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SYMPOSIUM ON INSURANCE & LITIGATION

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INSURING A CIVIL CONFESSION IN TEXAS: STRATEGIES FOR ALLEGING AND CHALLENGING AFFIRMATIVE DEFENSES

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AFFIRMATIVE DEFENSES ARE one of the most misused tools in Texas state court insurance litigation. Attorneys often succumb to the temptation to file an answer that contains a kitchen sink of generic affirmative defenses. This article provides a practical guide to asserting and challenging affirmative defenses in insurance litigation.

I. Affirmative Defenses Defined

The Texas Supreme Court has explained that the purpose of affirmative defenses is to provide notice to the opposing party "of the defensive issues to be tried."[1] An affirmative defense is "one of confession and avoidance."[2] In asserting an affirmative defense, the litigant "seeks to establish an independent reason why the plaintiff should not recover."[3] Under Texas Rule of Civil Procedure 94 and Federal Rule of Civil Procedure 8(c), affirmative defenses include "accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense." This language of "constituting an avoidance or affirmative defense" is the test for whether an allegation is an affirmative defense in Texas state[4] or federal[5] court. In fact, the primary difference between a claim and an affirmative defense is that a claim seeks some type of affirmative relief.[6]

> "Affirmative defenses are often asserted without adequate consideration or analysis to ensure that they are appropriate ... "

II. The Source of Affirmative Angst: Deciding Which Affirmative Defenses to Plead

Affirmative defenses are often asserted without adequate consideration or analysis to ensure that they are appropriate, in part because there is often significant time pressure on attorneys to assert them. Under Texas Rule of Civil Procedure 94, an affirmative defense must be raised in the "pleading to a preceding pleading."[7] This means that affirmative defenses must be alleged in the answer to a petition or the amended answer to an amended petition. This is also true in Texas federal court.[8] In Texas state court, even though the answer is not due until the Monday following 20 days after the petition is served,[9] attorneys often have much less time once the client actually hands them the petition. This pressure tempts many attorneys to "throw in the kitchen sink" of affirmative defenses.

One strategy to resist this temptation is to use a checklist of possible affirmative defenses. I begin by reviewing the affirmative defenses that are listed in Texas Rules of Civil Procedure 54 (regarding conditions precedent), 93 (regarding verified pleas), and 94 (regarding affirmative defenses). Then, I use a checklist of additional affirmative defenses. My personal checklist of affirmative defenses for insurance litigation and a brief description of the types of issues to which each is applicable appears in the Appendix.

In any event, as the Texas Supreme Court has explained, "Rule 94's requirement of pleading is not absolute."[10] There are a few exceptions to the pleading requirement for affirmative defenses. First, if the plaintiff's pleadings clearly anticipate that the defendant will rely upon certain affirmative defenses, then the defendant may rely upon such affirmative defenses.[11] Of course, it is better to assert an affirmative defense, rather than to rely on the court to agree that it has been implicitly raised. Second, no affirmative defense need be pled to contest enforcement of a plainly illegal contract.[12] This is a matter of public policy.[13] Third, it is an abuse of discretion for a trial court to refuse to allow a party to timely amend its pleadings unless either (1) the

opposing party presents evidence of surprise or prejudice, or (2) the amendment is facially prejudicial.[14] The Texas federal courts also allow somewhat similar exceptions to the pleading requirements.[15]

III. Properly Pleading Affirmative Defenses

Lawyers often fail to properly plead their affirmative defenses in insurance litigation. Under Texas Rule of Civil Procedure 45(b), pleadings must "consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense." The purpose is to provide "fair notice to the opponent" through "the allegations as a whole."[16] Texas courts have interpreted this Rule to require that an affirmative defense be "specifically" pled.[17]

Unfortunately, however, there is no bright line rule about what "specifically" pled means. A party is only required to give "fair notice" of the claim, not detail its evidence.[18] This "fair notice" must be sufficient information to enable the opposing party to respond.[19] Even more confusing, as previously discussed, not all defenses must even be "specifically" pled.[20]

IV. Strategies for Dealing with the "Defensive" Lawyer

A plaintiff should investigate the defendant's affirmative defenses because these are the defendant's allegations that, even if the plaintiff is correct about the basic facts behind its claims, there are independent reasons why the plaintiff should not recover. Thus, a difficulty for a plaintiff is to isolate the relevant affirmative defenses from the superfluous affirmative defenses. The following are a few helpful strategies.

