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SECURITIES AND FIDUCIARY DUTY CASES IN TEXAS

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This quarterly newsletter summarizes recent federal and state court decisions and other developments of interest to practitioners litigating securities and fiduciary duty claims in Texas. This quarter's court rulings (hyperlinked to Westlaw) and other notable events include:

- Fifth Circuit Rulings – In *U.S. v. Constantinescu*, the Fifth Circuit reversed the dismissal of a securities fraud indictment because it did more than allege deprivation of valuable economic information; it also alleged that the defendant fraudulently induced investors to sell their property. In the latest ruling in the *McDermott International* securities fraud class action, the Fifth Circuit upheld lower court decisions creating two subclasses of purchasers, those who purchased McDermott securities directly and those who obtained McDermott shares as part of the acquisition of Chicago Bridge & Iron.

- Federal District Court Rulings – In securities fraud class action cases, the *American Airlines* court dismissed plaintiffs' claims with prejudice; the *Concho Resources* court required the corporate defendant to produce a database of well data in native format; and the *CS DISCO* court recommended denial of class certification because the corrective disclosures alleged in the complaint did not match up with the alleged misstatements. In *Kinder Morgan*, the Court enjoined the Department of Labor from conducting a hearing into whistleblower allegations about pipeline safety because the two-layer removal requirement for the administrative law judge assigned to the matter violated the Take Care Clause of the U.S. Constitution.

- State Court Rulings – In *Kreines*, the 15th Court of Appeals overturned an injunction in a non-compete case because the language of the injunction prohibited the defendants from contact with entities "known to" them rather than listing the entities by name. In *Crain*, the Business Court dismissed an action alleging legal malpractice, fraud, breach of fiduciary duty, and other claims because it violated the anti-fracturing rule applicable to legal malpractice claims. In other appellate cases, courts addressed the limitations of the Texas Citizens Participation Act, when a financial advisory agreement does not impose fiduciary duties, whether an embezzler who hoped to open a "pet hotel" defrauded his business partner, and the results of a jury trial involving a Superbowl ticket-reselling scam.

We are also pleased to announce that **Claudia Wilson Frost** has joined the Firm as a partner, expanding the firm's expertise in energy and IP litigation. Claudia is a first-chair trial lawyer who has tried more than 40 cases to conclusion and argued more than 40 appeals in courts in the United States. She has a wide range of U.S. and cross-border experience representing plaintiffs and defendants in intellectual property, energy, technology, real property, and class action disputes. Claudia is a member of the American Board of Trial Advocates (ABOTA) and the American Academy of Appellate Lawyers. She was recognized in 2025 by Legal 500 Elite (energy litigation), Lawdragon 500 (energy

litigation), IP Star (Managing IP), and Best Lawyers (multiple litigation areas). For more information, see her bio at www.fletcherheld.com.

CASE SUMMARIES

I. FEDERAL CASES

A. Fifth Circuit Court of Appeals

1. *US v. Constantinescu*, 157 F.4th 392 (5th Cir. 2025)

In a criminal indictment for securities fraud, alleging a scheme to defraud based solely on depriving the victims of potentially valuable economic information is not sufficient, but alleging a fraudulent inducement scheme to obtain money for defendants is sufficient to allege both fraud and injury.

In a short opinion, the Fifth Circuit reversed the dismissal of a securities fraud indictment against defendants who allegedly induced their social media followers to purchase securities by misrepresenting defendants' trading positions and the potential price of securities. The district court dismissed the indictment based on the Supreme Court's ruling in *Ciminelli v. United States*, 598 U.S. 306 (2023), which held that a scheme to deprive victims of valuable economic information was not sufficient to allege fraud. The Fifth Circuit reversed because the indictment did more than just allege the deprivation of potentially valuable economic information. It also alleged that defendants fraudulently induced the victims to purchase securities, and this was sufficient to allege fraud and injury under *Kousisis v. United States*, 145 S. Ct. 1382, 1398 (2025).

First, the defendants argued the indictment did not allege a scheme to defraud or an intent to defraud because the object of the fraud was not to deprive the victims of money or property, but only valuable economic information. In *Ciminelli v. United States*, 598 U.S. 306, 312 (2023), a construction company paid a lobbyist to help it obtain state-funded jobs, and it was indicted for wire fraud. The sole argument presented by the government was that the company engaged in fraud because it deprived the state of the "right-to-control" its assets. The Supreme Court rejected this "right-to-control theory," ruling that the federal fraud statute only protects traditional property interests like money and property; the right to valuable economic information is not such an interest.

Acknowledging *Ciminelli*, the Fifth Circuit ruled that the fraudulent inducement allegations distinguished this case. "While it is true that a defendant cannot be convicted of fraud for depriving an individual of potentially valuable economic information alone, the indictment here went further, properly alleging defendants' scheme to defraud their followers of money." *Id.* Unlike *Ciminelli*, the indictment did not mention the "right to control" theory but instead relied on a fraudulent-inducement theory. In *Kousisis v. United States*, 145 S. Ct. 1382, 1398 (2025), the Supreme Court ruled that a fraudulent-inducement theory was not a repackaging of the right-to-control theory and that fraudulent inducement is a theory that protects money and property. Because the indictment alleged that defendants deprived their followers of a protected property interest by fraudulently inducing them to buy securities, it did not run afoul of *Ciminelli*. *Id.* at 396.

Second, defendants argued that the indictment did not allege any intent to defraud because it only claimed they intended to profit from their scheme, not harm any victim. The Fifth Circuit rejected this argument, again citing *Kousisis*. In that case, the defendant lied to obtain contracts with the state department of transportation, falsely representing that he owned a disadvantaged business when it

was only a pass-through entity. The government charged Kousisis with fraud under a fraudulent inducement theory, and he argued there was no allegation that he sought to hurt the victim's bottom line. The Supreme Court rejected that assertion, holding that a defendant violates the fraud statutes when he "schem[es] to obtain the victim's money or property, regardless of whether he seeks to leave the victim economically worse off. *Id.* at 396 (citations and quotations omitted).

2. *Nova Scotia Health Employees' Pension Plan v. McDermott Int'l, Inc.*, __ F.4th __, 2025 WL 2814735 (5th Cir. 2025)

When a Rule 23(f) petition for interlocutory appeal is filed, the district court retains jurisdiction over the case, and is free to modify its prior orders, until the motion is granted and an appellate court assumes jurisdiction over the case. When a class member (but not the lead plaintiff) is a member of two subclasses, it does not create a fundamental conflict or multiply any conflict.

