

DUAL BREACHES

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(1)

Competing Breach Claims

- Who can recover?
- Can anyone recover?
- If recovery is available, what are the limitations on that recovery?

Competing Breach Claims

- When both parties assert claims for breach of contract, questions arise regarding:
 - Who breached first
 - Whether the breaches were material
 - Whether performance continued after a breach
 - Whether substantial performance occurred, and, if so, whether it makes a difference

Breach

- Options / considerations when a breach occurs:
 - Terminate relationship
 - Continue relationship and performance
- Consequences of each

First Breach is Material

- If the first breach is material:
 - Non-breaching party is no longer required to perform
 - Second breach by non-breaching party is excused

Material Breach + Continued Performance

- If first breach is material but non-breaching party continues to perform:
 - Non-breaching party's performance is not excused
 - Second breach by non-breaching party is not excused
 - Claim for damages for first breach is not waived

First Breach Immaterial

- If the first breach is *immaterial*:
 - Are damages available for the immaterial breach?
 - Does the first material breach following the immaterial one negate the immaterial breach?

Bartush-Schnitzius Foods v. Cimco

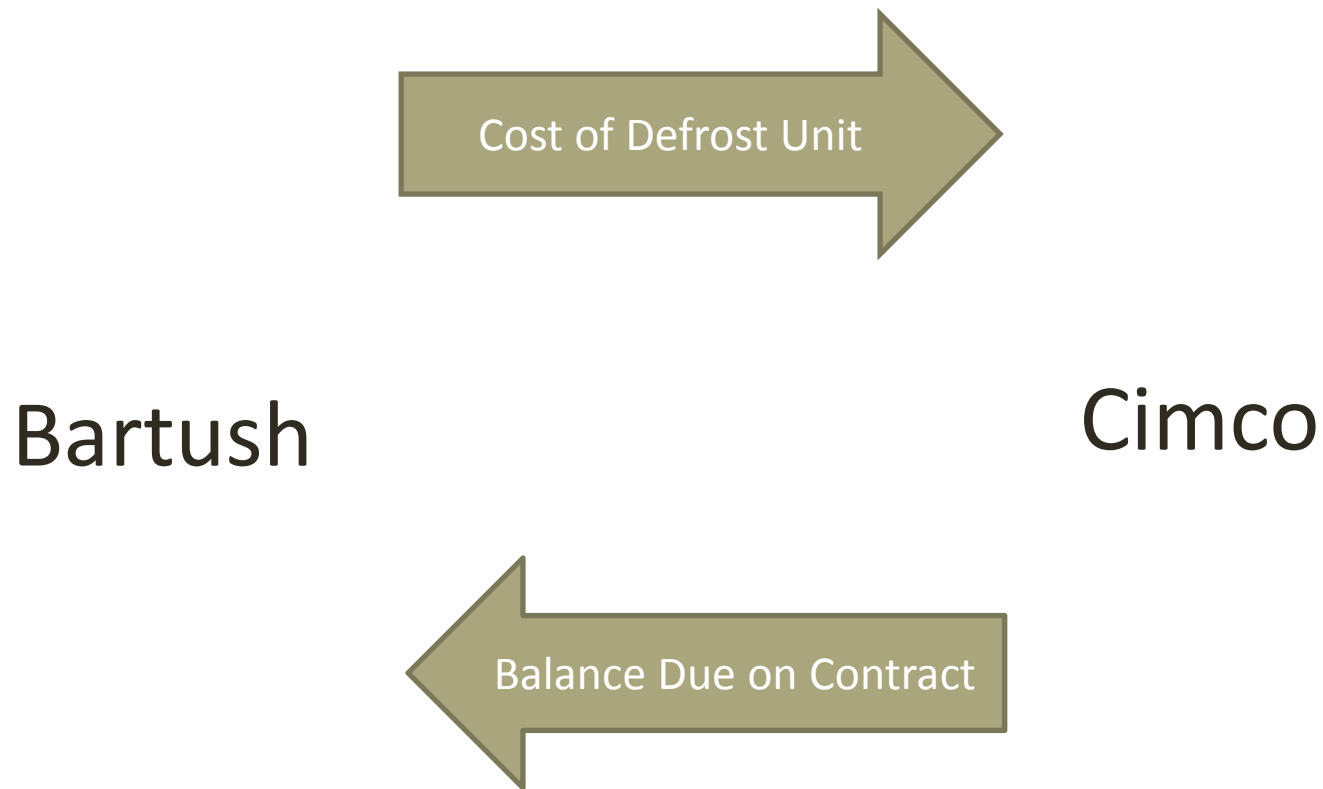
Refrigeration

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

Bartush-Schnitzius Foods v. Cimco Refrigeration

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

Competing Breach Claims



Jury's Findings

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

Trial Court's Judgment

- Although the jury found both parties breached the contract and that Bartush's breach was not excused, the trial court stated in its judgment that "it appears to the Court" that the verdict favored Bartush and was against Cimco
- Thus, the trial court rendered judgment in favor of Bartush for \$168,079 and awarded zero to Cimco

Fort Worth Court of Appeals

- Cimco appealed
- The Court of Appeals held that, because the jury found Bartush breached the contract, and then expressly found Bartush's breach was not excused, this necessarily included an implied finding that Cimco's prior breach was non-material
- Bartush's failure to pay was a material breach as a matter of law, rendering irrelevant the jury's finding that Cimco breached first and precluding Bartush's recovery

Court of Appeals' Reversal

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

Breach 2 – Bartush's non-payment (material as a matter of law)

= Cimco wins and Bartush gets nothing

Both Bartush and Cimco appealed to the Texas Supreme Court

Texas Supreme Court

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

Texas Supreme Court

- Generally whether a breach is material should be determined by the trier of fact (court or judge)
- Here, the jury appropriately determined materiality, unlike in *Mustang Pipeline*, where materiality was determined as a matter of law (involved breach of time-is-of-the-essence clause, with conclusive evidence)
- Materiality was determined by the jury in connection with finding that Bartush's breach was not excused (not in the initial questions regarding who breached and which breach was first)
