

Equitable Remedies for Contract Actions: Texas

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A Q&A guide to understanding key equitable remedies under Texas common law for contract actions. Specifically, this Q&A discusses injunctions, reformation, rescission, and specific performance.

INJUNCTIONS

1. What types of injunctions are available in your jurisdiction for breach of contract?

In Texas, there are three types of injunctions that a party can seek for breach of contract. These include:

- A permanent injunction, which is a form of final equitable relief that restrains or mandates conduct permanently or until a specific date (see *Webb v. Glenbrook Owners Ass'n, Inc.*, 298 S.W.3d 374, 383-84 (Tex. App.—Dallas 2009, no pet.)). Texas courts will not enforce contractual rights by permanent injunction unless the party seeking the injunction demonstrates that it has irreparable injury and no adequate remedy at law (*Cytogenix, Inc. v. Waldroff*, 213 S.W.3d 479, 487 (Tex. App.—Houston [1st Dist.] 2006, pet. denied)).
- A temporary injunction (also called a preliminary injunction in some jurisdictions). This is a form of temporary equitable relief that preserves the status quo while the court resolves the merits of the underlying dispute. (*Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993).) If the dispute is resolved in favor of the party seeking injunctive relief, the court lifts the temporary injunction and replaces it with some form of permanent relief, like a permanent injunction or money damages (*Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 555 (Tex. 2016) (defining status quo as “the last, actual, peaceable, uncontested status which preceded” the parties’ dispute)).
- A temporary restraining order (TRO), which preserves the status quo until the court decides whether to issue a temporary injunction

(*In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004)). A plaintiff cannot request a TRO without also requesting a temporary injunction (Tex. R. Civ. P. 680; *In re Tex. Nat. Res. Conservation Comm'n*, 85 S.W.3d 201, 205 (Tex. 2002) (orig. proceeding)).

2. Please identify the legal standards that courts in your jurisdiction use in deciding whether to grant:

- Permanent injunctions.
- Temporary injunctions.
- Temporary restraining orders.

PERMANENT INJUNCTIONS

Texas Civil Practice and Remedies Code (CPRC) Chapter 65 generally governs injunction proceedings in Texas, including permanent injunctions (*Cardinal Health Staffing Network, Inc. v. Bowen*, 106 S.W.3d 230, 234 (Tex. App.—Houston [1st Dist.] 2003, no pet.)). A party (the applicant) is entitled to injunctive relief if they fall within one of the five categories of the enabling statute found at CPRC § 65.011:

- The applicant is entitled to relief in the underlying action and the relief requires the restraint of an act that is prejudicial to the plaintiff.
- The applicant is entitled to an injunction because the defendant is performing, about to perform, or is allowing performance of an act that both:
 - relates to the subject of pending litigation in violation of the applicant’s rights; and
 - would render a judgment in that litigation ineffectual.
- The applicant is entitled to an injunction under principles of equity and a Texas statute authorizing an injunction.
- A cloud would be placed on the title of real property being sold under an execution against a party having no interest in that real property at the time of the sale, regardless of any remedy at law.
- Real or personal property is threatened with irreparable harm, regardless of any remedy at law.

(Tex. Civ. Prac. & Rem. Code Ann. § 65.011(1)-(5).)

To obtain a permanent injunction under the common law in Texas, the applicant typically must plead and prove:

- The existence of a wrongful act.
- The existence of imminent harm.
- The existence of irreparable injury.
- The absence of an adequate remedy at law.

(*Livingston v. Livingston*, 537 S.W.3d 578, 587 (Tex. App.—Houston [1st Dist.] 2017, no pet.); *Leibovitz v. Sequoia Real Estate Holdings, L.P.*, 465 S.W.3d 331, 350 (Tex. App.—Dallas 2015, no pet.))

