**JURY CHARGES FOR CONSTRUCTION CASES**

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Table of Contents

[Material Breach 5](#_Toc189505210)

[Breach of NOTICE PROVISION 7](#_Toc189505211)

[Tender 9](#_Toc189505213)

[Substantial Performance 10](#_Toc189505214)

[Cost to REPAIR 11](#_Toc189505215)

[Excessive Demand 12](#_Toc189505217)

[Breach 13](#_Toc189505218)

[Termination 14](#_Toc189505219)

[Breach – ACTS OF GOD 15](#_Toc189505220)

[Contract Damages - DELAY 16](#_Toc189505222)

[Prompt Payment W/GOOD FAITH DISPUTE QUESTION 17](#_Toc189505224)

[Prompt Payment W/GOOD FAITH DISPUTE INSTRUCTION 18](#_Toc189505227)

[Misapplication oF TRUST FUND 19](#_Toc189505230)

[Misapplication of Funds 20](#_Toc189505232)

[Contract Indemnity 22](#_Toc189505233)

[Betterment 23](#_Toc189505234)

[Consequential Damages 24](#_Toc189505235)

[Liquidated Damages 25](#_Toc189505236)

[Residential Questions and Instructions 28](#_Toc189505237)

[Residential Construction Liability Act (RCLA) – Reasonable offer 29](#_Toc189505238)

[RCLA-Fair market value of offer 29](#_Toc189505241)

[RCLA-Proximate cause (as a standalone question) 29](#_Toc189505244)

[RCLA-Implied warranty of good workmanship 30](#_Toc189505247)

[RCLA-Implied warranty of good workmanship 30](#_Toc189505249)

[Proximate cause instruction 30](#_Toc189505250)

[RCLA-Damages 30](#_Toc189505252)

[RCLA-Damages instruction 31](#_Toc189505253)

[Alternative RCLA Defenses 31](#_Toc189505253)

[RCLA Comparative Causation 31](#_Toc189505253)

[Defenses 32](#_Toc189505256)

[Excuse 32](#_Toc189505257)

[Fraudulent Inducement 32](#_Toc189505258)

[Affirmative Defenses (Broad) 32](#_Toc189505259)

[Affirmative Defense 33](#_Toc189505260)

[– Misappropriation 33](#_Toc189505261)

[of Funds 33](#_Toc189505262)

[Estoppel 34](#_Toc189505263)

[Excused/Waiver 35](#_Toc189505264)

[Duress 35](#_Toc189505265)

[Excuse – waiver, 36](#_Toc189505266)

[preclusion, ratification 36](#_Toc189505267)

[Excuse – waiver 40](#_Toc189505268)

[estoppel, release 40](#_Toc189505269)

[Payment Excuses – offset, withholding, release 45](#_Toc189505270)

[Estoppel 47](#_Toc189505271)

[Waiver 47](#_Toc189505272)

[Unclean Hands 47](#_Toc189505273)