 - Resulted in implied finding that Cimco's breach was immaterial

Immaterial Breach is Relevant

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

Immaterial Breach is Relevant

- The Texas Supreme Court held:
- Jury's findings that Cimco breached first and its breach was immaterial means
- Bartush still liable for its later breach (failure to pay)
- Thus, Bartush must continue to perform (pay the balance due) but also is entitled to damages for Cimco's immaterial breach
- Result: Bartush's damages offset by amounts owed to Cimco

Materiality as a Matter of Law

- While materiality is typically determined by the fact finder, some breaches are material as a matter of law
- Typically, an issue is decided as a matter of law because the evidence supports only one conclusion
- When a breach can be determined as a matter of law, you can recommend a client cease its performance without worrying about whether a fact finder will also determine that the client breached

Materiality as a Matter of Law

- Example: *Hooker v. Nguyen* - material breach by contractor relieved owner of remaining payment obligations
- *Mustang Pipeline* - contractor breached as a matter of law because:
 - the contract contained a hard deadline, a time-is-of-the-essence clause, and contemplated avoidance of delays, and
 - an objective inability to cure existed

Substantial Performance

- Prevents a party from claiming “breach” to get out of obligation
- Makes breach immaterial
 - Can bring claim if other party fails to fulfill its obligations under contract

Jury Charge Issues

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

Disjunctive question for competing claims of material breach. If both parties allege a breach of contract against one another, the court can ask the breach-of-contract question disjunctively, together with an appropriate instruction directing the jury to decide who committed the first material breach. An alternative way to submit competing claims of breach of an agreement is set forth below.

Jury Charge

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: _____

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Jury Charge

If you answered “Yes” to 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: _____

Jury Charge

PJC 101.21 Defenses-Basic Question

If you answered “Yes” to Question [101.1], the answer the following question. Otherwise, do not answer the following question.

QUESTION ____

Was *Don Davis*'s failure to comply excused?

PJC 101.22 Defenses-Instruction on Plaintiff's Material Breach (Failure of Consideration)

Failure to comply by *Don Davis* is excused by *Paul Payne*'s previous failure to comply with a material obligation of the same agreement.

Answer “Yes” or “No.”

Answer: _____

Jury Charge

- List of factors to consider whether breach is material:
 - 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.

Attorneys' Fees

- Competing breach claims complicate the analysis of attorneys' fee awards
- Analysis frequently depends upon whether the parties' contract has a "prevailing party" clause

Attorneys' Fees Under CPRC § 38.001

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

Main Issue?

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

Two Prevailing Parties?

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

Thank you!

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