A. Request for Disclosure

Although most attorneys already do so as an initial discovery step, you should make a request for disclosure under Texas Rule of Civil Procedure 194. Rule 194.2(c) requires the responding party to disclose "the legal theories and, in general, the factual bases of the responding party's claims or defenses . . ." Thus, when responding to a request for disclosure, the defendant should provide a basic explanation for the application of its affirmative defenses. Failure to do so risks having the affirmative defenses excluded from trial.[21]

B. Requests for Admission

For each affirmative defense that the defendant alleges, you can serve the defendant with requests for admission under Texas Rule of Civil Procedure 198.[22] Requests for admission may include "any matter within the scope of discovery, including statements of opinion or fact or the application of law to fact . . ."[23] After all, one of the purposes of requests for admission is to eliminate matters about which there is no real controversy.[24] You can, through a series of admission requests, essentially ask the defendant to negate the requisite factual basis for its affirmative defenses.[25]

For example, suppose one of the defendant's affirmative defenses is a statute of repose. Under such an affirmative defense, the defendant's argument is that the plaintiff cannot collect money for the construction or repair at issue because more than 10 years has elapsed since its completion.[26] Thus, if you filed your lawsuit on January 1, 2006, and the work at issue was completed one year earlier on January 1, 2005, then your admission request could be as follows: "Admit that the construction or repair at issue in this lawsuit was completed after December 31, 2004." The defendant must then (1) admit, (2) specifically deny, (3) "explain in detail" why it cannot truthfully admit or deny, (4) object, (5) assert a privilege, or (6) move for a protective order.[27]

While it is acceptable to preface your admissions requests with "admit," "deny," or "admit or deny," I recommend prefacing your admissions with either "admit" or "deny," depending upon which will result in a favorable admission for you. That way, if you are fortunate and the defendant fails to respond within the required 30 or 50 days after service,[28] your admission requests are automatically deemed admitted against the defendant.[29] In other words, the defendant will have admitted that it lacks factual bases for its affirmative defenses. Of course, the defendant can still subsequently challenge the deemed admissions, and you might still waive your right to rely upon the deemed admissions if you fail to object to the introduction of contrary evidence.[30] In any event, it is likely that these admission requests will demonstrate that some of the defendant's affirmative defenses are not tenable.

If that does not work, you can file a motion to compel proper responses to your requests for admission. If the Court grants your motion to compel, it may (1) deem the requests admitted or (2) order the defendant to amend its answers to the requests.[31] In addition, it is mandatory for the court to award your reasonable expenses unless the court finds (1) the request was objectionable, (2) the admission sought was of no substantial importance, (3) the responding party had a reasonable ground to believe that it would prevail on the matter, or (4) there was another good reason for the refusal to admit.[32]

C. Special Exceptions

Special exceptions are a great tool for obtaining additional information about affirmative defenses. The purpose of special exceptions is to inform the opposing party of defects in its pleadings so that the party can then cure the defects, if possible, by amendment.[33] If the defendant's affirmative defenses fail to provide enough detail to give the plaintiff "fair and adequate notice" of the affirmative defenses' applicability, then special exceptions are appropriate.[34]

D. Interrogatories and Depositions

Once the defendant abandons its pro-forma affirmative defenses, or if it only asserted a limited number of affirmative defenses, the plaintiff can use interrogatories and depositions to further delve into the bases for the remaining affirmative defenses. Since the number of interrogatories and time for depositions are both limited, you should reserve them for investigating the defendant's strongest affirmative defenses. Under Texas Rules of Civil Procedure 192.3(j) and 197.1, a party may serve contention interrogatories to discover the factual or legal bases for the other party's assertions. Contention interrogatories require the responding party to provide more detail than is required in response to a request for disclosure.[35]

"Since the number of interrogatories and time for depositions are both limited, you should reserve them for investigating the defendant's strongest affirmative defenses."

While few deponents will admit to knowing the legal bases for an affirmative defense, you can obtain the factual bases for certain types of affirmative defenses.[36] For instance, suppose your client claims that the defendant breached a contract to remodel a kitchen. The defendant alleges the affirmative defense of prior material breach. When you depose the defendant, you should ask him about when and how your client allegedly breached the contract first.