Although Texas courts do not appear to have addressed whether all four common law injunction elements apply to all five grounds listed in § 65.011, courts addressing the issue have held that common law rules of equity applicable to injunctions also govern injunctions brought under § 65.011 unless a controlling substantive statute explicitly provides a different standard (Tex. Civ. Prac. & Rem. Code Ann. § 65.001 (“The principles governing courts of equity govern injunctive proceedings if not in conflict with this chapter or other law.”)); *Town of Palm Valley v. Johnson*, 87 S.W.3d 110, 111 (Tex. 2001) (interpreting CPRC § 65.011(1) and concluding that the legislature did not abolish the requirement that the applicant for a permanent injunction show irreparable injury); *Storey v. Central Hide & Rendering Co.*, 226 S.W.2d 615 (Tex. 1950) (analyzing predecessor to § 65.011(5) and concluding that by enacting the statute, the legislature had not abolished the requirement to show both irreparable injury and an inadequate legal remedy); *Cheniere Energy, Inc. v. Parallax Enters. LLC*, 585 S.W.3d 70, 76 (Tex. App.—Houston [14th Dist.] 2019, pet. dismissed) (noting that the applicant for a temporary injunction must plead and prove the same equitable elements of injunctive relief to a request for injunctive relief under § 65.011); *Town of Flower Mound v. Eagleridge Operating, LLC*, 2019 WL 3955197, at *6 (Tex. App.—Fort Worth Aug. 22, 2019, no pet.) (mem. op.) (appellee had not shown irreparable harm and therefore had not shown its entitlement to injunctive relief under § 65.011(5)); *Devon Energy Prod. Co., LP v. McCarver*, 2015 WL 4710250, at *2 (Tex. App.—Waco 2015, no pet) (applying *Town of Palm Valley* reasoning to CPRC § 65.011(3)); *City of El Paso v. Caples Land Co., LLC*, 408 S.W.3d 26, 37 (Tex. App.—El Paso 2013, pet. denied) (applicant must establish both probable right to relief and irreparable injury for an injunction sought under § 65.011(2)); *Sonwalker v. St. Luke’s Sugar Land P’ship, L.L.P.*, 394 S.W.3d 186, 193 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (holding that general equitable standards governed injunction sought under provision of Texas Business Organizations Code because statute did not contain express statutory language defining the requirements for injunctive relief); *Cardinal Health*, 106 S.W.3d at 234-35 (CPRC Chapter 65 and the TRCP provide that the rules of equity control a court’s grant of temporary injunctive relief unless a controlling statute provides otherwise)). Therefore, the applicant should be prepared to plead and prove all four elements of the common law standard when seeking a permanent injunction in Texas under any of the five categories of § 65.011.

The standard for injunctive relief may differ for statutory claims or for certain common law claims (see, for example, *Cook v. Tom Brown Ministries*, 385 S.W.3d 592, 599 (Tex. App.—El Paso 2012, pet. denied) (holding that Texas Election Code provision for injunctive relief supersedes common law irreparable injury requirement); *Meehl v. Wise*, 285 S.W.3d 561, 565-66 (Tex. App.—Houston

[14th Dist.] 2009, no pet.) (discussing alternative standard for injunctions to enforce restrictive covenants); *Marauder Corp. v. Beall*, 301 S.W.3d 817, 820 (Tex. App.—Dallas 2009, no pet.) (showing of irreparable injury is not required for an injunction under the Texas Debt Collection Act); *Butler v. Arrow Mirror & Glass, Inc.*, 51 S.W.3d 787, 795 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (holding that Texas’s Covenants Not to Compete Act does not require a showing of irreparable injury)).

TEMPORARY INJUNCTIONS

The purpose of a temporary injunction is to preserve the status quo pending a trial on the merits for a permanent injunction (*Sonwalker*, 394 S.W.3d at 193).

CPRC Chapter 65 generally governs injunction proceedings in Texas, including temporary injunctions (*Cardinal Health*, 106 S.W.3d at 234). CPRC § 65.011 provides five grounds for injunctive relief (see Permanent Injunctions).

To obtain a temporary injunction under the common law in Texas, the plaintiff normally must plead and prove the same factors as for a common law permanent injunction (*Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002); *Cheniere Energy, Inc.*, 585 S.W.3d at 76 (noting that the applicant for a temporary injunction must plead and prove the same equitable elements of injunctive relief to a request for injunctive relief under § 65.011); see Permanent Injunctions).

As with permanent injunctions, the applicable standard may be different for certain statutory or common law temporary injunctions (see, for example, *Cook*, 385 S.W.3d at 599 (holding that Texas Election Code provision for injunctive relief supersedes common law irreparable injury requirement); *Meehl*, 285 S.W.3d at 565-66 (discussing alternative standard for injunctions to enforce restrictive covenants); *Marauder Corp.*, 301 S.W.3d at 820 (showing of irreparable injury is not required for an injunction under the Texas Debt Collection Act); *Butler*, 51 S.W.3d at 795 (holding that the Covenants Not to Compete Act under which the trial court may award injunctive relief does not require a showing of irreparable injury); employer from engaging in unlawful employment practice, dispenses with irreparable injury requirement)).

For more information on temporary injunctions in Texas generally, see Temporary Injunctive Relief Toolkit (TX) ([W-016-5879](#)).

TEMPORARY RESTRAINING ORDERS

Courts in Texas consider the same factors for a temporary injunction when deciding a TRO, but typically decide a TRO application on the sworn papers without holding an evidentiary hearing. Notice to the adverse party generally is required. However, a party may obtain an ex parte TRO if it is clearly shown by affidavit or verified complaint that **immediate** irreparable harm is likely to occur before notice can be given and the defendant heard in opposition (Tex. R. Civ. P. 680).