In this interlocutory appeal from a class certification order, the Fifth Circuit affirmed on both procedural and substantive grounds. On procedure, the Court held that the district court retained jurisdiction over the case while a Rule 23(f) petition for interlocutory appeal was pending and, therefore, the district court was authorized to amend its prior class certification order. It further ruled that the district court did not abuse its discretion in (1) finding a fundamental conflict between plaintiffs who purchased their shares and plaintiffs who exchanged their shares, (2) creating subclasses of purchasers and exchangers; and (3) allowing class members who were both exchangers and purchasers to hold claims in both classes. However, it refused to review the class certification methods used by the magistrate judge and the district court, ruling they were "case management decisions" not suitable for Rule 23(f) review. On substance, the Court affirmed the district court's conclusion that plaintiffs who exchanged their shares had standing to sue because they asserted a plausible theory of economic harm and there was no evidence to dispute it at this stage of the litigation.

Factual and Procedural Background

This interlocutory appeal arose from the long-running McDermott Section 10(b) securities litigation.[1] Lead plaintiff NSHEPP alleged fraud in connection with the 2018 merger of McDermott and Chicago Bridge & Iron (CB&I) and in connection with McDermott's post-merger business disclosures before it filed for bankruptcy protection. Lead plaintiff NSHEPP was initially selected to represent both (a) shareholders of CB&I who exchanged their stock for shares in McDermott (exchangers) and (b) shareholders who purchased their McDermott shares in the open market (purchasers).

When NSHEPP filed its class certification motion, however, the magistrate judge denied it without prejudice because of a fundamental conflict between the exchangers and purchasers. The magistrate judge reasoned that if CB&I's stock price was artificially inflated at the time of the merger, then the exchangers received a net benefit not shared by the purchasers. Because a conflict was likely to arise between these two groups, they could not be adequately represented by the same counsel. To

[1] We previously reported on multiple decisions in the case. *See* FH Newsletter 1Q21, at 8-12 (describing denial of motions to dismiss separate class actions alleging violations of §14(a) and §10(b)); FH Newsletter 4Q21, at 6 (describing recommendation to allow supplemental complaint but not additional class representative in §10(b) action); FH Newsletter 3Q22, at 11-12 (describing recommendation on motion to expand the class period for §10(b) action); 1Q24 Newsletter, at 11-13 (magistrate judge initial recommendation on class certification); 2Q24 Newsletter, at 21 (amended recommendation and district court order on class certification).

resolve this fundamental conflict, the magistrate judge recommended dividing the class into subclasses of exchangers and purchasers.

On February 29, 2024, the magistrate judge issued his memorandum and recommendation (MR-1). MR-1 was adopted by the district court with minimal changes on March 23, 2024 (OR-1). On April 8, 2024, NSHEPP filed a Rule 23(f) petition seeking appellate review of the class certification denial in OR-1. On April 10, the magistrate judge held a status conference and informed the district judge that he wanted to revise his prior order because the parties misunderstood it. The district judge then withdrew OR-1 on April 24, and the magistrate judge issued his revised memorandum and recommendation (MR-2) the same day. On June 21, the district judge adopted MR-2 with minor modifications, including striking a clause referring to plaintiffs' damages burden as an affirmative defense. The Fifth Circuit then accepted the petition.

On appeal, NSHEPP argued that (1) the district court lacked authority to withdraw and reissue its class certification order after the Rule 23(f) petition was filed; (2) no fundamental conflict existed between exchangers and purchasers; (3) the district court improperly imposed the burden of proving an affirmative defense on the plaintiffs; and (4) reopening the lead plaintiff process was improper. Defendants filed a cross petition under Rule 26(f) contesting (1) the holding that exchanger plaintiffs had standing; (2) the ability of individual plaintiffs to be part of both subclasses; and (3) NSHEPP's ability to appeal issues such as market efficiency and affirmative defense claims when they do not relate to class certification.

Court Rulings

The Court quickly dispensed with the Plaintiffs' argument that the district court lacked jurisdiction to change its order. Citing numerous cases, it reasoned that the district court retained jurisdiction over the case until the Fifth Circuit ruled on the Rule 26(f) petition and was free to modify its orders until that time. *Id.* at *4. For the same reason, the Court rejected NSHEPP's argument that binding precedents barred the district court and the appellate court from exercising jurisdiction at the same time. It noted that Rule 23 specifically contemplates modifications to class-certification orders. *Id.* at *6 (citing Fed. R. Civ. P. 23(c)(1)(C), "An order that grants or denies class certification may be altered or amended before final judgment.").

The Court then rejected as premature Defendants' argument that exchange plaintiffs lacked standing because they suffered no injury-in-fact when their CB&I stock was converted into McDermott stock. Describing the argument as "attractive in its simplistic framing," the Court refused to rule at this stage of the proceedings, noting that exchangers might be able to show they suffered an economic injury. Since Plaintiffs had presented a plausible theory of harm, *i.e.*, that misrepresentations inflated McDermott's stock price above any inflation from CB&I stock, and since there was no evidence in the record of the inflationary relationship between CB&I and McDermott stock, the Court ruled exchange plaintiffs had standing to sue.

The Court next ruled that the district court did not abuse its discretion in finding a fundamental conflict between exchangers and purchasers. It cited the magistrate's reasoning that the inflationary effect of CB&I stock would be important to exchangers but not to purchasers of McDermott stock and, thus, NSHEPP (an exchanger) was not an adequate representative for purchasers. While the Court emphasized that adequacy should focus on conflicts between class representatives and members, it also cited the magistrate's conclusion that counsel for purchasers

should not devote unnecessary time and resources to the issue of CB&I inflation. Since there was no abuse of discretion in finding a fundamental conflict, the Court ruled that either bifurcating or forming subclasses was an appropriate way to address it.