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|  | Material Breach | **Question No. \_\_\_\_\_**Did Defendant fail to comply with the Subcontract agreement? Answer “Yes” or “No.” ANSWER:                                                              *Instruction:* You are instructed that in answering Question No. \_\_\_\_\_ a failure to comply occurs if one party to a contract impairs or prevents the performance by the other party.“In every contract between a contractor and his subcontractor, the law implies an obligation on the part of the contractor to so perform his part of the work that the subcontractor's ability to perform his work is not prevented or impaired. *Hyatt Cheek Builders-Engineers Co. v. Bd. of Regents of Univ. of Texas Sys.,* 607 S.W.2d 258, 267 (Tex. Civ. App. 1980), writ dismissed (July 22, 1981), citing *Citizens National Bank of Orlando v. Vitt*, 367 F.2d 541 (5th Cir. 1966); 3 Corbin On Contracts s 571.In every construction contract, the law implies an obligation on each party to perform in a manner that will not hinder, impair or prevent the other party from performing. § 5:22. Implied conditions, duties, and warranties, Canterbury and Shapiro, TX Construction Law Manual § 5:22 (3d ed.)*Instruction:* A failure to comply must be material. The circumstances to consider in determining whether a failure to comply is material include:1. the extent to which the injured party will be deprived of the benefit which he reasonably expected; 2. the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;3. the extent to which the party failing to perform or to offer to perform will suffer forfeiture; 4. the likelihood that the party failing to perform or to offer to perform will cure his failure, taking into account the circumstances including any reasonable assurances; and 5.  the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. *Mustang Pipeline Co.*, 134 S.W.3d at 199 (adopting *Restatement (Second) of Contracts* § 241 (1981)).**Question No. \_\_\_\_\_** Did Plaintiff fail to comply with the Subcontract agreement? Answer “Yes” or “No.” ANSWER:                                                               *Instruction:* You are instructed that in answering Question No. \_\_\_\_\_ a failure to comply occurs if one party to a contract impairs or prevents the performance by the other party. A failure to comply must be material. The circumstances to consider in determining whether a failure to comply is material include: 1. the extent to which the injured party will be deprived of the benefit which he reasonably expected; 2.  the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; 3.  the extent to which the party failing to perform or to offer to perform will suffer forfeiture; 4.  the likelihood that the party failing to perform or to offer to perform will cure his failure, taking into account the circumstances including any reasonable assurances; 5. the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.*Mustang Pipeline Co.*, 134 S.W.3d at 199 (adopting *Restatement (Second) of Contracts*§ 241 (1981)) If you answered “Yes” to both Question \_\_\_\_\_ and Question \_\_\_\_\_, then answer Question \_\_\_\_\_Otherwise, do not answer Question \_\_\_\_\_. **Question No. \_\_\_\_\_** Who failed to comply with Subcontract agreement first?Answer “Plaintiff” or “Defendant.” ANSWER:                                                              If your answer to Question \_\_\_\_\_ was “No” then answer the following question.Otherwise, do not answer the following question. **Question No. \_\_\_\_\_**Did Defendant perform compensable work for Plaintiff?One party performs compensable work if valuable services are rendered, or materials furnished for another party who knowingly accepts and uses them and if the party accepting them should know that the performing party expects to be paid for the work.Answer “Yes” or “No”ANSWER:                                                               Texas Pattern Jury Charge (Business Consumer Insurance Employment) 101.42*Dobbins v. Redden*, 785 S.W.2d 377 (Tex.1990) |
| *Zachry Construction v. Port of**Houston Authority;*449 S.W.3d98 (Tex. 2014) | Breach ofNotice Provision | **Question No. \_\_\_\_\_** Did the Port fail to comply with Change Order 4? It is your duty to interpret the language of Change Order 4 and the Scope, Time, and Price Modifications to Specifications and Proposal attached to Change Order 4. You must decide its meaning by determining the intent of the parties at the time of the agreement. Consider all the facts and circumstances surrounding the making of the agreement, the interpretation placed on the agreement by the parties, and the conduct of the parties. In answering this question only, you are not being asked to decide whether the Port failed to comply with § 5.10 of the Contract. Furthermore, in answering this question, you are instructed that nothing in § 5.41 gave the Port the right to issue its October 11, 2005 response to the September 9, 2005 frozen cutoff wall design. Answer “Yes” or “No”ANSWER:                                                              **Question No.**  \_\_\_\_\_ Did the Port fail to comply with§ 5.10 of the General Conditions? In answering this question, it is your duty to interpret §§ 5.10 and 5.22 and the terms contained therein. You must decide the meaning of these provisions of the Contract by determining the intent of the parties at the time of the agreement. Consider all the facts and circumstances surrounding the making of the agreement, the interpretation placed on the agreement by the parties, and the conduct of the parties. In determining the meaning of these provisions, you may also consider a trade custom or usage, if any, if you find that such trade custom or usage existed. However, a trade custom or usage, if any, cannot vary, control, impair, restrict or enlarge the express language of the Contract. A trade custom or usage exists if it is a practice so generally or universally well known and used in the industry that the parties to a contract are charged with knowledge of its existence to such an extent as to raise the presumption that the parties contracted with reference to it. Furthermore, in answering this question, you are instructed that nothing in § 5.41  gave the Port the right to issue its October 11, 2005 response to  the September  9, *2005* frozen  cutoff wall design. Answer “Yes” or “No”ANSWER:                                                               If you answered "yes" to Question No. \_\_\_\_\_ and/or \_\_\_\_\_. then answer the following question.Otherwise, do not answer the following question. **Question No.** \_\_\_\_\_Did the Port fail to comply with the Contract by withholding, from the Port's payment on amounts invoiced by Zachry, the S600,000 for dredging? Answer “Yes” or “No”ANSWER:                                                               |
|  | Tender | **Question No. \_\_\_\_\_**Were James and Primoris excused from making tender to Westlake Chemical? You are instructed that the requirement of tender is excused when the party making the demand clearly indicates that it would refuse tender by the other party of any amount less than the amount of the demand. Answer “Yes” or “No”ANSWER:                                                              If you answered “No “to all parts of Question No. \_\_\_\_\_, then answer the following question. Otherwise, do not answer the following question.**Question No. \_\_\_\_\_**Was Westlake Chemical excused from making tender to James? You are instructed that the requirement of tender is excused when the party making the demand clearly indicates that it would refuse tender by the other party of any amount less than the amount of the demand. Answer “Yes” or “No”ANSWER:                                                               **Question No. \_\_\_\_\_**Was Westlake Chemical excused from making tender to James? You are instructed that the requirement of tender is excused when the party making the demand clearly indicates that it would refuse tender by the other party of any amount less than the amount of the demand. Answer “Yes” or “No”ANSWER:                                                               If you answered:“Yes” to Question \_\_\_\_\_ or “Yes” to Question \_\_\_\_\_ or “Yes” to Question \_\_\_\_\_ and if you also answered: “Yes” to Questions \_\_\_\_\_\_, \_\_\_\_\_, or \_\_\_\_\_, then answer the following Question. Otherwise, do not answer the following Question. |

