



## In the News

### Texas Supreme Court Clarifies the Need for Separate Jury Questions

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**Breach-of-contract and fraudulent-inducement claims are ubiquitous in complex business litigation. However, when concurrently seeking relief for breach of contract and fraudulent inducement, the “devil’s in the details” as to how to prepare the jury charge.**

*By Shain Khoshbin and Robin Bechtold | July 19, 2018 at 02:20 PM*

It seems simple enough. To fraudulently induce someone into a contract, there has to be an alleged contract. However, it is not that simple when preparing the jury charge for trial—especially if the plaintiff wants to recover benefit-of-the-bargain damages based on a fraudulent-inducement claim. That recently became apparent in *Anderson v. Durant*, where the Texas Supreme Court clarified that a separate jury question establishing an enforceable contract was not required to obtain benefit-of-the-bargain damages based on a fraudulent-inducement claim. Although the Texas Supreme Court also discussed the plaintiff’s defamation claim in its opinion, this article only addresses the facts and the rulings on the fraud and breach-of-contract claims.

### Summary of Facts Pertinent to the Fraudulent-Inducement Claim

Andrew Anderson was an employee of certain auto dealerships in Texas owned by Jerry Durant. More specifically, Durant is the majority shareholder in Jerry Durant Auto Group Inc., which owns five dealership entities including Jerry Durant Inc. Anderson began working for Auto Group in 2001 as a used-car manager and, approximately five years later, became the general manager for an Auto Group dealership in Weatherford, and was appointed to Auto Group’s board of directors. At all times, Anderson was an at-will employee.

In early 2011, Durant offered Anderson a “buy in” agreement to become part owner of the business. The agreement was not reduced to writing, and the parties disputed the terms. According to Anderson, Durant promised him that if he left his position in Weatherford to assume management responsibility for the historically struggling Durant Toyota and Durant Hyundai dealerships in Granbury, Durant would immediately give him a 10 percent ownership interest in those dealerships and the associated land. Durant claimed that he offered Anderson a general manager position at the two dealerships and the opportunity to earn a 10 percent ownership interest only in Durant Hyundai, if the dealership had a net profit of \$400,000. According to Durant, the deal did not include any real estate interests and was subject to Hyundai’s approval.

Regardless of the specific terms of the agreement, Anderson accepted it and moved to Granbury to begin managing the Durant Toyota and Durant Hyundai dealerships. In early December 2011, Durant announced he had a deal to sell his dealerships for \$44 million. Durant said the managers with “buy-in” agreements would be “taken care of.” Later, at the company Christmas party, Durant told the managers with “buy-in” agreements that the preceding 12 months had been the most profitable in Auto Group’s history and gave each of them (including Anderson) a check for \$75,000. At trial, the purpose of this payment was in dispute. Moreover, Durant claimed that Anderson was not entitled to a payment for his “buy-in” interest because the Hyundai dealership had not achieved the required \$400,000 net profit.

A few days later, Durant publicly accused Anderson of mismanaging inventory and violating company policy. Subsequently, Durant reprimanded Anderson about buying cars from a particular wholesaler in contravention of specific instructions and then accused Anderson of taking kickbacks. When Anderson conducted his own investigation and showed no losses on the transactions, Anderson rescinded his offer to repay the alleged losses, stating “It’s wrong, boss.”

It's wrong." Durant replied, "if you think that's wrong, you can hit the dirt." Anderson understood this to mean he was fired, left and never returned to work.

## **The Trial, the "Hotly Contested" Jury Charge and the Appeal**

Anderson sued Auto Group for, among other things, breach of contract and fraud. After a seven-week trial, the trial court submitted to the jury what the Texas Supreme Court called a "hotly contested" jury charge.

Jury Question Nos. 1-8 related to Anderson's breach-of-contract claim. Question No. 1 inquired as to the existence of an agreement where Anderson received both a 10 percent ownership interest in the Durant Toyota and Durant Hyundai dealerships and a 10 percent ownership interest in the real estate associated with the dealerships. Question Nos. 9 and 10 related to Anderson's fraud claim and followed the Pattern Jury Charge. They instructed that fraud requires a "material misrepresentation," which includes "a promise of future performance made with an intent, at the time the promise was made, not to perform as promised." The fraud-damages question asked the jury to determine the amount that would compensate Anderson by separately valuing a 10 percent ownership interest in each dealership and in the associated real estate. Without objection, the fraud-liability question was not conditionally submitted on an affirmative finding to Question No. 1.