Finally, the Court rejected Defendants' argument that it would be improper for individual plaintiffs to belong to both the exchange subclass and the purchaser subclass. Using a hypothetical investor, John Doe, who both exchanged and purchased his shares, the Court explained:

> Doe therefore has two interests that he wants adequately represented in this class action: (1) he wants damages in connection with his exchanged shares and, to further that interest, he wants NSHEPP to prove minimal inflation in CB&I stock and maximum inflation in McDermott stock (to maximize the difference and thus his damages); and (2) he wants the purchaser subclass's lead plaintiff to prove that defendants' misrepresentations fraudulently inflated McDermott stock price so that he can recover the difference between his purchase price and the price it should have been purchased at but for the misrepresentations. NSHEPP will adequately represent his exchanger interest–maybe trial proves he has a net negative; maybe it proves he has a net benefit–but, either way, NSHEPP will be protecting his exchanger interest and will fight to maximize his recovery because NSHEPP itself wants maximum recovery under this theory. The purchaser lead plaintiff will then protect Doe's purchase interest by bringing its strongest fraud-on-the-market case—again, because that lead plaintiff will itself be incentivized to maximize its own recovery as a purchaser. We see no logical reason why Doe cannot recover with respect to both of these separate interests—any conflict between purchasers and exchangers from a class-representative standpoint does not trickle down to unnamed class members seeking only their own personal damages.

Id. at *10. The fact that the pool for recovery might be limited did not sway the Court, and it relied on Rule 23's language that the "subclass representative" must "fairly and adequately" protect the interests of the [sub]class. "Having class members hold claims in both the exchanger and purchaser subclasses does not implicate, let alone multiply, any conflict." *Id.*

B. Federal District Courts

1. *Qawasmi v. American Airlines Group Inc.*, 2025 WL 3201639 (N.D. Tex. Nov. 15, 2025)

When a company discloses the underlying data supporting its optimistic statements, the material element to a reasonable investor is the disclosed data, not the adjectives describing it.

In this securities fraud class action, Judge O'Connor granted the motion to dismiss with prejudice filed by American Airlines (AA) and three of its officers. Plaintiffs alleged that the Defendants made false and misleading statements about the success of a new sales and distribution strategy designed to drive corporate customers to book directly with AA rather than through travel agents and other vendors. The district court concluded that the allegations failed to plausibly allege any fraud and failed to establish a compelling inference of scienter.

Factual Background

AA traditionally sold tickets and ancillary services to corporate customers through third party distributors (travel agents, travel management companies). Ticket orders were placed through the Electronic Data Interchange for Administration, Commerce, and Transport (EDIFACT). Beginning in December 2022, AA adopted changes to its sales and distribution strategy to modernize its offerings and reduce costs, including pushing corporate customers to use AA's New Distribution Capability (NDC) technology that was introduced in July 2023 to book travel directly through its website rather than through EDIFACT.

Plaintiffs claimed that AA's bookings from larger agencies and corporate clients immediately began to decline, and that American and its then-CEO Robert Isom, CFO Devon May, and Chief Commercial Officer Vasu Raja covered this up with material misstatements and omissions. Two confidential witnesses, who were employed as a Travel Agency Account Manager and a Retail Business Manager at AA, confirmed that corporations were not adopting NDC as quickly or broadly as anticipated and that AA's market share of corporate travel declined during the Class Period.

In May 2024, AA announced Raja's termination and adjusted its 2024 financial guidance. *Bloomberg* then published an article linking Raja's termination to a critical review by consulting firm Bain & Co. that concluded AA's NDC strategy had alienated corporate clients over the past few quarters. After the *Bloomberg* article, the stock suffered its largest single-day drop since COVID, and AA cut its financial guidance again, once more blaming the NDC strategy.

After putative class actions were filed and consolidated, defendants moved to dismiss the amended complaint on multiple grounds.

Discounting Confidential Witness Allegations

Courts may rely on the assertions of confidential witnesses (CWs) if they are "described in the complaint with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged." *Id.* at *3 (quoting *Owens v. Jastrow*, 789 F.3d 529, 542 n. 11 (5th Cir. 2015)). While the complaint described the CWs by title, responsibilities, and tenure at AA, neither was in a position to have interacted with the individual defendants because they were several reporting rungs below them:

> The CWs need not "'be a fly on every relevant wall – or directly deliver [to defendants] every relevant presentation—to plead allegations" that are credited. However, the CWs must be in a position to know that the problems alleged effect the Company as a whole and not only the individual slice to which they are privy."

Id. at *4 (citations omitted). Since the CWs had limited exposure to the business as a whole and were not employed at AA during the last four months of the Class Period, the Court "heavily discounted" their allegations. *Id.* It also heavily discounted the anonymous source quoted in the *Bloomberg* article because he was described only as "a person familiar with the matter." *Id.*

No Fraudulent Statements

The Court rejected many of the alleged fraudulent statements because they were not misrepresentations. Some were non-actionable corporate puffery, like the CEO's statements that he "felt confident" on a competitive basis with AA's peers and that he was "comfortable" with the start of the NDC execution. *Id.* at *5. Other statements were deemed not misleading, such as Raja's statement that "we're encouraged by . . . the durability of these customers' demand" for services. *Id.* at *6. Most were simply "positive remarks made about business travel trends and American's partnering with travel agencies …." *Id.* And many were accompanied by a factual basis for the optimistic statement such as "the agencies that constitute about 30% to 40% of our revenue are already doing more than 30% of their bookings through NDC." *Id.*

With respect to Corporate Travel Statements, plaintiffs claimed that (1) Defendants masked the worsened demand resulting from NDC by making broad statements instead of specifically addressing managed corporation travel, and (2) AA was actually losing small and medium-sized business share because of NDC. The Court disagreed, noting that none of the Plaintiffs' allegations directly contradicted the Defendants' statements, and using positive adjectives in the context of disclosed data did not make the adjectives material. *Id.* at *7. "The material elements of Defendants' statements are disclosed facts, not the adjectives describing them. Thus, Defendants' disclosures provide the material metrics that a reasonable investor would have relied on in making an investment decision." *Id.*

The Court also rejected Plaintiffs' argument that the Company's risk-factor statements in public filings were misleading. While it paused over statements about "potential disruptions between American and third-party service providers," in light of the CW allegations, it concluded that Plaintiffs had not plausibly alleged sufficient facts to show that overall revenue or demand decreased in 2023 so there was no allegation of harm, *i.e.,* that the possibility had actualized. *Id.* at *8. As for Financial Guidance statements, the Court ruled they all fell within the PSLRA's safe harbor for forward-looking statements. *Id.* at 9.

No Strong Inference of Scienter

Even if Plaintiffs had alleged actionable fraudulent statements, the Court determined they had not raised a strong inference of scienter.