E. Motion For Partial Summary Judgment

If, even after your diligent pursuit of discovery, the defendant still refuses to explain or amend its affirmative defenses, you may be able to eliminate them altogether by filing a motion for partial summary judgment under Texas Rule of Civil Procedure 166a. In Texas, you have the option of filing a no-evidence summary judgment motion, a "traditional" summary judgment motion, or a hybrid motion of both.[37]

The simplest approach is a no-evidence motion for partial summary judgment. The reason is that you are not required to provide evidence – you only need to allege that the opposing party lacks evidence for one or more essential element of its claim or defense.[38] Since the defendant has the burden of proof for its affirmative defenses, the plaintiff may file a no-evidence motion for partial summary judgment.[39] However, the converse is not true – a defendant generally cannot file a no-evidence motion for partial summary judgment on its affirmative defenses.[40] The rationale given in such cases is that the party with the burden of proof may not use the no-evidence motion to shift that burden.[41] In any event, before granting a no-evidence summary judgment motion, the court "must give the parties an adequate opportunity to plead a viable cause of action."[42]

By contrast, for a "traditional" summary judgment, you must prove ***each*** element of your affirmative defense.[43] This motion is more burdensome to prepare, but if the defendant proves its affirmative defense and wins the motion, then the applicable plaintiff's claim is eliminated. Further, as previously discussed, the defendant might not have the option of filing a no-evidence summary judgment motion.[44]

F. Motion In Limine and Jury Charge

Finally, if your case is set for a jury trial, you could file a motion in limine to exclude evidence that supports the affirmative defenses, but was not provided during discovery.[45] You might want to couple this with a challenge to the defendant's attempts to add these affirmative defenses to the jury charge. The basis for such a challenge would be that, under Texas Rule of Civil Procedure 278, the affirmative defenses were not properly pled or supported by the evidence.[46] This challenge can have special force, because it is the defendant's burden to obtain a jury finding on its affirmative defenses.[47] Consequently, if, despite your diligent discovery efforts, you have no notice from the defendant of the elements of defendant's affirmative defenses and the necessary facts to support them, then you have a reasonable argument to exclude such affirmative defenses from the jury charge.

V. Conclusion

In insurance litigation, as with other litigation, lawyers often use the kitchen sink approach to affirmative defenses in their original answer, whereby they throw mud on the wall, in the hope that some of it will stick. This merely delays the moment of reckoning as those lawyers must later devote precious time in an effort to support or reevaluate shaky affirmative defenses. Rather, they should conserve their efforts for more rewarding avenues. As Abraham Lincoln stated, "You cannot escape the responsibility of tomorrow by evading it today."

Appendix: My Personal Affirmative Defense Checklist For Insurance Litigation

- **abandonment** (or **election of remedies**): The plaintiff relinquished its right or interest by engaging in an act that is inconsistent with that right or interest.[48]
- **acceptance of benefits**: It would be unconscionable for the plaintiff to prevail on its breach of contract claim because the plaintiff cannot accept the benefits of a contract and also seek to void the contract. This is a "species" of quasi-estoppel.[49]
- **agency theory** (or **ostensible agency**): The defendant is not liable because the acts at issue were not performed by the defendant's agent.[50]
- **alteration** (or **misuse**): The plaintiff altered or misused the product in an unforeseen manner that was a proximate cause of the damaging event.[51]
- **assumption of risk**: The plaintiff expressly consented to the conduct, which is in one of the contexts that has not been "abolished" in Texas.[52]
- **bad faith**: The plaintiff acted with dishonesty of belief or purpose, despite a duty to act in good faith.[53]
- **conditional privilege**: The defendant is immunized from liability for its inaccurate statements because of a legal or moral duty.[54]
- **cure**: The plaintiff is not entitled to the award of treble damages under the Deceptive Trade Practices Act since the defendant fixed the defects.[55]
- **election of remedies**: Under certain circumstances, a litigant is barred from "pursuing two inconsistent remedies."[56]
- **equitable estoppel**: The plaintiff made a material misrepresentation or concealment with knowledge of the facts, the defendant lacked such knowledge, and, as the plaintiff intended, the defendant acted on its inadequate/incorrect knowledge. This affirmative defense subsumes fraudulent concealment.[57]
- **excuse** (or **legal justification**): The defendant is not blameworthy because of some reason that relieves it of its duty.[58]
- **express contract**: In general, a plaintiff cannot recover in *quantum meruit* or under a theory of unjust enrichment if a valid express contract covered the services or materials provided.[59]
- **failure/duty to mitigate**: The plaintiff should have taken actions to reduce its damages, so the defendant is not liable for such unnecessary damages.[60]
- **fraudulent concealment**: The defendant's affirmative defense of the statute of limitations is insufficient, because the defendant fraudulently concealed material information.[61]
- **fraudulent misrepresentation**: The defendant is not liable for a breach of contract because the defendant entered the contract based upon the plaintiff's misrepresentation.[62]
- **Good Samaritan statute**: The defendant is not liable for ordinary negligence because it administered emergency care.[63]
- **immunity**: The defendant is exempt from the duty the plaintiff alleges the defendant failed to, or improperly, performed.[64]
- **implied duty of good and workmanlike performance**: The defendant does not owe full payment to the plaintiff because the plaintiff failed to fulfill its implied duty of good and workmanlike performance.[65]
- **justification** (or **privilege**): The plaintiff acted despite having notice of the defendant's untrue statement.[66] Justification is also a defense against the plaintiff's tortious interference claim.[67]
- **knowledge of falsity**: The plaintiff's knowledge of the defendant's misrepresentations is a counter-defense to the defendant's claim of misrepresentation.[68]
- **lack of consideration**: The agreement is not enforceable against the defendant because there is a lack of consideration.[69]
- **mistake**: The contract is not binding, because the defendant was mistaken about a material element of