For more information on TROs in Texas generally, see Temporary Injunctive Relief Toolkit (TX) ([W-016-5879](#)).

RESCISSION

3. What are the elements of a rescission claim in your jurisdiction?

A party seeking to rescind a contract under Texas law must show that:

- A legally valid contract exists.
- The party itself was not in breach of contract (see *Williamson v. Davey*, 114 S.W. 195, 195-96 (Tex. App.—Galveston 1908, writ ref'd)).
- There is no other adequate remedy at law (*Scott v. Sebree*, 986 S.W.2d 364, 368 (Tex. App.—Austin 1999, pet. denied); *Ennis v. Interstate Distributors, Inc.*, 598 S.W.2d 903, 906 (Tex. App.—Dallas 1980, no writ)).
- The parties are in status quo or the status quo can be restored, including:
 - the plaintiff is not retaining benefits received under the contract without restoring the other party (*Ginn v. NCI Building Sys., Inc.*, 472 S.W.3d 802, 842 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (return to status quo is only one factor in determining rescission); (*Isaacs v. Bishop*, 249 S.W.3d 100, 110 (Tex. App.—Texarkana 2008, pet. denied) (party may also show that there are equitable considerations that obviate the need for the status quo);
 - the plaintiff has offered to return any consideration paid under the contract (*Davis v. Estridge*, 85 S.W.3d 308, 311 (Tex. App.—Tyler 2001, pet. denied) (plaintiff seeking rescission must return property plus value obtained from using the property between purchase and trial); *Carrow v. Bayliner Mar. Corp.*, 781 S.W.2d 691, 696 (Tex. App.—Austin 1989, no writ)); and
 - the plaintiff has “clean hands” (*Schenck v. Ebby Halliday Real Estate, Inc.*, 803 S.W.2d 361, 366 (Tex. App.—Fort Worth 1990, no writ) (a party seeking equity cannot come to court with unclean hands)).
- The contract:
 - was materially breached by the defendant, or if partially breached, the breach affects a material part of the contract’s essence and clearly shows an intent to rescind or abandon the contract (*Super Ventures, Inc. v. Chaudhry*, 501 S.W.3d 121, 130 (Tex. App.—Fort Worth 2016, no pet.));
 - was induced by fraud (*Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 345 (Tex. 2011); *Isaacs v. Bishop*, 249 S.W.3d 100, 109-10 (Tex. App.—Texarkana 2008, pet. denied); *Quicksilver Res., Inc. v. CMS Mktg. Servs. and Trading Co.*, 2005 WL 182951, at *7 (Tex. App.—Fort Worth Jan. 27, 2005, pet. denied) (mem. op.));
 - was entered into by a mutual material mistake that existed when the contract was executed (*Myrad Props., Inc. v. LaSalle Bank Nat’l Ass’n*, 300 S.W.3d 746, 751 (Tex. 2009));
 - was entered into by unilateral mistake, if the mistake goes to the heart of the agreement and occurred despite the exercise of ordinary care, and the status quo can be restored (see *Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 237 (Tex. 2016); *Cigna Ins. v. Rubalcada*, 960 S.W.2d 408, 412 (Tex. App.—Houston [1st Dist.] 1998, no pet.); see also *Ledig v. Duke Energy Corp.*, 193 S.W.3d 167, 175 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (a unilateral mistake that would permit a party to void a contract must be based on an existing fact, not a future event));
 - was incapable of being performed, because of impossibility (*N. Tex. Sav. & Bldg. Ass’n v. Jackson*, 63 S.W. 344, 345 (Tex. App. 1901)); or

- must be set aside for some other reason to avoid unjust enrichment (*Neese v. Lyon*, 479 S.W.3d 368, 380 (Tex. App.—Dallas 2015, no pet.)).

4. How, if at all, does bringing a rescission claim affect a party’s ability to bring a breach of contract claim in your jurisdiction?

In Texas, the plaintiff suing for breach of contract may affirm the contract and seek money damages caused by the breach and, in the same petition, alternatively request rescission of the contract as equitable relief (see *Waite Hill Servs., Inc. v. World Class Metal Works, Inc.*, 959 S.W.2d 182, 184 (Tex. 1998)).

The plaintiff may not recover on both theories and may wait to elect its remedy until after trial but before final judgment (see *Waite Hill Servs., Inc.*, 959 S.W.2d at 184 (a party may sue and seek damages on alternative theories); *Calstar Props., L.L.C. v. City of Fort Worth*, 139 S.W.3d 433, 439 (Tex. App.—Fort Worth 2004, pet. denied)). But see (*Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 345-46 (Tex. 2011); see also *Ginn v. NCI Building Sys., Inc.*, 472 S.W.3d 802, 837 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (court may award damages equal to the value of any proceeds or profits the defendant earned from the consideration that was improperly obtained)).