First, it rejected Plaintiffs' allegations based on post-class period statements and the *Bloomberg* article. Such "*hindsight* assessment" does not establish scienter. For example, "[k]nowing of a problem causing a deviation in revenue is not the same as knowing the underlying cause [of the problem]." *Id.* at *10 (citation omitted). By disclosing a deviation in revenue as early as January 2024 (one month after the alleged class period began), the defendants were doing the opposite of what Plaintiffs' alleged (covering up problems). The only binding precedent cited in support of this hindsight assessment was *Lormand*, but plaintiffs in that case also presented internal emails and other evidence from the class period that told the same story. *Id.*

Second, AA's decision to hire Bain to investigate issues did not reasonably suggest that the defendants knew the NDC strategy was driving customers away. The more reasonable inference was that "Defendants did not know what was causing the deviation and commissioned Bain to discover the cause." *Id.* at 11.

Finally, the Court rejected Plaintiffs' argument that a strong inference of scienter was established because of the defendants' access to internal data. Citing *Municipal Employees' Ret. Sys. v. Pier 1 Imports, Inc.*, 935 F.3d 424 (5th Cir. 2019), the Court noted that Plaintiffs failed to support their allegation that defendants actually knew what the granular data showed, much less the risks that the raw data might have exposed. They did not credibly allege that defendants accessed the data, that defendants understood the cause of the revenue deviation, or that the CW statements supported this allegation of knowledge based on internal reports. *Id.* at *12.

2. *In re Concho Resources, Inc. Secs. Litig.*, 2025 WL 2899518 (S.D. Tex. Oct. 10, 2025)

In securities fraud class action litigation alleging that defendants falsely touted their state-of-the-art drilling methodology but produced only Excel spreadsheets of outputs from a proprietary database, production of the underlying database of well data in native format was ordered.

In a discovery dispute arising after the class was certified, , Judge Hanen ordered defendants to produce Concho's ARIES database containing reserve data and information about revenue streams used for final budgeting and planning during the Class Period. Defendants had produced 207,000 documents totaling more than 2.83 million pages in the four years of litigation, but Plaintiffs argued the Excel spreadsheets produced by defendants were unlabeled, disorganized, and insufficient to determine what models defendants used when they claimed their state-of-the-art drilling methodology enabled them to improve oil and gas returns. Specifically, Plaintiffs asked the Court to compel defendants to produce (1) the databases associated with reserve reports; (2) internal databases used for final budgets and plans; and (3) any settings necessary to "tie in" those reports.

Applying the six factors cited in Rule 26(b)(1), the Court granted the Plaintiffs' motion to compel. Importantly, the Court noted that access to the databases was relevant to the issue of falsity because deposition testimony showed that defendants "may have relied on the underlying data [in the databases] to make their claims regarding the state of the Company." *Id.* at *4. However, "[r]egardless of whether the Individual Defendants only glanced at the Excel spreadsheets or were active in the ARIES database, the native format of the data that produced those Excel spreadsheets is still reasonably calculated to lead to the discovery of admissible evidence related to the scienter of Concho or the Individual Defendants." *Id.* "Although the discovery in this case has certainly been extensive, the Class Representatives are entitled to more than the sheer quantity of pages; they are entitled to workable data in the original form." *Id.* at *5.

The Court rejected defendants' argument that it would be unduly burdensome to reproduce the data as it existed during the Class Period because the ARIES system was constantly changing and those who specialized in the database were no longer employed by the company. Acknowledging that it could not compel the defendants to produce data they did not have, the Court nevertheless ordered defendants to make every effort to produce the documents to which the Class Representatives were entitled.

3. *Kinder Morgan, Inc. v. United States Department of Labor*, 2025 WL 3635155 (S.D. Tex. Dec. 15, 2025)

In addition to Seventh Amendment concerns, ALJ hearings may be challenged under the Take Care Clause of the Constitution that provides the President must have adequate power over the appointment and removal of executive officers.

In this declaratory judgment and injunctive relief action arising from a whistleblower complaint about pipeline safety, Kinder Morgan sought relief from an administrative hearing scheduled before an administrative law judge (ALJ). It argued that the two layers of for-cause removal protection for ALJs working for the Department of Labor violated the Take Care Clause of the Constitution. That clause provides that the President must have adequate power over the removal of executive officers to "take Care that the Laws be faithfully executed." Based on the Fifth Circuit's ruling in *Jarkesy v. Securities and Exchange Commission*, 34 F.4th 446, 463 (5th Cir. 2022), *aff'd on other grounds*, 144 S. Ct. 2177 (2024), the Court ruled that Kinder Morgan had shown a substantial likelihood of success on the merits and irreparable injury, and otherwise met the requirements for issuing an injunction.

This ruling is one of many recent successful challenges to agency administrative proceedings in the wake of the Supreme Court's *Jarkesy* opinion upholding the right to a jury trial in administrative proceedings and its earlier opinion in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010) that struck down a two-layer removal procedure for PCAOB appointees. While most of the recent constitutional challenges to agency proceedings have been based on Seventh Amendment right to jury trial concerns, this case is a reminder that *Free Enterprise* and the Fifth Circuit's *Jarkesy* ruling also held that hearings before ALJs with two-layer removal protection violates the Take Care Clause. *Jarkesy v. SEC*, 34 F.4th 446, 463-65 (5th Cir. 2022), *aff'd on other grounds*, 603 U.S. 109 (2024).

4. *Gambrill v. CS DISCO, Inc.*, 2025 WL 3771433 (W.D. Tex. Dec. 16, 2025)

In a securities fraud class action alleging that defendants' misrepresentations artificially inflated the stock price and that the impact of these statements can be seen by a price drop when corrective disclosures are made, the corrective disclosures and the alleged misrepresentations must match up to support a presumption of class-wide reliance.

In this securities class action arising from alleged misrepresentations by a public e-discovery company, Magistrate Judge Lane recommended that class certification be denied because defendants rebutted the *Basic* presumption of class-wide reliance. In a detailed and careful opinion, the Court concluded that there was a complete mismatch between the alleged corrective disclosures and the misrepresentations alleged in the complaint, thus defeating the inference of front-end price impact under the Supreme Court's *Basic* opinion.

Factual Background

CS DISCO is a public company that provides e-discovery services to law firms and corporate clients. It has three principal lines of business: (1) Ediscovery, a platform for collecting and reviewing documents; (2) Review, a service that uses machine learning tools to conduct review projects; and (3) Case Builder, a tool that allows attorneys to organize documents and evidence. Plaintiffs claimed that DISCO, its then-CEO Kiwi Camara, and then-CFO Michael LaFair made false and misleading

statements to investors about revenue growth related to DISCO's Review product. Specifically, plaintiffs alleged that defendants (1) downplayed the volatility of its rapid revenue growth and overperformance of financial guidance for its Review product and (2) specifically denied that the growth and overperformance were attributable to a small number of large review projects that defendants knew were of limited duration.