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|  | Substantial Performance | If you answered “Yes” to Question \_\_\_\_\_, answer Question \_\_\_\_\_. Otherwise, do not answer Question \_\_\_\_\_. **Question No.** \_\_\_\_\_Did Defendant substantially perform the construction obligations of its Subcontract? To constitute substantial performance Defendant must have substantially performed the Subcontract in the sense that defects, if any, are not pervasive, do not constitute a deviation from the general plan contemplated for the work. Such performance permits omissions or deviation from the subcontract as are inadvertent and unintentional, are not due to bad faith, do not impair the structure as a whole, and are remediable without tearing down and reconstructing. Answer “Yes” or “No”ANSWER:                                                               *Vance v. My apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 481(Tex.1984); *Atkinson v. Jackson Brothers*, 270 S.W. 848, 850-51 (Tex.Comm’n App. 1925, holding approved).  |

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|  | Cost toRepair | If you answered “Yes” to Question No. \_\_\_\_\_ then answer the following question.Otherwise, do not answer the following question. **Question No. \_\_\_\_\_**What is the reasonable and necessary cost to repair defective work, if any, or to complete the work, if any. Answer in dollars and cents, if any. ANSWER: $                                                              Texas Pattern Jury Charge (Business Consumer Insurance Employment) 101.46 Comment. *Vance v. My Apartment Steak House of San Antonio, Inc.,* 677 S.W.2d 480,481 (Tex. 1984); *Atkinson v. Jackson Brothers*, 270 S.W. 848, 851 (Tex.Comm’n App. 1925, holding approved).  |

