of which would be highly offensive to a reasonable person, and

2. that was not of legitimate public concern?

"Matter." The court may include the following limiting instruction, if needed:

When answering this question, you may consider only the following matter[*s*]: [*describe information at issue*].

Such a limiting instruction may be necessary, for example, if both actionable and non-actionable material are included in the publication.

Source of instruction. The question is taken from the elements identified in *Industrial Foundation of the South v. Industrial Accident Board*, 540 S.W.2d 668, 682 (Tex. 1976):

> It is generally recognized, however, that an injured party, in order to recover for public disclosure of private facts about himself, must show (1) that publicity was given to matters concerning his private life, (2) the publication of which would be highly offensive to a reasonable person of ordinary sensibilities, and (3) that the matter publicized is not of legitimate public concern.

See also Star-Telegram, Inc., 915 S.W.2d at 474. The definition of "publicize" comes from *Industrial Foundation of the South*, 540 S.W.2d at 683–84 ("'Publicity' requires communication to more than a small group of persons; the matter must be communicated to the public at large, such that the matter becomes one of public knowledge.").

PJC 110.18 Question and Instruction on Invasion of Privacy by Misappropriation

QUESTION _____

Did *Don Davis* misappropriate *Paul Payne*'s name or likeness?

"Misappropriate" means—

1. *Don Davis* made an unauthorized use of *Paul Payne*'s name or likeness for the value associated with it;

2. *Paul Payne* can be identified from the use; and

3. there was some advantage or benefit to *Don Davis*.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 110.18 submits the liability of the defendant for the unauthorized use of the plaintiff's name or likeness for the defendant's advantage. Texas courts and courts applying Texas law have recognized this cause of action. *See Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994); *Benavidez v. Anheuser Busch, Inc.*, 873 F.2d 102, 104 (5th Cir. 1989); *Express One International, Inc. v. Steinbeck*, 53 S.W.3d 895, 900 (Tex. App.—Dallas 2001, no pet.); *Kimbrough v. Coca-Cola/USA*, 521 S.W.2d 719, 722 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.). The supreme court discussed the cause of action but did not expressly adopt it in *Cain v. Hearst Corp.*, 878 S.W.2d 577, 578 n.2 (Tex. 1994).

Source of instruction. The definition of "misappropriate" is based on *Express One International, Inc.*, 53 S.W.3d at 900. The definition also requires the plaintiff to prove the use was unauthorized, based on *Kimbrough*, 521 S.W.2d at 722 (describing the tort as "a cause of action for the *unauthorized* appropriation or exploitation of his name or likeness by the defendants" (emphasis added)).

Citing the *Restatement (Second) of Torts* § 652C (1977), some courts interpreting Texas law describe the cause of action differently. *See Matthews*, 15 F.3d at 437; *Benavidez*, 873 F.2d at 104; *Faloona v. Hustler Magazine, Inc.*, 607 F. Supp. 1341, 1360 (N.D. Tex. 1985), *aff'd*, 799 F.2d 1000 (5th Cir. 1986).

PJC 110.19 False Light Invasion of Privacy (Comment)

Texas does not recognize a false light invasion of privacy claim, i.e., a claim that publicity unreasonably placed a person in a false position in the public's eye. *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994). No question or instruction is therefore required.

PJC 110.20 Defamation Mitigation Act (Comment)

In 2013 the Texas legislature enacted the Defamation Mitigation Act, Tex. Civ. Prac. & Rem. Code §§ 73.051–.062. The Act—

- requires a plaintiff to seek correction, clarification, or retraction from the publisher before filing suit, unless the defendant has already made a correction, clarification, or retraction;

- defines "person" to include corporations and other entities;

- applies to all claims for damages arising out of harm to personal reputation caused by the false content of a publication;

- provides for abatement of suits where no request was received;

- sets out specific procedures and time limits for making and responding to the plaintiff's request, including the time, sufficiency, manner, and adequacy of the correction, clarification, or retraction;

- provides for tolling of limitations during the time the parties are communicating;

- substantially restricts the admissibility of evidence relating to the parties' relevant communications;

- prevents recovery of punitive damages by a person who does not seek relief under the Act within ninety days after receiving knowledge of the publication; and

- allows recovery of punitive damages if a correction, clarification, or retraction is made in accordance with the Act only if the publication was made with "actual malice," a term not defined by the Act.

Section 73.058(d) provides that unless there is a reasonable dispute regarding the actual contents of the request for correction, clarification, or retraction, the sufficiency and timeliness of the request is a matter of law for the court, which is required to rule at the earliest appropriate time before trial whether, as a matter of law, the request meets the requirements of the Act. The Act is silent on whether the judge or jury determines the "actual contents" of the request and any resulting fact issues relating to the request and response. Accordingly, the Committee offers no recommendation for a jury submission on the issue(s).

PJC 111.1 Question and Instructions on Existence of Trade Secret

QUESTION _____

Did *Paul Payne* own a trade secret in the [*information, e.g., business, scientific, technical, economic, or engineering, and any formula, design, prototype, pattern, plan, compilation, program device, program, code, device, method, technique, process, procedure, financial data, or list of actual or potential customers or suppliers*] listed below?

"Trade secret" means [*information, e.g., business, scientific, technical, economic, or engineering, and any formula, design, prototype, pattern, plan, compilation, program device, program, code, device, method, technique, process, procedure, financial data, or list of actual or potential customers or suppliers*] that—

1. derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

2. is the subject of reasonable measures by the owner under the circumstances to maintain its secrecy.

"Proper means" are discovery by independent development [, *reverse engineering,*] or any other means that is not improper.

"Improper means" include theft; bribery; misrepresentation; breach or inducement of a breach of a duty to maintain secrecy, to limit use, or to prohibit discovery of a trade secret; or espionage through electronic or other means.

"Own" means to have rightful, legal, or equitable title to, or the right to enforce rights in, a trade secret.

Answer "Yes" or "No."

1. [*Sample trade secret instruction.*]

Answer: _____

2. [*Sample trade secret instruction.*]

Answer: _____

COMMENT

When to use. PJC 111.1 submits the issue of the existence of one or more trade secrets for misappropriation claims brought under the Texas Uniform Trade Secrets Act (the "Act"), effective September 1, 2013. *See* Tex. Civ. Prac. & Rem. Code § 134A.002. It should be used only if there is a dispute about the existence of a trade secret.

Broad-form submission. PJC 111.1 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

In some cases, such as when only a single trade secret is claimed, a broader question that combines issues of both existence and misappropriation may be feasible. In such cases, the question below may be used:

> Did *Don Davis* misappropriate a trade secret owned by *Paul Payne*?
>
> To find misappropriation of a trade secret, you must find that a trade secret existed that was owned by *Paul Payne*, and that *Don Davis*—
>
> *[Insert applicable instruction(s) regarding improper means of acquisition, use, or disclosure from PJC 111.2.]*
>
> *[Insert applicable definition instruction(s) from PJC 111.1 above.]*
>
> Answer "Yes" or "No."
>
> Answer: _____

Sample trade secret instructions. The nature of a trade secret is necessarily fact-specific. Therefore, the following sample instructions are illustrative only, using hypothetical situations to give a few examples of how instructions may be worded to submit the existence of various types of trade secrets.

Sample A

> The chemical formula for *Paul Payne*'s [*widgets*].

Sample B

The pattern for *Paul Payne*'s [*widgets*].

Sample C

The compilation of specified data for the design and production of *Paul Payne*'s [*widgets*].

Sample D

Paul Payne's [*widget*] program.

Sample E

Paul Payne's [*widget*] device.

Sample F

The method for designing and manufacturing *Paul Payne*'s [*widgets*].

Sample G

The technique for designing and manufacturing *Paul Payne*'s [*widgets*].

Sample H

The process for designing and manufacturing *Paul Payne*'s [*widgets*].

Sample I

Paul Payne's financial data for his [*widget*] business.

Sample J

Paul Payne's list of actual or potential customers or suppliers for his [*widget*] business.

Ownership of trade secret. Effective September 1, 2017, the Act provides that a trade-secret owner is a "person or entity in whom or in which rightful, legal, or equitable title to, or the right to enforce rights in, the trade secret is reposed." Tex. Civ. Prac. & Rem. Code § 134A.002(3–a). Ownership of a trade secret has been construed to be an element of a misappropriation claim under the Act. *St. Jude Medical S.C., Inc. v. Janssen-Counotte*, No. A-14-CA-877-SS, 2014 WL 7237411, at *14 (W.D. Tex. Dec. 17, 2014) (applying pre-2017 version of the Act).

The Act specifies the extent to which it displaces other Texas law regarding remedies for misappropriation of trade secrets. Tex. Civ. Prac. & Rem. Code § 134A.007;

see A.M. Castle & Co. v. Byrne, 123 F. Supp. 3d 895, 901 n.6 (S.D. Tex. 2015) (discussing displacement of conflicting remedies). To the extent prior Texas common law regarding ownership of trade secrets has not been displaced, Texas courts held before the Act that a plaintiff must establish ownership of the trade secret as an element of its misappropriation claim. *Rusty's Weigh Scales & Service, Inc. v. North Texas Scales, Inc.*, 314 S.W.3d 105, 109 (Tex. App.—El Paso 2010, no pet.); *Mabrey v. SandStream, Inc.*, 124 S.W.3d 302, 310 (Tex. App.—Fort Worth 2003, no pet.). The supreme court treated a licensee of a trade secret as an owner who could pursue a claim for misappropriation. *K&G Oil Tool & Service Co. v. G&G Fishing Tool Service*, 314 S.W.2d 782, 785, 790 (Tex. 1958); *see also LBDS Holding Co., LLC v. ISOL Technology Inc.*, No. 6:11-CV-428, 2014 WL 892126, at *1 (E.D. Tex. Mar. 2, 2014).

Definition of trade secret. The definition of "trade secret" is derived from the Act. Tex. Civ. Prac. & Rem. Code § 134A.002(6). The court should submit only the bracketed portions of the definition that could apply to the particular trade secrets alleged.

Trade secrets may be tangible or intangible, no matter how the trade secret is "stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing." Tex. Civ. Prac. & Rem. Code § 134A.002(6).

The definition does not include the six factors noted by the Texas Supreme Court in resolving a discovery dispute in *In re Bass*, 113 S.W.3d 735, 739–40 (Tex. 2002) (orig. proceeding) ("(1) [T]he extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of the measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."). *In re Bass* identified pre-Act factors that a trial court faced with a discovery dispute should consider in determining the existence of a trade secret, not factors that should be included in a jury instruction.

Improper means, proper means, and reverse engineering. The definitions of "proper means" and "reverse engineering" are derived from the Act. Tex. Civ. Prac. & Rem. Code § 134A.002(4)–(5). The Act defines proper means to include reverse engineering "unless prohibited." Tex. Civ. Prac. & Rem. Code § 134A.002(5). The Committee notes that no Texas case has yet addressed the meaning of "unless prohibited" under the Act. If breach of an agreement prohibiting reverse engineering is raised by the evidence, PJC 101.2 may be submitted. In a case in which reverse engineering of a product or device is not prohibited and is raised by the pleadings and the evidence, the following definition may be submitted with PJC 111.1:

> "Reverse engineering" means the process of studying, analyzing, or disassembling a product or device to discover its design, structure,

construction, or source code provided that the product or device was acquired lawfully or from a person having the legal right to convey it.

The definition of "improper means" is taken from section 134A.002(2) of the Act. *See Education Management Services, LLC v. Tracey*, 102 F. Supp. 3d 906, 914 (W.D. Tex. 2015) (applying the Act and listing improper means). The definition does not contain an exclusive list of improper means.

Uniform construction. The Act provides that it should be "applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it." Tex. Civ. Prac. & Rem. Code § 134A.008. Similarly, the Texas Government Code also provides that a "uniform act included in a code shall be construed to effect its general purpose to make uniform the law of those states that enact it." Tex. Gov't Code § 311.028.

PJC 111.2 Question and Instructions on Trade-Secret Misappropriation

If you answered "Yes" for any part of Question _____ [*111.1*], then answer the following question as to that part. Otherwise, do not answer the following question.

QUESTION _____

Did *Don Davis* misappropriate *Paul Payne*'s trade secret?

To find misappropriation of a trade secret, you must find that *Don Davis*—

[*acquired the trade secret, and that* Don Davis *knew or had reason to know that the trade secret was acquired by improper means; or*]

[*disclosed or used the trade secret without* Paul Payne*'s express or implied consent, and that* Don Davis *used improper means to acquire knowledge of the trade secret; or*]

[*disclosed or used the trade secret without* Paul Payne*'s express or implied consent, and that* Don Davis, *at the time of the disclosure or use, knew or had reason to know that his knowledge of the trade secret was derived from or through a person who had used improper means to acquire it; or*]

[*disclosed or used the trade secret without* Paul Payne*'s express or implied consent, and that* Don Davis, *at the time of the disclosure or use, knew or had reason to know that his knowledge of the trade secret was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or*]

[*disclosed or used the trade secret without* Paul Payne*'s express or implied consent, and that* Don Davis, *at the time of the disclosure or use, knew or had reason to know that his knowledge of the trade secret was derived from or through a person who owed a duty to* Paul Payne *to maintain its secrecy or limit its use; or*]

[*disclosed or used the trade secret without* Paul Payne*'s express or implied consent, and that* Don Davis *knew or had reason to know, before a material change of his position, that it was a trade secret and that knowledge of it had been acquired by accident or mistake.*]

"Improper means" [[*is/are*] *theft; bribery; misrepresentation; breach or inducement of a breach of a duty to maintain secrecy, to limit use, or to prohibit discovery of a trade secret; or espionage through electronic or other means*].

Answer "Yes" or "No" for each trade secret.

1. [*Sample trade secret instruction.*]

Answer: _____

2. [*Sample trade secret instruction.*]

Answer: _____

COMMENT

When to use. PJC 111.2 submits the issue of liability for misappropriation of one or more trade secrets under the Texas Uniform Trade Secrets Act (the "Act"), effective September 1, 2013. *See* Tex. Civ. Prac. & Rem. Code § 134A.002.

Broad-form submission. PJC 111.2 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Misappropriation. Section 134A.002(3) of the Act provides for six alternative improper methods of acquisition, use, or disclosure of trade secrets. *See Emerald City Management, LLC v. Kahn*, No. 4:14-cv-358, 2016 WL 98751, at *17–18, 29 (E.D. Tex. Jan. 8, 2016) (acknowledging improper disclosure can constitute misappropriation under the Act). The above instruction lists these six alternative improper methods of acquisition, use, or disclosure in brackets, but only the method(s) supported by the pleadings and evidence should be submitted.

The Act specifies the extent to which it displaces other Texas law regarding remedies for misappropriation of trade secrets. Tex. Civ. Prac. & Rem. Code § 134A.007; *see A.M. Castle & Co. v. Byrne*, 123 F. Supp. 3d 895, 901 n.6 (S.D. Tex. 2015) (discussing displacement of conflicting remedies). To the extent prior Texas common law regarding trade secrets has not been displaced, the Texas Supreme Court discussed the cause of action for misappropriation of trade secrets in *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 769–70 (Tex. 1958) (relying on *Restatement (First) of Torts* § 757 (1939)). The cause of action was further discussed in *Stewart & Stevenson Services, Inc. v. Serv-Tech, Inc.*, 879 S.W.2d 89, 95–96 (Tex. App.—Houston [14th Dist.] 1994, writ denied). *See also Phillips v. Frey*, 20 F.3d 623, 627 & n.5 (5th Cir. 1994) (applying Texas law).

Violation of duty imposed by confidential or contractual relationship. Confidential relationships imposing duties relating to a trade secret can exist in vari-

ous situations. *See, e.g.*, Tex. Civ. Prac. & Rem. Code § 134A.002(3) (describing circumstances in which duties concerning trade secrets arise under statute); *H.E. Butt Grocery Co. v. Moody's Quality Meats, Inc.*, 951 S.W.2d 33, 36 (Tex. App.—Corpus Christi 1997, writ denied) (finding negotiations during sale of business created confidential relationship); *American Derringer Corp. v. Bond*, 924 S.W.2d 773, 777 (Tex. App.—Waco 1996, no writ) (finding that former employee is prohibited from using confidential information or trade secrets acquired during his employment); *Crutcher-Rolfs-Cummings, Inc. v. Ballard*, 540 S.W.2d 380, 387 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.) (finding confidential relationship because plaintiff and defendant were licensor and licensee and also joint adventurers).

If the court determines that, as a matter of law, there was a contractual or confidential relationship giving rise to a duty to maintain the trade secret's secrecy or limit its use, an instruction to that effect may be necessary.

A party involved in a confidential relationship is under a duty not to use or disclose trade secret information obtained during the course of the relationship. *See American Derringer Corp.*, 924 S.W.2d at 777. In *Hyde Corp.*, the Court articulated the rule—as provided by section 757 of the *Restatement (First) of Torts*—concerning confidential relationships: a party is liable "if his disclosure or use of another's trade secret is a breach of the confidence reposed in him by the other in disclosing the secret to him." *Hyde Corp.*, 314 S.W.2d at 769; *see also American Derringer Corp.*, 924 S.W.2d at 777.

Improper means, proper means, and reverse engineering. In cases in which PJC 111.1 is not submitted, the definitions from that question of "proper means" and "reverse engineering" (if applicable) should be submitted with PJC 111.2.

The definition of "improper means" is taken from section 134A.002(2) of the Act. *See Education Management Services, LLC v. Tracey*, 102 F. Supp. 3d 906, 914 (W.D. Tex. 2015) (applying the Act and listing improper means). The definition does not contain an exclusive list of improper means. Only those means raised by the evidence should be submitted.

Commercial use. The Act does not define "use." Before the Act, trade secret use was defined at common law to mean commercial use by which the offending party seeks to profit from the use of the secret. *Atlantic Richfield Co. v. Misty Products, Inc.*, 820 S.W.2d 414, 422 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (citing *Metallurgical Industries Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1205 (5th Cir. 1986)); *see also Global Water Group, Inc. v. Atchley*, 244 S.W.3d 924, 930 (Tex. App.—Dallas 2008, pet. denied). If there is a factual dispute concerning the nature of the use, the court may include the following instruction derived from *Atlantic Richfield Co.*:

> Use of the trade secret means commercial use by which the offending party seeks to profit from the use of the secret.

Limitations. The statute of limitations for trade secret claims is three years and is subject to the discovery rule. Tex. Civ. Prac. & Rem. Code § 16.010. If limitations is at issue, the Committee recommends that the following question, which is adapted from PJC 102.23, be included:

> By what date should *Paul Payne*, in the exercise of reasonable diligence, have discovered the [*acquisition*] [*use*] [*disclosure*] by *Don Davis* of *Paul Payne*'s [*identify trade secret(s) submitted in PJC 111.1*]?

Former employees. The Act does not expressly address use of trade secret information by former employees. In cases in which a former employee's use of information may be at issue, the court may provide an instruction as follows:

> An employee may use general knowledge, skills, and experience obtained through previous employment to compete with the former employer. A former employee, however, may not use confidential or proprietary information acquired during the employment relationship in a manner adverse to his former employer.

This instruction is derived from *Sharma v. Vinmar International, Ltd.*, 231 S.W.3d 405, 424 (Tex. App.—Houston [14th Dist.] 2007, pet. dism'd), and *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 22 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

[Chapters 112–114 are reserved for expansion.]

CHAPTER 115 DAMAGES

[PJC 115.56–115.59 are reserved for expansion.]

PJC 115.1 Predicate—Instruction Conditioning Damages Questions on Liability

If you answered "Yes" to Question _____ [*insert number of appropriate liability question*], then answer the following question. Otherwise, do not answer the following question.

COMMENT

When to use. PJC 115.1 is used to condition answers to damages questions. The damages questions in this chapter assume liability in the question, so this predicate should always precede those questions. The Comments following damages questions in this chapter refer to the corresponding liability questions in other chapters.

PJC 115.2 Instruction on Whether Compensatory Damages Are Subject to Income Taxes (Actions Filed on or after September 1, 2003)

You are instructed that any monetary recovery for [*list each element of economic or noneconomic damages that is subject to taxation*] is subject to [*federal or state*] income taxes. Any recovery for [*list each element of economic or noneconomic damages that is not subject to taxation*] is not subject to [*federal or state*] income taxes.

COMMENT

When to use. PJC 115.2 should be submitted with the damages question in any action filed on or after September 1, 2003, in which a claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance. Whether an element of damages is taxable depends on the substantive tax law pertaining to each cause of action.

Source of instruction. Section 18.091 of the Texas Civil Practice and Remedies Code, entitled "Proof of Certain Losses; Jury Instruction," provides:

> (a) Notwithstanding any other law, if any claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance, evidence to prove the loss must be presented in the form of a net loss after reduction for income tax payments or unpaid tax liability pursuant to any federal income tax law.
>
> (b) If any claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance, the court shall instruct the jury as to whether any recovery for compensatory damages sought by the claimant is subject to federal or state income taxes.

Tex. Civ. Prac. & Rem. Code § 18.091.

PJC 115.3 Question on Contract Damages

[Insert predicate, PJC 115.1.]

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* damages, if any, that resulted from such failure to comply?

Consider the following elements of damages, if any, and none other.

[Insert appropriate instructions. See samples in PJC 115.4 and instructions in PJC 115.5.]

Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

1. [*Element A*] sustained in the past.

Answer: _____

2. [*Element A*] that, in reasonable probability, will be sustained in the future.

Answer: _____

3. [*Element B*] sustained in the past.

Answer: _____

4. [*Element B*] that, in reasonable probability, will be sustained in the future.

Answer: _____

COMMENT

When to use. PJC 115.3 should be predicated on a "Yes" answer to PJC 101.2 and may be adapted for use in most breach-of-contract cases by the addition of appropriate instructions setting out legally available measures of damages. See PJC 115.4 and 115.5. If only one measure of damages is supported by the pleadings and proof, the measure may be incorporated into the question.

Instruction required. PJC 115.3 *may not* be submitted without an instruction on the appropriate measures of damages. *See Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973). See PJC 115.4 and 115.5 for sample instructions.

Causation. To recover damages for breach of contract, a plaintiff must establish damages sustained as a result of the breach. *Southern Electrical Services, Inc. v. City of Houston*, 355 S.W.3d 319, 324 (Tex. App.—Houston [1st Dist.] 2011, pet. denied).

Parallel theories. If the breach-of-contract cause of action is only one of several theories of recovery submitted in the charge and any theory has a different legal measure of damages to be applied to a factually similar claim for damages, a separate damages question for each theory may be submitted and the following additional instruction may be included earlier in the charge:

> In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

Elements of damages submitted separately. The Committee generally recommends that multiple elements of damages be separately submitted to the jury. *Harris County v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002) (broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted); *see also* Tex. Civ. Prac. & Rem. Code § 41.008(a) ("In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages."). Separating economic from noneconomic damages is required to allow the court to apply the limits on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b).

Further, "[p]rejudgment interest may not be assessed or recovered on an award of future damages." Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases). Therefore, separation of past and future damages is required.

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

> Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money

for the same loss. That is, do not compensate twice for the same loss, if any.

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation is claimed as an element of damages, it may be necessary to modify the instruction on interest.

Insurance cases. If the court submits a single question like PJC 101.58 that includes liability, causation, and damages, then a separate question like PJC 115.3 is not needed to determine the amount of policy benefits that are owed. However, if consequential damages are alleged in addition to policy benefits, then a separate question like PJC 115.3 is needed to determine the consequential damages.

This question may be used to submit both direct and consequential damages in an insurance case when the court submits breach of contract questions that do not decide damages, such as PJC 101.57. The question should be modified to reflect the proper causation standard based on the insurance contract language and to instruct the jury on what damages to include and exclude. For example:

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* [*unpaid*] damages [, *if any,*] [*that were caused (partly/solely) by/that resulted from/because of*] the [*description of covered loss, event, or cause/such failure to comply*]?

Consider the following elements of damages, if any, and none other.

[Insert appropriate instructions that describe the covered loss or event found in answer to PJC 101.57, and any consequential damages. See samples in PJC 115.4 and instructions in PJC 115.5.]

[*Do not include in your answer damages, if any, caused by* [*describe excluded cause*].]

PJC 115.4 Sample Instructions on Direct and Incidental Damages—Contracts

Explanatory note: Damages instructions in contract actions are often necessarily fact-specific. Unlike most other form instructions in this volume, therefore, the following sample instructions are illustrative only, using a hypothetical situation to give a few examples of how instructions may be worded to submit various legal measures of damages for use in connection with the contract damages question, PJC 115.3.

Sample A—Loss of the benefit of the bargain

The difference, if any, between the value of the paint job agreed to by the parties and the value of the paint job performed by *Don Davis*. The difference in value, if any, shall be determined at the time and place the paint job was performed.

Sample B—Remedial damages

The reasonable and necessary cost to repaint *Paul Payne*'s truck.

Sample C—Loss of contractual profit

The difference between the agreed price and the cost *Paul Payne* would have incurred in painting the truck.

Sample D—Loss of contractual profit plus expenses incurred before breach

The amount *Don Davis* agreed to pay *Paul Payne* less the expenses *Paul Payne* saved by not completing the paint job.

Sample E—Damages after mitigation

The difference between the amount paid by *Paul Payne* to *John Jones* for painting the truck and the amount *Paul Payne* had agreed to pay *Don Davis* for that work.

Sample F—Mitigation expenses

Reasonable and necessary expenses incurred in attempting to have the truck repainted.

Sample G—Incidental damages

Reasonable and necessary costs to store *Paul Payne*'s tools while the truck was being repainted.

COMMENT

When to use. See explanatory note above. Because damages instructions in contract suits are necessarily fact-specific, no true "pattern" instructions are given—only samples of some measures of general damages available in contract actions. This list is not exhaustive. The samples are illustrative only, adapted to a hypothetical fact situation, and must be rewritten to fit the particular damages raised by the pleadings and proof and recoverable under a legally accepted theory. The instructions should be drafted in an attempt to make the plaintiff factually whole but not to put the plaintiff in a better position than he would have been in had the defendant fully performed the contract. *See Osoba v. Bassichis*, 679 S.W.2d 119, 122 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). For a comprehensive discussion of the theories of contract damages, see *Restatement (Second) of Contracts* §§ 346–356 (1981).