After defendants' motion to dismiss was denied,[2] plaintiffs moved to certify a class of investors who purchased and held DISCO's common stock during the period September 3, 2021 to August 11, 2022. *Id.* at *2 n.5. Defendants challenged certification under FED. R. CIV. P. 23(b)(3) on the ground that issues common to the class did not predominate over individual issues. Specifically, defendants argued that the *Basic* presumption of class-wide reliance was rebutted because the corrective disclosures did not match up with the alleged misrepresentations, thereby defeating any inference of price impact to support class-wide reliance.

Report and Recommendation

After reviewing the other requirements for class certification, which defendants did not contest, the Report focused on predominance. Defendants conceded that plaintiffs made an initial showing that the *Basic* presumption of class-wide reliance applied, but Defendants argued they had rebutted the presumption. As the Court explained:

> When a plaintiff's theory is that a defendant's misrepresentations or omissions kept their stock artificially inflated, price impact may be shown on the back end. Front-end price impact may be inferred from a back-end price drop when the stock price falls after a corrective disclosure demonstrating that a defendant's previous statements were untrue or that the defendant failed to disclose the truth. A back-end price drop supports this inference when the corrective disclosure "matches" the earlier misrepresentations or omissions. A corrective disclosure "need not precisely mirror an earlier misrepresentation." The two need only be "related" or "relevant" to one another. However, if there is a "mismatch" between the contents of the corrective disclosure and the misrepresentations or omissions, the inference of price impact is weaker.

Id. at *6 (citations omitted). Specifically, defendants claimed the alleged corrective disclosures did not correct (or match up) with the alleged misrepresentations in the complaint.

The Court reviewed each alleged misstatement in the complaint, emphasizing that plaintiffs admitted at the class certification hearing that only the bold highlighted language in the complaint was a misrepresentation. *Id.* at *10. The Court then compared the bolded language in the complaint to the alleged corrective disclosures cited by plaintiffs and concluded they did not match up. *Id.* at *7-10.

- First, the alleged misstatements were quite different from the alleged corrective disclosures. While plaintiffs argued the disclosures revealed that DISCO relied on the assumption that it would continue to receive seven figure per quarter revenues from a

[2] *See* 1Q25 FH Newsletter, at 3-4.

small number of large Review matters, the 2Q22 projections were not alleged to be a misrepresentation. *Id.* at *10.

- Second, the corrective disclosures only discussed 2Q22. They did not demonstrate that the projected revenue decline was due to a few larger Review accounts. Nor do they contradict other alleged misrepresentations that larger companies are consistently dealing with litigation and budget accordingly. *Id.*

- The comparison of the corrective disclosures and the misrepresentations reveals "too great a distance between the content of what the statements discussed" and "too great a distinction in the specificity of the matters discussed." *Id.* at *11.

The Court also reviewed the parties' expert reports, which did not alter the Court's conclusion. It criticized the plaintiffs' expert for assuming that the district court found a causal link between corrective disclosures and misstatements in its ruling on the motion to dismiss and noted that the expert did not even compare the alleged misrepresentations to the alleged corrective disclosures. *Id.* at *12.

After reviewing the other requirements for class certification, the Court recommended that class certification be denied. The Court's recommendation apparently led the parties to negotiate a settlement. On December 26, 2025, they filed an agreed motion to stay the case pending settlement documentation. The terms of the settlement have not been disclosed.

II. STATE CASES

A. Texas 15th Court of Appeals and Business Court

1. *Kreines v. ES3 Minerals, LLC*, 2025 WL 3502534 (Tex. App.-- 15th Dist. Dec. 4, 2025)

An injunction in a non-compete case cannot enjoin future contact with entities or individuals "known to the defendants" but must specify the companies and individuals without reference to defendants' knowledge. Also, the amount of the bind must be adequate; an enjoined party's estimated profit losses during the injunction period should be considered in determining an adequate bond amount, but the trial court's decision is not limited to this measure.

ES3 Minerals sued its former employees alleging breach of confidentiality, non-compete, and non-solicitation agreements. The district court entered an injunction against the defendants which was modified after removal to the Business Court. the defendants. Defendants challenged both the district court and Business Court injunctions as vague and challenged the Business Court injunction for lacking sufficient reasons for its issuance. The defendants challenged the $25,000 bond as inadequate. The 15th Court of Appeals ruled that while the Business Court's reasons for the injunction were adequate, its scope was vague by referring to entities "known to" defendants that could not be contacted. It remanded to the Business Court to clarify the scope of the injunction and to increase the amount of the bond.

Factual Background

Defendants Nicholas Kreines and David Ryan were employed by Plaintiff ES3 Minerals for approximately four years. Each signed confidentiality, non-competition, and non-solicitation

agreements when they joined ES3. Kreines worked in ES3's business development department, developed relationships with ES3 buyers, and was promoted to VP of Business Development. He had limited access to ES3's software platform but more fulsome access to buyer and pricing information. Ryan worked in ES3's acquisition department. While he did not interact with customers, he had access to sales scripts, pricing formulas, and ES3's full software platform.

In 2023 Ryan left ES3 and formed Defendant Liberty Mineral Partners, LLC (LMP). ES3 alleged that while Kreines was still employed at ES3 he met with Ryan multiple times to discuss ES3's software and pricing. After Kreines left, LMP hired Curtis Menchaca, a high-performing ES3 producer, to join them. Within 10 months, LMP signed 28 deals and generated $20.3 million in revenues and $6.7 million in profits. During the same period, ES3 suffered a $10 million decline in revenues and saw a decrease in the number of deals with its longtime buyers.

ES3 sued Kreines, Ryan, and LMP in Travis County District Court, alleging misappropriation of trade secrets, breach of fiduciary duty, breach of contract, and tortious interference. The trial court issued a temporary injunction prohibiting defendants from transacting with buyers with whom Kreines had worked in the past 24 months and from soliciting any of ES3's employees. The temporary injunction included a specific list of ES3's buyers but also enjoined defendants from negotiating or transacting business with "any contact and/or decision maker who is/was associated with" those entities. The defendants filed a notice of appeal to the Eighth Court of Appeals, but while the appeal was pending, removed the case to the Texas Business Court. They then filed a motion to dissolve the temporary injunction. While the Business Court denied that motion, it removed the "contact and/or decision maker" language and modified the injunction order to cover subsidiaries of ES3 buyers "known to LMP" and individuals who move to new entities if LMP "knows they are personally involved" in a transaction. Defendants appealed to the 15th Court of Appeals.