5. How does a party rescind a contract in your jurisdiction?

In Texas, a party may rescind a contract by contacting the counterparty and asking if they will consent to rescinding the contract (*Cates v. Cont’l Cas. Co.*, 366 S.W.2d 126, 128 (Tex. App.—Dallas 1963 no writ) (contracting parties may enter into a subsequent agreement to rescind the initial contract)). At this time, the party should tender or offer to tender the property or value received under the contract. If the counterparty refuses to rescind the contract, the party may file suit for a cause of action that will support the remedy of rescission such as breach of contract or fraud. (see *Kennebrew v. Harris*, 425 S.W.3d 588, 595-96 (Tex. App.—Houston [14th Dist.] pet. denied) (a party can only be entitled to rescission if the other party to the contract has committed some wrong).)

As part of the common law right to rescission, a party generally must give notice to the counterparty and either return or offer to return the property received and the value of any benefit received from its possession (*Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 824 (Tex. 2012); *Kennebrew*, 425 S.W.3d at 596). Additionally, some statutes require notification of the intent to rescind a contract (see, for example, Tex. Prop. Code Ann. § 5.064) (seller must provide notice of rescission of executory contract for conveyance of real property); Tex. Ins. Code Ann. § 1111A.014(i) (owner must provide notice of rescission of life settlement contract); Tex. Bus. & Com. Code Ann. § 17.50(b)(3) (a party may seek rescission in consumer transactions under the Texas Deceptive Trade Practices Act)).

6. What is the primary relief available to a party seeking rescission in your jurisdiction?

The primary relief available in a Texas rescission claim is restoration of the status quo. A court restores the status quo by placing the parties, as nearly as possible, in the positions they were in before the

contract was made (*Baty v. ProTech Ins. Agency*, 63 S.W.3d 841, 855 (Tex. App.—Houston [14th Dist.] 2001, pet. denied)). This typically results in the court ordering the parties to return the consideration exchanged in the bargain and voiding the contract (*H.E.B., LLC v. Ardinger*, 369 S.W.3d 496, 509 (Tex. App.—Fort Worth 2012, no pet.)).

7. What damages, if any, are available when a party seeks rescission in your jurisdiction?

A court generally may not order rescission and actual damages for breach of contract (see *Kargar v. Sorrentino*, 788 S.W.2d 189, 191 (Tex. App.—Houston [14th Dist.] 1990, no writ). But see *LaChalet Int'l, Inc. v. Nowik*, 787 S.W.2d 101, 104 (Tex. App.—Dallas 1990, no writ) (court may order **partial** rescission and award actual damages to compensate a party for its injury)).

When necessary to restore the party to its original position (status quo), the court may:

- Order the return of the consideration paid.
- Award special damages consisting of any further damages or expenses that the plaintiff reasonably incurred because of the contract.

(*Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 345-46 (Tex. 2011); see also *Ginn v. NCI Building Sys., Inc.*, 472 S.W.3d 802, 837 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (court may award damages equal to the value of any proceeds or profits the defendant earned from the consideration that was improperly obtained).)

In some instances, the court may award punitive damages in addition to ordering rescission (see, for example, *Nabours v. Longview Sav. & Loan Ass'n*, 700 S.W.2d 901, 904 (Tex. 1985); *Tex. Capital Sec., Inc. v. Sandefer*, 58 S.W.3d 760, 773-74 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (a plaintiff may be entitled to punitive damages if it is awarded rescission involving the return of property)).

8. What happens to the contract after the court grants rescission in your jurisdiction?

Under Texas law, when the court orders rescission, the contract and the parties' rights and liabilities under it are extinguished (*Hannon, Inc. v. Scott*, 2011 WL 1833106, at *9 (Tex. App.—Fort Worth 2011, May 12, 2011, pet. denied) (mem. op.); *City of the Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 732 (Tex. App.—Fort Worth 2008, pet. dismissed) (rescission is an undoing of the contract) and generally a substitute for money damages when money damages would be inadequate). After rescission, the parties are restored to their respective positions, as if the contract had never existed (*Ginn v. NCI Building Sys., Inc.*, 472 S.W.3d 802, 837 (Tex. App.—Houston [1st Dist.] 2015, no pet.)). This requires both parties to surrender any benefits received under the contract (*Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 825-26 (Tex. 2012) (rescission is not a one-way street); *Fazio v. Cypress/GR Houston I, L.P.*, 403 S.W.3d 390, 396 (Tex. App.—Houston [1st Dist.] 2013, pet. denied)).