Measures generally alternative. The measures outlined here are generally alternatives, although some, particularly incidental damages, may be available in addition to one of the other measures, as may consequential damages (see PJC 115.5).

Direct damages. Since *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854), contract damages have been divided into two categories: direct and consequential. *See Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 816 (Tex. 1997). Direct damages "are the necessary and usual result of the defendant's wrongful act; they flow naturally and necessarily from the wrong." *El Paso Marketing, L.P. v. Wolf Hollow I, L.P.*, 383 S.W.3d 138, 144 (Tex. 2012). Direct damages "compensate a plaintiff for a loss that is conclusively presumed to have been foreseen by the defendant as a usual and necessary consequence of the defendant's act." *DaimlerChrysler Motors Co. v. Manuel*, 362 S.W.3d 160, 179 (Tex. App.—Fort Worth 2012, no pet.). The general or direct nature of a type of damages is a determination of law to be made by the court. No question should be submitted concerning the foreseeability of direct damages; even if the evidence shows that such damages were not factually foreseeable to the parties, recovery is permitted if the damages are properly characterized by the court as direct rather than consequential. *American Bank v. Thompson*, 660 S.W.2d 831, 834 (Tex. App.—Waco 1983, writ ref'd n.r.e.).

Even damages usually not considered recoverable may be deemed direct damages if they stem as a matter of law from the breach of the contract in question. *See Cactus Utility Co. v. Larson*, 709 S.W.2d 709, 716 (Tex. App.—Corpus Christi 1986), *rev'd in part on other grounds*, 730 S.W.2d 640 (Tex. 1987) (expert witness fee, for accoun-

tant, recoverable as direct damages for breach of agreement to provide accounting services).

Benefit of the bargain and remedial damages. Whether difference in value or cost of repair is the proper measure of damages depends on the particular facts and circumstances in each case. *Fidelity & Deposit Co. of Maryland v. Stool*, 607 S.W.2d 17, 21 (Tex. Civ. App.—Tyler 1980, no writ); *see also Smith v. Kinslow*, 598 S.W.2d 910 (Tex. Civ. App.—Dallas 1980, no writ); *P.G. Lake, Inc. v. Sheffield*, 438 S.W.2d 952 (Tex. Civ. App.—Tyler 1969, writ ref'd n.r.e.).

Loss of contractual profit. Lost profits from collateral contracts are generally classified as consequential damages. Profits lost from the actual contract in question, however, are direct damages for the seller. *Continental Holdings, Ltd. v. Leahy*, 132 S.W.3d 471, 475 (Tex. App.—Eastland 2003, no pet.).

Lost profit plus capital expenditures. If the plaintiff has incurred expenses in preparation or performance and reasonably expected to recoup that investment as well as make a profit, this lost profit plus capital expenditures may be an appropriate measure of damages. *Houston Chronicle Publishing Co. v. McNair Trucklease, Inc.*, 519 S.W.2d 924, 929–31 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

Reliance damages. The plaintiff may elect to recover expenditures made in preparation or performance instead of claiming lost benefit of the bargain or profit damages. If the plaintiff makes this election because he would have lost money had the contract been completed and the defendant proves the amount of loss avoided as a result of the breach, the jury should also be instructed to deduct those prospective losses from the reliance damages. *Mistletoe Express Service v. Locke*, 762 S.W.2d 637, 638–39 (Tex. App.—Texarkana 1988, no writ).

Mitigation damages. Although normally raised defensively, the reasonable expenses of mitigating an economic loss are recoverable as actual damages for breach of contract. *Hycel, Inc. v. Wittstruck*, 690 S.W.2d 914, 924 (Tex. App.—Waco 1985, writ dism'd).

Incidental damages. A variety of expenditures and other incidental damages may be recoverable as direct damages, depending on the particular facts and circumstances of each case. *See, e.g., Cactus Utility Co.*, 709 S.W.2d at 716 (accountant's fees); *LaChance v. Hollenbeck*, 695 S.W.2d 618, 621–22 (Tex. App.—Austin 1985, writ ref'd n.r.e.) (improvements to real property); *Anderson Development Corp. v. Coastal States Crude Gathering Co.*, 543 S.W.2d 402, 405 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (additional salaries and expenses for equipment, maintenance, and supervision). Whether any particular incidental damages are characterized as direct or consequential is, as discussed above, a question for the court. If a claimed expense is deemed consequential, it should be submitted as such, using the form in PJC 115.5.

UCC cases. If the contract is for the sale of goods, the damages instructions should be drafted to incorporate the appropriate damages provisions in Tex. Bus. & Com. Code §§ 2.701–.724 (Tex. UCC). The following examples are illustrative only, using only a few damages provisions in the Uniform Commercial Code.

Sample A—(§ 2.708) Seller's damages for nonacceptance

The difference between the market price of the goods at the time and place *Paul Payne* was to tender them to *Don Davis* and the unpaid contract price.

Sample B—(§ 2.710) Seller's incidental damages

Commercially reasonable charges, expenses, or commissions *Paul Payne* incurred in stopping delivery of goods.

Commercially reasonable charges *Paul Payne* incurred for transportation, care, and custody of goods in connection with their return or resale.

Sample C—(§ 2.713) Buyer's damages for nondelivery

The difference between the market price at the time *Paul Payne* learned of *Don Davis*'s failure to comply and the contract price.

PJC 115.5 Instructions on Consequential Damages—Contracts

Lost profits that were a natural, probable, and foreseeable consequence of *Don Davis*'s failure to comply.

Damage to credit reputation that was a natural, probable, and foreseeable consequence of *Don Davis*'s failure to comply.

COMMENT

When to use. PJC 115.5, with its added element of foreseeability, should be used for recoverable elements of consequential damages that do not, as a matter of law, directly flow from the defendant's breach. *See Basic Capital Management, Inc. v. Dynex Commercial, Inc.*, 348 S.W.3d 894, 901–02 (Tex. 2011); *Stuart v. Bayless*, 964 S.W.2d 920, 921 (Tex. 1998). See PJC 115.4 Comment.

Foreseeability. "Foreseeability is a fundamental prerequisite to the recovery of consequential damages for breach of contract." *Basic Capital Management, Inc.*, 348 S.W.3d at 901. Consequential damages may be recovered only if proved to be the "natural, probable, and foreseeable consequence" of the defendant's breach. *Basic Capital Management, Inc.*, 348 S.W.3d at 901–02.

Caveat. Damages usually characterized as consequential may be deemed direct if they are so directly related to the contract that they stem as a matter of law from the breach. Conversely, not all factually foreseeable damages are legally recoverable. *See Myrtle Springs Reverted Independent School District v. Hogan*, 705 S.W.2d 707, 710 (Tex. App.—Texarkana 1985, writ ref'd n.r.e.) (loss of earning capacity and mental anguish not recoverable for breach of teaching contract).

Lost profits. If lost profits are not proved with reasonable certainty but are merely speculative, no recovery is allowed as a matter of law, and this instruction should not be included in the damages question. *Texas Instruments, Inc. v. Teletron Energy Management, Inc.*, 877 S.W.2d 276, 278–81 (Tex. 1994); *see Southwestern Energy Production Co. v. Berry-Helfand*, 491 S.W.3d 699, 711 (Tex. 2016). If, however, there is legally sufficient evidence of lost profits, a fact question is raised. *Southwest Battery Corp. v. Owen*, 115 S.W.2d 1097, 1099 (Tex. 1938).

UCC cases. For transactions covered by article 2 of the Uniform Commercial Code, see Tex. Bus. & Com. Code § 2.715(b)(1) (Tex. UCC) (buyer's consequential damages).

PJC 115.6 Question on Promissory Estoppel—Reliance Damages

[Insert predicate, PJC 115.1.]

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* damages, if any, that resulted from *his* reliance on *Don Davis*'s promise?

Consider the following elements of damages, if any, and none other.

[Insert appropriate instructions.]

Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

1. [*Element A*] sustained in the past.

Answer: _____

2. [*Element A*] that, in reasonable probability, will be sustained in the future.

Answer: _____

3. [*Element B*] sustained in the past.

Answer: _____

4. [*Element B*] that, in reasonable probability, will be sustained in the future.

Answer: _____

COMMENT

When to use. PJC 115.6 and appropriate instructions tailored to the specific reliance damages alleged by the plaintiff should be submitted following the liability question for promissory estoppel. See PJC 101.41.

Reliance damages only. In a claim based on promissory estoppel, the plaintiff is not entitled to recover expectancy damages or to receive the full benefit of the bargain. Only reliance damages are allowed. *Fretz Construction Co. v. Southern National*

Bank, 626 S.W.2d 478, 483 (Tex. 1981); *Wheeler v. White*, 398 S.W.2d 93, 96–97 (Tex. 1965).

Elements of damages submitted separately. The Committee generally recommends that multiple elements of damages be separately submitted to the jury. *Harris County v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002) (broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted); *see also* Tex. Civ. Prac. & Rem. Code § 41.008(a) ("In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages."). Separating economic from noneconomic damages is required to allow the court to apply the limits on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b).

Further, "[p]rejudgment interest may not be assessed or recovered on an award of future damages." Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases). Therefore, separation of past and future damages is required.

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

> Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation is claimed as an element of damages, it may be necessary to modify the instruction on interest.

PJC 115.7 Question on Quantum Meruit Recovery

[Insert predicate, PJC 115.1.]

QUESTION _____

What is the reasonable value of such compensable work at the time and place it was performed?

Answer in dollars and cents, if any.

Answer: _____

COMMENT

When to use. PJC 115.7 submits the measure of recovery for quantum meruit. *Hill v. Shamoun & Norman, LLP*, 544 S.W.3d 724, 733 (Tex. 2018) ("The measure of damages for recovery under a quantum-meruit theory is the reasonable value of the work performed and the materials furnished."). *See, e.g., Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992) (allowing for recovery under quantum meruit for services and materials); *Texas Delta Upsilon Foundation v. Fehr*, 307 S.W.2d 124, 127 (Tex. Civ. App.—Austin 1957, writ ref'd n.r.e.). The question must be predicated on an affirmative finding that the work is compensable under this theory. See PJC 101.42.

PJC 115.8 Defensive Instruction on Mitigation—Contract Damages

Do not include in your answer any amount that you find *Paul Payne* could have avoided by the exercise of reasonable care.

COMMENT

When to use. If the evidence raises a question about the plaintiff's failure to mitigate damages after the defendant's actionable conduct, an instruction on mitigation should be included with the damages question. *Alexander & Alexander of Texas, Inc. v. Bacchus Industries, Inc.*, 754 S.W.2d 252, 253 (Tex. App.—El Paso 1988, writ denied).

Defendant's burden of proof. Failure to mitigate is an affirmative defense, and the burden of proof is on the party asserting such a failure. The supreme court has approved the submission of affirmative defenses by instruction, "provided the burden of proof is properly placed." *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 651 (Tex. 1988). Where appropriate, the trial court may specifically state the burden of proof by supplementing the above instruction or the general instructions (see PJC 100.3), or the trial court may submit a question on the defense. The defendant must offer evidence showing not just the plaintiff's lack of care but also the amount by which the damages were increased by such failure to mitigate. *Cocke v. White*, 697 S.W.2d 739, 744 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.); *R.A. Corbett Transport, Inc. v. Oden*, 678 S.W.2d 172, 176 (Tex. App.—Tyler 1984, no writ); *Copenhaver v. Berryman*, 602 S.W.2d 540, 544 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

Settlement offers and expense to plaintiff of mitigation. The supreme court has held that a mere refusal to accept a settlement offer cannot support submission of a mitigation-of-damages instruction and that the long-standing law of this state requires a claimant to mitigate damages only if it can do so with "trifling expense or with reasonable exertions." *Gunn Infiniti v. O'Byrne*, 996 S.W.2d 854, 857 (Tex. 1999).

DTPA and Insurance Code. Several appellate opinions have cited the duty to mitigate as grounds for allowing DTPA consumers to recover mitigation expenses as actual damages. *Hycel, Inc. v. Wittstruck*, 690 S.W.2d 914, 924 (Tex. App.—Waco 1985, writ dism'd); *Orkin Exterminating Co. v. LeSassier*, 688 S.W.2d 651, 653 (Tex. App.—Beaumont 1985, no writ). The duty to mitigate has been used defensively in DTPA and Insurance Code suits. *See, e.g., Pinson v. Red Arrow Freight Lines, Inc.*, 801 S.W.2d 14, 15 (Tex. App.—Austin 1990, no writ) (DTPA); *Alexander & Alexander of Texas, Inc.*, 754 S.W.2d at 253 (Insurance Code article 21.21).

Mitigation damages. Mitigation may also be the basis for an affirmative recovery of damages for the plaintiff. See PJC 115.4.

UCC cases. A buyer's recovery of consequential damages is limited to those "which could not reasonably be prevented by cover or otherwise." Tex. Bus. & Com. Code § 2.715(b)(1) (Tex. UCC).

PJC 115.9 Question and Instruction on Deceptive Trade Practice Damages

[Insert predicate, PJC 115.1.]

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* damages, if any, that resulted from such conduct?

Consider the following elements of damages, if any, and none other.

[Insert appropriate instructions.
See examples in PJC 115.4 and 115.10.]

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

1. [*Element A*] sustained in the past.

Answer: _____

2. [*Element A*] that, in reasonable probability, will be sustained in the future.

Answer: _____

3. [*Element B*] sustained in the past.

Answer: _____

4. [*Element B*] that, in reasonable probability, will be sustained in the future.

Answer: _____

COMMENT

When to use. PJC 115.9 should be predicated on a "Yes" answer to PJC 102.1, 102.7, or 102.8, finding a violation of section 17.46(b) of the Texas Deceptive Trade Practices–Consumer Protection Act (Tex. Bus. & Com. Code §§ 17.41–.63) (DTPA), an unconscionable action, or a breach of warranty. It may be adapted for use in most DTPA cases by the addition of appropriate instructions setting out legally available measures of damages. See PJC 115.4 and 115.10.

Instruction required. Failure to instruct the jury on appropriate measures of damages is error. *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973).

Alternative measures. The DTPA permits the injured consumer to recover the greatest amount of actual damages caused by the wrongful conduct. Thus, the consumer may submit to the jury alternative measures of damages for the same loss and then elect after the verdict the recovery desired by waiving the surplus findings on damages. *Kish v. Van Note*, 692 S.W.2d 463, 466–67 (Tex. 1985). Similarly, if the DTPA claim is only one of several theories of recovery, each cause of action will have its own damages question inquiring about similar claims of damages.

Separating elements of damages. Based on Tex. Civ. Prac. & Rem. Code § 41.008(a), the Committee suggests separating economic from other compensatory damages. Separating economic from noneconomic and past from future damages is required—

1. to allow the court to apply the limits on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b);

2. to allow calculation of prejudgment interest on damages in cases governed by Tex. Fin. Code § 304.1045 (for final judgments signed or subject to appeal on or after September 1, 2003); and

3. to allow the court to apply the proper standards for recovery of economic, mental anguish, and additional damages under DTPA § 17.50(b).

See PJC 115.10 for sample damages instructions.

In addition, broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted. *Harris County v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002). If there is any question about the sufficiency of the evidence to support one or more of the elements, the Committee recommends that the elements of damages be separately submitted to the jury.

Instruction on considering elements separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the follow-

ing language should be substituted for the instruction to consider each element separately:

> Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation is claimed as an element of damages, it may be necessary to modify the instruction on interest.

PJC 115.10 Sample Instructions—Deceptive Trade Practice Damages

Explanatory note: Damages instructions in DTPA actions are often necessarily fact-specific. Unlike most other form instructions in this volume, therefore, the following sample instructions are illustrative only, using a hypothetical situation to give a few examples of how instructions may be worded to submit various legal measures of damages for use in connection with the DTPA damages question, PJC 115.9.

Sample A—Loss of the benefit of the bargain

The difference, if any, in the value of the paint job as it was received and the value it would have had if it had been as [*represented*] [*warranted*]. The difference in value, if any, shall be determined at the time and place the paint job was done.

Sample B—Out of pocket

The difference, if any, in the value of the paint job as it was received and the price *Paul Payne* paid for it. The difference, if any, shall be determined at the time and place the paint job was done.

Sample C—Expenses

The reasonable and necessary cost to repaint the truck.

The reasonable and necessary interest expense that *Paul Payne* incurred on the loan *he* received to pay for the paint job.

Sample D—Loss of use

[The reasonable and necessary expense incurred in renting a car.] [The reasonable rental value of a replacement vehicle.]

Sample E—Lost profits

Paul Payne's lost profits sustained in the past.

Paul Payne's lost profits that, in reasonable probability, *he* will sustain in the future.

Sample F—Lost time

The reasonable value of the time spent by *Paul Payne* correcting or attempting to correct the problems with the paint job.

Sample G—Damage to credit

Damage to *Paul Payne*'s credit reputation sustained in the past.

Damage to *Paul Payne*'s credit reputation that, in reasonable probability, *he* will sustain in the future.

Sample H—Medical care

Medical care in the past.

Medical care that, in reasonable probability, *Paul Payne* will sustain in the future.

Sample I—Loss of earning capacity

Loss of earning capacity sustained in the past.

Loss of earning capacity that, in reasonable probability, *Paul Payne* will sustain in the future.

Sample J—Mental anguish

Paul Payne's mental anguish sustained in the past.

Paul Payne's mental anguish that, in reasonable probability, *he* will sustain in the future.

COMMENT

When to use. See explanatory note above. Because damages instructions in DTPA suits are necessarily fact-specific, no true "pattern" instructions are given—only samples of damages available in DTPA actions. This list is not exhaustive. The samples are illustrative only, adapted to a hypothetical fact situation, and must be rewritten to fit the particular damages raised by the pleadings and proof. Instructions on one or more measures of damages must be submitted with the DTPA damages question, PJC 115.9. In addition to the measures outlined above, any of the common-law measures of damages for breach of contract may be available to the plaintiff in a DTPA action. See PJC 115.4.

Instruction required. Failure to instruct the jury on appropriate measures of damages is error. *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973).

Separating elements of damages. Based on Tex. Civ. Prac. & Rem. Code § 41.008(a), the Committee suggests separating economic from other compensatory

damages. Separating economic from noneconomic and past from future damages is required—

1. to allow the court to apply the limits on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b);

2. to allow calculation of prejudgment interest on damages in cases governed by Tex. Fin. Code § 304.1045 (for final judgments signed or subject to appeal on or after September 1, 2003); and

3. to allow the court to apply the proper standards for recovery of economic, mental anguish, and additional damages under Tex. Bus. & Com. Code § 17.50(b) (DTPA).

Available measures. Damages available to DTPA plaintiffs are those recoverable at common law. *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 939 (Tex. 1980). Traditional measures of damages for misrepresentation are the out-of-pocket and benefit-of-the-bargain measures, the first two samples listed above. *W.O. Bankston Nissan, Inc. v. Walters*, 754 S.W.2d 127, 128 (Tex. 1988); *Leyendecker & Associates v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984). Cost of repair is another recognized measure. *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77, 78 n.1 (Tex. 1977). Damages for cost of repair and diminution in value may or may not be duplicative. *See Houston Unlimited, Inc. Metal Processing v. Mel Acres Ranch*, 443 S.W.3d 820, 827 (Tex. 2014). A wide variety of incidental and consequential damages are recoverable. *Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 162 (Tex. 1992); *Kish v. Van Note*, 692 S.W.2d 463, 466–67 (Tex. 1985). Except as specifically provided in DTPA § 17.50(b), (h), damages for bodily injury or death or for the infliction of mental anguish are exempted from DTPA coverage. DTPA § 17.49(e).

Alternative measures. The DTPA permits the injured consumer to recover the greatest amount of actual damages caused by the wrongful conduct. Thus, the consumer may submit to the jury alternative measures of damages for the same loss and then elect after the verdict the recovery desired by waiving the surplus findings on damages. *Kish*, 692 S.W.2d at 466–67.

Separate answer for each element. Broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted. *Harris County v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002). If there is any question about the sufficiency of the evidence to support one or more of the elements, the Committee recommends that the elements of damages be separately submitted to the jury.

Loss of use. The consumer does not need to actually incur out-of-pocket expenses to recover for loss of use of an item. Evidence of the reasonable rental value of the substitute is sufficient. *Luna v. North Star Dodge Sales*, 667 S.W.2d 115, 118–19 (Tex. 1984).

Expenses. Recoverable damages include reasonably necessary expenses shown to be factually caused by the defendant's conduct. *Kish*, 692 S.W.2d at 466. In *Jacobs v. Danny Darby Real Estate, Inc.*, 750 S.W.2d 174, 175 n.2 (Tex. 1988), the supreme court raised, but because it was not asserted by point of error, left unanswered, the question of whether those expenses must be proved reasonable and necessary.

Lost time. See *Village Mobile Homes, Inc. v. Porter*, 716 S.W.2d 543, 549–50 (Tex. App.—Austin 1986, writ ref'd n.r.e.), and *Ybarra v. Saldana*, 624 S.W.2d 948, 951–52 (Tex. App.—San Antonio 1981, no writ), for discussion of damages for lost time.

Consideration paid. Another accepted measure of damages is the consumer's net economic loss, determined by subtracting the amount of any benefits received from the consideration the consumer has paid. For example, in *Woo v. Great Southwestern Acceptance Corp.*, 565 S.W.2d 290, 298 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.), the consumer recovered as damages the amount paid for a distributorship, less the value of certain materials she had received, and in *Henry S. Miller Co. v. Bynum*, 797 S.W.2d 51, 54 (Tex. App.—Houston [1st Dist.] 1990), *aff'd*, 836 S.W.2d 160 (Tex. 1992), the consumer recovered the amounts spent to open a business, less the amount he recouped when the business was sold. If the consumer receives nothing or if what is received is worthless, then the recovery under this measure of damages would be simply the consideration paid. *Vogelsang v. Reece Import Autos, Inc.*, 745 S.W.2d 47, 48 (Tex. App.—Dallas 1987, no writ), *abrogated on other grounds by E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 554 (Tex. 1995). In addition to being a measure of damages, restoration of money paid is available under a theory of rescission and restitution in DTPA § 17.50(b)(3). *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 824–27 (Tex. 2012).

Medical care. If there is a question whether medical expenses are reasonable or medical care is necessary, the phrase *Reasonable expenses for necessary medical care* should be substituted for the phrase *Medical care* in sample *H*.

No foreseeability required. Proof of foreseeability is not required to recover consequential damages, such as lost profits, under the DTPA. *Hycel, Inc. v. Wittstruck*, 690 S.W.2d 914, 922–23 (Tex. App.—Waco 1985, writ dism'd); *Howell Crude Oil Co. v. Donna Refinery Partners, Ltd.*, 928 S.W.2d 100, 110–11 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *cf. Investors, Inc. v. Hadley*, 738 S.W.2d 737, 739 (Tex. App.—Austin 1987, writ denied).

Mental anguish. Mental anguish damages may be recoverable in DTPA actions if the trier of fact finds the conduct was committed knowingly, DTPA § 17.50(b)(1), or if a claimant is granted the right to bring a cause of action under the DTPA by "another law," DTPA § 17.50(h).

PJC 115.11 Question on Additional Damages—Deceptive Trade Practices

[Insert predicate, PJC 115.1.]

QUESTION _____

What sum of money, if any, in addition to actual damages, should be awarded to *Paul Payne* against *Don Davis* because *Don Davis*'s conduct was committed [*knowingly*] [*intentionally*]?

Answer in dollars and cents, if any.

Answer: _____

COMMENT

When to use. PJC 115.11 should be predicated on a jury finding that the defendant's deceptive trade practice, breach of warranty, or unconscionable act was committed knowingly or intentionally. See PJC 102.21.

Factors to consider. In light of the constitutional concerns raised in *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 26–30 (Tex. 1994), an instruction on the exemplary damages factors set out at PJC 115.38 should be submitted with the question at PJC 115.11. *See also TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). Some trial courts have, without objection, given instructions similar to the definition of exemplary damages in connection with submission of these DTPA enhancement damages. *Ortiz v. Flintkote Co.*, 761 S.W.2d 531, 537 (Tex. App.—Corpus Christi 1988, writ denied); *Rendon v. Sanchez*, 737 S.W.2d 122, 126 (Tex. App.—San Antonio 1987, no writ).

Treble damages.

DTPA suits. A finding of knowing or intentional conduct is required for any award of discretionary damages. Tex. Bus. & Com. Code § 17.50(b)(1) (DTPA). See PJC 102.21.

Insurance Code chapter 541 suits. The Insurance Code makes additional damages discretionary with the trier of fact if the defendant acted knowingly. *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 488 (Tex. 2018). The plaintiff should submit the question of knowing conduct as in PJC 102.21 and then should ask the jury to determine the amount of additional damages as in PJC 115.11. *See* Tex. Ins. Code § 541.152(b).

Recovery of treble damages is the same whether the claim is brought directly under chapter 541 or is brought through DTPA § 17.50(a)(4). In *Vail v. Texas Farm Bureau Mutual Insurance Co.*, 754 S.W.2d 129, 137 (Tex. 1988), the supreme court held that this DTPA section "incorporates article 21.21 [now chapter 541] . . . in its entirety," including its treble damages provision.

Cap on treble damages. The maximum recovery under DTPA § 17.50(b)(1) is treble damages. *Jim Walter Homes, Inc. v. Valencia*, 690 S.W.2d 239, 241 (Tex. 1985). Rather than submit to the jury the rather convoluted formula in section 17.50(b)(1), it is preferable to have the jury supply whatever amount it wishes as "additional damages" and have the court impose the statutory ceiling on the recovery actually awarded at judgment.

PJC 115.12 Contribution—Deceptive Trade Practices Act and Insurance Code Chapter 541 (Comment)

DTPA and Insurance Code incorporate existing principles. DTPA section 17.555 provides that a DTPA defendant "may seek contribution or indemnity from one who, under the statute law or at common law, may have liability for the damaging event of which the consumer complains." Tex. Bus. & Com. Code § 17.555 (DTPA). No new contribution scheme was created; rather, the section incorporates "existing principles of contribution and indemnity law into DTPA cases." *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 446 (Tex. 1989). Though the Insurance Code does not have a section like DTPA § 17.555 incorporating existing contribution principles, the supreme court applied the original statutory pro rata scheme in chapter 32 of the Civil Practice and Remedies Code to an article 21.21 (now chapter 541) case in *Stewart Title Guaranty Co. v. Sterling*, 822 S.W.2d 1, 6 n.7 (Tex. 1991), *overruled in part on other grounds by Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006).