Court Rulings

Defendants claimed the injunction order was vague because (1) the District Court's order used the phrase "contact and/or decision maker" to describe restricted buyers, and (2) the Business Court's modification of that order referred to subsidiaries "known to LMP." ES3 claimed the modified order adequately identified the specific buyers.

The Court of Appeals noted that an injunction must be "specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained." TEX. R. CIV. P. 683. It cited the Texas Supreme Court's admonition that orders "must not be susceptible of different meanings or construction." *Kreines*, at *5 (citing *Ex parte Hodges*, 625 S.W.2d 304, 306 (Tex. 1981)). The Court held that Defendant's first vagueness argument was moot because the Business Court removed the "contact and/or decision maker" language from the injunction. However, the Court agreed that the "known to LMP" language of the modified order was vague.

The Court noted there was a split of authority among Texas appellate courts over whether a defendant's knowledge was a sufficient limitation in an injunction. *Id.* at *5-6 (citing *Lockhart v. McCurley*, 2010 WL 966029 (Tex. App.—Waco Mar. 10, 2010, no pet., and *Computek Computer & Office Supplies, Inc. v. Walton*, 156 S.W.3d 217, 221 (Tex. App.—Dallas 2005, no pet.). The majority of appellate courts follow the *Computek* decision which held that a lack of specificity cannot be cured by any knowledge the defendant has outside of the injunction. "Where a prohibition is to be enforced by

power of contempt, it is not too much to ask for the court to specifically name those entities and individuals who are the subject of the prohibition." *Id.* at *6. The Business Court adopted the *Computek* majority view and sustained the appeal because the injunction was vague.

The Court of Appeals also ruled that the $25,000 bond imposed by the Business Court was an abuse of discretion. Noting that "a bond's adequacy is a notoriously unsettled area of the law," *id.* at *8, the Court nonetheless held that "a bond must be proportionate to the degree of harm that an enjoined party will suffer if the injunction imposed proves to have been unwarranted." *Id.* at *9. The record did not support a bond amount of $25,000, but the record showed the injunction would prevent LMP from closing five deals valued at approximately $3.6 million, that LMP had revenues of $20 million in 2024, and that $6.7 million of those revenues were profit. The Court left the bond determination on remand to the discretion of the Business Court, but it strongly suggested that estimated profit losses should be the most important consideration. *Id.* at *10 ("An enjoined party's estimated profit losses during the injunction period may be an important consideration in determining an adequate bond amount, but the trial court's decision is not limited to this measure.").

2. ***Crain v. Northern*, ___ S.W.3d ___, 2025 WL 3674750 (Tex. Bus. Dec. 17, 2025)**

Under the anti-fracturing rule in Texas, a plaintiff cannot split a single malpractice claim into multiple causes of action if they arise from the same factual allegations as the malpractice claim.

In this action for legal malpractice, fraud, breach of fiduciary duty, negligence, and other claims arising from a real estate business relationship between a client and his lawyer, the Texas Business Court dismissed the case for lack of jurisdiction. Applying the anti-fracturing rule that prohibits splitting a single malpractice claim into multiple causes of action, *see, e.g., Pitts v. Rivas*, 709 S.W.3d 517, 523-24 (Tex. 2025), the Court ruled that the plaintiff expressly asserted a legal malpractice claim and that all the other claims were based on the same factual allegations. While Texas allows clients to assert separate claims for fraud, breach of fiduciary, negligence, and other causes of action against their lawyers, they may not do so if they are based on the same factual allegations as a malpractice claim. The Court dismissed the action without prejudice for lack of jurisdiction to hear malpractice actions and violation of the anti-fracturing rule.

B. <u>Other Texas Appellate Cases</u>

1. ***Hatteras Evergreen Private Equity Fund, LLC v. Longboat Capital, LLC*, 2025 WL 3237952 (Tex. App. - Houston [14th Dist.] Nov. 20, 2025)**

When raising a Texas Citizens Participation Act (TCPA) defense, be certain that the claims implicate First Amendment concerns protected by the TCPA. Fiduciary duty and breach of contract claims based on lack of due diligence do not implicate TCPA concerns.

The TCPA is frequently raised as a defense in litigation, but this opinion highlights some of its limitations. Plaintiff alleged claims for fraud, breach of fiduciary duty, and breach of contract based on misrepresentations made in two letters and the lack of due diligence in selling an investment fund to a company whose stock was later delisted. The Court acknowledged the letters might implicate First Amendment rights, but the lack of due diligence had nothing to do with First Amendment concerns

about free speech and association. Moreover, the Court ruled that the defendants failed to demonstrate that any of the claims related to matters of public concern. The Court affirmed the denial of defendants' motion to dismiss.

Factual Background

Plaintiff Longboat Capital invested $1.75 million in an investment fund of Defendant Hatteras. After the investment was made, Hatteras informed Longboat that it had approved a plan of liquidation for the fund the prior year. That plan effectively traded all of Hatteras' assets for a 100% interest in Beneficient, a publicly traded company that planned to start a new investment fund. Hatteras claimed in two letters that "there will be no discount" in the value of the investment, and that Longboat and other investors would be able to earn 5% per year in the new fund. In June 2023, Beneficient went public at an opening stock price of $15 per share, but a year later, the stock was delisted from the NASDAQ after trading at less than $0.10 per share.

Longboat was concerned about the decline in its investment and the misrepresentations in the letters sent by Hatteras. It sent Hatteras a request to inspect its books and records. Hatteras produced documents, but none of them related to the valuation of Beneficient's consideration for the sale of the fund. Based on the records produced, Longboat argued that Hatteras had performed no due diligence on Beneficient and sued Hatteras for breach of fiduciary duties, breach of contract, and fraud. Hatteras filed a motion to dismiss under the TCPA. The district court denied the motion to dismiss, and this appeal followed.

Discussion

After ruling that Hatteras' appeal was timely, the Court addressed the merits of the motion to dismiss under the TCPA. The purpose of the statute is to "identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits." *Id.* at *2 (quoting *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015)). The TCPA defines the exercise of the right of free speech as "a communication made in connection with a matter of public concern." *Id.* at *2 (citing TEX. CIV. PRAC. & REM. CODE § 27.001(3)). A public concern includes a statement or activity about (1) "a matter of political, social, or other interest to the community," or (2) "a subject of concern to the public." *Id.* at *3 (citing TEX. CIV. PRAC. & REM. CODE § 27.001(7)(B)).