9. What are the most common defenses to a rescission claim in your jurisdiction?

Common defenses to a rescission claim under Texas law include:

- Rescission is improper because the plaintiff ratified the contract by failing to rescind with reasonable promptness (*Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 344 (Tex. 2011)).
- The plaintiff waived the right to rescission by continuing to retain benefits or consideration received under the contract (*Sharma v. Varani*, 2002 WL 31487912, at *3 (Tex. App.—Houston [14th Dist.] Nov. 7, 2002, no pet.) (not designated for publication); *Boyster v. MCR Constr. Co.*, 673 S.W.2d 938, 941 (Tex. App.—Dallas 1984, writ ref'd n.r.e.)).
- The status quo of the parties before the contract cannot be restored (*Neese v. Lyon*, 479 S.W.3d 368, 389-90 (Tex. App.—Dallas 2015, no pet.)).
- Other available remedies exist to make the plaintiff whole, such as money damages (see *Issacs v. Bishop*, 249 S.W.3d 100, 109 (Tex. App.—Texarkana 2008, pet. denied) (rescission is an equitable remedy used as a substitute when monetary damages are inadequate)).
- The plaintiff is not entitled to rescission because it already received the full benefit of the bargain (*Hynds v. Foster*, 2017 WL 769909, at *8 (Tex. App.—Houston [1st Dist.] Feb. 28, 2017, no pet.) (mem. op.)).
- The party seeking rescission failed to give timely notice that the contract was rescinded (*Kennebrew v. Harris*, 425 S.W.3d 588, 596 (Tex. App.—Houston [14th Dist.] 2014, pet. denied)).

10. How, if at all, can a defendant assert rescission in your jurisdiction?

Under Texas law, a defendant responding to a breach of contract action may assert rescission as a counterclaim or as an affirmative defense (*Matter of Marriage of I.C. and Q.C.*, 551 S.W.3d 119, 121 (Tex. 2018) (counterpetition for breach of contract sought rescission in the alternative); *Morton v. Nguyen*, 412 S.W.3d 506, 508 (Tex. 2013) (counterclaim); *9029 Gateway S. Joint Venture v. Eller Media Co.*, 159 S.W.3d 183, 186 (Tex. App.—El Paso 2004, no pet.) (affirmative defense)).

When asserted as a counterclaim, the defendant must plead rescission with sufficient particularity to give the plaintiff fair notice of the claim (Tex. R. Civ. P. 45(b) and 47(a); *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015); *Burnett v. James*, 564 S.W.2d 407, 409 (Tex. App.—Dallas 1978, writ dismissed)).

When asserting rescission as an affirmative defense, the defendant must specifically plead it in writing or it is waived (Tex. R. Civ. P. 94 (any matter constituting an avoidance or affirmative defense must be specifically pleaded); *9029 Gateway S. Joint Venture*, 159 S.W.3d at 186).

11. What is the statute of limitations for a rescission claim and when does the statute of limitations begin to run in your jurisdiction?

In Texas, a four-year statute of limitations normally applies to rescission claims, depending on the theory underlying the right to rescind, such as:

- Breach of contract (Tex. Civ. Prac. & Rem. Code § 16.004 (debt). But see *Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 870 (Tex. 2007) (unjust enrichment claims fall under Tex. Civ. Prac. & Rem. Code Ann. § 16.003 and have a two-year statute of limitations)).
- Fraud (Tex. Civ. Prac. & Rem. Code Ann. § 16.004(4); *Mai Thi Tran v. Luu*, 2014 WL 1410345 (Tex. App.—Waco April 10, 2014, no pet.) (mem. op.) (mutual or unilateral mistake coupled with fraud)).
- Failure of consideration (*Precision Sheet Metal Mfg. Co., Inc. v. Yates*, 794 S.W.2d 545, 550 (Tex. App.—Dallas 1990, writ denied)).
- Other actions that do not have an express limitations period (Tex. Civ. Prac. & Rem. Code Ann. § 16.051).

A cause of action generally accrues when the facts come into existence that allow the claimant to seek a judicial remedy, such as the date of a breach or other occurrence justifying rescission (*Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 514 (Tex. 1998); see also *Precision Sheet Metal Mfg. Co.*, 794 S.W.2d at 550 (statute of limitations begins to run when the mutual mistake or fraud is discovered or in the exercise of reasonable diligence should have been discovered)).