1995 DTPA amendments. In DTPA causes of action accruing on or after September 1, 1995, and for all such suits filed on or after September 1, 1996, contribution is governed by chapter 33 of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code § 33.002(a)(2); *see also* Acts 1995, 74th Leg., R.S., ch. 414, § 20(b) (H.B. 668), eff. Sept. 1, 1995. For a discussion and a sample submission, see PJC 115.36 comment, "Contribution defendants."

PJC 115.13 Question and Instruction on Actual Damages under Insurance Code Chapter 541

[Insert predicate, PJC 115.1.]

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* damages, if any, that were caused by such unfair or deceptive act or practice?

Consider the following elements of damages, if any, and none other.

[Insert appropriate instructions.
See examples in PJC 115.10.]

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

1. [*Element A*] sustained in the past.

Answer: _____

2. [*Element A*] that, in reasonable probability, will be sustained in the future.

Answer: _____

3. [*Element B*] sustained in the past.

Answer: _____

4. [*Element B*] that, in reasonable probability, will be sustained in the future.

Answer: _____

COMMENT

When to use. PJC 115.13 should be used if the insured is claiming damages for a violation of Tex. Ins. Code ch. 541. PJC 115.13 should be predicated on a "Yes" answer to PJC 102.14.

Instruction required. PJC 115.13 *may not* be submitted without an instruction on the appropriate measures of damages. *See Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973). See PJC 115.10 for sample instructions.

Policy benefits. The supreme court has identified certain circumstances in which policy benefits are recoverable. *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 489 (Tex. 2018). Unless both the amount and causation of policy benefits as damages are conclusively established, the Committee believes it prudent to submit this element of damages to the jury.

Mental anguish. Mental anguish damages may not be recovered under the DTPA or Insurance Code chapter 541 unless a knowing violation is shown. *Beaston v. State Farm Life Insurance Co.*, 861 S.W.2d 268, 278 (Tex. App.—Austin 1993), *rev'd on other grounds*, 907 S.W.2d 430, 435–36 (Tex. 1995) (former article 21.21).

Elements of damages submitted separately. The Committee generally recommends that multiple elements of damages be separately submitted to the jury. *Harris County v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002) (broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted); *see also* Tex. Civ. Prac. & Rem. Code § 41.008(a) ("In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages."). Separating economic from noneconomic damages is required to allow the court to apply the limits on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b).

Further, "[p]rejudgment interest may not be assessed or recovered on an award of future damages." Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases). Therefore, separation of past and future damages is required.

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

> Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation is claimed as an element of damages, it may be necessary to modify the instruction on interest.

PJC 115.14 Question and Instruction on Actual Damages for Breach of Duty of Good Faith and Fair Dealing

[Insert predicate, PJC 115.1.]

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* damages, if any, that were proximately caused by such conduct?

[Insert definition of proximate cause, PJC 100.13.]

Consider the following elements of damages, if any, and none other.

[Insert appropriate instructions. See sample instructions in PJC 115.10 for format.]

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

1. [*Element A*] sustained in the past.

Answer: _____

2. [*Element A*] that, in reasonable probability, will be sustained in the future.

Answer: _____

3. [*Element B*] sustained in the past.

Answer: _____

4. [*Element B*] that, in reasonable probability, will be sustained in the future.

Answer: _____

COMMENT

When to use. PJC 115.14 should be used if the insured is claiming damages other than policy benefits. PJC 115.14 should be predicated on a "Yes" answer to PJC 103.1.

Instruction required. PJC 115.14 *may not* be submitted without an instruction on the appropriate measures of damages. *See Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973). See PJC 115.10 for sample instructions.

Proximate cause. For a definition of proximate cause, see PJC 100.13.

Policy benefits. Unpaid benefits due under the policy may or may not be recoverable as damages, depending on the circumstances of the case. *See Twin City Fire Insurance Co. v. Davis*, 904 S.W.2d 663 (Tex. 1995); *Seneca Resources Corp. v. Marsh & McLennan, Inc.*, 911 S.W.2d 144 (Tex. App.—Houston [1st Dist.] 1995, no writ). If policy benefits are wrongfully withheld, they are properly submitted as damages. *See Vail v. Texas Farm Bureau Mutual Insurance Co.*, 754 S.W.2d 129, 136 (Tex. 1988) (policy benefits wrongfully withheld recoverable as a matter of law in DTPA or article 21.21 (now chapter 541) case).

Damages other than policy benefits. If there is delay or denial of payment of an insurance claim, there may be personal injury damages, damage to credit, lost profits, and other damages. For sample instructions that may apply, see PJC 115.10.

Elements of damages submitted separately. The Committee generally recommends that multiple elements of damages be separately submitted to the jury. *Harris County v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002) (broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted); *see also* Tex. Civ. Prac. & Rem. Code § 41.008(a) ("In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages."). Separating economic from noneconomic damages is required to allow the court to apply the limits on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b).

Further, "[p]rejudgment interest may not be assessed or recovered on an award of future damages." Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases). Therefore, separation of past and future damages is required.

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

> Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you

have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation is claimed as an element of damages, it may be necessary to modify the instruction on interest.

PJC 115.15 Remedies for Breach of Fiduciary Duty (Comment)

Jury questions. Whether equitable relief is granted is for the court to decide based on "the equity of the circumstances"; however, the jury must resolve any contested fact issues. *Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999). Fact disputes for the jury to decide may include the existence of a breach, the agent's culpability, the value of the agent's services, the amount of contractual consideration paid, and the existence and amount of any harm to the principal. The court will then decide whether the breach was clear and serious and whether the remedy would be equitable and just. *Burrow*, 997 S.W.2d at 245–46.

Equitable relief generally. Where a fiduciary who breaches his duty has profited or benefited from a transaction with the beneficiary, as described in PJC 104.2–104.5, the plaintiff is entitled to equitable relief (such as rescission, constructive trust, profit disgorgement, or fee forfeiture) without having to show that the breach caused damages. *Burrow*, 997 S.W.2d at 238; *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 222 (Tex. 2017); *see also Restatement (Third) of Agency* § 8.01 cmt. d (2006) (listing remedies). Where willful actions constituting a fiduciary breach also amount to fraudulent inducement, the contractual consideration received by the fiduciary is recoverable regardless of whether the breach caused actual damages. *ERI Consulting Engineers, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010).

Rescission. The court may grant rescission of a transaction accomplished by a breach of the defendant's fiduciary duty. *See Allison v. Harrison*, 156 S.W.2d 137, 140 (Tex. 1941) (purchase of land done without full disclosure by the fiduciary was voidable and could be set aside at plaintiff's option, even without proof that the price obtained was unreasonable); *see also Schiller v. Elick*, 240 S.W.2d 997, 1000 (Tex. 1951) (setting aside deed obtained through fiduciary's breach).

Constructive trust. The court may impose a constructive trust to restore property or profits lost through the fiduciary's breach. *Consolidated Gas & Equipment Co. v. Thompson*, 405 S.W.2d 333, 336 (Tex. 1966); *International Bankers Life Insurance Co. v. Holloway*, 368 S.W.2d 567, 577 (Tex. 1963); *Slay v. Burnett Trust*, 187 S.W.2d 377, 388 (Tex. 1945).

Injunction. The court may grant injunctive relief. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 773 (Tex. 1958) (injunction allowed to prevent damage through abuse of confidence in wrongfully appropriating trade secrets); *Elcor Chemical Corp. v. Agri-Sul, Inc.*, 494 S.W.2d 204, 212 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.) (enjoining unfair use of trade secret by party breaching confidential relationship).

Statutory remedies. Under appropriate circumstances, the court may—

1. compel a trustee to perform the trustee's duties;
2. enjoin the trustee from committing a breach of trust;

3. compel the trustee to redress a breach of trust;

4. order a trustee to account;

5. appoint a receiver to take possession of the trust property and administer the trust;

6. suspend the trustee;

7. remove the trustee when the trustee materially violates a trust; the trustee becomes incapacitated or insolvent; the trustee fails to make a necessary accounting; or the court finds other cause for the trustee's removal;

8. reduce or deny compensation to the trustee;

9. void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property of which the trustee wrongfully disposed and recover the property or the proceeds from the property; or

10. "order any other appropriate relief."

Tex. Prop. Code § 114.008(a); *see also* Tex. Civ. Prac. & Rem. Code chs. 64, 65.

Profit disgorgement, fee forfeiture. See PJC 115.16 and 115.17.

Actual and exemplary damages. In a proper case, in addition to equitable relief, the plaintiff may also recover actual and exemplary damages caused by the fiduciary's breach. *Manges v. Guerra*, 673 S.W.2d 180, 184 (Tex. 1984); *see also Cantu v. Butron*, 921 S.W.2d 344, 351–53 (Tex. App.—Corpus Christi 1996, writ denied). See PJC 115.18 (actual damages for breach of fiduciary duty) and 115.37 and 115.38 (exemplary damages).

PJC 115.16 Question on Profit Disgorgement—Amount of Profit

QUESTION _____

What was the amount of *Don Davis*'s profit in [*describe the transaction in question, e.g., Don Davis's leasing of mineral rights to himself*]?

Answer in dollars and cents, if any.

Answer: _____

COMMENT

When to use. Profit disgorgement does not present a jury question. If the amount of profit is disputed, however, PJC 115.16 may be used. See PJC 115.15.

Amount of profit. A fiduciary cannot use his position to gain any benefit for himself at the expense of his principal. *Schiller v. Elick*, 240 S.W.2d 997, 999 (Tex. 1951); *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 264–65 (Tex. 1951); *Slay v. Burnett Trust*, 187 S.W.2d 377, 388 (Tex. 1945); *MacDonald v. Follett*, 180 S.W.2d 334, 338 (Tex. 1944). A fiduciary must account for, and yield to the beneficiary, any profit that he makes as a result of a breach of his fiduciary duty. *International Bankers Life Insurance Co. v. Holloway*, 368 S.W.2d 567, 576–77 (Tex. 1963); *Restatement (Third) of Agency* §§ 8.01 cmt. d(1), 8.02 (2006).

PJC 115.17 Question on Fee Forfeiture—Amount of Fee

QUESTION _____

What was the amount of *Don Davis*'s fees in [*describe the transaction in question, e.g., Don Davis's brokerage of the real estate transaction*]?

Answer in dollars and cents, if any.

Answer: _____

COMMENT

When to use. If the amount of the fiduciary's fee is disputed, PJC 115.17 should be used. Once the amount of the fee has been established, the court determines as a matter of equity the amount, if any, to be forfeited. *See Burrow v. Arce*, 997 S.W.2d 229, 241 (Tex. 1999); see also PJC 115.15.

Causation not required. It is not necessary to prove that the fiduciary's breach caused damages to have the fiduciary forfeit fees. *Burrow*, 997 S.W.2d at 238–40.

Return of consideration. A trial court may also fashion an equitable remedy that requires return of all or part of any benefit received, including contractual consideration. *See ERI Consulting Engineers, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010) (affirming equitable award of significant part of contractual consideration paid by plaintiffs to defendant). If the amount or value of the benefit is in dispute, a modified version of PJC 115.17 may be used.

PJC 115.18 Question on Actual Damages for Breach of Fiduciary Duty

[Insert predicate, PJC 115.1.]

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* damages, if any, that were proximately caused by such conduct?

Consider the following elements of damages, if any, and none other.

[Insert appropriate instructions.
See examples in PJC 115.4 and 115.10.]

Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

1. [*Element A*] sustained in the past.

Answer: _____

2. [*Element A*] that, in reasonable probability, will be sustained in the future.

Answer: _____

3. [*Element B*] sustained in the past.

Answer: _____

4. [*Element B*] that, in reasonable probability, will be sustained in the future.

Answer: _____

COMMENT

When to use. Breach of fiduciary duty is an independent tort that will support an award of actual damages. *Manges v. Guerra*, 673 S.W.2d 180, 184 (Tex. 1984). A fiduciary is liable for any loss or damages suffered by the plaintiff. *Slay v. Burnett Trust*, 187 S.W.2d 377, 391 (Tex. 1945); *see also NRC, Inc. v. Huddleston*, 886 S.W.2d 526, 530 (Tex. App.—Austin 1994, no writ); *Restatement (Third) of Agency* § 8.01

cmt. d (2006). PJC 115.18 may be used when the plaintiff seeks actual damages in addition to equitable relief or as an alternate remedy. See PJC 115.5 and 115.20.

Elements of damages submitted separately. The Committee generally recommends that multiple elements of damages be separately submitted to the jury. *Harris County v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002) (broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted); *see also* Tex. Civ. Prac. & Rem. Code § 41.008(a) ("In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages."). Separating economic from noneconomic damages is required to allow the court to apply the limits on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b).

Further, "[p]rejudgment interest may not be assessed or recovered on an award of future damages." Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases). Therefore, separation of past and future damages is required.

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

> Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation is claimed as an element of damages, it may be necessary to modify the instruction on interest.

PJC 115.19 Question and Instruction on Direct Damages Resulting from Fraud

[Insert predicate, PJC 115.1.]

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* damages, if any, that resulted from such fraud?

Consider the following elements of damages, if any, and none other.

[Insert appropriate instructions. See sample instructions in PJC 115.4 and 115.10 for format.]

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

1. [*Element A*] sustained in the past.

Answer: _____

2. [*Element A*] that, in reasonable probability, will be sustained in the future.

Answer: _____

3. [*Element B*] sustained in the past.

Answer: _____

4. [*Element B*] that, in reasonable probability, will be sustained in the future.

Answer: _____

COMMENT

When to use. PJC 115.19 should be predicated on a "Yes" answer to PJC 105.1 or 105.7 and may be adapted for use in most fraud cases by the addition of appropriate instructions setting out legally available measures of direct damages. See PJC 115.4 and 115.10. If only one measure of damages is supported by the pleadings and proof, the measure may be incorporated into the question.

Instruction required. PJC 115.19 *may not* be submitted without an instruction on the appropriate measures of damages. *See Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973). See PJC 115.4 and 115.10 for sample instructions.

Direct damages. PJC 115.19 should be used only for the submission of direct damages in fraud cases. For a discussion of direct damages, see PJC 115.4 Comment. In fraud cases, direct damages are sometimes referred to as general damages—that is, damages that are the necessary and usual result of the wrongful act. *Baylor University v. Sonnichsen*, 221 S.W.3d 632, 636 (Tex. 2007). "Texas recognizes two measures of direct damages for common-law fraud: the out-of-pocket measure and the benefit-of-the bargain measure." *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018) (citing *Zorrilla v. Aypco Construction II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015)). However, the benefit-of-the-bargain measure is not available for fraud that induces a nonbinding contract. *Anderson*, 550 S.W.3d at 614; *Zorrilla*, 469 S.W.3d at 153 (citing *Haase v. Glazner*, 62 S.W.3d 795, 799–800 (Tex. 2001)). "[I]f there is a defect in contract formation, the only potentially viable measure of fraud damages is the out-of-pocket measure." *Zorrilla*, 469 S.W.3d at 153.

PJC 115.20 may be used to submit consequential damages, and PJC 115.38 may be used to submit exemplary damages.

Elements of damages submitted separately. The Committee generally recommends that multiple elements of damages be separately submitted to the jury. *Harris County v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002) (broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted); *see also* Tex. Civ. Prac. & Rem. Code § 41.008(a) ("In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages."). Separating economic from noneconomic damages is required to allow the court to apply the limits on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b).

Further, "[p]rejudgment interest may not be assessed or recovered on an award of future damages." Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases). Therefore, separation of past and future damages is required.

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

> Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation is claimed as an element of damages, it may be necessary to modify the instruction on interest.

Damages for securities law violation. Damages are available for a securities law violation "if the buyer no longer owns the security." Tex. Rev. Civ. Stat. art. 581–33A, 33B. To submit such damages in cases in which the amount is disputed, this question should be modified by replacing the word "fraud" with the words "securities law violation." The instruction on the elements of damages should track Tex. Rev. Civ. Stat. art. 581–33D(3) or 33D(4), as applicable.

If the remedy of rescission is sought, PJC 115.19 should not be submitted. Instead, if the amount of money due is disputed, the jury should be asked to determine the amount using the formula in Tex. Rev. Civ. Stat. art. 581–33D(1) or 33D(2), as applicable.

PJC 115.20 Question and Instruction on Consequential Damages Caused by Fraud

[Insert predicate, PJC 115.1.]

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* damages, if any, that were proximately caused by such fraud?

[Insert definition of proximate cause, PJC 100.13.]

Consider the following elements of damages, if any, and none other.

[Insert appropriate instructions. See sample instructions in PJC 115.4 and 115.10 for format, and see PJC 115.5.]

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

1. [*Element A*] sustained in the past.

Answer: _____

2. [*Element A*] that, in reasonable probability, will be sustained in the future.

Answer: _____

3. [*Element B*] sustained in the past.

Answer: _____

4. [*Element B*] that, in reasonable probability, will be sustained in the future.

Answer: _____

COMMENT

When to use. PJC 115.20 should be predicated on a "Yes" answer to PJC 105.1 or 105.7 and may be adapted for use in most fraud cases by the addition of appropriate instructions setting out legally available measures of damages. See PJC 115.4, 115.5, and 115.10. If only one measure of damages is supported by the pleadings and proof, the measure may be incorporated into the question.

Instruction required. PJC 115.20 *may not* be submitted without an instruction on the appropriate measures of damages. *See Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973). See PJC 115.4, 115.5, and 115.10 for sample instructions.

Proximate cause—consequential damages. PJC 115.20 should be used only for the submission of consequential or special damages in fraud cases. Consequential or special damages are "those damages which result naturally, but not necessarily, from the defendant's wrongful acts." *J&D Towing, LLC v. American Alternative Insurance Corp.*, 478 S.W.3d 649, 655 (Tex. 2016). To be recoverable, such damages must be the "proximate result" of fraud. *Airborne Freight Corp. v. C.R. Lee Enterprises*, 847 S.W.2d 289, 295 (Tex. App.—El Paso 1992, writ denied); *El Paso Development Co. v. Ravel*, 339 S.W.2d 360, 363 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.), *cited and relied on in Trenholm v. Ratcliff*, 646 S.W.2d 927, 933 (Tex. 1983); *see also Morriss-Buick Co. v. Pondrom*, 113 S.W.2d 889, 890 (Tex. 1938) (loss resulting directly and proximately from fraud). For a description of general and special damages, see *Sherrod v. Bailey*, 580 S.W.2d 24, 28 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.).

PJC 115.19 should be used to submit direct damages, and PJC 115.38 may be used to submit exemplary damages.

Elements of damages submitted separately. The Committee generally recommends that multiple elements of damages be separately submitted to the jury. *Harris County v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002) (broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted); *see also* Tex. Civ. Prac. & Rem. Code § 41.008(a) ("In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages."). Separating economic from noneconomic damages is required to allow the court to apply the limits on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b).

Further, "[p]rejudgment interest may not be assessed or recovered on an award of future damages." Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases). Therefore, separation of past and future damages is required.

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

> Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation is claimed as an element of damages, it may be necessary to modify the instruction on interest.

PJC 115.21 Question and Instruction on Monetary Loss Caused by Negligent Misrepresentation

[Insert predicate, PJC 115.1.]

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* damages, if any, that were proximately caused by such negligent misrepresentation?

[Insert definition of proximate cause, PJC 100.13.]

Consider the following elements of damages, if any, and none other. Do not add any amount for interest on past damages, if any.

Answer separately in dollars and cents for damages, if any.

The difference, if any, between the value of what *Paul Payne* received in the transaction and the purchase price or value given.

Answer: _____

The economic loss, if any, otherwise suffered in the past as a consequence of *Paul Payne*'s reliance on the misrepresentation.

Answer: _____

The economic loss, if any, that in reasonable probability will be sustained in the future as a consequence of *Paul Payne*'s reliance on the misrepresentation.

Answer: _____

COMMENT

When to use. PJC 115.21 should be predicated on a "Yes" answer to PJC 105.19. If only one measure of damages is supported by the pleadings and proof, the measure may be incorporated into the question.

Instruction required. PJC 115.21 *may not* be submitted without an instruction on the appropriate measures of damages. *See Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973).

Source of instructions. The measures of damages set forth in the instructions are prescribed by *Restatement (Second) of Torts* § 552B (1977) and have been adopted by

the Supreme Court of Texas. *Federal Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442–43 (Tex. 1991); *see also D.S.A., Inc. v. Hillsboro Independent School District*, 973 S.W.2d 662, 663–64 (Tex. 1998). In *D.S.A., Inc.*, the court also recognized that under *Restatement (Second) of Torts* § 311 (1965), a party could recover damages for risk of physical harm if actual physical harm had resulted from negligent misrepresentation. *D.S.A., Inc.*, 973 S.W.2d at 664; *but see Sloane*, 825 S.W.2d at 443 n.4.

Elements of damages submitted separately. The Committee generally recommends that multiple elements of damages be separately submitted to the jury. *Harris County v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002) (broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted); *see also* Tex. Civ. Prac. & Rem. Code § 41.008(a) ("In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages."). Separating economic from noneconomic damages is required to allow the court to apply the limits on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b).

Further, "[p]rejudgment interest may not be assessed or recovered on an award of future damages." Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases). Therefore, separation of past and future damages is required.

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

> Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Parallel theories. If the negligent misrepresentation cause of action is only one of several theories of recovery submitted in the charge and any theory has a different legal measure of damages to be applied to a factually similar claim for damages, a separate damages question for each theory may be submitted and the following additional instruction may be included earlier in the charge:

> In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be.

Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation is claimed as an element of damages, it may be necessary to modify the instruction on interest.

PJC 115.22 Question on Damages for Intentional Interference with Existing Contract or for Wrongful Interference with Prospective Contractual Relations

[Insert predicate, PJC 115.1.]

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* damages, if any, proximately caused by such interference?

[Insert definition of proximate cause, PJC 100.13.]

Consider the following elements of damages, if any, and none other.

[Insert appropriate instructions. See examples in PJC 115.4 and instructions in PJC 115.5.]

Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

1. [*Element A*] sustained in the past.

Answer: _____

2. [*Element A*] that, in reasonable probability, will be sustained in the future.

Answer: _____

3. [*Element B*] sustained in the past.

Answer: _____

4. [*Element B*] that, in reasonable probability, will be sustained in the future.

Answer: _____

COMMENT

When to use. PJC 115.22 should be predicated on a "Yes" answer to PJC 106.1 finding interference with an existing contract or to a question appropriately submitting

tortious interference with prospective contractual relations (see PJC 106.3). PJC 115.22 is used to establish the proximate cause and actual damages elements of intentional interference with an existing contract as set forth in the Comment to PJC 106.1 and of wrongful interference with prospective contractual relations as stated in PJC 106.3.

Instruction required. PJC 115.22 *may not* be submitted without an instruction on the appropriate measures of damages. *See Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973). See PJC 115.4 and 115.5 for sample instructions.

Damages. PJC 115.22 submits actual damages in interference cases. For questions submitting exemplary damages, see PJC 115.37 and 115.38 and the Comments accompanying those questions.

The basic measure of damages is the same as for breach of contract. *American National Petroleum Co. v. Transcontinental Gas Pipe Line Corp.*, 798 S.W.2d 274, 278 (Tex. 1990) (the "basic measure of actual damages for tortious interference with contract is the same as the measure of damages for breach of the contract interfered with, to put the plaintiff in the same economic position he would have been in had the contract [or relationship] interfered with been actually performed."). Thus, damages for interference with an existing contract or prospective contractual relations include the pecuniary loss of the contract's benefit and consequential losses. *American National Petroleum Co.*, 798 S.W.2d at 278.

Generally, damages for mental anguish are not recoverable for tortious interference with contract. *Compare Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 818 (Tex. 2005) (stating in a case alleging intentional infliction of emotional distress that mental anguish is not compensable for tortious interference), *and American National Petroleum Co.*, 798 S.W.2d at 278 (basic measure of actual damages for tortious interference with contract is same as measure of damages for breach of interfered-with contract), *with City of Tyler v. Likes*, 962 S.W.2d 489, 496 (Tex. 1997) ("Mental anguish is compensable as the foreseeable result of a breach of . . . a very limited number of contracts dealing with intensely emotional non-commercial subjects such as preparing a corpse for burial, . . . or delivering news of a family emergency . . . ."). *See also Soukup v. Sedgwick Claims Management Services, Inc.*, No. 01-11-00871-CV, 2012 WL 3134223, at *6–7 (Tex. App.—Houston [1st Dist.] Aug. 2, 2012, pet. dism'd) (mem. op.) (relying on *Creditwatch* and holding that because mental anguish damages are generally not recoverable for breach of contract they are also not recoverable for tortious interference with contract; the measure of damages for tortious interference "is the same as the measure of damages for breach of the interfered-with contract").

Elements of damages submitted separately. The Committee generally recommends that multiple elements of damages be separately submitted to the jury. *Harris County v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002) (broad-form submission of multi-

ple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted); *see also* Tex. Civ. Prac. & Rem. Code § 41.008(a) ("In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages."). Separating economic from noneconomic damages is required to allow the court to apply the limits on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b).

Further, "[p]rejudgment interest may not be assessed or recovered on an award of future damages." Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases). Therefore, separation of past and future damages is required.

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

> Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Parallel theories. If theories of recovery other than those addressed in PJC 115.22 are submitted in the charge and any theory has a different legal measure of damages to be applied to a factually similar claim for damages, a separate damages question for each theory may be submitted and the following additional instruction may be included earlier in the charge:

> In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation is claimed as an element of damages, it may be necessary to modify the instruction on interest.

[PJC 115.23 is reserved for expansion.]