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|  | Excessive Demand | **Question No. \_\_\_\_\_**Did Plaintiff make an excessive demand upon Defendants?You are instructed that in considering whether a demand is excessive, the dollar amount is not by itself indicative. The dispositive inquiry for determining whether a demand is excessive is whether the claimant acted either unreasonably or in bad faith in making the demand. Demand is not excessive simply because it is greater than the amount eventually awarded. Answer “Yes” or “No”ANSWER:                                                               If you answered “Yes” to Question No. \_\_\_\_\_, then answer the following question. Otherwise, do not answer the following question.**Question No.** \_\_\_\_\_Did Defendant make an excessive demand upon Plaintiff? You are instructed that in considering whether a demand is excessive, the dollar amount is not by itself indicative. The dispositive inquiry for determining whether a demand is excessive is whether the claimant acted either unreasonably or in bad faith in making the demand. Demand is not excessive simply because it is greater than the amount eventually awarded. Answer “Yes” or “No”ANSWER:                                                              If you answered “Yes” to Question No. \_\_\_\_\_, then answer the following question. Otherwise, do not answer the following question.   |

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| *Mustang Pipeline v. Driver Pipeline* | Breach | **Question No. \_\_\_\_\_**Was Driver rightfully terminated?  You are instructed that Driver was rightfully terminated only if Driver persistently and repeatedly refused and failed to supply sufficient skilled workmen, materials and equipment necessary to provide Mustang with a fully operational pipeline system in accordance with the contract document,  and continued  to disregard  the Engineer's  instructions to prosecute the work with the faithfulness,  energy  and due diligence necessary to fulfill the terms of the  contract. Answer “Yes” or “No”ANSWER:                                                              **Question No.** \_\_\_\_\_Do you find that Driver received written notice and opportunity to cure prior to termination of its Contract? Answer “Yes” or “No”ANSWER:                                                               INSTRUCTION: You are instructed that Mustang has elected to terminate Driver for default and, therefore, you cannot consider any other termination provisions of the ·contract other than those set forth in Paragraph 3.4401 **Question No. \_\_\_\_\_**Did Mustang Pipeline Co. provide Seaboard Surety with notice of Driver Pipeline's default, if any, and a reasonable opportunity to cure the default prior to terminating the contract?Answer “Yes” or “No”ANSWER:                                                               |

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|  | Termination | **Question No. \_\_\_\_\_**Did Driver perform compensable work for Mustang?One party performs compensable work if valuable services are rendered or materials are furnished for the party sought to be charged who knowingly accepts and uses them and if the party accepting them should know that the performing party expects to be paid for the work by the party sought to be charged.Answer “Yes” or “No”ANSWER:                                                               ACCEPTED:DENIED:  |