Frustrated with Question No. 1, the jurors inquired: "Is this an all or nothing question? Both dealerships—and both land associated with them?" They also requested that the question be broken into two parts so they could answer separately:

- (1) whether "Durant agree[d] to immediately provide [Anderson] a 10 percent ownership of Durant dealerships," and
- (2) whether Durant agreed to provide "a 10% ownership in the real estate."

The trial court responded that, "[t]o answer 'yes' to this question, the jury must find an agreement regarding both dealerships and both parcels of real estate." Hence, the jury answered "no" to Question No. 1 (concerning the existence of the specified agreement) and did not answer the remaining breach-of-contract questions.

However, the jury found in favor of Anderson on his fraud claim and awarded him fraud damages of \$323,150 as "[t]he value of a 10% ownership interest in the Durant Toyota dealership in Granbury, Texas, excluding the value of the associated real estate," and \$60,000 as "[t]he value of a 10% ownership interest in the Durant Hyundai dealership in Granbury, Texas, excluding the value of the associated real estate." The jury awarded zero damages for the value of a 10% ownership interest in the real estate associated with the two dealerships.

Auto Group, among other defendants, appealed. The Court of Appeals unanimously reversed the trial court's judgment and rendered a take-nothing judgment. In so doing, it held, *inter alia*, that an "independent finding of an enforceable agreement was required to recover benefit-of-the-bargain damages on the fraud claim; the jury's negative answer to Question No. 1 could not have supplied that finding; the court could not infer the jury found an enforceable agreement via the fraud findings; and the fraud recovery therefore failed for want of a viable damages measure."

## **Fraudulent Inducement Does Not Require a Separate Jury Finding of an Enforceable Agreement**

The Texas Supreme Court concluded that the Court of Appeals erred in denying Anderson's benefit-of-the-bargain damages on his fraudulent-inducement claim. In sum, the Texas Supreme Court held that the "jury findings [were] sufficient to support a finding of fraudulent inducement because the fraud submissions incorporate[d] the necessary elements for recovery, including an enforceable promise, the existence of which is supported by legally sufficient evidence."

In so holding, the court clarified certain legal principles concerning fraud claims, which are often involved in business/commercial litigation. Namely, Texas law imposes a "duty to abstain from inducing another to enter into a contract through the use of fraudulent misrepresentations." And claims of fraud and fraudulent inducement share the

same basic elements, whereby fraudulent inducement is actionable when a false promise of future performance is made with a present intent not to perform. In particular, “[f]raudulent inducement is a species of common-law fraud that shares the same basic elements: (1) a material misrepresentation, (2) made with knowledge of its falsity or asserted without knowledge of its truth, (3) made with the intention that it should be acted on by the other party, (4) which the other party relied on and (5) which caused injury.” Accordingly, “because fraudulent inducement arises only in the context of a contract, the existence of a contract is an essential part of its proof.” In addition, the court pointed out that—unlike out-of-pocket damages that also are available with regard to a fraudulent-inducement claim—benefit-of-the-bargain damages will not be available if a promise to perform is unenforceable “because one can have no compensable expectancy from a bargain that is not binding.”

The court concluded that the Court of Appeals erred in denying Anderson’s fraud recovery on the basis that Anderson failed to secure a separate jury finding of an enforceable agreement. In that regard, it held that the requirement for an enforceable bargain does not require a defrauded party to obtain a “finding of enforceability separate and apart from favorable fraudulent-inducement findings.” And it explained that Anderson’s benefit-of-the-bargain damages were recoverable because the jury’s findings in response to the fraud-liability question were sufficient to support the verdict. Namely, Anderson’s fraud-liability questions incorporated the required elements of a contract (promise, reliance, and an agreement), and no jury findings rendered the promise unenforceable. In so holding, the court rejected four (4) other arguments raised by Auto Group.