PJC 115.24 Sample Instructions on Direct and Incidental Damages—Breach of Employment Agreement

Explanatory note: Damages instructions in a breach of an employment agreement case, like contract actions, are necessarily fact-specific and can vary with the circumstances of each case. The elements listed below are those commonly used in employment contract cases but do not represent an exhaustive list. These instructions are to be used in conjunction with the contract damages question, PJC 115.3.

Sample A—Lost earnings

"Lost earnings" equal the present cash value of the employment agreement to the employee had it not been breached, less amounts actually earned.

Sample B—Lost employee benefits other than earnings

"Benefits" include [*sick-leave pay, vacation pay, cost-of-living increases, profit-sharing benefits, stock options, pension fund benefits, health insurance, life insurance, housing or transportation subsidies, bonuses*].

Sample C—Loss of insurance coverage

Losses incurred as a result of the loss of health, life, dental, or similar insurance coverage.

Sample D—Mitigation expenses

Reasonable and necessary expenses in obtaining other employment.

COMMENT

When to use. See explanatory note above. Because damages instructions are necessarily fact-specific, no true "pattern" instructions are given—only samples of general damages available in employment contract actions. This list is not exhaustive. The samples are illustrative only and must be rewritten to fit the particular damages raised by the pleadings and proof and recoverable under a legally accepted theory.

Measure of damages. The legal measure of damages for the breach of an employment agreement is the present cash value of the agreement to the employee had it not been breached, less any amounts the employee should in the exercise of reasonable diligence be able to earn through other employment. *Gulf Consolidated International, Inc. v. Murphy*, 658 S.W.2d 565, 566 (Tex. 1983); *see also Southwest Airlines Co. v. Jaeger*, 867 S.W.2d 824, 835 (Tex. App.—El Paso 1993, writ denied) (approv-

ing jury question and instructions on damages for breach of employment contract); *Lone Star Steel Co. v. Wahl*, 636 S.W.2d 217, 221 (Tex. App.—Texarkana 1982, no writ) (measure of damages is all wages past due and all future promised wages less what can be earned by reasonable effort in similar employment). There may be elements of actual damages that are recoverable other than those listed in PJC 115.24.

Separate answer for each element. Broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted. *Harris County v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002). If there is any question about the sufficiency of the evidence to support one or more of the elements, the Committee recommends that the elements of damages be separately submitted to the jury.

Consequential damages. If foreseeability is at issue, see PJC 115.5 and make appropriate modifications.

PJC 115.25 Defensive Instruction on Mitigation—Breach of Employment Agreement Damages

Do not include in your answer any amount that you find *Paul Payne* could have earned by exercising reasonable diligence in seeking other employment.

COMMENT

When to use. PJC 115.25 should be included with the damages question (see PJC 115.3) if the evidence raises a question about the employee's failure to mitigate damages after the employer's actionable conduct. *Gulf Consolidated International, Inc. v. Murphy*, 658 S.W.2d 565, 566 (Tex. 1983).

The general rules concerning mitigation found at the Comment to 115.8 are also applicable to mitigation in employment contracts.

Source of instruction. PJC 115.25 is derived from *Gulf Consolidated International, Inc.*, 658 S.W.2d at 566, and *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572, 581 (Tex. App.—Houston [1st Dist.] 1992, no writ). See also PJC 115.8.

PJC 115.26 Question and Instruction on Damages for Wrongful Discharge for Refusing to Perform an Illegal Act

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* damages, if any, that resulted from such conduct?

Consider the following elements of damages, if any, and none other. Answer separately in dollars and cents for damages, if any.

1. Lost earnings that were sustained in the past.

Answer: _____

2. Lost earnings that, in reasonable probability, will be sustained in the future.

Answer: _____

3. Lost employee benefits other than earnings that were sustained in the past.

Answer: _____

4. Lost employee benefits other than earnings that, in reasonable probability, will be sustained in the future.

Answer: _____

"Benefits" include [*sick-leave pay, vacation pay, profit-sharing benefits, stock options, pension fund benefits, housing or transportation subsidies, bonuses, monetary losses incurred as a result of the loss of health, life, dental, or similar insurance coverage*].

COMMENT

When to use. PJC 115.26 should be predicated on a "Yes" answer to PJC 107.3, finding wrongful discharge for refusing to perform an illegal act.

Source of question and instruction. The concurring opinion in *Sabine Pilot Service, Inc. v. Hauck* suggests that Tex. Lab. Code § 451.001 (formerly article 8307c), prohibiting firing an employee for filing a workers' compensation claim, should serve as a guide for the appropriate measure of damages for wrongful discharge for refusing

to perform an illegal act. *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733, 736 (Tex. 1985) (Kilgarlin, J., concurring). The concurrence suggests that the proper measure of damages in such cases includes "loss of wages, both past and those reasonably anticipated in the future, and employee and retirement benefits that would have accrued had employment continued. It would also include punitive damages." *Sabine Pilot Service, Inc.*, 687 S.W.2d at 736; *see also Worsham Steel Co. v. Arias*, 831 S.W.2d 81, 84 (Tex. App.—El Paso 1992, no writ) (approving above as measures of damages in article 8307c case). But the Texas Supreme Court has more recently allowed that, "in the proper case, *Sabine Pilot* plaintiffs may recover any reasonable tort damages, including punitive damages." *Safeshred, Inc. v. Martinez*, 365 S.W.3d 655, 660–61 (Tex. 2012). There may be other elements of common-law damages, e.g., mental anguish, that are recoverable other than those listed in PJC 115.26. The Committee expresses no opinion concerning the recoverability of these common-law damages.

Mitigation. For a defensive instruction on mitigation, see PJC 115.8 and 115.25.

Elements of damages submitted separately. The Committee generally recommends that multiple elements of damages be separately submitted to the jury. *Harris County v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002) (broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted); *see also* Tex. Civ. Prac. & Rem. Code § 41.008(a) ("In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages."). Separating economic from noneconomic damages is required to allow the court to apply the limits on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b).

Further, "[p]rejudgment interest may not be assessed or recovered on an award of future damages." Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases). Therefore, separation of past and future damages is required.

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

> Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Exemplary damages. No Texas case has established whether exemplary damages are recoverable in a *Sabine Pilot* case. The predicate state of mind or conduct for an

award of exemplary damages is set out in Tex. Civ. Prac. & Rem. Code § 41.003(a). See PJC 115.37. *Cf. Azar Nut Co. v. Caille*, 734 S.W.2d 667, 669 (Tex. 1987) (exemplary damages are within article 8307c (now Tex. Lab. Code § 451.001) "reasonable damages suffered by employee" terminated in a retaliatory manner). If exemplary damages are recoverable, see PJC 115.38.

After-acquired evidence of employee misconduct. If the employer has pleaded the discovery of evidence of employee misconduct acquired only after the employee's employment was terminated, see PJC 107.8 for the applicable instruction.

PJC 115.27 Question and Instructions on Damages for Retaliation under Texas Whistleblower Act

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* damages, if any, that resulted from such conduct?

Consider the following elements of damages, if any, and none other.

Do not include interest on any amount of damages you may find.

Do not include back pay or interest in calculating compensatory damages, if any.

Answer separately in dollars and cents for damages, if any.

1. Lost wages during the period of suspension or termination.

Answer: _____

2. Lost employee benefits other than loss of earnings.

"Benefits" include [*sick-leave pay, vacation pay, profit-sharing benefits, stock options, pension fund benefits, housing or transportation subsidies, bonuses, monetary losses incurred as a result of the loss of health, life, dental, or similar insurance coverage*].

Answer: _____

3. Compensatory damages in the past, which include [*emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other noneconomic losses*].

Answer: _____

4. Compensatory damages in the future, which include [*economic losses, emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other noneconomic losses*].

Answer: _____

COMMENT

When to use. PJC 115.27 should be predicated on a "Yes" answer to PJC 107.4, finding retaliation under the Texas Whistleblower Act, Tex. Gov't Code §§ 554.001–.010.

Source of question and instructions. PJC 115.27 is derived from Tex. Gov't Code § 554.003 and *City of Ingleside v. Kneuper*, 768 S.W.2d 451, 454 (Tex. App.—Austin 1989, writ denied).

Statutory relief. Tex. Gov't Code § 554.003 provides for recovery of actual damages and attorney's fees for a violation of the Whistleblower Act. The statute, however, does not define "actual damages." The elements given above are not meant to be exclusive, but rather are those most commonly allowed in employment cases.

The statute also provides for equitable relief in the nature of an injunction or reinstatement of employment and/or benefits, which is to be determined by the trial court. Tex. Gov't Code § 554.003; *see Caballero v. Central Power & Light Co.*, 858 S.W.2d 359 (Tex. 1993) (equitable relief under Texas Commission on Human Rights Act (now Texas Labor Code chapter 21) is to be determined by judge).

Mitigation. For a defensive instruction on mitigation, see PJC 115.8 and 115.25.

Attorney's fees. For submission of attorney's fees, see PJC 115.60.

Exemplary damages unavailable, post–June 15, 1995, cases. Exemplary damages are not available under the Texas Whistleblower Act. Tex. Gov't Code § 554.003(a).

Elements of damages submitted separately. The Committee generally recommends that multiple elements of damages be separately submitted to the jury. *Harris County v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002) (broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted); *see also* Tex. Civ. Prac. & Rem. Code § 41.008(a) ("In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages."). Separating economic from noneconomic damages is required to allow the court to apply the limits on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b).

Further, "[p]rejudgment interest may not be assessed or recovered on an award of future damages." Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases). Therefore, separation of past and future damages is required.

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or

potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

> Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation is claimed as an element of damages, it may be necessary to modify the instruction on interest.

After-acquired evidence of employee misconduct. If the employer has pleaded the discovery of evidence of employee misconduct acquired only after the employee's employment was terminated, see PJC 107.8 for the applicable instruction.

PJC 115.28 Question and Instruction on Damages—Retaliation for Seeking Workers' Compensation Benefits

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* damages, if any, that resulted from such conduct?

Consider the following elements of damages, if any, and none other.

Do not include interest on any amount of damages you may find.

Do not include back pay or interest in calculating compensatory damages, if any.

Reduce lost wages, if any, by wages earned, if any, in the past and wages, if any, which in reasonable probability will be earned in the future.

Answer separately in dollars and cents for damages, if any.

1. Lost earnings and employee benefits in the past (between date of [*discharge or discriminatory event*] and today).

Answer: _____

2. Lost earnings and employee benefits that in reasonable probability will be lost in the future.

Answer: _____

3. Compensatory damages in the past, which include [*emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other noneconomic losses*].

Answer: _____

4. Compensatory damages in the future, which include [*emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other noneconomic losses*].

Answer: _____

COMMENT

When to use. PJC 115.28 should be predicated on a "Yes" answer to PJC 107.5.

Source of question and instructions. Tex. Lab. Code § 451.002 provides for recovery of reasonable damages. The elements of damages given in PJC 115.28 are not meant to be exclusive, but rather are those most commonly allowed in employment cases. *See, e.g., Carnation Co. v. Borner*, 610 S.W.2d 450, 453–54 (Tex. 1980) (permitting recovery for future lost wages, retirement benefits, and other benefits ascertainable with reasonable certainty); *Pacesetter Corp. v. Barrickman*, 885 S.W.2d 256, 259 (Tex. App.—Tyler 1994, no writ) (award of past and future employee benefits); *Worsham Steel Co. v. Arias*, 831 S.W.2d 81, 85–86 (Tex. App.—El Paso 1992, no writ) (mental anguish as a compensable injury); *DeFord Lumber Co. v. Roys*, 615 S.W.2d 235, 237–38 (Tex. Civ. App.—Dallas 1981, no writ) (award of damages for lost wages in the past). In this instruction, damages for "lost earnings" subsumes the elements of lost earnings and loss of earning capacity. *See Strauss v. Continental Airlines, Inc.*, 67 S.W.3d 428, 435–36 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

Equitable relief. In addition to the reasonable damages allowed under Tex. Lab. Code § 451.002, the trial court may reinstate the employee (Tex. Lab. Code § 451.002(b)) or restrain for cause a violation of section 451.001 (Tex. Lab. Code § 451.003).

Mitigation. For a defensive instruction on mitigation, see PJC 115.8 and 115.25.

Exemplary damages. See PJC 115.38.

After-acquired evidence of employee misconduct. If the employer has pleaded the discovery of evidence of employee misconduct acquired only after the employee's employment was terminated, see PJC 107.8 for the applicable instruction. *See Trico Technologies Corp. v. Montiel*, 949 S.W.2d 308 (Tex. 1997).

Elements of damages submitted separately. The Committee generally recommends that multiple elements of damages be separately submitted to the jury. *Harris County v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002) (broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted); *see also* Tex. Civ. Prac. & Rem. Code § 41.008(a) ("In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages."). Separating economic from noneconomic damages is required to allow the court to apply the limits on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b).

Further, "[p]rejudgment interest may not be assessed or recovered on an award of future damages." Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases). Therefore, separation of past and future damages is required.

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or

potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

> Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation is claimed as an element of damages, it may be necessary to modify the instruction on interest.

[PJC 115.29 is reserved for expansion.]

PJC 115.30 Question and Instruction on Unlawful Employment Practices Damages

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* damages, if any, that resulted from such conduct?

Consider the following elements of damages, if any, and none other.

Do not include interest on any amount of damages you may find.

Do not include back pay or interest in calculating compensatory damages, if any.

Answer in dollars and cents for damages, if any.

1. Back pay.

"Back pay" is that amount of wages and employment benefits that *Paul Payne* would have earned if *he* had not been subjected to *his* employer's unlawful conduct less any wages, unemployment compensation benefits or workers' compensation benefits *he* received in the interim.

"Employment benefits" include [*sick-leave pay, vacation pay, profit-sharing benefits, stock options, pension fund benefits, housing or transportation subsidies, bonuses, monetary losses incurred as a result of the loss of health, life, dental, or similar insurance coverage*].

Answer: _____

2. Compensatory damages in the past, which include [*emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other noneconomic losses*].

Answer: _____

3. Compensatory damages in the future, which include [*economic losses, emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other noneconomic losses*].

Answer: _____

COMMENT

When to use. PJC 115.30 should be predicated on a "Yes" answer to PJC 107.6.

Source of question and instruction. PJC 115.30 is based on Tex. Lab. Code §§ 21.258, 21.2585. *See also Speer v. Presbyterian Children's Home & Service Agency*, 847 S.W.2d 227, 228 (Tex. 1993) (Texas Commission on Human Rights Act (now Texas Labor Code chapter 21) specifically allows for compensatory relief).

Equitable relief. In addition to actual and exemplary damages allowed under Tex. Lab. Code § 21.2585 and attorney's fees under Tex. Lab. Code § 21.259, on a finding that an employer has engaged in unlawful employment practices, the trial court may order an injunction or additional equitable relief under Tex. Lab. Code § 21.258. *See also Caballero v. Central Power & Light Co.*, 858 S.W.2d 359, 361 (Tex. 1993) (equitable relief under TCHRA (now Texas Labor Code chapter 21) is to be determined by judge).

Attorney's fees. See PJC 115.60.

Front pay. "Front pay is an equitable remedy intended to compensate a plaintiff for future lost wages and benefits." *Texas Youth Commission v. Koustoubardis*, 378 S.W.3d 497, 502 (Tex. App.—Dallas 2012, pet. dism'd). Because front pay is an equitable remedy and not an element of compensatory damages, the United States Supreme Court has determined that "front pay" is not a future pecuniary loss subject to the statutory cap on damages under 42 U.S.C. § 1981a, the federal counterpart to Texas Labor Code section 21.2585. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846–48 (2001).

To recover front pay, the plaintiff must show that reinstatement is not feasible. *Wal-Mart Stores, Inc. v. Davis*, 979 S.W.2d 30, 45 (Tex. App.—Austin 1998, pet. denied). The trial court must decide whether it is equitable for the plaintiff to recover front pay and may submit a question to the jury to determine the amount. *Dell, Inc. v. Wise*, 424 S.W.3d 100, 116–17 (Tex. App.—Eastland 2013, no pet.); *Davis*, 979 S.W.2d at 45.

If the trial court decides to submit front pay to the jury, economic losses in the form of front pay should be excluded from the definition of future compensatory damages.

After-acquired evidence of employee misconduct. If the employer has pleaded the discovery of evidence of employee misconduct acquired only after the employee's employment was terminated, see PJC 107.8 for the applicable instruction.

Elements of damages submitted separately. The Committee generally recommends that multiple elements of damages be separately submitted to the jury. *Harris County v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002) (broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted); *see also* Tex. Civ. Prac. & Rem. Code § 41.008(a) ("In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic

damages separately from the amount of other compensatory damages."). Separating economic from noneconomic damages is required to allow the court to apply the limits on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b).

Further, "[p]rejudgment interest may not be assessed or recovered on an award of future damages." Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases). Therefore, separation of past and future damages is required.

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

> Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation is claimed as an element of damages, it may be necessary to modify the instruction on interest.

PJC 115.31 Predicate Question and Instruction on Exemplary Damages for Unlawful Employment Practices

Answer the following question regarding *Don Davis* only if you unanimously answered "Yes" to Question _____ [*applicable liability question*] [*or Question* _____ [*applicable liability question*]]. Otherwise, do not answer the following question.

To answer "Yes" to [*any part of*] the following question, your answer must be unanimous. You may answer "No" to [*any part of*] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [*that part of*] the following question.

QUESTION _____

Do you find by clear and convincing evidence that *Don Davis* engaged in the discriminatory practice that you have found in answer to Question _____ [*applicable liability question*] [*or Question* _____ [*applicable liability question*]] with malice or with reckless indifference to the right of *Paul Payne* to be free from such practices?

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

"Malice" means a specific intent by *Don Davis* to cause substantial injury or harm to *Paul Payne*.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 115.31 should be used for a claim for punitive damages under Texas Labor Code chapter 21 (formerly Texas Commission on Human Rights Act), when—

1. the evidence indicates that the discriminatory employment practice was motivated by malice or reckless indifference, Tex. Lab. Code § 21.2585(b); and

2. the cause of action arose on or after September 1, 1995, the effective date of Tex. Lab. Code § 21.2585.

Source of question and instruction. PJC 115.31 is derived from Tex. Lab. Code § 21.2585 and Tex. Civ. Prac. & Rem. Code § 41.001(2), (7). Under Tex. Civ. Prac. & Rem. Code § 41.003(d) and the supreme court's March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a, unanimity is required on the exemplary damages question and the applicable liability question. PJC 115.31 is conditioned accordingly. The unanimity instruction is adapted from the instruction in Tex. Civ. Prac. & Rem. Code § 41.003(e) and the supreme court's March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a.

Unanimity. For actions filed on or after September 1, 2003, "[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages." Tex. Civ. Prac. & Rem. Code § 41.003(d). Section 41.003(e) of the Code mandates that the jury be instructed that its answer regarding the amount of exemplary damages must be unanimous. By the supreme court's March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the exemplary damages question and the applicable liability question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d). PJC 115.31 is conditioned accordingly.

Multiple defendants. The following conditioning instruction may be substituted in a case involving claims against multiple defendants:

> Answer the following question regarding a defendant only if you unanimously answered "Yes" to Question _____ [*applicable liability question*] [*or Question* _____ [*applicable liability question*]] regarding that defendant. Otherwise, do not answer the following question regarding that defendant.

PJC 115.32 Question on Employer Liability for Exemplary Damages for Conduct of Supervisor

QUESTION _____

Did *Don Davis* make a good-faith effort to prevent [*race, color, disability, religious, sex, national origin, or age*] [*discrimination or harassment*] in *his* workplace?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 115.32 should be used for claims of exemplary damages under Texas Labor Code chapter 21 (formerly Texas Commission on Human Rights Act) where there is evidence that an employer made good-faith efforts to comply with the antidiscrimination laws and a manager or agent acted contrary to such efforts.

Source of question. PJC 115.32 is derived from *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999), and *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278 (5th Cir. 1999).

PJC 115.33 Question and Instructions—Defamation General Damages

[Insert predicate, PJC 115.1.]

QUESTION _____

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* injuries, if any, that were proximately caused by [*the statement*]?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately in dollars and cents for damages, if any.

1. Injury to reputation sustained in the past.

Answer: _____

2. Injury to reputation that, in reasonable probability, *Paul Payne* will sustain in the future.

Answer: _____

3. Mental anguish sustained in the past.

Answer: _____

4. Mental anguish that, in reasonable probability, *Paul Payne* will sustain in the future.

Answer: _____

COMMENT

When to use. PJC 115.33 is to be used in a defamation case involving a claim of general damages. *Anderson v. Durant*, 550 S.W.3d 605, 618 (Tex. 2018).

Source of instruction. In defamation cases, "[o]nce injury to reputation is established, a person defamed may recover general damages without proof of other injury." *Leyendecker & Associates v. Wechter*, 683 S.W.2d 369, 374 (Tex. 1984) (citing *Guisti*

v. Galveston Tribune, 150 S.W. 874 (Tex. 1912)). General damages include damages for noneconomic loss of reputation or mental anguish. *Anderson*, 550 S.W.3d at 618; *Hancock v. Variyam*, 400 S.W.3d 59, 65 (Tex. 2013). The First Amendment requires competent evidence to support an award of actual or compensatory damages when the speech is public or the level of fault is less than actual malice. *Hancock*, 400 S.W.3d at 65; *see also Burbage v. Burbage*, 447 S.W.3d 249, 259 (Tex. 2014).

Defamatory per se. Defamation per se refers to false statements so obviously harmful that general damages may be presumed. *Anderson*, 550 S.W.3d at 618. The following instruction may be used in common-law cases not involving constitutional requirements in which the court (or in some cases, the jury) has found the matter to be defamatory per se. Texas law presumes that per se defamatory statements injure the victim's reputation and entitle him to recover general damages, including damages for loss of reputation and mental anguish. *Bentley v. Bunton*, 94 S.W.3d 561, 604 (Tex. 2002); *see also Leyendecker & Associates*, 683 S.W.2d at 374 (party defamed by a writing libelous per se allowed recovery at common law without proof of injury); *Salinas v. Salinas*, 365 S.W.3d 318, 320–21 (Tex. 2012).

Texas law does not presume any damages beyond nominal damages. *Salinas*, 365 S.W.3d at 320–21. In *Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc.*, 434 S.W.3d 142, 160 (Tex. 2014) (citing and quoting *Bentley*, 94 S.W.3d at 606), the court held that "the evidence must be legally sufficient as to both the existence and the *amount* of such damages, that '[j]uries cannot simply pick a number and put it in the blank,' and that instead the amount must fairly and reasonably compensate the plaintiff for his injury." Where the statement is defamatory per se, the following instruction should be given with the question:

> You must award at least nominal damages for injury to reputation in the past. Nominal damages are a trifling sum, such as $1.

This instruction comes from *Hancock*, 400 S.W.3d at 65.

Except under very limited circumstances, this instruction should not be used in cases involving public officials, public figures, or matters of public concern, even if the matter at issue is defamatory per se. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), the U.S. Supreme Court held that states are not free to presume damages in libel cases with constitutional implications unless there is a finding of actual malice (knowing falsity or reckless disregard for the truth). See the Comment to PJC 110.5 for a discussion of the circumstances in which actual malice is required. In a case where these prerequisites—defamation per se and actual malice—have been met, one court has held that the jury should be instructed concerning this presumption. *Texas Disposal Systems Landfill, Inc. v. Waste Management Holdings, Inc.*, 219 S.W.3d 563, 582–83 (Tex. App.—Austin 2007, pet. denied).

Multiple statements. Chapter 110 of this volume assumes a single allegedly defamatory statement. If multiple statements are at issue, separate submissions may be

required, depending on whether the case involves public or private speech. For example, as a matter of common law and constitutional law damages are recoverable only for false and defamatory statements. *See Hancock*, 400 S.W.3d at 65; *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (libel plaintiff "must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918 (1982) (no damages can be awarded for economic losses caused by expression protected by First Amendment); *Bell Publishing Co. v. Garrett Engineering Co.*, 170 S.W.2d 197, 206 (Tex. 1943) (under common law, where affirmative defense of substantial truth has been submitted to jury, damages are recoverable only for defamatory statements that are not found to be true: "[W]here some of the defamatory charges are found to be true and others false, the jury should be instructed to consider only such damages as resulted from the false . . . ."). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Elements considered separately. The instruction not to compensate twice for the same loss is taken from *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2003), and is proper in cases involving undefined or potentially overlapping categories of damages. In other cases, the following instruction may be substituted:

> Consider the following elements of damages, if any, and none other.

Past and future damages submitted separately. Separation of past and future damages is required because "[p]rejudgment interest may not be assessed or recovered on an award of future damages." Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases).

PJC 115.34 Question and Instructions—Defamation Special Damages

[Insert predicate, PJC 115.1.]

QUESTION _____

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* actual pecuniary loss, if any, that was proximately caused by [*the statement*]?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately in dollars and cents for damages, if any.

1. [*Element A*] sustained in the past.

Answer: _____

2. [*Element A*] that, in reasonable probability, will be sustained in the future.

Answer: _____

3. [*Element B*] sustained in the past.

Answer: _____

4. [*Element B*] that, in reasonable probability, will be sustained in the future.

Answer: _____

[Insert additional elements as may be appropriate for items of special damages.]

COMMENT

When to use. Special damages are never presumed and must always be proved. *Anderson v. Durant*, 550 S.W.3d 605, 618 (Tex. 2018); *Hancock v. Variyam*, 400 S.W.3d 59, 66 (Tex. 2013). Special damages in defamation claims are the actual pecuniary losses proximately caused by a defamation. *Anderson*, 550 S.W.3d at 618; *Hurl-*

but v. Gulf Atlantic Life Insurance Co., 749 S.W.2d 762, 766–67 (Tex. 1987). Courts have recognized a variety of special damages in defamation cases. *Brown v. Petrolite Corp.*, 965 F.2d 38, 46 (5th Cir. 1992) (increased advertising costs to respond to defamation); *Peshak v. Greer*, 13 S.W.3d 421, 427 (Tex. App.—Corpus Christi 2000, no pet.) (loss of earning capacity); *Wenco of El Paso/Las Cruces, Inc. v. Nazario*, 783 S.W.2d 663, 667 (Tex. App.—El Paso 1989, no writ) (past and future loss of wages); *Houston Belt & Terminal Railway Co. v. Wherry*, 548 S.W.2d 743, 753 (Tex. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) (loss of employment).