the contract.[70] Mistake is also a counter-defense to the affirmative defense of release.[71]

- **mitigation**: The plaintiff failed to mitigate damages, so its recovery should be reduced.[72]
- **modification**: Even though the defendant breached the terms on the face of the contract, this is irrelevant because the contract was subsequently modified.[73]
- **mutual mistake**: The contract is not binding, because the parties entered the contract based on mutual mistake.[74]
- **novation**: The contract is not binding, because the parties entered a substituted contract.[75]
- **offset** (or **setoff**): The plaintiff is not entitled to the amount it requests, because the defendant has already provided partial compensation.[76]
- **penalty**: The contract's liquidated damages provision is essentially a penalty, the enforcement of which is against public policy.[77]
- **prior material breach**: The plaintiff first breached the contract, so the defendant's performance or lack thereof is excused.[78]
- **promissory estoppel**: A promise made without consideration is enforceable to prevent injustice if the plaintiff intended for, and the defendant acted in, reasonable reliance.[79]
- **quasi-estoppel**: Since it would be unconscionable for the plaintiff to maintain inconsistent positions, the defendant has an equitable reason for plaintiff's claim to be denied.[80]
- **ratification**: The plaintiff retained the benefits of the transaction after acquiring full knowledge of the unauthorized act.[81]
- **representation**: The defendant is not liable, because it did not act in the plaintiff's alleged representative capacity.[82]
- **repudiation**: The plaintiff did not intend to perform the contract, so the defendant need not do so.[83]
- **rescission**: The parties agreed to discharge their respective duties and terminate the contract.[84]
- **retraction**: The plaintiff is not entitled to enforcement, because the plaintiff withdrew its renunciation.[85]
- **settlement**: The parties previously settled the issues, so the plaintiff's current claims against the defendant are against the public policy of favoring settlement.[86]
- **status as a bona fide purchaser**: The defendant's status as a bona fide purchaser is an affirmative defense in a title dispute.[87]
- **statute of repose**: The plaintiff, who constructed or repaired an improvement to real property, failed to sue not later than 10 years after the completion of the construction or repair.[88]
- **suicide**: The plaintiff's conduct in committing or attempting to commit suicide was the sole cause of its damages.[89]
- **truth**: The defendant's statements were true, so the plaintiff's claims of slander, libel, or defamation should be denied.[90]
- **unclean hands**: The plaintiff cannot seek equitable relief against the defendant unless it has "come to the court with clean hands."[91]
- **unreasonableness of attorney's fees**: The court may reduce unreasonable attorney's fees.[92]
- **volenti**: Defendants' affirmative defense to a negligence action in which (1) the defendant is responsible for a dangerous condition or activity, and (2) the plaintiff knows of the danger, appreciates it, and voluntarily exposes himself thereto.[93]
- **willful and intentional misconduct**: The plaintiff's negligence claim should be denied because the plaintiff acted with willful and intentional misconduct.[94]

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[1] *Land Title Co. v. F.M. Stiger, Inc.*, 609 S.W.2d 754, 756 (Tex. 1980); *see accord* TEX. R. CIV. P. 47.

[2] *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 212 (Tex. 1996).

[3] *Id.*

[4] *See Phillips v. Phillips*, 820 S.W.2d 785, 789 (Tex. 1991) (internal citations omitted).

[5] *See* FED. R. CIV. P. 8(c).