REFORMATION

12. What are the elements of a reformation claim in your jurisdiction?

A party seeking to reform a contract in Texas must show that:

- The parties reached a valid and enforceable agreement that was definite and explicit.
- The agreement was reduced to writing.
- The writing does not express the actual understanding reached by the parties concerning a material fact because of:
 - a mutual mistake in reducing the agreement to writing, including scrivener's error;
 - a unilateral mistake by one party along with inequitable conduct (such as fraud) by the other party; or

(*Cherokee Water Co. v. Forderhause*, 741 S.W.2d 377, 379 (Tex. 1987); *Champlin Oil & Ref. Co. v. Chastain*, 403 S.W.2d 376, 382 (Tex. 1965) (parties' agreement must have been definite and explicit); see also *Conn v. Hagan*, 55 S.W. 323, 325 (Tex. 1900); *Samson Expl., LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 766, 779 (Tex. 2017) (a scrivener's or draftsman's error may provide grounds for reformation of the written agreement on the basis of mutual mistake); *Charles R. Tips Family Tr. v. PB Commercial LLC*, 459 S.W.3d 147, 156 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *Liu v. Yang*, 69 S.W.3d 225, 228-29 (Tex. App.—Corpus Christ 2001, no pet.).)

13. How, if at all, does bringing a reformation claim affect a party's ability to bring a breach of contract claim in your jurisdiction?

In Texas, the plaintiff may bring a breach of contract claim and seek reformation in the same petition. The plaintiff may not recover under both theories and must elect the remedy before final judgment (see *N. Tex. Mun. Water Dist. v. Jinright*, 2018 WL 6187632, at *2 (Tex. App.—Dallas Nov. 27, 2018, pet. denied) (mem. op.)).

14. What relief is available to a party seeking reformation in your jurisdiction?

The relief available to a party seeking reformation is a corrected contract that restates the terms of the written contract and brings it into conformity with the parties' actual agreement (*Cherokee Water Co. v. Forderhause*, 741 S.W.2d 377, 379 (Tex. 1987)). However, reformation may not be used to create a contract that the parties did not make (*Continental Oil Co. v. Doornbos*, 402 S.W.2d 879, 883 (Tex. 1966); *Mullins v. Mullins*, 889 S.W.2d 550, 553 (Tex. App.—Houston [14th Dist.] 1994, writ denied)).

15. What damages, if any, are available when a party seeks reformation in your jurisdiction?

Under Texas law, money damages typically are not available to a party that seeks only to reform a contract. A party that is seeking money damages for breach of contract and reformation must elect its remedy before final judgment is rendered (*Nguyen v. Hoang*, 507 S.W.3d 360, 383 (Tex. App.—Houston [1st Dist.] 2006, no pet.)).

16. What happens to a contract after it is reformed in your jurisdiction?

If a Texas court orders reformation, the contract remains in effect, but in modified form, with the terms the court determines accurately reflect the parties' intended agreement (see *Cherokee Water Co. v. Forderhause*, 741 S.W.2d 377, 379 (Tex. 1987)).

17. What are the most common defenses to a reformation claim in your jurisdiction?

The most common defenses to a reformation claim under Texas law are that:

- The original agreement is unenforceable (see *Carter v. McDonald*, 172 S.W.2d 767, 768-70 (Tex. App.—El Paso 1943, writ ref'd)).
- The contract accurately reflects the agreement of the parties (see *Thalman v. Martin*, 635 S.W.2d 411, 413 (Tex. 1982) (the equitable power of the court is to reform the written instrument so that it reflects the true agreement of the parties)).
- Lack of fraud, accident, or mistake (*LasikPlus of Texas, P.C. v. Mattioli*, 418 S.W.3d 210, 221 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (defendant offered evidence contrary to the existence of a mutual mistake and plaintiffs offered no evidence on the issue)).
- In the case of real property, the property was subsequently conveyed to a bona fide purchaser who acquired the property in good faith, for valuable consideration, and without notice of the claimed mistake (*Richmond v. Wells*, 395 S.W.3d 262 (Tex. App.—Eastland 2012, no pet.)).
- Statute of limitations (see *Cosgrove v. Cade*, 468 S.W.3d 32, 39 (Tex. 2015); *Jarzombek v. Ramsey*, 534 S.W.3d 534, 539 (Tex. App.—San Antonio 2017, pet. denied)).

18. How, if at all, can a defendant assert reformation in your jurisdiction?

Under Texas law, a defendant can assert reformation as an affirmative defense and as a counterclaim (see *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 824 (Tex. App.—Dallas 2009, no pet.) (reformation counterclaim); *Samson Expl., LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 766, 774 (Tex. 2017) (affirmative defense of quasi-estoppel and reformation based on scrivener's error)).

Most often, defendants use reformation to argue that the contract under which the plaintiff is suing does not accurately reflect the parties' actual agreement. The defendant asks the court to reform the contract and then shows that its conduct did not violate the parties' intended agreement (see *Marcuz v. Marcuz*, 857 S.W.2d 623, 625-27 (Tex. App.—Houston [1st Dist.] 1993, no writ)). Like any party seeking reformation, the defendant must request reformation in its live pleadings before the court may reform the contract (*Cardenas v. Varner*, 182 S.W.3d 380, 382 (Tex. App.—Amarillo 2005, no pet.)).