Source of instruction. This question is based on *Hurlbut*, 749 S.W.2d at 766–67.

Multiple statements. Chapter 110 of this volume assumes a single allegedly defamatory statement. If multiple statements are at issue, separate submissions may be required. For example, as a matter of common law and constitutional law damages are recoverable only for false and defamatory statements. *See Hancock*, 400 S.W.3d at 65; *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (libel plaintiff "must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918 (1982) (no damages can be awarded for economic losses caused by expression protected by First Amendment); *Bell Publishing Co. v. Garrett Engineering Co.*, 170 S.W.2d 197, 206 (Tex. 1943) (under common law, where affirmative defense of substantial truth has been submitted to jury, damages are recoverable only for defamatory statements that are not found to be true: "[W]here some of the defamatory charges are found to be true and others false, the jury should be instructed to consider only such damages as resulted from the false . . . ."). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Elements considered separately. The instruction not to compensate twice for the same loss is taken from *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2003) and is proper in cases involving undefined or potentially overlapping categories of damages. In other cases, the following instruction may be substituted:

> Consider the following elements of damages, if any, and none other.

Past and future damages submitted separately. Separation of past and future damages is required because "[p]rejudgment interest may not be assessed or recovered on an award of future damages." Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases).

PJC 115.35 Question and Instructions—Invasion of Privacy Damages

[Insert predicate, PJC 115.1.]

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* injuries, if any, that were proximately caused by such conduct?

Consider the following elements of damages, if any, and none other.

[Insert appropriate instructions.]

Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

1. [*Element A*] sustained in the past.

Answer: _____

2. [*Element A*] that, in reasonable probability, will be sustained in the future.

Answer: _____

3. [*Element B*] sustained in the past.

Answer: _____

4. [*Element B*] that, in reasonable probability, will be sustained in the future.

Answer: _____

COMMENT

When to use. PJC 115.35 should be used in connection with claims of invasion of privacy. Since there are three different types of invasion of privacy causes of action recognized by Texas law, the elements of damages for each may differ. For example, while causes of action for physical intrusion and publication of private facts may include damages for mental anguish or lost income, causes of action for misappropriation may also include damages for loss of the value of the name or likeness misappropriated (*see Restatement (Second) of Torts* §§ 652H cmt. a, 652H(c) (1977)).

Appropriate instructions tailored to the specific damages at issue should be submitted with this question. Some illustrative instructions that could be modified to submit these elements of damages include PJC 115.10 (mental anguish) and 115.26 (lost earnings).

Source of instruction. In appropriate cases, damages for invasion of privacy can include mental anguish ("Damages for mental suffering are recoverable without the necessity of showing actual physical injury in a case of willful invasion of the right of privacy because the injury is essentially mental and subjective, not actual harm done to the plaintiff's body." *Billings v. Atkinson*, 489 S.W.2d 858, 861 (Tex. 1973); *see also Patel v. Hussain*, 485 S.W.3d 153, 177–78 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *Beaumont v. Basham*, 205 S.W.3d 608, 615–18 (Tex. App.—Waco 2006) (supporting award of damages for mental anguish based on invasion of privacy)); lost wages; or other special damages proximately caused by the invasion of privacy. *Household Credit Services, Inc. v. Driscol*, 989 S.W.2d 72 (Tex. App.—El Paso 1998) (supporting award of mental anguish damages, exemplary damages, and damages for lost wages and future lost wages in invasion of privacy action). In the case of misappropriation of name or likeness, damages can also include the loss of the exclusive use of the value so appropriated (*see Restatement (Second) of Torts* §§ 652H cmt. a, 652H(c) (1977)).

Elements of damages submitted separately. The Committee generally recommends that multiple elements of damages be separately submitted to the jury. *Harris County v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002) (broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted); *see also* Tex. Civ. Prac. & Rem. Code § 41.008(a) ("In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages."). Separating economic from noneconomic damages is required to allow the court to apply the limits on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b).

Further, "[p]rejudgment interest may not be assessed or recovered on an award of future damages." Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases). Therefore, separation of past and future damages is required.

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

> Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money

for the same loss. That is, do not compensate twice for the same loss, if any.

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation is claimed as an element of damages, it may be necessary to modify the instruction on interest.

PJC 115.36 Proportionate Responsibility

If you answered "Yes" to Questions _____ and _____ [*applicable questions*] for more than one of those named below, then answer the following question. Otherwise, do not answer the following question.

Assign percentages of responsibility only to those you found caused or contributed to cause the [*harm*] [*damages*]. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found.

QUESTION _____

For each person you found caused or contributed to cause the [*harm*] [*damages*] to *Paul Payne*, find the percentage of responsibility attributable to each:

1.	*Don Davis*	_____%
2.	*Paul Payne*	_____%
3.	*Sam Settlor*	_____%
4.	*Responsible Ray*	_____%
Total		100 %

COMMENT

When to use. Tex. R. Civ. P. 277 requires a percentage question "[i]n any cause in which the jury is required to apportion the loss among the parties." For causes of action based on tort accruing on or after September 1, 1995, and in all such suits filed on or after September 1, 1996, the trier of fact must determine the percentage of responsibility of each defendant, claimant, settling person, or responsible third party with respect to each person's causing or contributing to cause the harm for which damages are sought. Tex. Civ. Prac. & Rem. Code § 33.003. The responsibility to be determined must arise from a negligent act or omission, a defective or unreasonably dangerous product, or other conduct or activity that violates an applicable legal standard. Tex. Civ. Prac. & Rem. Code § 33.003.

Common-law claims based on tort. PJC 115.36 should be used if the case involves "any cause of action based on tort" or any action brought under the DTPA. Tex. Civ. Prac. & Rem. Code § 33.002(a). Chapter 33 has been applied to claims of negligent misrepresentation, *Galle, Inc. v. Pool*, 262 S.W.3d 564, 571–72 (Tex. App.—Austin 2008, pet. denied), and claims for intentional torts, *Arceneaux v. Pinna-*

cle Entertainment, Inc., 523 S.W.3d 746, 749 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (applies to intentional torts including assault).

Courts of appeals have differed on the circumstances under which fraud is subject to apportionment. *Compare Villarreal v. Wells Fargo Brokerage Services, LLC*, 315 S.W.3d 109, 124 n.6 (Tex. App.—Houston [1st Dist.] 2010, no pet.), *Isaacs v. Bishop*, 249 S.W.3d 100, 116–17 (Tex. App.—Texarkana 2008, pet. denied), *JCW Electronics, Inc. v. Garza*, 176 S.W.3d 618, 626 & n.3 (Tex. App.—Corpus Christi 2005), *rev'd on other grounds*, 257 S.W.3d 701 (Tex. 2008), *and JHC Ventures, L.P. v. Fast Trucking, Inc.*, 94 S.W.3d 762, 773–74 (Tex. App.—San Antonio 2002, no pet.), *with Mayes v. Stewart*, 11 S.W.3d 440, 451–52 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (holding that only actual knowledge of fraud—not "should have known" negligence standard—will defeat claim for fraud), *and Davis v. Estridge*, 85 S.W.3d 308, 311–12 (Tex. App.—Tyler 2002, pet. denied) ("Traditionally, negligence has never been a defense to fraud."). Before the 1995 changes to the proportionate responsibility statute, intentional tort claims, including fraud, were not subject to apportionment. *See Stewart Title Guaranty Co. v. Sterling*, 822 S.W.2d 1, 6 n.7 (Tex. 1991), *overruled in part on other grounds by Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 933 (Tex. 1983). The current version of the proportionate responsibility statute has done away with this statutory exclusion.

Statutory claims. Whether the chapter 33 proportionate responsibility question in PJC 115.36 should be used in connection with a statutory claim depends on whether the statute contains a separate and conflicting fault-allocation scheme. *In re Xerox Corp.*, No. 16-0671, 2018 WL 3077704, at *4 (Tex. June 22, 2018) (Texas Medicaid Fraud Prevention Act not subject to chapter 33 apportionment). The supreme court has found that chapter 33 does not apply to conversion claims under article 3 of the UCC. *Southwest Bank v. Information Support Concepts, Inc.*, 149 S.W.3d 104, 110–11 (Tex. 2004). The supreme court has found that chapter 33 does apply to breach of implied warranty claims under article 2 of the UCC. *JCW Electronics, Inc.*, 257 S.W.3d at 702.

Intermediate appellate court cases state that chapter 33 applies to Texas Securities Act cases. *Villarreal*, 315 S.W.3d at 124 n. 6. Intermediate cases state that chapter 33 does not apply to Texas Uniform Fraudulent Transfers Act cases. *Challenger Gaming Solutions, Inc. v. Earp*, 402 S.W.3d 290, 299 (Tex. App.—Dallas 2013, no pet).

Use of "harm" or "damages." Depending on the type of cause submitted to the jury, the term "harm" or "damages" should be used as appropriate. See also the current editions of State Bar of Texas, *Texas Pattern Jury Charges—General Negligence, Intentional Personal Torts & Workers' Compensation* and *Texas Pattern Jury Charges—Malpractice, Premises & Products* for instances in which "injury" or "occurrence" may be appropriate.

Conditioned on responsibility of more than one person. PJC 115.36 is conditioned on findings that the acts or omissions of more than one person caused the damages or injury, because otherwise no comparison is possible.

Multiple liability theories. When multiple liability theories are submitted and the parties dispute whether one theory is legally valid or supported by legally sufficient evidence, it may not be feasible to submit a single proportionate responsibility question predicated on all liability theories. *See Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 215, 225–28 (Tex. 2005) (reversible error to allow jury, in apportioning responsibility, to consider claim on which there was no evidence).

Plaintiff submitted only if plaintiff violated legal standard. The plaintiff (*Paul Payne*) should be submitted in this question only if the law governing the cause of action provides an "applicable legal standard" by which the plaintiff's conduct is measured and the jury is asked in a predicate question whether *Paul Payne* violated that standard. Tex. Civ. Prac. & Rem. Code § 33.003. Otherwise, the question should not include the plaintiff.

If there is more than one responsible person. If more than one responsible person has been found liable in a liability question, separate percentage answers should be sought for each person. For example:

1. *Don Davis* _____%
2. *Paul Payne* _____%
3. *Sam Settlor* _____%
4. *Responsible Ray* _____%

Settling persons. The proportionate responsibility statute requires the responsibility of a settling person (*Sam Settlor*) to be determined by the trier of fact. Tex. Civ. Prac. & Rem. Code §§ 33.003, 33.011. "Settling person" is defined as a person—

> who has, at any time, paid or promised to pay money or anything of monetary value to a claimant in consideration of potential liability with respect to the personal injury, property damage, death, or other harm for which recovery of damages is sought.

Tex. Civ. Prac. & Rem. Code § 33.011(5). To include a settling person, that person's name must be included in a basic liability question.

Responsible third parties—causes of action filed before July 1, 2003. The liability of a "responsible third party" (*Responsible Ray*) should be inquired into only if that party is joined under former Tex. Civ. Prac. & Rem. Code § 33.004. Acts 1995, 74th Leg., R.S., ch. 136, § 1 (S.B. 28), eff. Sept. 1, 1995. A "responsible third party" is defined in former Tex. Civ. Prac. & Rem. Code § 33.011(6). Acts 1985, 69th Leg., R.S., ch. 959, § 1 (S.B. 797), eff. Sept. 1, 1985, *amended by* Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.07 (S.B. 5), eff. Sept. 2, 1987; Acts 1995, 74th Leg., R.S., ch. 136, § 1

(S.B. 28), eff. Sept. 1, 1995. Under former Tex. Civ. Prac. & Rem. Code § 33.003, if a responsible third party is submitted in a basic liability question, the responsible third party should also be submitted in the proportionate responsibility question. Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.06 (S.B. 5), eff. Sept. 2, 1987, *amended by* Acts 1995, 74th Leg., R.S., ch. 136, § 1 (S.B. 28), eff. Sept. 1, 1995.

Responsible third parties—causes of action filed on or after July 1, 2003. In 2003 the legislature changed responsible third party practice from one of joinder to one of designation. Tex. Civ. Prac. & Rem. Code § 33.004. The legislature also expanded the category of responsible third parties. Tex. Civ. Prac. & Rem. Code §§ 33.004, 33.011(6). "'Responsible third party' means any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these." Tex. Civ. Prac. & Rem. Code § 33.011(6). Section 33.003(b) provides that a question regarding conduct by any person may not be submitted to the jury without evidence to support the submission. Tex. Civ. Prac. & Rem. Code § 33.003(b).

Contribution defendants.

Inclusion in liability question. If there is a contribution defendant (*Connie Contributor*), that party's liability should be determined in a separate liability question. *See* Tex. Civ. Prac. & Rem. Code §§ 33.003, 33.011, 33.016. "Contribution defendant" is defined as "any defendant, counterdefendant, or third-party defendant from whom any party seeks contribution with respect to any portion of damages for which that party may be liable, but from whom the claimant seeks no relief at the time of submission." Tex. Civ. Prac. & Rem. Code § 33.016(a).

Separate comparative question necessary. The responsibility of the contribution defendant should *not* be included in the question comparing the responsibility of the plaintiff with that of the other defendants. Tex. Civ. Prac. & Rem. Code § 33.016(c). A separate comparative question is necessary. An example of a question on comparative responsibility of a contribution defendant is as follows:

> If you answered "Yes" to Questions _____ and _____ [*applicable questions*] for more than one of those named below, then answer the following question. Otherwise, do not answer the following question.
>
> Assign percentages only to those you found caused or contributed to cause the [*harm*]. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one named below is not necessarily measured by the number of acts or omissions found.

QUESTION _____

For each person you found caused or contributed to cause the [*harm*] to *Paul Payne*, find the percentage of responsibility attributable to each:

1.	*Don Davis*	_____%
2.	*Connie Contributor*	_____%
Total		100 %

Exceptions to the limitations on joint and several liability. The limitations on joint and several liability set forth in chapter 33 of the Civil Practice and Remedies Code do not apply in certain instances:

Actions filed before July 1, 2003. See former section 33.002 of the Civil Practice and Remedies Code (Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.05 (S.B. 5), eff. Sept. 2, 1987, *amended by* Acts 1989, 71st Leg., R.S., ch. 380, § 4 (S.B. 437), eff. Sept. 1, 1989; Acts 1995, 74th Leg., R.S., ch. 136, § 1 (S.B. 28), eff. Sept. 1, 1995; Acts 1995, 74th Leg., R.S., ch. 414, § 17 (H.B. 668), eff. Sept. 1, 1995; Acts 2001, 77th Leg., R.S., ch. 643, § 2 (H.B. 2087), eff. Sept. 1, 2001).

Actions filed on or after July 1, 2003. *See* Tex. Civ. Prac. & Rem. Code § 33.013.

Several of the examples of criminal conduct constituting exceptions to the limitations on joint and several liability also constitute exceptions to the cap or limitation on exemplary damages, such as forgery, securing execution of a document by deception, fraudulent removal of a document, or theft. See PJC 115.40–115.46 for examples of those charges and for applicable comments. Note, however, that a jury question seeking to establish conduct sufficient to lift the limitation on joint and several liability must ask whether the defendant, with the specific intent to do harm to others, acted in concert with another person to engage in the conduct described in the applicable Penal Code section. Tex. Civ. Prac. & Rem. Code § 33.002(b). These elements are not contained in the charges found at PJC 115.40–115.46.

PJC 115.37 Predicate Question and Instruction on Award of Exemplary Damages

PJC 115.37A Question and Instruction for Actions Filed before September 1, 2003

If you answered "Yes" to Question _____ [*applicable liability question*] [*or Question* _____ [*applicable liability question*]], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Do you find by clear and convincing evidence that the harm to *Paul Payne* resulted from [*malice or fraud*]?

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

"Malice" means—

1. a specific intent by *Don Davis* to cause substantial injury to *Paul Payne*; or

2. an act or omission by *Don Davis*,

   a. which when viewed objectively from the standpoint of *Don Davis* at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

   b. of which *Don Davis* has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

[And/or use appropriate definition for "fraud"; see comment below, "Fraud as a ground for exemplary damages."]

Answer "Yes" or "No."

Answer: _____

PJC 115.37B Question and Instruction for Actions Filed on or after September 1, 2003

Answer the following question only if you unanimously answered "Yes" to Question _____ [*applicable liability question*] [*or Question* _____ [*applicable liability question*]]. Otherwise, do not answer the following question.

To answer "Yes" to [*any part of*] the following question, your answer must be unanimous. You may answer "No" to [*any part of*] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [*that part of*] the following question.

QUESTION _____

Do you find by clear and convincing evidence that the harm to *Paul Payne* resulted from [*malice, fraud, or gross negligence*]?

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

"Malice" means a specific intent by *Don Davis* to cause substantial injury or harm to *Paul Payne*.

[And/or use appropriate definition for "fraud" or "gross negligence"; see comments below, "Fraud as a ground for exemplary damages" and "Gross negligence as a ground for exemplary damages."]

COMMENT

When to use. PJC 115.37 is used as a predicate question to PJC 115.38, the question for exemplary damages. It is based on an affirmative finding to a liability question such as PJC 103.1 (tort duty of good faith and fair dealing) or 106.1 (interference with existing contract). PJC 115.37A applies only to causes of action arising on or after September 1, 1995, and filed before September 1, 2003. PJC 115.37B applies to actions filed on or after September 1, 2003.

In a case in which a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 115.37 should be answered in the first phase of the trial.

Source of question. PJC 115.37A is derived from Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.12 (S.B. 5), eff. Sept. 2, 1987, *amended by* Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995; Acts 1997, 75th Leg., R.S., ch. 165, § 4.01 (S.B.

898), eff. Sept. 1, 1997. (Note: In the remainder of this Comment, citations to the Texas Civil Practice and Remedies Code as set out in the preceding session laws will be made to "former Tex. Civ. Prac. & Rem. Code § ____.") PJC 115.37B is derived from Tex. Civ. Prac. & Rem. Code §§ 41.001(7), (11), 41.003(a)(1), (2), (3), (d), 41.004(a). By the supreme court's March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the exemplary damages question and the applicable liability question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d). PJC 115.37B is conditioned accordingly. The unanimity instruction is adapted from the instruction in Tex. Civ. Prac. & Rem. Code § 41.003(e) and the supreme court's March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a.

Fraud as a ground for exemplary damages. Fraud, as well as malice, is a ground for recovery of exemplary damages. Tex. Civ. Prac. & Rem. Code § 41.003(a)(1). As a predicate for recovery of exemplary damages, fraud is defined as "fraud other than constructive fraud." Tex. Civ. Prac. & Rem. Code § 41.001(6). In an appropriate case, substitute *fraud* for *malice* in the question proper and insert a definition for "fraud" conforming to the pleadings and evidence of the case, using the definitions for fraud found at PJC 105.2–105.3, 105.7–105.11 as a guide. However, if fraud is an underlying theory of liability as well as a predicate for recovery of exemplary damages, the question may be modified as follows:

> Do you find by clear and convincing evidence that the harm to *Paul Payne* resulted from [*malice, gross negligence, or*] any fraud found by you in Question _____?

Constructive fraud cannot serve as a predicate for recovery of exemplary damages. Tex. Civ. Prac. & Rem. Code § 41.001(6). Accordingly, if constructive fraud is an underlying theory of liability in addition to intentional or statutory fraud, constructive fraud should be separately submitted and not included as a predicate for PJC 115.37. See PJC 105.4 comment, "Fraud as a ground for exemplary damages."

Gross negligence as a ground for exemplary damages. In actions filed on or after September 1, 2003, gross negligence is also a ground for recovery of exemplary damages. Tex. Civ. Prac. & Rem. Code § 41.003(a)(3). As a predicate for recovery of exemplary damages, the following instruction should be given:

> "Gross negligence" means an act or omission by *Don Davis*,
>
> 1. which when viewed objectively from the standpoint of *Don Davis* at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

2. of which *Don Davis* has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Tex. Civ. Prac. & Rem. Code § 41.001(11). In an appropriate case, substitute this statutory definition of "gross negligence" for *malice* in the question proper.

Recovery of exemplary damages in a wrongful death case. In a wrongful death case brought before September 1, 2003, by or on behalf of the decedent's spouse or heir of the decedent's body under a statute enacted pursuant to Tex. Const. art. XVI, § 26, exemplary damages may be recovered on a showing that the claimant's damages resulted from willful act, omission, or gross neglect. "Gross neglect" has the same definition as "malice" in former Tex. Civ. Prac. & Rem. Code § 41.001(7)(B). Former Tex. Civ. Prac. & Rem. Code § 41.003(a)(3). That statutory definition is the source of the second definition of "malice" in PJC 115.37A. See former Tex. Civ. Prac. & Rem. Code ch. 71 (Acts 1985, 69th Leg., R.S., ch. 959, § 1 (S.B. 797), eff. Sept. 1, 1985, *amended by* Acts 1993, 73d Leg., R.S., ch. 4, § 1 (S.B. 2), eff. Aug. 30, 1993; Acts 1995, 74th Leg., R.S., ch. 567, § 1 (S.B. 400), eff. Sept. 1, 1995; Acts 1997, 75th Leg., R.S., ch. 424, §§ 1, 3 (S.B. 220), eff. May 29, 1997; Acts 1999, 76th Leg., R.S., ch. 382, §§ 1, 2 (H.B. 3477), eff. May 29, 1999) for applicable statutes concerning wrongful death, and the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products* ch. 81 for pattern jury charges in wrongful death cases.

Unanimity. For actions filed on or after September 1, 2003, "[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages." Tex. Civ. Prac. & Rem. Code § 41.003(d). Section 41.003(e) of the Code mandates that the jury be instructed that its answer regarding the amount of exemplary damages must be unanimous. By the supreme court's March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the exemplary damages question and the applicable liability question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d). PJC 115.37B is conditioned accordingly.

Multiple defendants. The following conditioning instruction may be substituted in a case involving claims against multiple defendants:

Answer the following question regarding a defendant only if you unanimously answered "Yes" to Question _____ [*applicable liability question*] [*or Question* _____ [*applicable liability question*]] regarding that defendant. Otherwise, do not answer the following question regarding that defendant.

PJC 115.38 Question and Instruction on Exemplary Damages

Answer the following question only if you unanimously answered "Yes" to Question _____ [*applicable predicate question*] [*or Question* _____ [*applicable predicate question*]]. Otherwise, do not answer the following question.

You must unanimously agree on the amount of any award of exemplary damages.

QUESTION _____

What sum of money, if any, if paid now in cash, should be assessed against *Don Davis* and awarded to *Paul Payne* as exemplary damages, if any, for the conduct found in response to Question _____ [*applicable predicate question*] [*or Question* _____ [*applicable predicate question*]]?

"Exemplary damages" means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are—

1. The nature of the wrong.
2. The character of the conduct involved.
3. The degree of culpability of *Don Davis*.
4. The situation and sensibilities of the parties concerned.
5. The extent to which such conduct offends a public sense of justice and propriety.
6. The net worth of *Don Davis*.

[Insert additional instructions if appropriate. See, e.g., PJC 115.39.]

Answer in dollars and cents, if any.

Answer: _____

COMMENT

When to use. PJC 115.38 is used to submit exemplary damages. It should be predicated on a finding justifying the award of exemplary damages. See comments below. Chapter 41 of the Texas Civil Practice and Remedies Code does not apply to most suits brought under the DTPA and Texas Insurance Code chapter 541. Tex. Civ. Prac. & Rem. Code § 41.002(d). There may be reason, however, to use the "factors to

consider" listed in PJC 115.38 in such cases. See PJC 115.11 for the "additional damages" question in DTPA cases.

Source of instructions. PJC 115.38 is derived from Tex. Civ. Prac. & Rem. Code §§ 41.001(5), 41.003(d), (e), 41.011(a); and the supreme court's March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a.

Actions filed before September 1, 2003. A unanimous decision on the amount of exemplary damages is not required for actions filed before September 1, 2003. In such cases, substitute the following instruction:

> If you answered "Yes" to Question _____ [*applicable predicate question(s)*], then answer the following question. Otherwise, do not answer the following question.

Predicate finding. Section 41.003 of the Civil Practice and Remedies Code requires a predicate finding before an award of exemplary damages may be made. Tex. Civ. Prac. & Rem. Code § 41.003. Those predicate questions are found at PJC 115.31 and 115.37. If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, predicate questions should be submitted in the first phase of the trial. By the supreme court's March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the exemplary damages question and the applicable liability question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d) that are filed after September 1, 2003. PJC 115.31 and 115.37B are conditioned accordingly.

Actual damages generally required. In general, exemplary damages may be awarded only if damages other than nominal damages are awarded. However, in actions filed before September 1, 2003, if the jury finds that the harm suffered by the plaintiff was caused by a specific intent by the defendant to cause substantial injury to the plaintiff (the first definition of "malice" in PJC 115.37), then an award of nominal damages will support an award of exemplary damages. Former Tex. Civ. Prac. & Rem. Code § 41.004. Actions filed on or after September 1, 2003, are governed by the 2003 amendments to the Civil Practice and Remedies Code that provide that a claimant may not recover exemplary damages if the jury awards only nominal damages. Tex. Civ. Prac. & Rem. Code § 41.004(a).

Multiple defendants. There should be a separate question and answer blank for each defendant against whom exemplary damages are sought. Tex. Civ. Prac. & Rem. Code § 41.006; *Norton Refrigerated Express, Inc. v. Ritter Bros. Co.*, 552 S.W.2d 910, 913 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.). In a case involving multiple defendants against whom exemplary damages are sought, the following instruction on unanimity may be substituted:

Answer the following question regarding a defendant only if you unanimously answered "Yes" to Question _____ [*applicable predicate question*] [*or Question* _____ [*applicable predicate question*]] regarding that defendant. Otherwise, do not answer the following question regarding that defendant.

Multiple plaintiffs. For multiple plaintiffs, consideration may be given to an additional question asking the jury to apportion the exemplary damages among them. Tex. Civ. Prac. & Rem. Code § 71.010; *Burk Royalty Co. v. Walls*, 596 S.W.2d 932, 939 (Tex. Civ. App.—Fort Worth 1980), *aff'd on other grounds*, 616 S.W.2d 911 (Tex. 1981).