[6] *See e.g., My-Tech, Inc. v. University of N. Tex. Health Sci. Ctr. at Fort Worth*, 166 S.W.3d 880, 884 (Tex. App.—Dallas 2005, pet. filed July 29, 2005) ("To determine whether a defendant's answer asserts a counterclaim or an affirmative defense, courts should analyze the facts alleged. . . . We ask whether the defendant could have maintained the claim as an independent suit. . . . However, to determine if a defendant's prayer for general relief is a counterclaim or an affirmative defense, we look at the general purpose of the pleadings. . . . If there is no prayer for affirmative relief, matters that are pleaded defensively do not present a counterclaim."); *Doyer v. Pitney Bowes, Inc.*, 80 S.W.3d 215, 218 (Tex. App.—Austin 2002, pet. denied); *Kuehnhoefer v. Welch*, 893 S.W.2d 689, 692 (Tex. App.—Texarkana 1995, writ denied) ("When a party requests affirmative relief with the issue, the court cannot treat the counterclaim as an affirmative defense . . . Alternative pleadings may entitle the party to a jury question on both the affirmative defense and the counterclaim."); *Adams v. Tri-Continental Leasing Corp.*, 713 S.W.2d 152, 153 (Tex. App.—Dallas 1986, no writ).

[7] *See accord Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 481 (Tex. 2001) ("It is the defendant's burden to plead and request instructions on an affirmative defense."); *Davis v. City of San Antonio*, 752 S.W.2d 518, 519 (Tex. 1988).

[8] *See* FED R. CIV. P. 8(c); *Freeman v. Chevron Oil*, 517 F.2d 201, 204 (5th Cir. 1975).

[9] *See* TEX. R. CIV. P. 99(b).

[10] *Shoemake v. Fogel, Ltd.*, 826 S.W.2d 933, 937 (Tex. 1992) (". . . the defense of immunity, like the defense of penalty, is not waived by the failure to specifically plead it if it is apparent on the face of the petition and established as a matter of law.").

[11] S*ee e.g., Phillips*, 820 S.W.2d at 789 ("Whenever the defense is not clearly established on the face of the pleadings, as it is here, it must be pleaded. . . . We apply a narrow but necessary exception, long and well established, to the general requirement that affirmative defense be pleaded.") *see accord Rogers v. In re: Ardella Veigel Inter Vivos Trust No. 2*, 162 S.W.3d 281, 289-90 (Tex. App.—Amarillo 2005, pet. denied) (". . . simply alleging in one sentence that a litigant's conduct violated the covenant of good faith and fair dealing did not give fair notice sufficient to comply with Rule 47. . . . Stating that 'questions' exist regarding 'acts' of a party would not afford a reasonable attorney fair notice of the claims involved or potentially relevant evidence necessary to defend against them.").

[12] *Shoemake*, 826 S.W.2d at 937.

[13] *Id.*

[14] *See* TEX. R. CIV. P. 62, 63, 66; *Sosa v. Central Power & Light*, 909 S.W.2d 893, 895 (Tex. 1995); *Chapin & Chapin, Inc. v. Texas Sand & Gravel Co.*, 844 S.W.2d 664, 665 (Tex. 1992).

[15] *See, e.g.*, FED. R. CIV. P. 8(f), 15(a), (b), (d), 15; *Foman v. Davis*, 371 U.s. 178, 182 (1962); *Chambers v. Johnson*, 197 F.3d 732, 735 (5th Cir. 1999); *PYCA Indus., Inc. v. Harrison Cty. Waste Water Mgmt. Dist.*, 177 F.3d 351, 363 (5th Cir. 1999); *Martin's Herend Imports, Inc. v. Diamond & Gen trading U.S. Co.*, 195 F.3d 765, 770 (5th Cir. 1999).

[16] TEX. R. CIV. P. 45(b).

[17] *Shoemake*, 826 S.W.2d at 937; *see also Southwestern Fire & Cas. Co. v. Larue*, 367 S.W.2d 162, 163 (Tex. 1963).

[18] *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000).

[19] *Paramount Pipe & Sup. Co. v. Muhr*, 749 S.W.2d 491, 494-95 (Tex. 1988) ("The purpose of the fair notice requirement is to provide the opposing party with sufficient information to enable him to prepare a defense. Rule 45 does not require that the plaintiff set out in his pleadings the evidence upon which he relies to establish his asserted cause of action."); *Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex. 1993) ("A court should uphold the petition as to a cause of action that may be reasonably inferred from what is specifically stated, even if an element of the cause of action is not specifically alleged."); *Perez v. Briercroft Serv. Corp.*, 809 S.W.2d 216, 218 (Tex. 1991); *see accord J.K. and Susie L. Wadley Research Inst. & Blood Bank v. Beeson*, 835 S.W.2d 689, 693 (Tex. App.—Dallas 1992, writ denied) (Alleging an affirmative defense of "common law statute of limitations" is insufficient to give the plaintiff "fair notice" of a statute of limitations under a ***specific*** statute.).