19. What is the statute of limitations for a reformation claim and when does it begin to run in your jurisdiction?

The statute of limitations for an action seeking reformation of a contract under Texas law is four years after the day the cause of action accrues (Tex. Civ. Prac. & Rem. Code Ann. § 16.051; *Brown v. Havard*, 593 S.W.2d 939, 944 (Tex. 1980); *Cullins v. Foster*, 171 S.W.3d 521, 531 (Tex. App.—Houston [14th Dist.] 2005, pet. denied)). Texas courts apply the discovery rule to reformation claims based on mutual mistake. If the discovery rule applies, the four-year statute of limitations does not begin until the party seeking reformation knew, or using reasonable diligence should have known, about the mistake (*Brown*, 593 S.W.2d at 944; *Cullins*, 171 S.W.3d at 531).

SPECIFIC PERFORMANCE

20. What are the elements of a specific performance claim in your jurisdiction?

To obtain an order granting specific performance under Texas law, the plaintiff must plead and prove that:

- The contract at issue is valid and enforceable and its essential terms are expressed with certainty and clarity.
- The defendant breached the contract.
- The plaintiff has complied with its obligations under the contract including tender of performance, unless excused by the defendant's breach or repudiation. In that case, the plaintiff may plead that it would have performed but for the defendant's breach or repudiation.
- The plaintiff is ready, willing, and able to timely perform its obligations under the contract.
- No other adequate remedy exists at law.

(*DiGiuseppe v. Lawler*, 269 S.W.3d 588, 593-94 (Tex. 2008); *Paciwest, Inc. v. Warner Alan Props., LLC*, 266 S.W.3d 559, 571 (Tex. App.—Fort Worth 2008, pet. denied); *Stafford v. S. Vanity Magazine, Inc.*, 231 S.W.3d 530, 535 (Tex. App.—Dallas 2007, pet. denied); *Chapman v. Olbrich*, 217 S.W.3d 482, 491 (Tex. App.—Houston [14th Dist.] 2006, no pet.)).

A court generally will not order specific performance unless it can effectively enforce compliance with its order (see *Anderson v. Anderson*, 563 S.W.2d 345, 346 (Tex. App.—Dallas 1978, no writ) (the parties must receive substantially all that they bargained for)).

21. How, if at all, does seeking specific performance affect a party's ability to bring a breach of contract claim seeking damages in your jurisdiction?

Specific performance and money damages for breach of contract are inconsistent remedies. Specific performance seeks to compel a party to perform its contractual obligations, rather than to pay money damages for a breach. (*Goldman v. Olmstead*, 414 S.W.3d 346, 361 (Tex. App.—Dallas 2013, pet. denied).) A party may seek as **alternative** relief either specific performance or money damages in a breach of contract action. The relief associated with specific performance may include monetary compensation when necessary to place the parties in the same position as if the contract had been fully performed (*Goldman*, 414 S.W.3d at 361 (such compensation is incident to specific performance and does not constitute money damages for breach of contract)).

22. What relief may be granted to a party seeking specific performance in your jurisdiction?

The relief available to a party seeking specific performance is a court order directing the other party to do what the contract requires it to do (see, generally, *Glass v. Anderson*, 596 S.W.2d 507, 513 (Tex. 1980); see also *S. Plains Switching, Ltd. Co. v. BNSF Ry. Co.*, 255 S.W.3d 690, 703 (Tex. App.—Amarillo 2008, pet. denied) (noting that a court generally will not order a party to perform a series of acts over a long period of time that require constant court supervision)). Under appropriate circumstances, the court also may order the payment of expenses incurred by the performing party that resulted from the non-performing party's late performance (*Paciwest, Inc. v. Warner Alan Props., LLC*, 266 S.W.3d 559, 575 (Tex. App.—Fort Worth 2008, pet. denied)).

23. What damages, if any, are available when a party seeks specific performance in your jurisdiction?

Texas courts generally may not award **both** specific performance and money damages in the same action for the same breach (*Hays Street Bridge Restoration Grp. v. City of San Antonio*, 570 S.W.3d 697, 707 (Tex. 2019); *Yazdani-Beioky v. Sharifan*, 550 S.W.3d 808, 832 (Tex. App.—Houston [14th Dist.] 2018, pet. denied)).