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|  | Breach – Acts of God | **Question No. \_\_\_\_\_**Did any of those named below divert or impound the natural flow of surface waters, or permit a diversion or impounding of it to continue, in a manner that damaged the Owner’s Property by the overflow of the water diverted or impounded? "Surface waters" are those which are diffused overground from falling rain or melting snows and continue to be such until they reach some bed or channel in which water is accustomed to flow and ceases to be such when it enters a water course in which it is accustomed to flow. When rainfall is under control, either by ditches, tanks, ponds, or pipes, it is no longer considered surface water. If an occurrence is caused by unprecedented rainfall or an "act of God," it is not caused by any person. An occurrence is caused by an act of God if it is caused directly and exclusively by the violence of nature, without human intervention or cause, and could not have been prevented by reasonable foresight or care. If an occurrence would have occurred regardless of any diversion or impoundment of the natural flow of surface waters, or permitting such diversion or impoundment to continue, it is not caused by anyone. It must be proven such unlawful diversion or impoundment caused damages to the Ladera Property which would not have resulted but for such unlawful diversion or impoundment. Answer “Yes” or “No”1.       Plaintiff \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_2.       Defendant \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
|  | Contract Damages –  Delay | **PLAINTIFF'S REQUESTED SPECIAL ISSUE NO. \_\_\_\_\_** What amount of money, if any, paid now in cash, do you find would fairly and reasonably compensate Subcontractor for damages related to delay and impact claims incurred as a result of Owner 's failure to comply with its contract with General Con­tractor?**PLAINTIFF'S REQUESTED INSTRUCTION NO. \_\_\_\_\_** You are instructed that with respect to Special Issue No. \_\_\_\_\_, Subcontractor need only prove its damages with a reasonable degree of certainty. This does not require proof to an absolute mathematical certainty. If a wrong has been done from which monetary-loss results, you may make a just and reasonable estimate of the  damage based on relevant data, including opinion evidence, even if the extent  of  damages cannot be proven precisely.**PLAINTIFF REQUESTED INSTRUCTION NO. \_\_\_\_\_**Do not consider any damages to Subcontractor or General Contractor not caused by the conduct of Owner or its agents. With respect to damages sought by Subcontractor in this lawsuit, you are entitled to consider what amount, if any, were caused by General Contractor If you find that any of the damages Subcontractor is seeking to recover in this lawsuit were caused by General Contractor, those damages should not be included in your answer to this Special Issue No. \_\_\_\_\_.**PLAINTIFF'S REQUESTED INSTRUCTION NO. \_\_\_\_\_**Do not include in your answer any amount that you find General Contractor could have avoided by the exercise of reasonable care.**PLAINTIFF'S REQUESTED INSTRUCTION NO. \_\_\_\_\_**Do not include in your answer any amount for interest on any damages  **PLAINTIFF'S REQUESTED INSTRUCTION NO. \_\_\_\_\_\_** You are entitled to consider any contract provisions which attempt to limit damages for delay. However, with respect to the damages, if any,  which  you  find which result from the delays on the project, you are instructed to disregard any con­tract provisions which attempt to prohibit the recovery of damages for delays if you  find any one or more of the following existed on the project: A. Owner acted in a willful, malicious or grossly negligent manner; or, B. Owner breached a fundamental obligation of the contract; or,C. General Contractor and/or Subcontractor encountered unforeseen or uncontemplated circumstances on the project; or, D. Owner actively interfered with the work of General Contractor and/or Subcontractor.  |
| Property Code Chapter 28 | Prompt Payment w/Good FaithDispute Question | **Question No. \_\_\_ (Prompt Payment)** **Did the DEFENDANT fail to promptly pay amounts owed to PLAINTIFF, if any, with respect to the Project?** **Instruction: “Promptly pay” defined** A subcontractor who receives payment from a general contractor, who in turn receives payment from an owner or a person authorized to act on behalf of any owner, must pay each of its sub-subcontractors the portion of the payment that is attributable to work properly performed as provided under the relevant contract, to the extent of that sub-subcontractor’s interest in the payment. The payment must be made not later than the seventh day after the date the subcontractor receives payment from the general contractor. Answer “Yes” or “No”ANSWER:                                                               **Question No. \_\_\_ (Prompt Payment)** **Did a good faith dispute exist concerning the amount owed to PLAINTIFF, if any, with respect to the Projects?** Answer “Yes” or “No”ANSWER:                                                               |