[20] *See, e.g., Shoemake v. Fogel, Ltd.*, 826 S.W.2d at 937.

[21] *See* TEX. R. CIV. P. 193.6(a); *see accord National Family Care Life Ins. Co. v. Fletcher*, 57 S.W.3d 662, 667-68 (Tex. App.—Beaumont 2001, pet. denied).

[22] However, you might want to be careful about submitting a large set of admissions requests at one time. *See, e.g., Reynolds v. Murphy*, 188 S.W.3d 252, 260-61 (Tex. App.—Fort Worth 2006, pet. filed May 30, 2006) ("When a party has objected to a large set of requests for admissions on the ground that the volume of the requests is unduly burdensome and harassing, requiring that party to file a more specific objection to each request to prevent the admissions from being deemed would defeat the purpose of filing such a general objection, a motion for protective order, or both, which are expressly authorized by the rules.").

[23] TEX. R. CIV. P. 198.1.

[24] *See, e.g., Natural Gas Pipeline Co. of Am. v. Pool*, 30 S.W.3d 639, 652 (Tex. App.—Amarillo 2000), *rev'd on other grounds*, 124 S.W.3d 188 (Tex. 2003).

[25] In Texas state courts, you can use admission requests that are mixed statements of fact and law, but not solely statements of law. *See, e.g., Fort Bend Central Appraisal District v. Hines Wholesale Nurseries,* 844 S.W.2d 857, 858-59 (Tex. App.—Texarkana 1992, writ denied); *Esparza v. Diaz,* 802 S.W.2d 772, 775-76 (Tex. App.—Houston [14th Dist.] 1990, writ denied); *Laycox v. Jaroma*, 709 S.W.2d 2, 3-4 (Tex. App.—Corpus Christi 1986, writ denied).

[26] *See, e.g., Ryland Group, Inc.*, 924 S.W.2d at 121.

[27] *See* TEX. R. CIV. P. 198.2(b).

[28] *See* TEX. R. CIV. P. 198.2(a).

[29] *See* TEX. R. CIV. P. 198.2(c); *Marshall v. Vise*, 767 S.W.2d 699, 700 (Tex. 1989); *see accord Wheeler v. Green*, 157 S.W.3d 439, 442 (Tex. 2005).

[30] *See id*.

[31] *See* TEX. R. CIV. P. 215.4(a).

[32] *See* TEX. R. CIV. P. 215.4(b).

[33] *See Horizon/CMS Healthcare Corp.*, 34 S.W.3d at 896 ("Texas follows a 'fair notice' standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant.").

[34] *See Friesenhahn v. Ryan*, 960 S.W.2d 656, 659 (Tex. 1998); *see accord Horizon/CMS Healthcare Corp.*, 34 S.W.3d at 897; *Roarke v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982) (citing TEX. R. CIV. P. 90, 91).

[35] *See* TEX. R. CIV. P. 194 cmt.2.

[36] *See* TEX. R. CIV. P. 192.1(f), 199.5.

[37] *See Binur v. Jacob*, 135 S.W.3d 646, 650-51 (Tex. 2004).

[38] *See* TEX. R. CIV. P. 166a(i).

[39] *See accord* TEX. R. CIV. P. 94, 166a(i).

[40] *See, e.g., Wortham v. Dow Chemical Co.*, 179 S.W.3d 189, 195 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

[41] *See, e.g., Nowak v. DAS Inv. Corp.*, 110 S.W.3d 677, 680 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

[42] *Friesenhahn*, 960 S.W.2d at 659.

[43] *See, e.g., Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 511 (Tex. 1995).

[44] *See also Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex. 1996) ("When a defendant moves for summary judgment based on an affirmative defense, such as the statute of repose, the defendant, as movant, bears the burden of proving each essential element of that defense.").

[45] *See* TEX. R. EVID. 103, 104, 403; *Hartford Acc. & Indem. Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963).

[46] *See, e.g., Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162, 166 (Tex. 2002); *Triplex Comm., Inc. v. Riley*, 900 S.W.2d 716, 718 (Tex. 1995).

[47] *See, e.g., Little Rock Furniture Manufacturing Co. v. Dunn*, 222 S. W.2d 985, 205-06 (Tex. 1947).

[48] *See, e.g., France v. American Indem. Co.*, 648 S.W.2d 283, 285 (Tex. 1983).

[49] *See, e.g., Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 863-64 (Tex. 2000).

[50] *See, e.g., Baptist Mem. Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 947 (Tex. 1998) ("Thus the burden shifted to Sampson to raise a fact issue on each element of her ostensible agency theory, which Texas courts have held to be in the nature of an affirmative defense.")