Prejudgment interest not recoverable. Prejudgment interest on exemplary damages is not recoverable. Tex. Civ. Prac. & Rem. Code § 41.007.

Bifurcation. For actions filed before September 1, 2003, no predicating instruction is necessary if the court has granted a timely motion to bifurcate trial of the amount of punitive damages. *See* Tex. Civ. Prac. & Rem. Code § 41.009; *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 29–30 (Tex. 1994). For actions filed on or after September 1, 2003, the instruction on unanimity must be given in the bifurcated phase.

If in the first phase of the trial the jury finds facts establishing a predicate for an award of exemplary damages, then a separate jury charge should be prepared for the second phase of the trial. See the comments above regarding predicate-finding and PJC 115.37. In such a second-phase jury charge, PJC 115.38 should be submitted with both PJC 100.3 and 100.4.

Factors to consider in determining amount of award. The "factors to consider" listed in PJC 115.38 are from Tex. Civ. Prac. & Rem. Code § 41.011(a).

Limits on conduct to be considered. When there is a significant risk that a jury may seek to punish a defendant for a constitutionally improper reason, the Due Process Clause requires that an additional instruction be given to protect against that risk. *Philip Morris USA v. Williams*, 549 U.S. 346, 355–57.

For example, the defendant's lawful out-of-state conduct may be probative on some issues in a punitive damages case in certain circumstances. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 422 (2003). When such evidence is admitted, "[a] jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *Campbell*, 538 U.S. at 422.

In addition, evidence that the defendant's conduct risked harm to persons who are not before the court may be probative in determining the reprehensibility of that conduct. But when such evidence is admitted, the jury should be instructed that it may not

punish the defendant for any harm it may have caused to persons who are not parties to the litigation. *Williams*, 549 U.S. at 357.

Limitation on amount of recovery. Section 41.008 of the Civil Practice and Remedies Code limits recovery of exemplary damages. However, these limitations will not apply in favor of a defendant found to have "knowingly" or "intentionally" committed conduct described as a felony in specified sections of the Texas Penal Code. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c), (d) and PJC 115.40–115.46.

PJC 115.39 Question and Instruction for Imputing Liability for Exemplary Damages

PJC 115.39A Question and Instruction Imputing Malice to a Corporation—Causes of Action Accruing on or after September 1, 1995, and Filed before September 1, 2003

If you answered "Yes" to Question _____ [*applicable liability question*], and you inserted a sum of money in answer to Question _____ [*applicable damages question*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Do you find by clear and convincing evidence that the harm to *Paul Payne* resulted from malice attributable to *ABC Corporation*?

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

"Malice" means—

1. a specific intent by *Don Davis* to cause substantial injury to *Paul Payne*; or

2. an act or omission by *Don Davis*,

   a. which when viewed objectively from the standpoint of *Don Davis* at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

   b. of which *Don Davis* has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

You are further instructed that malice may be attributable to *ABC Corporation* because of an act by *Don Davis* if, but only if—

[Insert one or more of the following grounds as supported by the evidence.]

1. *ABC Corporation* authorized the doing and the manner of the act, or

2. *Don Davis* was unfit and *ABC Corporation* was reckless in employing *him*, or

3. *Don Davis* was employed [*as a vice-principal*] [*in a managerial capacity*] and was acting in the scope of employment, or

4. *ABC Corporation* or a [*vice-principal*] [*manager*] of *ABC Corporation* ratified or approved the act.

Answer "Yes" or "No."

Answer: _____

PJC 115.39B Question and Instruction Imputing Gross Negligence to a Corporation—Actions Filed on or after September 1, 2003

Answer the following question regarding *ABC Corporation* only if you unanimously answered "Yes" to Question _____ [*applicable liability question*] regarding *ABC Corporation*. Otherwise, do not answer the following question regarding *ABC Corporation*.

To answer "Yes" to [*any part of*] the following question, your answer must be unanimous. You may answer "No" to [*any part of*] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [*that part of*] the following question.

QUESTION _____

Do you find by clear and convincing evidence that the harm to *Paul Payne* resulted from gross negligence attributable to *ABC Corporation*?

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

"Gross negligence" means an act or omission by *Don Davis*,

1. which when viewed objectively from the standpoint of *Don Davis* at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

2. of which *Don Davis* has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

You are further instructed that *ABC Corporation* may be grossly negligent because of an act by *Don Davis* if, but only if—

[Insert one or more of the following grounds as supported by the evidence.]

1. *ABC Corporation* authorized the doing and the manner of the act, or

2. *Don Davis* was unfit and *ABC Corporation* was reckless in employing *him*, or

3. *Don Davis* was employed [*as a vice-principal*] [*in a managerial capacity*] and was acting in the scope of employment, or

4. *ABC Corporation* or a [*vice-principal*] [*manager*] of *ABC Corporation* ratified or approved the act.

[Include one or more of the following definitions if the grounds include an element in which the term "vice-principal," "manager," or "managerial capacity" is used. Only the applicable elements of vice-principal, manager, or managerial capacity should be included in the definitions as submitted to the jury.]

A person is a "vice-principal" if—

1. that person is a corporate officer; or

2. that person has authority to employ, direct, and discharge an employee of *ABC Corporation*; or

3. that person is engaged in the performance of nondelegable or absolute duties of *ABC Corporation*; or

4. *ABC Corporation* has confided to that person the management of the whole or a department or division of the business of *ABC Corporation.*

A person is a manager or is employed in a managerial capacity if—

1. that person has authority to employ, direct, and discharge an employee of *ABC Corporation*; or

2. *ABC Corporation* has confided to that person the management of the whole or a department or division of the business of *ABC Corporation.*

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 115.39 may be used if a plaintiff seeks to impute the gross negligence or malice of a defendant employee to his corporate employer. The grounds listed in this instruction are alternatives, and any of the listed grounds that are not applicable to or supported by sufficient evidence in the case should be omitted. Regarding broad-form submission, see PJC 116.2. If imputation is not required, see PJC 115.37 and substitute *ABC Corporation* for *Don Davis*.

Source of instruction. The supreme court adopted the doctrine set out in *Restatement of Torts* § 909 (1979) in *King v. McGuff*, 234 S.W.2d 403 (Tex. 1950); *see also Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967). Section 909 sets out four distinct reasons to impute the gross negligence or malice of an employee to a corporate employer. As the court in *Fisher* set out:

> The rule in Texas is that a principal or master is liable for exemplary or punitive damages because of the acts of his agent, but only if:
>
> (a) the principal authorized the doing and the manner of the act, or
>
> (b) the agent was unfit and the principal was reckless in employing him, or
>
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
>
> (d) the employer or a manager of the employer ratified or approved the act.

Fisher, 424 S.W.2d at 630; *see also Bennett v. Reynolds*, 315 S.W.3d 867, 883–84 (Tex. 2010); *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 391 (Tex. 1997). In *Fort Worth Elevators Co.*, the court held that the gross negligence of a "vice-principal" could be imputed to a corporation and listed the elements of "vice-principal" as set out in the definitions in PJC 115.39B. *Fort Worth Elevators Co. v. Russell*, 70 S.W.2d 397, 406 (Tex. 1934), *disapproved on other grounds by Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987). The court also discussed "absolute or nondelegable duties" for which "the corporation itself remains responsible for the manner of their performance." *Fort Worth Elevators Co.*, 70 S.W.2d at 401.

Definition of "nondelegable or absolute duties." If the evidence on vice-principal requires the submission of the element that includes the term "nondelegable or absolute duties," further definitions may be necessary.

Nondelegable and absolute duties of a corporation are (1) the duty to provide rules and regulations for the safety of employees and to warn them as to the hazards of their positions or employment, (2) the duty to furnish reasonably safe machinery or instrumentalities with which its employees are to labor, (3) the duty to furnish its employees with a reasonably safe place to work, and (4) the duty to exercise ordinary care to

select careful and competent coemployees. *Central Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 652 n.10 (Tex. 2007); *see Fort Worth Elevators Co.*, 70 S.W.2d at 401.

Caveat. The decision to define nondelegable or absolute duties may need to be balanced against the consideration that this definition may constitute an impermissible comment on the weight of the evidence. In any event, only those elements of the definition raised by the evidence should be submitted.

Punitive damages based on criminal act by another person. Subject to certain exceptions, a court may not award exemplary damages against a defendant because of the harmful criminal act of another. *See* Tex. Civ. Prac. & Rem. Code § 41.005(a), (b). For causes of action accruing on or after September 1, 1995, an employer may be liable for punitive damages arising out of a criminal act by an employee but only if—

(1) the principal authorized the doing and the manner of the act;

(2) the agent was unfit and the principal acted with malice in employing or retaining him;

(3) the agent was employed in a managerial capacity and was acting in the scope of employment; or

(4) the employer or a manager of the employer ratified or approved the act.

Tex. Civ. Prac. & Rem. Code § 41.005(c); *see also Bennett*, 315 S.W.3d at 883–84.

Malice as a ground for exemplary damages in actions filed on or after September 1, 2003. Malice is also a ground for recovery of exemplary damages. *See* Tex. Civ. Prac. & Rem. Code § 41.003(a)(3).

Definitions of "gross negligence" and "malice." See PJC 115.37.

Unanimity instructions. The unanimity instructions in PJC 115.39B come from the supreme court's March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a in all cases filed on or after September 1, 2003.

PJC 115.40 Question and Instructions—Securing Execution of Document by Deception as a Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(11))

Answer the following question only if you unanimously answered "Yes" to Question _____ [*115.37*]. Otherwise, do not answer the following question.

To answer "Yes" to [*any part of*] the following question, your answer must be unanimous. You may answer "No" to [*any part of*] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [*that part of*] the following question.

QUESTION _____

Did *Don Davis* secure the execution of a document by deception [*and was the value of the property affected $2,500 or more*]?

"Securing the execution of a document by deception" occurs when a person causes another person to *sign* any document affecting *property*, and does so by deception, with the intent to defraud or harm any person.

A person acts with intent with respect to the nature of *his* conduct or to a result of *his* conduct when it is the conscious objective or desire to engage in the conduct or cause the result.

"Deception" means creating or confirming by words or conduct a false impression of law or fact that is likely to affect the judgment of another in the transaction, and that the actor does not believe to be true.

"Property" means: (a) real property; (b) tangible or intangible personal property, including anything severed from land; or (c) a document, including money, that represents or embodies anything of value.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 115.40 should be used in a case in which (1) exemplary damages are sought, (2) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003, and (3) the plaintiff alleges harm based on conduct described as a fel-

ony in Tex. Penal Code § 32.46. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(11). This statute applies to causes of action accruing on or after September 1, 1995. If the jury finds conduct that violates Tex. Penal Code § 32.46, and the conduct rises to the level of a felony, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c).

Bifurcation. If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 115.40 should be answered in the first phase of the trial.

Caveat: burden of proof. The Committee expresses no opinion on the burden of proof for the question set forth above. *See* Tex. Civ. Prac. & Rem. Code §§ 41.003(c), 41.008(c).

Alternative language for "sign." In an appropriate case, the word *execute* may be substituted for the word *sign. See* Tex. Penal Code § 32.46(a).

Alternative language for "property." In an appropriate case, the term *service* or *the pecuniary interest of any person* may be substituted for the word *property. See* Tex. Penal Code § 32.46(a)(1). If *service* is substituted for *property*, the following definition should be substituted:

> "Service" includes: (a) labor and professional service; (b) telecommunication, public utility, and transportation service; (c) lodging, restaurant service, and entertainment; and (d) the supply of a motor vehicle or other property for use.

Tex. Penal Code § 32.01(3).

"Deception." The definition of "deception" in PJC 115.40 is taken from Tex. Penal Code § 31.01(1) and *Goldstein v. State*, 803 S.W.2d 777, 790 (Tex. App.—Dallas 1991, pet. ref'd). See Tex. Penal Code § 31.01(1) for alternative definitions of "deception."

"Value" and requirement that conduct be described as a felony. Tex. Civ. Prac. & Rem. Code § 41.008(c) requires that the limitation or cap on exemplary damages may be lifted only if the plaintiff's damages are based on conduct "described as a felony" in Tex. Penal Code § 32.46. The criterion for felony status is that the property or service have a value of $2,500 or higher. Tex. Penal Code § 32.46(b)(4). The optional language in the basic question in PJC 115.40 establishes whether the defendant's conduct rises to the status of a felony, if there is a dispute about the value of the property in question.

Unanimity. For actions filed on or after September 1, 2003, "[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages." Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary dam-

ages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e). By the supreme court's March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the applicable liability question as well as the exemplary damages question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d). Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish "liability for and the amount of exemplary damages"; therefore, these questions are conditioned on, and require, unanimous findings. See PJC 115.41–115.46.

Actions filed before September 1, 2003. A unanimous decision on liability for and the amount of exemplary damages is not required for actions filed before September 1, 2003. In such cases, substitute the following conditioning instruction:

> If you answered "Yes" to Question _____ [*115.37*], then answer the following question. Otherwise, do not answer the following question.

Source of instruction and definition. The question and instructions are derived from Tex. Penal Code §§ 31.01(1), 31.08, 32.01(2), (3), 32.46; Tex. Civ. Prac. & Rem. Code § 41.008.

PJC 115.41 Question and Instruction—Fraudulent Destruction, Removal, Alteration, or Concealment of Writing as a Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(12))

Answer the following question only if you unanimously answered "Yes" to Question _____ [*115.37*]. Otherwise, do not answer the following question.

To answer "Yes" to [*any part of*] the following question, your answer must be unanimous. You may answer "No" to [*any part of*] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [*that part of*] the following question.

QUESTION _____

Did *Don Davis alter* [*describe the writing in question, e.g., Terry Testator's will dated February 29, 2004*] with intent to defraud or harm another?

A person acts with intent with respect to the nature of *his* conduct or to a result of *his* conduct when it is the conscious objective or desire to engage in the conduct or cause the result.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 115.41 should be used in a case in which (1) exemplary damages are sought, (2) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003, and (3) the plaintiff alleges harm based on conduct described as a felony in Tex. Penal Code § 32.47. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(12). This statute applies to causes of action accruing on or after September 1, 1995. If the jury finds conduct that violates Tex. Penal Code § 32.47, and that conduct rises to the level of a felony, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c). See comment below, "Felonious conduct," for a discussion of the requirements needed to establish that the conduct in question was felonious.

Bifurcation. If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 115.41 should be answered in the first phase of the trial.

Caveat: burden of proof. The Committee expresses no opinion on the burden of proof for the question set forth above. *See* Tex. Civ. Prac. & Rem. Code §§ 41.003(c), 41.008(c).

Alternative language for "alter." In an appropriate case, the terms *remove, conceal, destroy, substitute,* or *impair the verity (legibility) (availability) of* may be substituted for the word *alter*. *See* Tex. Penal Code § 32.47(a).

Not applicable to governmental records. Because Tex. Penal Code § 32.47 does not apply to writings that are "governmental records," PJC 115.41 is not applicable in a case in which the writing in question is such a record. *See* Tex. Penal Code § 32.47(a). See Tex. Penal Code § 37.01(2) for a definition of "governmental record."

Definition of "writing." In an appropriate case, use a definition of "writing" as provided in Tex. Penal Code § 32.47(b).

Felonious conduct. Tex. Civ. Prac. & Rem. Code § 41.008(c) provides that the limitation or cap on exemplary damages may be lifted only if the plaintiff's damages are based on conduct "described as a felony" in Tex. Penal Code § 32.47. The criminal conduct described in Tex. Penal Code § 32.47 rises to felonious conduct only in the following situations:

1. the writing is a will or codicil of another, whether or not the maker is alive or dead and whether or not it has been admitted to probate; or

2. the writing is a deed, mortgage, deed of trust, security instrument, security agreement, or other writing for which the law provides public recording or filing, whether or not the writing has been acknowledged.

Tex. Penal Code § 32.47(d).

Unanimity. For actions filed on or after September 1, 2003, "[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages." Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e). By the supreme court's March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the applicable liability question as well as the exemplary damages question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d). Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish "liability for and the amount of exemplary damages"; therefore, these questions are conditioned on, and require, unanimous findings. See PJC 115.40, 115.42–115.46.

Actions filed before September 1, 2003. A unanimous decision on liability for and the amount of exemplary damages is not required for actions filed before September 1, 2003. In such cases, substitute the following conditioning instruction:

> If you answered "Yes" to Question _____ [*115.37*], then answer the following question. Otherwise, do not answer the following question.

Source of instruction and definition. The question and instructions are derived from Tex. Penal Code §§ 6.03(a), 32.47; Tex. Civ. Prac. & Rem. Code § 41.008.

PJC 115.42 Question and Instructions—Forgery as a Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(8))

Answer the following question only if you unanimously answered "Yes" to Question _____ [*115.37*]. Otherwise, do not answer the following question.

To answer "Yes" to [*any part of*] the following question, your answer must be unanimous. You may answer "No" to [*any part of*] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [*that part of*] the following question.

QUESTION _____

Did *Don Davis* commit forgery with the intent to defraud or harm another?

"Forgery" means that a person *alters, makes, completes, executes, or authenticates* a writing so that it purports to *be the act of another who did not authorize that act.*

A person acts with intent with respect to the nature of *his* conduct or to a result of *his* conduct when it is the conscious objective or desire to engage in the conduct or cause the result.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 115.42 should be used in a case in which (1) exemplary damages are sought, (2) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003, and (3) the plaintiff alleges harm based on conduct described as a felony in Tex. Penal Code § 32.21. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(8). This statute applies to causes of action accruing on or after September 1, 1995. If the jury finds conduct that violates Tex. Penal Code § 32.21, and that conduct rises to the level of a felony, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c)(8). See comment below, "Felonious conduct," for a discussion of the requirements needed to establish that the conduct in question was felonious.

Bifurcation. If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 115.42 should be answered in the first phase of the trial.

Caveat: burden of proof. The Committee expresses no opinion on the burden of proof for the question set forth above. *See* Tex. Civ. Prac. & Rem. Code §§ 41.003(c), 41.008(c).

Alternative language for issuance or possession of a forged writing. Tex. Penal Code § 32.21(a)(1)(B) defines "forgery" alternatively as occurring when a person issues, transfers, registers the transfer of, passes, publishes, or otherwise utters a forged writing as defined in Tex. Penal Code § 32.21(a)(1)(A). Also, Tex. Penal Code § 32.21(a)(1)(C) gives another alternative definition of "forgery" as occurring when a person possesses a forged writing (as defined in Tex. Penal Code § 32.21(a)(1)(A)) with the intent to utter it (as defined in Tex. Penal Code § 32.21(a)(1)(B)). In an appropriate case, an alternative definition of "forgery" may be substituted.

Definition of "writing." In an appropriate case, use an applicable definition of "writing" as found in Tex. Penal Code § 32.21(a)(2).

Alternative language for "be the act of another who did not authorize that act." In an appropriate case, the language *have been executed at a time (at a place) (in a numbered sequence) other than was in fact the case*, or *be a copy of an original when no such original existed* may be substituted for the original language of the charge. Tex. Penal Code § 32.21(a)(1)(A).

Felonious conduct. Tex. Civ. Prac. & Rem. Code § 41.008(c) provides that the limitation or cap on exemplary damages may be lifted only if the plaintiff's damages are based on conduct "described as a felony" in Tex. Penal Code § 32.21. The criminal conduct described in Tex. Penal Code § 32.21 generally rises to felonious conduct only when the writing is or purports to be—

1. a will, codicil, deed, deed of trust, mortgage, security instrument, security agreement, credit card, check, authorization to debit an account at a financial institution, or similar sight order for payment of money, contract, release, or other commercial instrument;

2. part of an issue of money, securities, postage, or revenue stamps;

3. a license, certificate, permit, seal, title, letter of patent, or similar document issued by a government; or

4. another instrument issued by a state or national government or by a subdivision of either, or part of an issue of stock, bonds, or other instruments representing interests in or claims against another person.

Tex. Penal Code § 32.21(d), (e). Even if the writing meets these criteria, the conduct will, under certain circumstances, constitute only a misdemeanor. *See* Tex. Penal Code § 32.21(e–1). However, conduct that would otherwise constitute only a misdemeanor

may be raised to felony level if it is committed against an elderly individual. *See* Tex. Penal Code § 32.21(e–2).

Unanimity. For actions filed on or after September 1, 2003, "[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages." Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e). By the supreme court's March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the applicable liability question as well as the exemplary damages question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d). Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish "liability for and the amount of exemplary damages"; therefore, these questions are conditioned on, and require, unanimous findings. See PJC 115.40, 115.41, 115.43–115.46.

Actions filed before September 1, 2003. A unanimous decision on liability for and the amount of exemplary damages is not required for actions filed before September 1, 2003. In such cases, substitute the following conditioning instruction:

> If you answered "Yes" to Question _____ [*115.37*], then answer the following question. Otherwise, do not answer the following question.

Source of instruction and definition. The question and instructions are derived from Tex. Penal Code §§ 6.03(a), 32.21(a), (b); Tex. Civ. Prac. & Rem. Code § 41.008.

PJC 115.43 Question and Instructions—Theft as a Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(13))

Answer the following question only if you unanimously answered "Yes" to Question _____ [*115.37*]. Otherwise, do not answer the following question.

To answer "Yes" to [*any part of*] the following question, your answer must be unanimous. You may answer "No" to [*any part of*] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [*that part of*] the following question.

QUESTION _____

Did *Don Davis* commit theft [*and was the value of the stolen property $30,000 or greater*]?

"Theft" means that a person unlawfully appropriates *property* with the intent to deprive the owner of property. Appropriating *property* is unlawful if it is without the owner's effective consent.

A person acts with intent with respect to the nature of *his* conduct or to a result of *his* conduct when it is the conscious objective or desire to engage in the conduct or cause the result.

"Deprive" means *to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner.*

"Owner" means a person who has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than *Don Davis*.

"Property" means: (a) real property; (b) tangible or intangible personal property, including anything severed from land; or (c) a document, including money, that represents or embodies anything of value.

"Consent" means assent in fact, whether express or implied.

"Effective consent" includes *consent by a person legally authorized to act for the owner. Consent is not effective if induced by deception or coercion.*

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 115.43 should be used in a case in which (1) exemplary damages are sought, (2) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003, and (3) the plaintiff alleges harm based on conduct described as a third-degree felony in Tex. Penal Code § 31.03. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(13). This statute applies to causes of action accruing on or after September 1, 1995. If the jury finds conduct that violates Tex. Penal Code ch. 31, and that conduct rises to the level of a third-degree felony, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c). See comment below, "'Value' and requirement that conduct be described as a third-degree felony," for a discussion of the requirements needed to establish that the conduct in question was felonious.

Bifurcation. If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 115.43 should be answered in the first phase of the trial.

Caveat: burden of proof. The Committee expresses no opinion on the burden of proof for the question set forth above. *See* Tex. Civ. Prac. & Rem. Code §§ 41.003(c), 41.008(c).

Alternative definition for "unlawful appropriation of property." "Unlawful appropriation of property" also occurs when the property is stolen and the actor appropriates the property knowing it was stolen by another. Tex. Penal Code § 31.03(b)(2). In an appropriate case, this definition should be substituted for the one shown above, and the Penal Code's definition of "knowing conduct," found at Tex. Penal Code § 6.03(b), should be given as well.

Alternative definitions for "deprive." In an appropriate case, one or more of the following definitions of "deprive" may be substituted for the one shown above:

> to restore property only upon payment of reward or other compensation.

or—

> to dispose of property in a manner that makes recovery of the property by the owner unlikely.

Tex. Penal Code § 31.01(2)(B), (C).

Effective consent. In an appropriate case, the language *Consent is not effective if induced by deception or coercion* may be replaced with any of the following alternatives:

> [Consent is not effective if]

1. given by a person *Don Davis* knows is not legally authorized to act for the owner;

2. given by a person who by reason of youth, mental disease or defect, or intoxication is known by *Don Davis* to be unable to make reasonable property dispositions; or

3. given solely to detect the commission of an offense.

See Tex. Penal Code § 31.01(3)(B), (C), (D). If the defendant's knowledge of a fact is in issue (as in option 1 above), the definition of "knowing conduct" found at Tex. Penal Code § 6.03(b) should be given.

Theft of services and trade secrets. Tex. Penal Code § 31.04 should be consulted if the alleged theft was of services rather than of property, and Tex. Penal Code § 31.05 should be consulted if the alleged theft was of a trade secret.

"Value" and requirement that conduct be described as a third-degree felony. Tex. Civ. Prac. & Rem. Code § 41.008(c)(13) requires that the theft be at a level of a third-degree felony or higher in order to lift the limitation or cap on exemplary damages awards. The general criterion for a third-degree felony is that the property or service have a value of $30,000 or higher but less than $150,000. Tex. Penal Code § 31.03(e)(5). The optional language in the basic question in PJC 115.43 makes this inquiry, if there is a dispute about the value of what was stolen. Tex. Penal Code § 31.08 contains additional criteria for ascertaining value to determine the level of the offense, and Tex. Penal Code § 31.03 contains additional, nonmonetary criteria for ascertaining the level of punishment.

Unanimity. For actions filed on or after September 1, 2003, "[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages." Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e). By the supreme court's March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the applicable liability question as well as the exemplary damages question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d). Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish "liability for and the amount of exemplary damages"; therefore, these questions are conditioned on, and require, unanimous findings. See PJC 115.40–115.42, 115.44–115.46.

Actions filed before September 1, 2003. A unanimous decision on liability for and the amount of exemplary damages is not required for actions filed before September 1, 2003. In such cases, substitute the following conditioning instruction:

If you answered "Yes" to Question _____ [*115.37*], then answer the following question. Otherwise, do not answer the following question.

Source of instruction and definition. The question and instructions are derived from Tex. Penal Code §§ 1.07(a)(11), (35), 6.03, 31.01(2), (3), (4), (5), 31.03, 31.08; Tex. Civ. Prac. & Rem. Code § 41.008.

PJC 115.44 Question and Instruction—Commercial (Fiduciary) Bribery as a Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(9))

Answer the following question only if you unanimously answered "Yes" to Question _____ [*115.37*]. Otherwise, do not answer the following question.