First, the court addressed Auto Group’s argument that the jury’s answers to the breach-of-contract and fraud questions were conflicting. In rejecting that argument, it held the fact that the jury answered “no” to a separate question (*i.e.* Question No. 1) on the existence of a contract was “legally irrelevant” because the “contract question restricted the jury to a particular iteration of the terms: an immediate ten-percent interest in both dealerships *and* a ten-percent interest in the real estate associated with them;” “[b]ut the fraud question did not similarly restrict the jury, allowing a finding of fraudulent inducement based on any promise of future performance supported by the evidence.” Thus, the jury reasonably could find an agreement involving the Granbury dealerships but not the associated land. *Id.*

Second, it rejected Auto Group’s argument that, if Anderson intended the fraud question to encompass different terms than those in the breach-of-contract question, he should have requested an instruction to that effect or appealed the adverse breach-of-contract finding. The court reasoned that Auto Group requested a proper broad form fraud submission that followed the Pattern Jury Charge and included fraud questions which were not conditionally submitted based on an affirmative answer to the breach-of-contract question (without contrary request or objection).

Third, it rejected Auto Group’s argument that no evidence supported a finding that the parties agreed to a contract for only both dealership interests without an associated real estate interest in each. The court reasoned that, in a no-evidence review, it views the evidence in the light most favorable to the verdict, disregarding evidence contrary to the verdict unless a reasonable jury could not. “More than a scintilla of evidence exists when reasonable and fair-minded people could reach different conclusions based on the evidence.” And, since the jury’s role is to evaluate the credibility of the witnesses and reconcile any inconsistencies, the court must uphold the jury verdict when any reasonable version of the evidence supports it.

Fourth, it rejected Auto Group’s argument that Anderson waived his fraudulent-inducement claim because “he disavowed fraudulent inducement in the court of appeals by arguing ‘[t]he fraud claim that was pleaded, tried, and submitted to the jury was common law fraud, not fraudulent inducement based on an oral contract’.” In so doing, the court explained that it is “generally hesitant” to find waiver and will construe briefing “reasonably, yet liberally, so that the right to appellate review is not lost by waiver.” And, thus, it rejected the waiver argument because Anderson’s fraudulent-inducement issue in one of its issue statements encompassed the argument that Auto Group fraudulently induced Anderson to enter an agreement by making a promise of future performance with the present intent not to perform (under a liberal, but reasonable, construction).

### Lessons Learned

Breach-of-contract and fraudulent-inducement claims are ubiquitous in complex business litigation. However, when concurrently seeking relief for breach of contract and fraudulent inducement, the “devil’s in the details” as to how to prepare the jury charge—especially if the plaintiff wants to recover benefit-of-the-bargain damages based on a fraudulent-inducement claim. That became apparent in *Anderson v. Durant*, where the Texas Supreme Court recently clarified that a separate jury question establishing an enforceable contract was *not* required to obtain benefit-of-the-bargain damages based on a fraudulent-inducement claim.

*Anderson v. Durant* highlights the importance of the specific wording included in a jury charge that includes claims for breach of contract and fraudulent inducement. In this regard, as discussed above, the court made a couple of key points:

- It found that the jury’s fraudulent-inducement findings and contract findings did not conflict because the breach-of-contract questions restricted the jury to a particular iteration of the contract terms (an immediate 10% interest in both dealerships *and* a 10% interest in the associated real estate) and the fraud question mirrored the Pattern Jury Charge (which required only a finding of fraudulent inducement based on any promise of future performance supported by the evidence); and
- It found that Anderson did not need to request a jury instruction stating that he intended the fraudulent-inducement question to encompass different terms than those included in the breach-of-contract question because Auto Group requested a broad form fraud submission that was not conditionally submitted based on an affirmative answer to the breach-of-contract question.

Thus, three important lessons from this recent Texas Supreme Court opinion are:

- A separate jury question establishing an enforceable contract is not necessary to prevail on a fraudulent-inducement claim if the fraudulent-inducement charge incorporates the requisite elements of a contract;
- Be careful about tying a fraudulent-inducement jury charge to a specific breach-of-contract jury charge (or contractual terms at issue in the dispute), as it may give rise to conflicting jury findings; and
- Recognize that, if a proposed jury charge for a fraudulent-inducement claim is conditionally submitted based on an affirmative answer to a breach-of-contract question, a negative answer to the breach-of-contract question would gut the fraudulent-inducement claim.

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