[51] *See, e.g., General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 351-52 (Tex. 1977).

[52] *Davis v. Greer*, 940 S.W.2d 582, 582 (Tex. 1996) ("Although Texas has abolished assumption of the risk as a complete defense in some contexts, it remains viable when a party expressly consents to the conduct.").

[53] *See, e.g., Associated Indem. Corp. and Fireman's Fund Ins. Co. v. CAT Contr., Inc.*, 964 S.W.2d 276, 280-86 (Tex. 1998).

[54] *See, e.g., General Motors Acceptance Corp. v. Howard*, 487 S.W.2d 708, 710-11 (Tex. 1974); *but cf. Denton Pub. Co. v. Boyd*, 460 S.W.2d 881, 883-85 (Tex. 1970) (The special exception privilege in a libel case may be lost if the plaintiff shows the counter-defense of malice).

[55] *See, e.g.,* TEX. BUS. & COM. CODE § 17.50; *Ramsey v. General Motors Corp.*, 685 S.W.2d 15, 16 (Tex. 1985).

[56] *See Medina v. Herrera*, 927 S.W.2d 597, 600 (Tex. 1996); *France*, 648 S.W.2d at 285.

[57] *See, e.g., Doe v. Linam*, 225 F. Supp.2d 731, 736-37 (S.D. Tex. 2002) (citing *Gulbenkian v. Penn*, 252 S.W.2d 929, 31 (Tex. 1952)); *Cook Composites, Inc. v. Westlake Styrene Corp.*, 15 S.W.3d 124, 135 (Tex. App.—Hou. [14th Dist.] 2000, pet. dism'd) (*citing Schroeder v. Texas Ironworks, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991)).

[58] *See, e.g., Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 689-90 (Tex. 1989); *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 517 (Tex. 1988).

[59] *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 740 (Tex. 2005); *Fortune Prod. Co. v. Connoco, Inc.*, 52 S.W.3d 671, 685 (Tex. 2000).

[60] *See, e.g., Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W.2d 854, 856-57 (Tex. 1999); *Gulf Consol. Int'l. v. Murphy*, 658 S.W.2d 565, 566 (Tex. 1983); TEX. CIV. PRAC. & REM. CODE § 73.003; *see c.f. Austin Hill Country Rlty., Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 296-97 (Tex. 1997).

[61] *See, e.g., Baptist Mem. Hosp. Sys. v. Arrendondo*, 922 S.W. 2d 120, 122 (Tex. 1996); *Borderlon v. Peck*, 661 S.W.2d 907, 908 (Tex. 1983).

[62] *See, e.g., Koral Industries v. Security-Connecticut Life Ins. Co.*, 802 S.W.2d 650, 651 (Tex. 1990) (". . . only the insurer's actual knowledge of the misrepresentations would have destroyed its defense of fraud.").

[63] *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 74.151-52, 84.001-.008; *McIntyre v. Ramirez*, 109 S.W.3d 741, 742 (Tex. 2003).

[64] *See, e.g.,* TEX. CIV. PRAC. & REM. CODE §§ 73.004, 74.003; *Kinnear v. Texas Comm'n on Human Rights*, 14 S.W.3d 299, 300 (Tex. 2000); *University of Tex. Southwestern Med. Ctr. of Dallas v. Margulis*, 11 S.W.3d 186, 187-88 (Tex. 2000).

[65] *See accord Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 352-53 n.2, 358 (Tex. 1987).