To answer "Yes" to [*any part of*] the following question, your answer must be unanimous. You may answer "No" to [*any part of*] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [*that part of*] the following question.

QUESTION _____

Did *Don Davis*, without *Paul Payne*'s consent, intentionally solicit, accept, or agree to accept any benefit from another person on the agreement or understanding that the benefit would influence *his* conduct in relation to the affairs of *Paul Payne*?

A person acts with intent with respect to the nature of *his* conduct or to a result of *his* conduct when it is the conscious objective or desire to engage in the conduct or cause the result.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 115.44 should be used in a case in which (1) exemplary damages are sought, (2) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003, and (3) the plaintiff alleges harm based on conduct described in Tex. Penal Code § 32.43. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(9). This statute applies to causes of action accruing on or after September 1, 1995. If the jury finds conduct that violates Tex. Penal Code § 32.43, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c).

Bifurcation. If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 115.44 should be answered in the first phase of the trial.

Caveat: burden of proof. The Committee expresses no opinion on the burden of proof for the question set forth above. *See* Tex. Civ. Prac. & Rem. Code §§ 41.003(c), 41.008(c).

Consent. If a definition of "consent" is required, use the following:

> "Consent" means assent in fact, whether express or apparent.

Tex. Penal Code § 1.07(a)(11).

Benefit. If a definition of "benefit" is required, use the following:

> "Benefit" means anything reasonably regarded as economic gain or advantage, including benefit to any other person in whose welfare the beneficiary is interested.

Tex. Penal Code § 1.07(a)(7).

Knowing standard of conduct. Tex. Civ. Prac. & Rem. Code § 41.008(c) authorizes elimination of the limitation on exemplary damages awards if the conduct described in the applicable Penal Code section was committed either knowingly or intentionally. If knowing instead of intentional conduct is alleged, use the following definition:

> A person acts knowingly with respect to the nature of *his* conduct or to circumstances surrounding *his* conduct when *he* is aware of the nature of *his* conduct or that the circumstances exist. A person acts knowingly with respect to a result of *his* conduct when *he* is aware that *his* conduct is reasonably certain to cause the result.

Tex. Penal Code § 6.03(b).

Offering bribe also criminal conduct. A person who, for an improper purpose, intentionally offers, confers, or agrees to confer a benefit to a fiduciary also commits commercial bribery. Tex. Penal Code § 32.43(c). In an appropriate case, the question should read:

> Did *Don Davis* intentionally offer, confer, or agree to confer a benefit on *Fred Fiduciary* on the agreement that the benefit would influence *Fred Fiduciary*'s conduct in relation to the affairs of *Paul Payne*?

Fiduciary. The defendant must be a fiduciary for the conduct described in Tex. Penal Code § 32.43 to apply. "Fiduciary" is defined there as (1) an agent or employee; (2) a trustee, guardian, custodian, administrator, executor, conservator, receiver, or similar fiduciary; (3) a lawyer, physician, accountant, appraiser, or other professional advisor; or (4) an officer, director, partner, manager, or other participant in the direction of the affairs of a corporation or association. Tex. Penal Code § 32.43(a)(2). If the existence of such a fiduciary relationship is disputed, a preliminary question should be

submitted, and PJC 115.44 should be made conditional on a "Yes" answer to that question. *See Schiller v. Elick*, 240 S.W.2d 997, 999 (Tex. 1951) (dispute whether defendant was plaintiff's agent). See chapter 104 of this volume regarding fiduciary and confidential relationships.

Beneficiary. For purposes of the commercial bribery statute, a "beneficiary" is the person for whom a fiduciary acts. Tex. Penal Code § 32.43(a)(1). PJC 115.44 assumes that the plaintiff is the beneficiary.

Unanimity. For actions filed on or after September 1, 2003, "[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages." Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e). By the supreme court's March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the applicable liability question as well as the exemplary damages question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d). Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish "liability for and the amount of exemplary damages"; therefore, these questions are conditioned on, and require, unanimous findings. See PJC 115.40–115.43, 115.45, 115.46.

Actions filed before September 1, 2003. A unanimous decision on liability for and the amount of exemplary damages is not required for actions filed before September 1, 2003. In such cases, substitute the following conditioning instruction:

> If you answered "Yes" to Question _____ [*115.37*], then answer the following question. Otherwise, do not answer the following question.

Source of instruction and definition. Tex. Penal Code § 32.43; Tex. Civ. Prac. & Rem. Code § 41.008.

PJC 115.45 Question and Instructions—Misapplication of Fiduciary Property as a Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(10))

Answer the following question only if you unanimously answered "Yes" to Question _____ [*115.37*]. Otherwise, do not answer the following question.

To answer "Yes" to [*any part of*] the following question, your answer must be unanimous. You may answer "No" to [*any part of*] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [*that part of*] the following question.

QUESTION _____

Did *Don Davis* intentionally misapply [*identify property defendant held as a fiduciary, e.g., 300 shares of ABC Corporation common stock*] in a manner that involved substantial risk of loss to *Paul Payne* [*and was the value of the property $2,500 or greater*]?

"Misapply" means a person deals with property [*or money*] contrary to *an agreement under which the person holds the property* [*or money*].

"Substantial risk of loss" means it is more likely than not that loss will occur.

A person acts with intent with respect to the nature of *his* conduct or to a result of *his* conduct when it is the conscious objective or desire to engage in the conduct or cause the result.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 115.45 should be used in a case in which (1) exemplary damages are sought, (2) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003, and (3) the plaintiff alleges harm based on conduct described in Tex. Penal Code § 32.45. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(10). This statute applies to causes of action accruing on or after September 1, 1995. If the jury finds conduct that violates Tex. Penal Code § 32.45, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c).

Bifurcation. If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 115.45 should be answered in the first phase of the trial.

Caveat: burden of proof. The Committee expresses no opinion on the burden of proof for the question set forth above. *See* Tex. Civ. Prac. & Rem. Code §§ 41.003(c), 41.008(c).

Knowing standard of conduct. Tex. Civ. Prac. & Rem. Code § 41.008(c) authorizes elimination of the limitation on exemplary damages awards if the conduct described in the applicable Penal Code section was committed either knowingly or intentionally. If knowing instead of intentional conduct is alleged, use the following definition:

> A person acts knowingly with respect to the nature of *his* conduct or to circumstances surrounding *his* conduct when *he* is aware of the nature of *his* conduct or that the circumstances exist. A person acts knowingly with respect to a result of *his* conduct when *he* is aware that *his* conduct is reasonably certain to cause the result.

Tex. Penal Code § 6.03(b).

Agreement. If a definition of "agreement" is required, use the following:

> "Agreement" means the act of agreement or coming to an agreement; a harmonious understanding; or an arrangement as to a course of action.

Bynum v. State, 711 S.W.2d 321, 323 (Tex. App.—Amarillo 1986), *aff'd*, 767 S.W.2d 769 (Tex. Crim. App. 1989) (applying ordinary, dictionary definition of "agreement").

Property. Tex. Penal Code § 32.01(2) defines "property" broadly to include tangible or intangible property as well as money. Because the jury may not understand money to be "property," the word "money" should be used if money is involved in the case.

Acting contrary to a law governing disposition of property. In an appropriate case, the phrase *a law prescribing the custody or disposition of the property* may be substituted for, or added to, the phrase *an agreement under which the person holds the property*. *See* Tex. Penal Code § 32.45(a)(2).

Fiduciary. The defendant must be a fiduciary for the conduct described in Tex. Penal Code § 32.45 to apply. "Fiduciary" is defined there as including (1) "a trustee, guardian, administrator, executor, conservator, and receiver"; (2) "an attorney in fact or agent appointed under a durable power of attorney" as provided by title 2, subtitle P, of the Texas Estates Code; (3) "any other person acting in a fiduciary capacity, but not a commercial bailee unless the commercial bailee is a party in a motor fuel sales agreement with a distributor or supplier," as those terms are defined in Tex. Tax Code

§ 162.001; and (4) "an officer, manager, employee, or agent carrying on fiduciary functions on behalf of a fiduciary." Tex. Penal Code § 32.45(a)(1). "[A]ny other person acting in a fiduciary capacity" embraces all fiduciaries, not just the categories of fiduciaries enumerated in Tex. Penal Code § 32.45(a)(1). *Coplin v. State*, 585 S.W.2d 734, 735 (Tex. Crim. App. 1979); *Showery v. State*, 678 S.W.2d 103, 107–08 (Tex. App.—El Paso 1984, pet. ref'd).

If the existence of such a fiduciary relationship is disputed, a preliminary question should be submitted, and PJC 115.45 should be made conditional on a "Yes" answer to that question. *See Schiller v. Elick*, 240 S.W.2d 997, 999 (Tex. 1951) (dispute whether defendant was plaintiff's agent). See chapter 104 of this volume regarding fiduciary and confidential relationships.

Substantial risk of loss. The definition of "substantial risk of loss" is derived from *Bynum*, 767 S.W.2d at 774–75, and *Casillas v. State*, 733 S.W.2d 158, 163–64 (Tex. Crim. App. 1986).

Misapplication of property of financial institution. If the defendant is alleged to have misapplied property of a financial institution instead of fiduciary property, the question should be amended to read as follows:

> QUESTION _____
>
> Did *Don Davis* intentionally misapply property of *ABC Bank* in a manner that involved substantial risk of loss to *ABC Bank* [*and was the value of the misapplied property $2,500 or greater*]?
>
> "Misapply" means to deal with property contrary to a law prescribing the custody or disposition of the property.
>
> "Substantial risk of loss" means it is more likely than not that loss will occur.
>
> A person acts with intent with respect to the nature of *his* conduct or to a result of *his* conduct when it is the conscious objective or desire to engage in the conduct or cause the result.

"Value" and requirement that conduct be described as a felony. Tex. Civ. Prac. & Rem. Code § 41.008(c) provides that the limitation or cap on exemplary damages may be lifted only if the plaintiff's damages are based on conduct "described as a felony" in Tex. Penal Code § 32.45. The criminal conduct described in Tex. Penal Code § 32.45 rises to felonious conduct only when the value of the property misapplied is $2,500 or higher. Tex. Penal Code § 32.45(c). The optional language in the basic question in PJC 115.45 establishes whether the defendant's conduct rises to the status of a felony, if there is a dispute about the value of the misapplied property.

Unanimity. For actions filed on or after September 1, 2003, "[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for

and the amount of exemplary damages." Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e). By the supreme court's March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the applicable liability question as well as the exemplary damages question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d). Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish "liability for and the amount of exemplary damages"; therefore, these questions are conditioned on, and require, unanimous findings. See PJC 115.40–115.44, 115.46.

Actions filed before September 1, 2003. A unanimous decision on liability for and the amount of exemplary damages is not required for actions filed before September 1, 2003. In such cases, substitute the following conditioning instruction:

> If you answered "Yes" to Question _____ [*115.37*], then answer the following question. Otherwise, do not answer the following question.

Source of instruction and definition. Tex. Penal Code §§ 31.08, 32.45; Tex. Civ. Prac. & Rem. Code § 41.008.

PJC 115.46 Other Conduct of Defendant Authorizing Removal of Limitation on Exemplary Damages Award (Comment)

In addition to the actions described in PJC 115.40–115.45, nine other instances of the defendant's conduct, listed in Tex. Civ. Prac. & Rem. Code § 41.008(c), will support a removal of the limitation on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b). They are:

- murder (Tex. Penal Code § 19.02);
- capital murder (Tex. Penal Code § 19.03);
- aggravated kidnapping (Tex. Penal Code § 20.04);
- aggravated assault (Tex. Penal Code § 22.02);
- sexual assault (Tex. Penal Code § 22.011);
- aggravated sexual assault (Tex. Penal Code § 22.021);
- injury to a child, elderly individual, or disabled individual (Tex. Penal Code § 22.04), but for actions filed on or after September 1, 2003, "not if the conduct occurred while providing health care as defined by [Texas Civil Practice and Remedies Code] Section 74.001" (Tex. Civ. Prac. & Rem. Code § 41.008(c)(7));
- intoxication assault (Tex. Penal Code § 49.07); and
- intoxication manslaughter (Tex. Penal Code § 49.08).

When to use. A question asking whether the defendant engaged in the conduct described in the Penal Code provisions set out above should be used in a case in which (1) exemplary damages are sought, (2) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003, and (3) the plaintiff alleges harm based on conduct described in the Penal Code provision. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c). This statute applies to causes of action accruing on or after September 1, 1995. If the jury answers "Yes" to such a question, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c).

Drafting of question. A jury question regarding one or more of the acts set out in the Penal Code sections listed above should follow the pattern set out in PJC 115.40–115.45. For questions and instructions on these actions, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products*.

Standard of conduct—"knowingly" or "intentionally." Tex. Civ. Prac. & Rem. Code § 41.008(c) authorizes elimination of the limitation on exemplary damages awards if the conduct described in the applicable Penal Code section was committed either knowingly or intentionally. "Knowingly" is defined as follows:

> A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Tex. Penal Code § 6.03(b).

"Intentionally" is defined as follows:

> A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

Tex. Penal Code § 6.03(a).

Felonious conduct. Tex. Civ. Prac. & Rem. Code § 41.008(c) provides that the limitation or cap on exemplary damages may be lifted only if the plaintiff's damages are based on conduct "described as a felony" in the applicable Penal Code section, unless the conduct is intoxication assault or intoxication manslaughter.

Unanimity. For actions filed on or after September 1, 2003, "[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages." Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e). By the supreme court's March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the applicable liability question as well as the exemplary damages question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d). Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish "liability for and the amount of exemplary damages"; therefore, these questions are conditioned on, and require, unanimous findings. See PJC 115.40–115.45.

[PJC 115.47 is reserved for expansion.]

PJC 115.48 Question and Instruction on Damages for Misapplication of Trust Funds under the Texas Construction Trust Funds Act

[Insert predicate, PJC 115.1.]

QUESTION _____

What amount of trust funds of which *Paul Payne* was a beneficiary were misapplied by *Don Davis* and not paid to *Paul Payne*?

Do not add any amount for interest on damages, if any.

Answer in dollars and cents for damages, if any.

Answer: _____

COMMENT

When to use. PJC 115.48 should be predicated on a "Yes" answer to PJC 101.47.

Source of question. PJC 115.48 is derived from *Choy v. Graziano Roofing of Texas, Inc.*, 322 S.W.3d 276, 293–95 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

Attorney's fees. Texas Property Code chapter 162 does not expressly authorize an award of attorney's fees.

Partial excuse. If there is a factual dispute regarding whether only a portion of the misapplication of trust funds is excused, the following instruction should be included:

> Do not include in your answer any amount of misapplied trust funds to which you found in Question _____ [*101.48*] an excuse applies.

PJC 115.49 Question and Instructions on Prompt Payment to Contractors and Subcontractors Damages

[Insert predicate, PJC 115.1.]

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* damages, if any, that resulted from not being promptly paid by *Don Davis*?

Consider the following elements of damages, if any, and none other.

The unpaid amount for properly performed work or materials suitably stored or specially fabricated under the contract.

Do not speculate about what *Paul Payne*'s ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answer at the time of judgment. Do not add any amount for interest on damages, if any.

Answer in dollars and cents for damages, if any.

Answer: _____

COMMENT

When to use. PJC 115.49 should be predicated on a "Yes" answer to PJC 101.50.

Instruction required. PJC 115.49 *may not* be submitted without an instruction on the appropriate measures of damages. *See Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973).

Attorney's fees. For submission of attorney's fees, see PJC 115.60.

Interest on overdue payment. An unpaid amount begins to accrue interest on the day after the date on which the payment becomes due and bears interest at the rate of 1.5 percent per month and 18 percent per year. *See* Tex. Prop. Code § 28.004.

Interest on an unpaid amount stops accruing under section 28.004 on the earlier of—

1. the date of delivery;

2. the date of mailing, if payment is mailed and delivery occurs within three days; or

3. the date the judgment is entered for violation of prompt payment.

See Tex. Prop. Code § 28.004.

To the extent there are factual disputes about the date payment became due or the date the interest on the unpaid account stopped accruing, additional jury questions may be necessary.

[PJC 115.50–115.53 are reserved for expansion.]

PJC 115.54 Question on Trade-Secret Misappropriation Damages

[Insert predicate, PJC 115.1.]

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* damages, if any, that were caused by such misappropriation?

Consider the following elements of damages, if any, and none other.

[Insert appropriate instructions. See examples in PJC 115.55.]

Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

1. [*Element A*] sustained in the past.

Answer: _____

2. [*Element A*] that, in reasonable probability, will be sustained in the future.

Answer: _____

3. [*Element B*] sustained in the past.

Answer: _____

4. [*Element B*] that, in reasonable probability, will be sustained in the future.

Answer: _____

COMMENT

When to use. PJC 115.54 should be predicated on a "Yes" answer to PJC 111.2 and may be adapted for use in most trade-secret-misappropriation cases by the addition of appropriate instructions setting out legally available measures of damages. See PJC 115.55. If only one measure of damages is supported by the pleadings and proof, the measure may be incorporated into the question.

Elements of damages submitted separately. The Committee generally recommends that multiple elements of damages be separately submitted to the jury. *Harris*

County v. Smith, 96 S.W.3d 230, 233–34 (Tex. 2002) (broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted). In cases involving more than one claimed trade secret, consider whether the elements of damages should be submitted separately for each trade secret the jury finds was misappropriated. For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Further, "[p]rejudgment interest may not be assessed or recovered on an award of future damages." Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases). Therefore, separation of past and future damages is required.

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

> Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment.

Texas Theft Liability Act. In dicta but applying Texas law, the Fifth Circuit court of appeals opined that the "civil remedy provided for by the [Texas Theft Liability Act (TTLA)] for misappropriation of trade secrets was superseded by the Texas Uniform Trade Secrets Act (TUTSA) . . . ." *In re Mandel*, 578 Fed. Appx. 376, 384 n.8 (5th Cir. 2014) (recognizing that the "TUTSA has no effect on the present litigation because the act only applies" to misappropriations made on or after September 1, 2013). The legislature removed the provision applying the TTLA to theft of trade secrets effective September 1, 2013. *Beardmore v. Jacobson*, 131 F. Supp. 3d 656, 670 n.3 (S.D. Tex. 2015).

Future damages. Future damages may not be recoverable if an injunction is obtained. Pursuant to the Texas Uniform Trade Secrets Act (the "Act"), effective September 1, 2013, an injunction may condition future use of the trade secret upon payment of a reasonable royalty in "exceptional circumstances." Tex. Civ. Prac. & Rem. Code § 134A.003(b). In such cases, Sample *C* from PJC 115.55 should be submitted to determine the future royalty.

Attorney's fees. Under the Act, the court may award reasonable attorney's fees to a prevailing party in certain circumstances, such as when a claim of misappropriation

is made in bad faith or willful and malicious misappropriation exists. Tex. Civ. Prac. & Rem. Code § 134A.005(1), (3). "'Willful and malicious misappropriation' means intentional misappropriation resulting from the conscious disregard of the rights of the owner of the trade secret." Tex. Civ. Prac. & Rem. Code § 134A.002(7). Texas courts have not yet addressed whether issues such as reasonableness, bad faith, or willful and malicious misappropriation are to be determined by the court or the jury. For a question submitting reasonableness to the jury, see PJC 115.60.

Exemplary damages. Pursuant to the Act, only "willful and malicious misappropriation" may form the basis for an award of exemplary damages in misappropriation-of-trade-secret cases. Tex. Civ. Prac. & Rem. Code § 134A.004(b). "'Willful and malicious misappropriation' means intentional misappropriation resulting from the conscious disregard of the rights of the owner of the trade secret." Tex. Civ. Prac. & Rem. Code § 134A.002(7). Exemplary damages under the Act are capped at two times actual damages. Tex. Civ. Prac. & Rem. Code § 134A.004(b); *Southwestern Energy Production Co. v. Berry-Helfand*, 491 S.W.3d 699, 711 n.7 (Tex. 2016).

PJC 115.55 Sample Instructions on Actual Damages—Trade-Secret Misappropriation

Exemplary note: Damages instructions in a misappropriation-of-trade-secrets case are necessarily fact-specific and can vary with the circumstances of each case. The elements listed below are those commonly used in misappropriation-of-trade-secrets cases but do not represent an exhaustive list. These instructions are to be used in conjunction with the misappropriation-of-trade-secrets damages question, PJC 115.54.

Sample A—Plaintiff's actual loss

Paul Payne's lost profits caused by the misappropriation.

Sample B—Defendant's unjust enrichment

Profits that *Don Davis* earned from the misappropriation.

[or]

Development costs that *Don Davis* avoided by the misappropriation.

Sample C—Reasonable royalty

The price that a willing buyer and a willing seller would have agreed on, at the time of the misappropriation, as a fair price for *Don Davis*'s use of the trade secret.

COMMENT

When to use. Section 134A.007 of the Texas Civil Practice and Remedies Code specifies the extent to which the Texas Uniform Trade Secrets Act (the "Act"), effective September 1, 2013, displaces other Texas law regarding remedies for misappropriation of a trade secret. To the extent other Texas law has not been displaced by the Act, it is examined below.

The Act provides for three measures of damages: (1) actual loss caused by misappropriation; (2) unjust enrichment caused by misappropriation that is not taken into account in computing actual loss; and (3) in lieu of damages measured by any other methods, a reasonable royalty for the misappropriator's unauthorized disclosure or use of the trade secret. Tex. Civ. Prac. & Rem. Code § 134A.004(a).

As explained below, the sample elements of damages provided above are not intended to be exclusive, and it may be appropriate to modify an element, or to submit an element other than those listed above, in a particular case.

Plaintiff's actual loss. The Act provides that a plaintiff is entitled to recover the actual loss caused by misappropriation of a trade secret. Tex. Civ. Prac. & Rem. Code § 134A.004(a). Cases decided prior to the Act often used the plaintiff's lost profits caused by the misappropriation to measure actual loss, and that measure is used in Sample *A* above. *See Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 89–90 (Tex. 1973); *Elcor Chemical Corp. v. Agri-Sul, Inc.*, 494 S.W.2d 204, 214 (Tex. App.—Dallas 1973, writ ref'd n.r.e.); *see also Bohnsack v. Varco, L.P.*, 668 F.3d 262, 280 (5th Cir. 2012) ("Damages in misappropriation cases can take several forms . . . [including] the value of plaintiff's lost profits."); *Restatement (First) of Torts* § 757 cmt. e (1939); *Restatement (Third) of Unfair Competition* § 45 cmts. d, e (1995). For further discussion of lost profits, see the Comment to PJC 115.5.

Depending on the evidence, actual loss may include elements in addition to lost profits, or lost profits may not be an appropriate measure of actual loss. In such cases, additional or alternative instructions on the appropriate measure of damages must be provided. See PJC 115.4 and 115.5 for sample instructions.

Defendant's unjust enrichment. In some cases, the defendant has used the plaintiff's trade secret to his advantage with no obvious effect on the plaintiff save for the relative differences in their subsequent competitive positions. *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 535 (5th Cir. 1974). The Act provides that a claimant is entitled to recover the unjust enrichment caused by misappropriation of a trade secret. Tex. Civ. Prac. & Rem. Code § 134A.004(a). Cases decided prior to the Act examine various forms of "benefits, profits, or advantages gained by the defendant in the use of the trade secret." *Lykes-Youngstown Corp.*, 504 F.2d at 536.

Unjust enrichment damages may be measured by the defendant's actual profits from the misappropriation of the trade secret or the development costs the defendant avoided incurring through misappropriation. *Bohnsack*, 668 F.3d at 280; *Lykes-Youngstown Corp.*, 504 F.2d at 536, 538–39; *Southwestern Energy Production Co. v. Berry-Helfand*, 491 S.W.3d 699, 711 (Tex. 2016). Depending on the facts, either the defendant's profits or costs avoided or both may be submitted, and each measure may be modified as necessary to ensure that the jury's verdict can be translated into a judgment without awarding the plaintiff a double recovery. If the defendant earned profits from the misappropriation, the plaintiff may recover the total amount of the defendant's profits or some apportioned amount corresponding to the actual contribution the trade secret(s) made to the defendant's profits. *Lykes-Youngstown Corp.*, 504 F.2d at 539.

The Act permits recovery for both actual loss and unjust enrichment to the extent the unjust enrichment caused by the misappropriation is not taken into account in computing actual loss. Tex. Civ. Prac. & Rem. Code § 134A.004(a); *Southwestern Energy Production Co.*, 491 S.W.3d at 711 n.7.

Reasonable royalty for use. The Act authorizes recovery of a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret, but it provides that such damages are in lieu of damages measured by any other method. Tex. Civ. Prac. & Rem. Code § 134A.004(a). Cases decided prior to the Act examine this measure of damages as well. *E.g., Calce v. Dorado Exploration, Inc.*, 309 S.W.3d 719, 738 (Tex. App.—Dallas 2010, no pet.); *Elcor Chemical Corp.*, 494 S.W.2d at 214; *see Restatement (Third) of Unfair Competition* § 45 cmts. d, g (1995).

A reasonable royalty is "'what the parties would have agreed to as a fair price for licensing the defendant to put the trade secret to the use the defendant intended at the time the misappropriation took place.'" *Southwestern Energy Production Co.*, 491 S.W.3d at 711 (quoting *Mid-Michigan Computer Systems, Inc. v. Marc Glassman, Inc.*, 416 F.3d 505, 510–11 (6th Cir. 2005)); *see MGE UPS Systems, Inc. v. GE Consumer & Industrial, Inc.*, 622 F.3d 361, 367 n.2 (5th Cir. 2010). The royalty is calculated based on a "fictional negotiation of what a willing licensor and licensee would have settled on as the value of the trade secret at the beginning of the infringement." *Southwestern Energy Production Co.*, 491 S.W.3d at 711 (citing *Metallurgical Industries Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1208 (5th Cir. 1986), and *Lykes-Youngstown Corp.*, 504 F.2d at 540). In essence, a reasonable royalty is "a proxy for the [actual] value of what the defendant appropriated, but it is not simply a percentage of the defendant's actual profits." *Southwestern Energy Production Co.*, 491 S.W.3d at 711 (citing *Metallurgical Industries Inc.*, 790 F.2d at 1208, and *Lykes-Youngstown Corp.*, 504 F.2d at 537). In determining this price, the following factors may be considered: (1) the resulting and foreseeable changes in the parties' competitive positions; (2) past prices that purchasers or licensees paid for the trade secret; (3) the total value of the secret to the plaintiff, including development costs and the importance of the secret to the plaintiff's business; (4) the nature and extent of the defendant's use of the trade secret; and (5) other factors, such as whether an alternative process exists. *Fourtek, Inc.*, 790 F.2d at 1208; *Lykes-Youngstown Corp.*, 504 F.2d at 540; *Calce*, 309 S.W.3d at 738.