While part of Longboat's petition was based on assurances in the letters Hatteras sent to Longboat, which were alleged to be fraudulent, Longboat's claims for breach of fiduciary duty and breach of contract were based on Hatteras' conduct related to the fund and its failure to provide access to its books and records. The claims had nothing to do with statements made by Hatteras or its decision to associate with Beneficient. And the boilerplate language in the petition incorporating earlier paragraphs alleging fraud into other claims did not mean that the claims were actually "based on" or "in response to" Hatteras' exercise of free speech or association. *Id.*. at *4.

Nor did Hatteras demonstrate that Longboat's claims implicated matters of public concern. While Hatteras cited cases under California's anti-S.L.A.P.P. statute in support, no Texas caselaw with that conclusion was cited to or identified by the Court. "A private contract dispute affecting only the fortunes of the private parties involved is simply not a "matter of public concern" under any tenable understanding of those words." *Id.* at *4 (quoting *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC,*

591 S.W.3d 127, 137 (Tex. 2019)). While private communications are sometimes covered by the TCPA if they involve environmental, health, or safety concerns relevant to the public, Hatteras did not demonstrate that its actions and omissions were matters of public concern.

2. *Wilemon v. Brownlie*, 2025 WL 3039140 (Tex. App. - Fort Worth Oct. 30, 2025)

When a financial advisory agreement limits its scope to financial analyses and investment recommendations, no fiduciary duty is created for transactions between the parties that fall outside of that scope.

The Fort Worth Court of Appeals affirmed a hybrid summary judgment ruling in favor of the Plaintiff's financial advisor for breach of fiduciary duty and fraud in connection with a debt forgiveness transaction between the two men. The Court ruled that the Defendant financial advisor did not owe any fiduciary duty to the Plaintiff because the financial advisory agreement on which that duty was based was limited in scope and not implicated in the debt forgiveness transaction. The Court further ruled that Plaintiff's fraud claims failed because he failed to present any evidence that the alleged omissions were material to the Plaintiff's decision to enter into the debt forgiveness transaction.

Factual and Procedural Background

Defendant Brownlie was Plaintiff Wilemon's financial advisor, but the two men also engaged in separate business ventures together. In one of these ventures, Brownlie's company (CCIC) borrowed money from an entity they co-owned (RAZ). In 2018, CCIC's debt was distributed to RAZ's owners on a pro rata basis, meaning that Brownlie, through CCIC, became indebted to Wilemon. Subsequently, Wilemon proposed they find a transaction to "get them closer to even." In the transaction that followed, Wilemon released CCIC's debt in exchange for a mix of cash, accounts receivable, mineral interests, and shares in certain oil and gas entities that both men knew were non-producing. Wilemon admitted that he signed the transaction documents without reading them but later demanded that Brownlie reverse the transaction. When Brownlie refused, Wilemon sued him for breach of fiduciary duty, fraud under the Texas Securities Act, fraudulent inducement, and fraud-based quasi contract.

Brownlie moved for a hybrid summary judgment on Wilemon's claims. He argued that he did not owe Wilemon any fiduciary duty with respect to the transaction and that Wilemon had no evidence to support his fraud claims. Wilemon countered that Brownlie was a fiduciary based on the terms of a 2014 financial advisory agreement and, in connection with the debt forgiveness transaction, failed to disclose a spreadsheet summarizing the transaction, the low value of the non-producing oil and gas properties given to Wilemon, and the amount of debt being forgiven. The district court disagreed and granted summary judgment to Brownlie.

Court's Ruling

On appeal, the Court reviewed the terms of the 2014 financial advisory agreement to determine if it created a fiduciary duty. In it, Brownlie agreed to provide advisory services to Wilemon regarding various public and private investment opportunities, but it specifically limited its scope to "financial advice contained in the financial analyses or investment recommendations individually prepared for" Wilemon. Assuming without deciding that the agreement made Brownlie a fiduciary, the Court concluded that it did not apply because Brownlie (by Wilemon's admission) never prepared

any analysis or recommendation for Wilemon about the separate debt forgiveness transaction. "The mere fact that Brownlie had agreed to serve as Wilemon's financial advisor in some instances was not, on its own, more than a scintilla of evidence that he served as Wilemon's financial advisor in this instance." *Id.* at *6.

As to Wilemon's fraud claims, the Court noted that all the transaction details in the spreadsheet that Wilemon did not see were included in the transaction documents that Wilemon signed but did not read. It further noted that Wilemon was aware the oil and gas properties had not produced "a penny of revenue in 12 years" when he signed the document. In short, Wilemon's complaint was that the investments were unsuitable for his portfolio and Brownlie should not have recommended them. The Court ruled on narrow grounds that Wilemon failed to make a case for fraud because he failed to present any evidence that the undisclosed facts were material to his decision to enter into the transaction.

3. ***Kott v. Miller*, 2025 WL 3247114 (Tex. App. - Austin Nov. 21, 2025)**

Members of an LLC cannot waive their duty of loyalty to the company under the Texas Business Organizations Code.

In this appeal from a bench trial about falsifying a promissory note from a real estate LLC, the Court of Appeals affirmed the district court's ruling that members of an LLC owe a duty of loyalty to the LLC that cannot be waived. The colorful facts, involving a pet hotel, an embezzler, and the defendant who executed a $350,000 promissory note to himself after his business partner had a stroke, highlight some of the risks of doing business as a small LLC. Fortunately, for the plaintiff, the unremitting duty of loyalty enshrined in the Texas Business Organizations Code (TBOC) saved the day for the Plaintiff.

Factual Background

Two neighbors, Kott and Miller, formed an LLC (MK Developers) to invest in real estate. They each had a 50% interest in the LLC with capital accounts that increased in value when they contributed money. In 2009, MK Developers began investing in a project called "the Pet Hotel" to house pets when their owners were out of town. After Miller had a stroke, Kott unilaterally executed a $350,000 note from himself to MK Developers. The note was secured by a future interest in the Pet Hotel and included a statement in Kott's handwriting that Miller authorized the note but was "unable to sign due to physical impairment (stroke)." Kott claimed he spoke with Miller about the note, but he could not recall when that discussion occurred. Miller testified he had no knowledge of the note when it was executed and did not learn of its existence until much later.