In narrow circumstances the court may award incidental damages that are necessary to place the parties in the same position as if the contract had been fully performed (*Goldman v. Olmstead*, 414 S.W.3d 346, 361-62 (Tex. App.—Dallas 2013, pet. denied)). Incidental damages may include money damages to equalize any losses caused by the defendant's delay in performing the contract, such as:

- Lost profits.
- Increased construction costs.
- Interest rate increases.
- Attorneys' fees.

(*TLC Hospitality LLC v. Pillar Income Asset Mgmt., Inc.*, 570 S.W.3d 749, 770-71 (Tex. App.—Tyler 2018, pet. denied) (these are not considered breach of contract damages but are awarded to equalize any losses incurred by offsetting them with money damages to compensate); *Ifiesimama v. Haile*, 522 S.W.3d 675, 690 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (attorneys' fees are not barred when specific performance is awarded when the contract otherwise allows the prevailing party to recover them); *Olmstead*, 414 S.W.3d at 362).)

24. What are the most common defenses to a specific performance claim in your jurisdiction?

Under Texas law, the most common defenses to a claim seeking the equitable remedy of specific performance are that:

- Another adequate remedy at law exists (*Shandyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 423 (Tex. 2011)).
- The party seeking specific performance is not ready, willing, and able to perform or has not offered to do so (*DiGiuseppe v. Lawler*, 269 S.W.3d 588, 593, 599 (Tex. 2008); *Paciwest, Inc. v. Warner Alan Props., LLC*, 266 S.W.3d 559, 571-73 (Tex. App.—Fort Worth 2008, pet. denied)).
- The contract has not been breached because it expired or was terminated (*Lyons v. Ortego*, 2018 WL 4014218, at *6-7 (Tex. App.—Houston [1st Dist.] Aug. 23, 2018, no pet.) (mem. op.) (when a contract terminates by its own terms before performance, there is nothing to enforce by specific performance)).
- It is impossible for the defendant to perform its obligations under the contract (*Stafford v. S. Vanity Magazine, Inc.*, 231 S.W.3d 530, 537-38 (Tex. App.—Dallas 2007, pet. denied)).
- The plaintiff has not performed or complied with all the contract's terms (*DiGiuseppe*, 269 S.W.3d at 605 (Medina, J. dissenting) (citing *Glass v. Anderson*, 596 S.W.2d 507, 513 (Tex. 1980))).
- The plaintiff's conduct was unlawful or inequitable resulting in "unclean hands" (*Paciwest, Inc.*, 266 S.W.3d at 571; *Lazy M Ranch, Ltd. v. TXI Operations, LP*, 978 S.W.2d 678, 683 (Tex. App.—Austin 1998, pet. denied)).
- The contract is invalid and does not contain the essentials of a binding legal obligation (*Lopez v. Sanchez*, 2015 WL 7717218, at *5 (Tex. App.—Dallas Nov. 30, 2015, no pet.) (mem. op.)).

- No contract exists (*Chervinskis v. Love*, 2007 WL 1289544, *5 (Tex. App.—Waco May 2, 2007, no pet.) (mem. op.)).
- Specific performance is an improper remedy because it requires the defendant to perform a continuous series of acts, extending over a long period of time with court supervision (*L Series, L.L.C. v. Holt*, 571 S.W.3d 864, 876 (Tex. App.—Fort Worth 2019, pet. denied)).
- The plaintiff repudiated the contract after the time for performance (*Glass*, 596 S.W.2d at 508).

25. How, if at all, can a defendant assert specific performance in your jurisdiction?

In Texas, a defendant may assert a counterclaim seeking specific performance (*Taylor Hous. Auth. v. Shorts*, 549 S.W.3d 865, 875 (Tex. App.—Austin 2018, no pet.); *Guggenheim Corp. Funding, LLC v. Valerus Compression Servs., L.P.*, 465 S.W.3d 673, 692 (Tex. App.—Houston [14th Dist.] 2015, pet. denied)). For example, a counterclaim for specific performance may be appropriate where a plaintiff stops performing and commences an action to rescind the contract. A defendant who believes that the contract is valid and enforceable may assert a counterclaim for an order directing the plaintiff to perform (see, for example, *Tye v. Apperson*, 689 S.W.2d 320, 324 (Tex. App.—Fort Worth 1985 (ordering specific performance in favor of defendant-appellants on the basis of their counterclaim))).

26. What is the statute of limitations for a claim seeking specific performance and when does the statute of limitations begin to run in your jurisdiction?

Under Texas law, the statute of limitations for bringing a breach of contract claim that seeks specific performance is four years after the date the cause of action accrues. It begins to run on the date the breach occurs. (Tex. Civ. Prac. & Rem. Code Ann. § 16.004(a)(1); *Stine v. Stewart*, 80 S.W.3d 586, 592 (Tex. 2002); *Archer v. Tregellas*, 566 S.W.3d 281, 288 (Tex. 2018).)

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