|  | Prompt Payment w/Good FaithDispute Instruction | **Question No. \_\_\_ (Prompt Payment)** **Was DEFENDANT required to promptly pay amounts owed to PLAINTIFF, if any with respect to the Project?** Instruction: “Promptly pay” defined A subcontractor who receives payment from a general contractor, who in turn receives payment from an owner or a person authorized to act on behalf of any owner, must pay each of its sub-subcontractors the portion of the payment that is attributable to work properly performed as provided under the relevant contract, to the extent of that sub-subcontractor’s interest in the payment. The payment must be made not later than the seventh day after the date the subcontractor receives payment from the general contractor. Instruction: Disputed payment If a good faith dispute exists concerning the amount owed prompt payment is not required, although the subcontractor may only withhold from the sub-subcontractor up to 110% of the disputed amount for construction projects involving single family residence, duplexes, triplexes, and quadruplexes, and the subcontractor may withhold from the sub-subcontractor up to 100% of the disputed amount for other types of construction projects. Answer “Yes” or “No”ANSWER:                                                               |
|  | Misapplication of Trust Fund | **Question No. \_\_\_\_\_** Did Don Davis intentionally, knowingly, or with intent to defraud misapply trust funds of which Paul Payne was a beneficiary? Misapplication of trust funds occurs if Don Davis— 1.  directly or indirectly retained, used, disbursed, or otherwise diverted trust funds, and did so2.  without first fully paying all current or past-due obligations incurred by Don Davis to the beneficiaries of the trust funds. “Current or past-due obligations” are those obligations incurred or owed by Don Davis for labor or materials furnished in the direct prosecution of the work under the construction contract prior to the receipt of the trust funds and which are due and payable by Don Davis no later than thirty days following receipt of the trust funds. “Trust funds” are—1.   construction payments made to a [contractor or subcontractor or to an officer, director, or agent of a contractor or subcontractor], under a construction contract for the improvement of specific real property; or2.  loan receipts borrowed by a [contractor, subcontractor, or owner or by an officer, director, or agent of a contractor, subcontractor, or owner] for the purpose of improving specific real property, and the loan is secured in whole or in part by a lien on the property.  A “beneficiary” is a[n] [artisan/laborer/mechanic/contractor/subcontractor/ materialman] who labors or who furnishes labor or materials for the construction or repair of an improvement on specific real property. Answer “Yes” or “No”ANSWER:                                                               |
|  | Misapplication of Funds | **Question No. \_\_\_\_\_****Misapplication of Construction Trust Funds under the Texas Construction Trust Funds Act by Contractor**Did Contractor intentionally, knowingly, or with intent to defraud misapply construction trust funds of which Subcontractor was a beneficiary? “**Misapplication of construction trust funds**” occurred if Contractor directly or indirectly retained, used, disbursed, or otherwise diverted construction trust funds, and did so without first fully paying all current or past-due obligations incurred by Defendants to the beneficiaries of the construction trust funds. “**Construction trust funds**” are construction payments made to a contractor or subcontractor or to an officer, director, or agent of a contractor or subcontractor, under a construction contract for the improvement of specific real property in Texas. A “**beneficiary**” is an artisan, laborer, mechanic, contractor, subcontractor, or materialman who labors or who furnishes labor or materials for the construction or repair of an improvement on specific real property. A “**trustee**” is a contractor, subcontractor, or owner or an officer, director, or agent of a contractor, subcontractor, or owner, who receives construction trust funds or who has control or direction of construction trust funds. “**Current or past-due obligation**s” are those obligations incurred or owed by Defendants for labor or materials furnished in the direct prosecution of the work under the construction contract prior to the receipt of the construction trust funds and which are due and payable by Defendants no later than 30 days following receipt of the trust funds.A person acts with “**intent to defraud**” if he retains, uses, disburses, or diverts construction trust funds with the intent to deprive the beneficiaries of the construction trust funds. Answer “Yes” or “No”ANSWER:                                                              **Supporting Authority: PJC 101.47, TEX. PROP. CODE 162.031(a)**If you answered “Yes” to Question \_\_\_\_\_, then answer the following question. Otherwise, do not answer the following question.**Question No. \_\_\_\_\_****Damages for Misapplication of Construction Trust Funds under the****Texas Construction Trust Funds Act Against Contractor**What amount of construction trust funds of which Subcontractor was a beneficiary were misapplied by Contractor and not paid to Subcontractor? Do not add any amount for interest on damages, if any. Answer in dollars and cents for damages, if any.ANSWER: $                                                             **Supporting Authority: PJC 115.1, 115.48** |