Years later, Kott pleaded guilty to embezzling from his employer, 195 Lumber, and was ordered to pay $2 million in restitution. MK Developers' bank records were admitted as evidence of Kott's scheme. They showed that Kott had falsely entered 195 Lumber invoices into MK Developers' records and pretended that he had individually paid them to increase the value of his capital account. As part of his restitution, Kott sold his interest in MK Developers to Miller for $350,000. But when Miller later asked Kott to sign papers relinquishing his interest in MK Developers' property, Kott refused and demanded repayment of the $350,000 promissory note that Miller was unaware existed.

After a bench trial in which Miller alleged that Kott breached his fiduciary duties, the court ruled that the $350,000 promissory note was void, and this appeal followed.

Discussion

On appeal, Kott argued that the trial court erred in ruling that the promissory note was void because (1) he had authority to unilaterally execute promissory notes on behalf of MK Developers, and (2) Miller and/or MK Developers ratified the note.

The Court first addressed the legal standards for breach of fiduciary duty claims between LLC members. While members of an LLC do not owe each other fiduciary duties to each other, they do owe fiduciary duties to the LLC entity, including the duty to "refrain from self-dealing." The TBOC § 101.255(b) provides that an otherwise valid and enforceable contract between a member and an LLC is not void or voidable if (1) the material facts of the relationship or interest are disclosed to or known by (a) the company's governing authority, or (b) the members of the company who in good faith approve the contract; or (2) the contract is fair to the company when it is authorized, approved, or ratified by the members of the company.

While Kott did not dispute that he had a personal interest in the promissory note, he claimed MK Developers' regulations waived any conflicts of interest for members doing business with the company. The Court rejected that argument, noting that it did not eliminate the fiduciary duty of loyalty to the company or allow members of the LLC to circumvent this provision in the TBOC. In addition, it pointed to a provision in the company regulations requiring members to obtain the consent of other members before getting any advance of funds.

The Court also rejected Kott's ratification argument, noting that "[r]atification is the adoption or confirmation by a person with knowledge of all material facts of a prior act which did not then legally bind him and which he had a right to repudiate." *Id.* at *4 (quoting *BPX Operating Co. v. Strickhausen*, 629 S.W.3d 189, 196 (Tex. 2021)). Kott claimed that (1) the material facts were disclosed to Miller because the $350,000 note was listed in the company's financial statements, and (2) he disclosed the note to Miller. The court rejected the first as inadequate disclosure because "[e]ven a diligent search of the company's books would not have necessarily revealed the material terms of the note." The Court rejected the second argument because the district court was not required to credit Kott's testimony, and Miller denied being aware of the note's existence.

Finally, the Court upheld the district court's conclusion that the note was not fair to the company. The evidence showed that "Kott executed the note by signing Miller's name without Miller's consent, and with terms that were not disclosed or authorized by Miller." *Id.* at *5. Since the evidence supported the district court's finding that the note was unfair to the company and Kott did not satisfy any of the safe harbor provisions in TBOC § 101.255(b), the Court affirmed the trial court's judgment that the note was void.

4. ***Davoudi v. Lehne*, 2025 WL 3762831 (Tex. App. – Houston [14th Dist.] Dec. 30, 2025)**

If a professional poker player asks you to invest in a Superbowl ticket-reselling scheme, just say no, or get the agreement in writing (preferably with collateral) to support the payment obligation.

In this appeal arising from a fraudulent Superbowl ticket-reselling scheme, the Court upheld jury findings of fraud, breach of contract, DTPA violations, and securities fraud, and an award of $650,000 to the plaintiff. The Court overruled the defendant's objections to the sufficiency of the evidence and to the trial court's decision not to award the defendant attorney's fees for defeating a claim of usury that the plaintiff abandoned. However, the Court agreed that the final judgment should have included the jury's separate award of $114,000 on defendant's cross-claim against another defendant who failed to appear at trial.

Factual Background

Houston ticket broker Ali Fazell approached plaintiff Kelly Lehne at a Las Vegas poker tournament about investing in a plan to purchase and resell tickets to Superbowl LI that was to be played at NRG stadium in Houston. Lehne declined but passed the information on to her good friend, Ali Davouli, who became interested in the plan. Davouli (not Fazell) then attempted to persuade Lehne to invest $500,000 in the scheme and made numerous oral and written promises to her. He said he had "verified the deal;" "there was no way she would lose money," and that he would be "up in [Fazell's] accounting with a fine-tooth comb." *Id.*

In fact, Davouli did not review any accounting information and only verified the investment opportunity by speaking to Fazell on a 90-minute phone call, reviewing Fazell's website, and talking to someone who confirmed that Fazell provided him with tickets. Moreover, Davouli learned from Fazell but did not share with Lehne that the ticket-selling plan was "very hush-hush" and that Davouli could not ask the Texans or NRG about the tickets.

To induce Lehne to participate, Davouli eventually provided Lehne with a Written Ticket Purchase Agreement in which he promised to return her $500,000 Advance Amount plus a 30% return. He also executed a promissory note for $650,000 to be paid by November 30, 2016. When another investor informed Davouli that the promissory note was unenforceable because it was usurious (a 43% interest rate), Davouli did not share this with Lehne.

In the end, neither Fazell nor Davouli purchased any Superbowl tickets, and Lehne was not repaid her $500,000 advance or the 30% return she was promised. Fazell apparently used her money to fund his business and poker tournaments and to pay back other investors in the scheme. Lehne then sued Fazell and Davouli for breach of contract, fraud, DTPA violations, and securities fraud. Fazell failed to answer or appear, and Lehne took a default judgment against him. Davouli went to trial and lost. The jury found for Lehne on all her claims and found for Davouli on his cross-claim against Fazell for $114,000. Lehne elected to recover on her fraud claim for $650,000. The district court entered a final judgment of $650,000 for Lehne but refused to include the $114,000 award from Fazell to Davouli in the judgment.

Court Decision

Davouli raised three objections to the jury findings and the trial court's final judgment: (1) the sufficiency of the evidence to support the jury finding of fraud; (2) the trial court's refusal to grant him attorney fees for a usury claim that Lehne alleged then dropped; and (3) the trial court's failure to include the $114,000 jury award to Davouli against Fazell.

The Court of Appeals reviewed the evidence in detail and concluded there was ample evidence to support the jury finding of fraud. In particular, it noted that Davouli only argued there was no evidence of intentional fraud, but the jury could have found fraud because Davouli's statements to Lehne were reckless. Since Davouli did not preserve his claim for attorney's fees on the abandoned usury claim, he waived that objection. Finally, the Court agreed that the trial court should have included the $114,000 award to Davouli from Fazell.

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