[66] *See, e.g., Friendswood Dev. Co. v. McDade Co*, 926 S.W.2d 280, 283 (Tex. 1996).
[67] *See, e.g., Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 207 (Tex. 2002); *Prudential Ins. Co. v. Financial Rev. Servs., Inc.,* 29 S.W.3d 74, 77-83 (Tex. 2000).
[68] *See accord Sonnichesen v. Baylor University*, 2004 Tex. App. LEXIS 7774, * 9 (Tex. App.—Waco Aug. 25, 2004, pet filed).
[69] *See, e.g., Lakeway Co. v. Leon Howard, Inc.*, 585 S.W.2d 660, 662 (Tex. 1979).
[70] *See, e.g., Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990); *Taylor v. Arlington Ind. School Dist*., 335 S.W.2d 371, 372-77 (1960); *Benson v. The Travelers Ins. Co.*, 464 S.W.2d 709, 712-13 (Tex. App.—Dallas 1971, no writ).
[71] *See, e.g., Gulf Consolidated Int'l, Inc.*, 658 S.W.2d at 566.
[72] *See, e.g., Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W.2d 854, 856-58 (Tex. 1999); *but cf. Austin Hill Country Realty v. Palisades Plaza*, 948 S.W.2d 293, 296-97 (Tex. 1997).
[73] *See, e.g., Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984).
[74] *See, e.g., Santos v. Mid-Continent Refrigerator Co.*, 471 S.W.2d 568, 569 (Tex. 1971).
[75] *See, e.g., Vickery v. Vickery*, 999 S.W.2d 342, 356 (Tex. 1999) (citing *Flanagan v. Martin*, 880 S.W.2d 863, 867 (Tex. App.—Waco 1994, writ dism'd w.o.j.) ("The satisfaction in an accord and satisfaction is usually the *performance* of the new promise, rather than the *new promise* itself. When, however, the new promise is accepted as the satisfaction, the accord is more properly termed a novation.")).
[76] *See, e.g.,* TEX. CIV. PRAC. & REM. CODE § 72.004; *United States Pipe & Foundry Co. v. City of Waco*, 100 S.W.2d 1099, 1112 (Tex. App.—Waco 1936), *aff'd*, 108 S.W.2d 432 (1937).
[77] *See, e.g., Phillips*, 820 S.W.2d at 789-90.
[78] *See, e.g., Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004); *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 692 (Tex. 1994); *Hauglum v. Durst*, 769 S.W.2d 646, 651 (Tex. App.—Corpus Christi 1989, no writ).
[79] *See, e.g., Nichols v. Smith*, 507 S.W.2d 518, 520-21 (Tex. 1974).
[80] *See, e.g., Lopez*, 22 S.W.3d at 864 (Tex. 2000).
[81] *See, e.g., Land Title Co.*, 609 S.W.2d at 756-57; *Petroleum Anchor Equip. v. Tyra*, 419 S.W.2d 829, 834 (Tex. 1967); *TCA Bldg. Co. v. Northwestern Resources Co.*, 922 S.W.2d 629, 634-35 (Tex. App.—Waco 1996, writ denied).
[82] *See, e.g., Seale v. Nichols*, 505 S.W.2d 251, 254-55 (Tex. 1974).
[83] *See, e.g., Woods*, 769 S.W.2d at 517; *Universal Life & Accident Ins. Co. v. Sanders*, 102 S.W.2d 405, 407-08 (Tex. 1937).
[84] *See, e.g., Smith v. Nat'l Resort Communities, Inc.*, 585 S.W.2d 655, 659-60 (Tex. 1979); *Hunt Cty. Oil Co. v. Scott*, 67 S.W. 451, 452 (Tex. App.—Austin 1902, writ ref'd); *Rowan Cos. v. Transco Exploration Co.*, 679 S.W.2d 660, 662 (Tex. App.—Houston [1st Dist.] 1984, writ refused).
[85] *See, e.g., Barclays American/Business Credit, Inc. v. E&E Enterprises, Inc.*, 697 S.W.2d 694, 701 (Tex. App.—Dallas 1985, no writ).
[86] *See e.g., Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 270-74, 280 (Tex. 1995); *Hall v. Rawls*, 171 S.W.2d 324, 324-27 (Tex. 1943).
[87] *See, e.g., Madison v. Gordon*, 39 S.W.3d 604, 606 (Tex. 2001).
[88] *See, e.g., Ryland Group, Inc.*, 924 S.W.2d at 121.
[89] *See, e.g.,* TEX. CIV. PRAC. & REM. CODE § 93.001(a); *Kassen v. Hatley*, 887 S.W.2d 4, 13 (Tex. 1994); *Galindo v. Dean*, 69 S.W.3d 623, 625 (Tex. App.—Eastland 2002, no pet.).
[90] *See, e.g.,* TEX. CIV. PRAC. & REM. CODE § 73.005; *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995); *McIlvain v. Jacobs*, 794 S.W.2d 14, 15-16 (Tex. 1990).
[91] *See, e.g., Truly v. Austin*, 744 S.W.2d 934, 938 (Tex. 1988); *City of Wink v. Griffith Amusement Co.,* 100 S.W.2d 695, 702 (Tex. 1936).
[92] *See, e.g., F.R. Hernandez Constr. & Supply Co. v. Nat'l Bank of Commerica*, 578 S.W.2d 675, 677, 79 (Tex. 1979).
[93] *See, e.g., Rabb v. Coleman*, 469 S.W.2d 384, 387 (Tex. 1971).
[94] *See, e.g., Ryland Group, Inc.*, 924 S.W.2d at 121.