Hypothetical sale. The Act does not specifically include a measure of damages allowing recovery of the amount that would be paid in a "hypothetical sale" of the trade secret at the time it was misappropriated, though pre-Act cases recognized this measure as a species of actual loss or unjust enrichment damages. *E.g., Bohnsack*, 668 F.3d at 280; *Lykes-Youngstown Corp.*, 504 F.2d at 535 & n.26; *Precision Plating & Metal Finishing, Inc. v. Martin-Marietta Corp.*, 435 F.2d 1262, 1263 (5th Cir. 1970).

The hypothetical sale theory considers the amount a reasonable purchaser would have paid for the trade secret. *Bohnsack*, 668 F.3d at 280. This method calculates damages by looking at the "investment value of the trade secret." *Precision Plating &*

Metal Finishing, Inc., 435 F.2d at 1263. In other words, damages are determined by what an investor would pay for the return he foresees from owning the trade secret, taking into account the facts, circumstances, and information available at the time. *Precision Plating & Metal Finishing, Inc.*, 435 F.2d at 1263. This measure of damages is used when the defendant has deprived the plaintiff of the trade secret's use or destroyed its value, such as by publishing the trade secret so that no secret remains. *Lykes-Youngstown Corp.*, 504 F.2d at 535.

If the law, the pleadings, and the evidence warrant the submission of a hypothetical-sale damage instruction, the following form may be used:

Sample D—Hypothetical Sale

> The value that a reasonably prudent investor would have paid for the trade secret at the time of the misappropriation.

See Bohnsack, 668 F.3d at 280.

Contractual remedies. The Act does not affect contractual remedies premised upon misappropriation of trade secrets. Tex. Civ. Prac. & Rem. Code § 134A.007(b)(1).

[PJC 115.56–115.59 are reserved for expansion.]

PJC 115.60 Question on Attorney's Fees

[Insert predicate, PJC 115.1.]

QUESTION _____

What is a reasonable fee for the necessary services of *Paul Payne*'s attorney, stated in dollars and cents?

Answer with an amount for each of the following:

1. For representation through trial and the completion of proceedings in the trial court.

Answer: _____

2. For representation through appeal to the court of appeals.

Answer: _____

3. For representation at the petition for review stage in the Supreme Court of Texas.

Answer: _____

4. For representation at the merits briefing stage in the Supreme Court of Texas.

Answer: _____

5. For representation through oral argument and the completion of proceedings in the Supreme Court of Texas.

Answer: _____

COMMENT

When to use. Attorney's fees are recoverable in contracts, DTPA, Insurance Code, Texas Whistleblower Act, and Texas Labor Code chapter 21 (formerly Texas Commission on Human Rights Act) claims. Tex. Civ. Prac. & Rem. Code § 38.001; Tex. Bus. & Com. Code § 17.50(d) (DTPA); Tex. Ins. Code ch. 541; Tex. Gov't Code § 554.003(a); Tex. Lab. Code ch. 21. In cases involving the Texas Labor Code, there is a split in authority on whether the question of a reasonable attorney's fee should be determined by the court or a jury. *Compare Union Pacific Railroad Co. v. Loa*, 153 S.W.3d 162, 173–74 (Tex. App.—El Paso 2004, no pet.), *and Borg-Warner Protective*

Services Corp. v. Flores, 955 S.W.2d 861, 870 (Tex. App.—Corpus Christi 1997, no pet.) (amount of reasonable attorney's fee to be decided by court), *with Bill Miller Bar-B-Q Enterprises, Ltd. v. Gonzales*, No. 04-13-00704-CV, 2014 WL 5463951 (Tex. App.—San Antonio Oct. 29, 2014, no pet.) (mem. op.) (amount of reasonable attorney's fee to be decided by jury). PJC 115.60 is to be used regardless of the terms of the fee agreement.

In *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 817–19 (Tex. 1997), the supreme court held that a percentage award question should not be used. Although a contingent fee is proper, the jury's award must be stated in dollars and cents.

Stages of representation. Depending on the evidence in a particular case, the court may submit a different number of elements and change the descriptions of the stages of representation.

Factors to consider. In *Arthur Andersen & Co.*, the supreme court held that certain factors should be considered in determining the reasonableness of an attorney's fee award. In an appropriate case, the following instruction may be used, but only the factors that are relevant in the particular case should be included:

> Factors to consider in determining a reasonable fee include—
>
> 1. The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly.
>
> 2. The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> 3. The fee customarily charged in the locality for similar legal services.
>
> 4. The amount involved and the results obtained.
>
> 5. The time limitations imposed by the client or by the circumstances.
>
> 6. The nature and length of the professional relationship with the client.
>
> 7. The experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> 8. Whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

See Arthur Andersen & Co., 945 S.W.2d at 818. *See also* Tex. Disciplinary Rules Prof'l Conduct R. 1.04(b), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013) (Tex. State Bar R. art. X, § 9).

Attorney's fees awarded to a prevailing plaintiff. To recover attorney's fees under chapter 38 of the Civil Practice and Remedies Code, a party must (1) prevail on a cause of action for which attorney's fees are recoverable and (2) recover actual damages. *Ashford Partners, Ltd. v. ECO Resources, Inc.*, 401 S.W.3d 35, 40 (Tex. 2012); *MBM Financial Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 666 (Tex. 2009); *but see McKinley v. Drozd*, 685 S.W.2d 7 (Tex. 1985) (net recovery not required to obtain attorney's fees under article 2226 (now chapter 38 of the Civil Practice and Remedies Code) or DTPA).

The phrase "if any" should not be included in the questions for fees. The jury determines the amount of reasonable and necessary fees, not whether fees should be recovered. Attorney's fees in some amount for trial and appeal are required to be awarded to a prevailing claimant under chapter 38 if supported by some evidence. *See Ventling v. Johnson*, 466 S.W.3d 143 (Tex. 2015).

Segregating claims. If any attorney's fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees. Intertwined facts do not make unrecoverable fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313–14 (Tex. 2006). A party, however, may recover attorney's fees incurred in overcoming defenses or counterclaims to a claim for which attorney's fees are recoverable. *Varner v. Cardenas*, 218 S.W.3d 68, 69 (Tex. 2007). Any error in failing to segregate attorney's fees is waived by a failure to object to the lack of segregation. *Green International, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997); *Rhodes v. Kelly*, No. 05-16-00888-CV, 2017 WL 2774452, at *13 (Tex. App.—Dallas June 27, 2017, pet. denied). The question to be submitted may vary from PJC 115.60 in cases involving multiple claims where fees are not recoverable under one or more of the claims.

Defendant's attorney's fees. This question may be modified to submit the defendant's attorney's fees as well, if recoverable under contract law or under DTPA §§ 17.50(c) or 17.506.

Paralegal fees. Concerning the inclusion of compensation for a legal assistant's work in an award of attorney's fees, see *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 763 (Tex. 2012), and *Jarvis v. K&E Re One, LLC*, 390 S.W.3d 631, 643–44 (Tex. App.—Dallas 2012, no pet.).

PJC 116.1 Preservation of Charge Error (Comment)

The purpose of this Comment is to make practitioners aware of the need to preserve their complaints about the jury charge for appellate review and to inform them of general considerations when attempting to perfect those complaints. It is not intended as an in-depth analysis of the topic.

Basic rules for preserving charge error.

Objections and requests. Errors in the charge consist of (1) defective questions, instructions, and definitions actually submitted (that is, definitions, instructions, and questions that, while included in the charge, are nevertheless incorrectly submitted); and (2) questions, instructions, and definitions that are omitted entirely. Objections are required to preserve error as to any defect in the charge. In addition, a written request for a substantially correct question, instruction, or definition is required to preserve error for certain omissions.

- Defective question, definition, or instruction: *Objection*

  Affirmative errors in the jury charge must be preserved by objection, regardless of which party has the burden of proof for the submission. Tex. R. Civ. P. 274. Therefore, if the jury charge contains a *defective* question, definition, or instruction, an objection pointing out the error will preserve error for review.

- Omitted definition or instruction: *Objection and request*

  If the omission concerns a definition or an instruction, error must be preserved by an objection and a request for a substantially correct definition or instruction. Tex. R. Civ. P. 274, 278. For this type of omission, it does not matter which party has the burden of proof. Therefore, a request must be tendered even if the erroneously omitted definition or instruction is in the opponent's claim or defense.

- Omitted question, Party's burden: *Objection and request*;
  Opponent's burden: *Objection*

  If the omission concerns a question relied on by the party complaining of the judgment, error must be preserved by an objection and a request for a substantially correct question. Tex. R. Civ. P. 274, 278. If the omission concerns a question relied on by the opponent, an objection alone will preserve error for review. Tex. R. Civ. P. 278. To determine whether error preservation is required for an opponent's omission, consider that, if no element of an independent ground of recovery or defense is submitted in the charge or is requested, the ground is waived. Tex. R. Civ. P. 279.

- Uncertainty about whether the error constitutes an omission or a defect: *Objection and request*

  If there is uncertainty whether an error in the charge constitutes an affirmative error or an omission, the practitioner should both request and object to ensure the error is preserved. *See State Department of Highways & Public Transportation v. Payne*, 838 S.W.2d 235, 239–40 (Tex. 1992).

Timing and form of objections and requests.

- Objections, requests, and rulings must be made—
  1. before the reading of the charge to the jury, Tex. R. Civ. P. 272; or
  2. by an earlier deadline set by the trial court, *King Fisher Marine Service, L.P. v. Tamez*, 443 S.W.3d 838, 843 (Tex. 2014) (providing that such a deadline must "afford[] the parties a 'reasonable time' to inspect and object to the charge").
- Objections must—
  1. be made in writing or dictated to the court reporter in the presence of the court and opposing counsel, Tex. R. Civ. P. 272; and
  2. specifically point out the error and the grounds of complaint, Tex. R. Civ. P. 274.
- Requests must—
  1. be made separate and apart from any objections to the charge, Tex. R. Civ. P. 273;
  2. be in writing and tendered to the court, Tex. R. Civ. P. 278; and
  3. be in substantially correct wording, Tex. R. Civ. P. 278, which does not mean that the request be absolutely correct, nor does it mean that the request be merely sufficient to call the matter to the attention of the court, but instead means that the request is substantively correct and not affirmatively incorrect. *Placencio v. Allied Industrial International, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987).

Rulings on objections and requests.

- Rulings on objections may be oral or in writing. Tex. R. Civ. P. 272.
- Rulings on requests must be in writing and must indicate whether the court refused, granted, or granted but modified the request. Tex. R. Civ. P. 276.

Submitting wrong theory. "[Where] the wrong theory of recovery was submitted and the correct theory of recovery was omitted entirely, the defendant has no obligation to object." *See United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 481

(Tex. 2017). The court held that error had been preserved by raising the argument in the trial court in a motion for judgment notwithstanding the verdict. *Levine*, 537 S.W.3d at 482; *see also* Tex. R. Civ. P. 279.

Common mistakes that may result in waiver of charge error.

- Failing to submit requests in writing (oral or dictated requests will not preserve error).
- Failing to make requests separately from objections to the charge (generally it is safe to present a party's requests at the beginning of the formal charge conference, but separate from a party's objections).
- Offering requests "en masse," that is, tendering a complete charge or obscuring a proper request among unfounded or meritless requests (submit each question, definition, or instruction separately, and submit only those important to the outcome of the trial).
- Failing to file with the clerk all requests that the court has marked "refused" (a prudent practice is to also keep a copy for one's own file).
- Failing to make objections to the court's charge on the record.
- Failing to make objections to the court's charge before the reading of the charge to the jury or by an earlier deadline set by the trial court.
- Making objections on the record while the jury is deliberating even if by agreement and with court approval.
- Adopting by reference objections to other portions of the court's charge.
- Dictating objections to the court reporter in the judge's absence (the judge and opposing counsel should be present).
- Relying on or adopting another party's objections to the court's charge without obtaining court approval to do so beforehand (as a general rule, each party must make its own objections).
- Relying on a pretrial ruling. *See Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917, 919–20, 920 n.3 (Tex. 2015) (per curiam).
- Failing to assert at trial the same grounds for charge error urged on appeal (grounds not distinctly pointed out to the trial court cannot be raised for the first time on appeal).
- Failing to obtain a ruling on an objection or request.

Principle of error preservation. In *State Department of Highways & Public Transportation v. Payne*, the supreme court stated:

> There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling. The more specific requirements of the rules should be applied, while they remain, to serve rather than defeat this principle.

Payne, 838 S.W.2d at 241. The goal is to apply the charge rules "in a common sense manner to serve the purposes of the rules, rather than in a technical manner which defeats them." *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 452 (Tex. 1995) (per curiam). The keys to error preservation are (1) when in doubt about how to preserve, both object and request; and (2) in either case, clarity is essential: make your arguments timely and plainly enough that the trial court is aware of the claimed error, and get a ruling on the record. *See, e.g., Wackenhut*, 453 S.W.3d at 919–20.

PJC 116.2 Broad-Form Issues and the *Casteel* Doctrine (Comment)

In *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), the supreme court held that inclusion of a legally invalid theory in a broad-form liability question taints the question and requires a new trial. *Casteel*, 22 S.W.3d at 388–89. The court has since extended this rule to legal sufficiency challenges to an element of a broad-form damages question, *see Harris County v. Smith*, 96 S.W.3d 230, 235–36 (Tex. 2002), and to complaints about inclusion of an invalid liability theory in a comparative responsibility finding, *see Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 226–28 (Tex. 2005).

The supreme court has recently clarified that harmful error must be presumed, as in *Casteel*, when an appellate court cannot determine whether the jury found liability on an improper basis because a necessary limiting instruction was not submitted despite a timely request or objection. *Benge v. Williams*, 548 S.W.3d 466, 475–76 (Tex. 2018) (reiterating this proposition and stating that "we have twice held that when the question allows a finding of liability based on evidence that cannot support recovery, the same presumption-of-harm rule [from *Casteel*] must be applied"); *see Texas Commission on Human Rights v. Morrison*, 381 S.W.3d 533, 535 (Tex. 2012) (per curiam); *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 863 (Tex. 2009).

When a broad-form submission is infeasible under the *Casteel* doctrine and a granulated submission would cure the alleged charge defect, a specific objection to the broad-form nature of the charge question is necessary to preserve error. *Thota v. Young*, 366 S.W.3d 678, 690–91 (Tex. 2012) (citing *In re A.V.*, 113 S.W.3d 355, 363 (Tex. 2003); *In re B.L.D.*, 113 S.W.3d 340, 349–50 (Tex. 2003)). But when a broad-form submission is infeasible under the *Casteel* doctrine and a granulated submission would still be erroneous because there is no evidence to support the submission of a separate question, a specific and timely no-evidence objection is sufficient to preserve error without a further objection to the broad-form nature of the charge. *Thota*, 366 S.W.3d at 690–91.

APPENDIX

Following are the tables of contents of the other volumes in the *Texas Pattern Jury Charges* series. These tables represent the 2018 editions of these volumes, which were the current editions when this book was published. Other topics may be added in future editions.

The practitioner may also be interested in the *Texas Criminal Pattern Jury Charges* series. Please visit **http://texasbarbooks.net/texas-pattern-jury-charges/** for more information.

Contents of *TEXAS PATTERN JURY CHARGES—GENERAL NEGLIGENCE, INTENTIONAL PERSONAL TORTS & WORKERS' COMPENSATION* (2018 Ed.)

Contents of
***TEXAS PATTERN JURY CHARGES—MALPRACTICE, PREMISES & PRODUCTS* (2018 Ed.)**

[Chapters 41–49 are reserved for expansion.]

Contents of
***TEXAS PATTERN JURY CHARGES—FAMILY & PROBATE* (2018 Ed.)**

Contents of
***TEXAS PATTERN JURY CHARGES—OIL & GAS* (2018 Ed.)**

CHAPTER 313 DAMAGES

STATUTES AND RULES CITED

[Decimal references are to PJC numbers.]

Texas Constitution

Texas Revised Civil Statutes

Texas Agriculture Code

Texas Business & Commerce Code

Texas Business Corporation Act

Texas Business Organizations Code

Texas Civil Practice & Remedies Code

Texas Election Code

Texas Family Code

Texas Finance Code

Texas Government Code

Texas Health & Safety Code

Texas Insurance Code

Texas Labor Code

Texas Local Government Code

Texas Occupations Code

Texas Penal Code

Texas Property Code

Texas Tax Code

Texas Rules of Civil Procedure

Texas Rules of Evidence

Texas Disciplinary Rules of Professional Conduct

United States Code

Code of Federal Regulations

United Nations

Miscellaneous

CASES CITED

[Decimal references are to PJC numbers.]

C

D

G

H

L

M

N

U

SUBJECT INDEX

[Decimal references are to PJC numbers.]

D

E

T

How to Download This Book

To install this book's digital download, go to

www.texasbarcle.com/pjc-business-2018

For details, see the section below titled
"Downloading and Installing."

DIGITAL DOWNLOAD DOCUMENTATION

Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment
Digital Download 2018

The complimentary downloadable version of *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment* contains the entire text of the printed book. If you have questions or problems with this product not covered in the documentation available via the URLs below, please contact TexasBarBooks at (800) 204-2222, ext. 1499 for technical support or ext. 1411 for orders and accounts, or at **books@texasbar.com**.

Additional and Entity Licenses

The current owner of this book may purchase additional and entity licenses for the digital download. Each additional license is for one additional lawyer and that lawyer's support team only. Additional and entity licenses are subject to the terms of the original license concerning permitted users of the printed book and digital download. Please visit **http://texasbarbooks.net/additional-licenses** for details.

Frequently Asked Questions

For answers to digital download licensing, installation, and usage questions, visit TexasBarBooks FAQs at **http://texasbarbooks.net/f-a-q**.

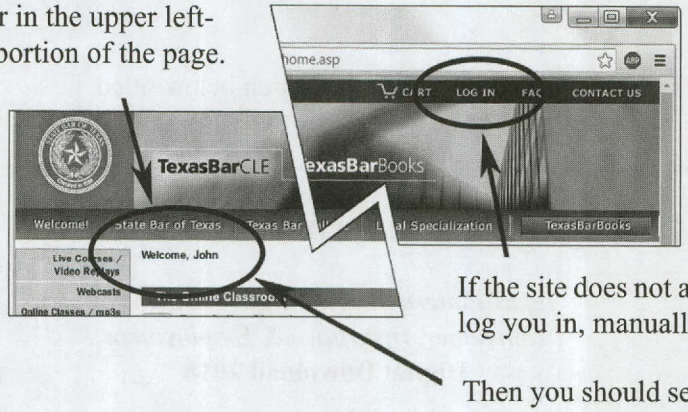
Downloading and Installing

Use of the digital download is subject to the terms of the license and limited warranty included in this documentation and on the digital download web pages. By accessing the digital download, you waive all refund privileges for this publication.

To install this book's complete digital download, follow the instructions below.

1. Log in at **texasbarcle.com**:

   If the site automatically logs you in, your name should appear in the upper left-hand portion of the page.



   If the site does not automatically log you in, manually log in.

   Then you should see your name.

   If you are not yet a registered user of the site, on the log-in page, use the "New User? Click here" link to complete the quick, free registration.

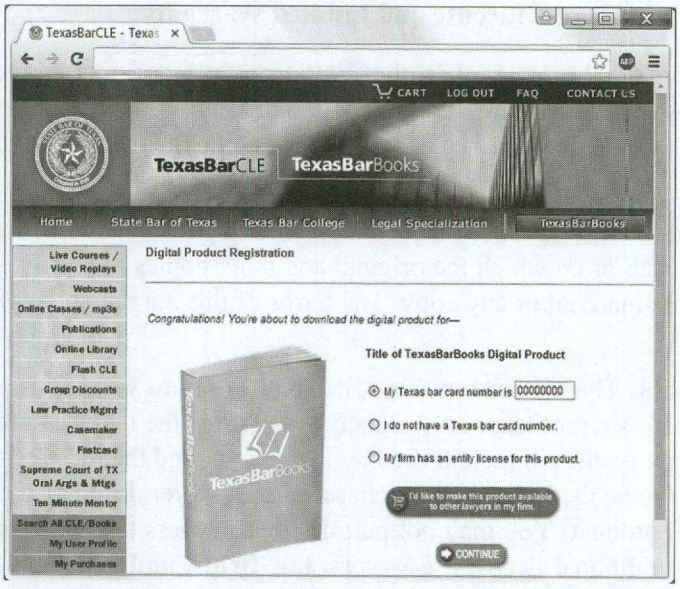
2. Go to **www.texasbarcle.com/pjc-business-2018**:

   After logging in, up in the browser's address bar, select all text after "texasbarcle.com/."

   Modify the selected text to make the URL "**www.texasbarcle.com/pjc-business-2018**" and press your keyboard's "Enter" key.

   The "http://" and "www" are optional for most browsers.

3. The initial download web page should look similar to the one below.



See **http://texasbarbooks.net/download-tips** for more download and installation tips.

USE OF THE MATERIAL IN THE DIGITAL DOWNLOAD IS SUBJECT TO THE FOLLOWING LICENSE AGREEMENT.

License and Limited Warranty

Grant of license: The material in the digital product and in the documentation is copyrighted by the State Bar of Texas ("State Bar"). The State Bar grants you a nonexclusive license to use this material as long as you abide by the terms of this agreement.

Ownership: The State Bar retains title and ownership of the material in the files and in the documentation and all subsequent copies of the material regardless of the form or media in which or on which the original and other copies may exist. This license is not a sale of the material or any copy. The terms of this agreement apply to derivative works.

Permitted users: The material in these files is licensed to you for use by one lawyer and that lawyer's support team only. At any given time, the material in these files may be installed only on the computers used by that lawyer and that lawyer's support team. That lawyer may be the individual purchaser or the lawyer designated by the firm that purchased this product. You may not permit other lawyers to use this material unless you purchase additional licenses. **Lawyers, law firms, and law firm librarians are specifically prohibited from distributing these materials to more than one lawyer. A separate license must be purchased for each lawyer who uses these materials.** For information about special bulk discount pricing for law firms, please call 1-800-204-2222, ext. 1402, or 512-427-1402. Libraries not affiliated with firms may permit reading of this material by patrons of the library through installation on one or more computers owned by the library and on the library's network but may not lend or sell the files themselves. The library may not allow patrons to print or copy any of this material in such a way as would infringe the State Bar's copyright.

Copies: You may make a copy of the files for backup purposes. Otherwise, you may copy the material in the files only as necessary to allow use by the users permitted under the license you purchased. Copyright notices should be included on copies. You may copy the documentation, including any copyright notices, as needed for reference by authorized users, but not otherwise.

Transfer: You may not transfer any copy of the material in the files or in the documentation to any other person or entity unless the transferee first accepts this agreement in writing and you transfer all copies, wherever located or installed, of the material and documentation, including the original provided with this agreement. You may not rent, loan, lease, sublicense, or otherwise make the material available for use by any person other than the permitted users except as provided in this paragraph.

Limited warranty and limited liability: THE STATE BAR MAKES NO WARRANTIES, EXPRESS OR IMPLIED, CONCERNING THE MATERIAL IN THESE FILES, THE DOCUMENTATION, OR THIS AGREEMENT. THE STATE BAR EXPRESSLY DISCLAIMS ALL

IMPLIED WARRANTIES, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND OF FITNESS FOR A PARTICULAR PURPOSE. THE MATERIAL IN THE FILES AND IN THE DOCUMENTATION IS PROVIDED "AS IS."

THE STATE BAR SHALL NOT BE LIABLE FOR THE LEGAL SUFFICIENCY OR LEGAL ACCURACY OF ANY OF THE MATERIAL CONTAINED IN THESE FILES. NEITHER THE STATE BAR NOR ANY OF THE CONTRIBUTORS TO THE MATERIAL MAKES EITHER EXPRESS OR IMPLIED WARRANTIES WITH REGARD TO THE USE OR FREEDOM FROM ERROR OF THE MATERIAL. EACH USER IS SOLELY RESPONSIBLE FOR THE LEGAL EFFECT OF ANY USE OR MODIFICATION OF THE MATERIAL.

IN NO EVENT SHALL THE STATE BAR BE LIABLE FOR LOSS OF PROFITS OR FOR INDIRECT, SPECIAL, CONSEQUENTIAL, OR PUNITIVE DAMAGES, EVEN IF THE STATE BAR HAS BEEN ADVISED OF THE POSSIBILITY OF THOSE DAMAGES. THE STATE BAR'S AGGREGATE LIABILITY ARISING FROM OR RELATING TO THIS AGREEMENT OR THE MATERIAL IN THE FILES OR IN THE DOCUMENTATION IS LIMITED TO THE PURCHASE PRICE YOU PAID FOR THE LICENSED COPYRIGHTED PRODUCT. THIS AGREEMENT DEFINES YOUR SOLE REMEDY.

General provisions: This agreement contains the entire agreement between you and the State Bar concerning the license to use the material in the files. The waiver of any breach of any provision of this agreement does not waive any other breach of that or any other provision. If any provision is for any reason found to be unenforceable, all other provisions nonetheless remain enforceable.

- Admonitory Instructions
- Contracts
- DTPA/Insurance Code Ch. 541
- Good Faith and Fair Dealing
- Fiduciary Duty
- Fraud and Negligent Misrepresentation
- Interference with Existing and Prospective Contract
- Employment
- Piercing the Corporate Veil
- Civil Conspiracy
- Defamation, Business Disparagement, and Invasion of Privacy
- Misappropriation of Trade Secrets
- Damages
- Preservation of Charge Error

TexasBarBooks
texasbarbooks.net

6714