|  | Contract Indemnity | Answer this Question only if you answered: (1) “Yes” to Question \_\_\_\_ (Breach of Warranty) and “No” to Question \_\_\_\_ (Breach Excused) and/or (2) “Yes” to Question \_\_\_\_ (Compliance with Contract) and “No” to Question \_\_\_\_ (Breach Excused).Question No. \_\_\_ (Contractual Indemnity) Do the following persons owe Third-Party Plaintiff a duty to indemnify Third-Party Plaintiff? (A)   Third-Party Defendant 1 (B)   Third-Party Defendant 1  Answer “Yes” or “No” for each of the following: (A)                                                               (B)                                                                 Note: *A third-party plaintiff would want this question to be excluded (e.g., a third-party plaintiff would want the assumption to be that indemnity is required) while a third-party defendant would want this question to be included (e.g., a third-party defendant would want the opportunity to avoid any derivative liability).*Instruction: Indemnity “Indemnify” means to make good; to compensate; to make reimbursement to one of a loss incurred by them as the result of legal consequences of an act on the part of another person; to restore the victim of a loss, in whole or in part, by payment, repair, or replacement; to save harmless; to secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss falling upon him. Indemnity is the right of one person to be compensated for a loss because of the legal consequences of the conduct of another person. This right also applies to one who discharges a duty owed by him or her to one party, but that, as between himself or herself and a third party, actually should have been discharged by that third party. If you reach a verdict in favor of plaintiff against defendant, you must decide whether codefendant must indemnify defendant for any of the liability defendant owes to plaintiff. You must determine that defendant has discharged a duty owed by it but that, as between itself and codefendant, should have been discharged by codefendant, to entitle defendant to indemnification from codefendant.Instruction: “Arise out of,” “resulting from,” and “caused by” The use of the terms “arise out of” or similar terms does not mean that the indemnified party must show direct or proximate causation. Rather, such terms require only that a general nexus be established between the indemnifying party’s obligations and the detriment for which indemnity is sought. “Arise out of” simply means that there is a causal connection or relation. There is no significant distinction between “arise out of” and “resulting from.” “Caused by” involves a more direct causal connection or relation. |
|  | Betterment  | **Instruction:**Do not include in your answer any amounts that are associated with any repairs or other enhancements, upgrades, or added value that will result in improvement to the Property rather than restoring the Property to the condition the Property would have been in had there been no failure to comply. A person cannot recover damages that would put the person in a better position than if the applicable contract had been performed. |
|  | Consequential Damages | If you answered “Yes” to Question \_\_ [*insert number for the appropriate preceding liability question for breach of contract*]*,* then proceed to answer the following questions \_\_\_ through \_\_\_ with respect to [*Claimant*]’s claim(*s)* for [*insert element of consequential damages to be submitted, e.g.,* *lost profits/lost use/lost rent/lost sales opportunity, etc.*]; otherwise, do not answer questions \_\_\_ through \_\_\_\_. [*Insert the following instruction if the jury will be asked to consider awarding more than one element of consequential damages.*]In answering the following questions for each of the following claimed elements of damages, consider each element of damages separately and independently of the others.  Do not include any sum of money in your answer for any one element if you have otherwise included that sum of money in another of the following elements of damages. That is, do not include the same amount in more than one element of damages. Question \_\_\_\_ What sum of money, if any, if paid now in cash, would fairly and reasonably compensate [*Claimant*] for [*each* *element of consequential damages claimed, e.g.,* *lost profits/lost use/lost rent/lost sales opportunity, etc.*], if any, that resulted from [*Breaching Party*]’s failure to comply with the agreement with [*Claimant*]? Answer in dollars and cents the amount, if any, for [*element of consequential damages claimed, e.g.,* for *loss of profits/loss of use/added interest costs, added rental costs, loss of sales or revenue, etc.*]:   $ ­­ \_\_\_\_\_\_\_\_\_\_\_\_\_\_ For the amount stated above, if any, do not include any amount for interest. For the amount state above, if any, do not include any amount that you find [Claimant] could have avoided by the exercise of reasonable care. [*Repeat above question separately for each element of consequential damages to be submitted to the jury, and for each, add the following related special issue question.*] Question \_\_\_ If you have stated an amount in answer to Question \_\_ above, answer the following question, otherwise do not answer the following question, and proceed to the next question: Do you find that such damages, if any, were reasonably foreseeable to [Breaching Party] at the time of the agreement with [Claimant] as a natural and probable consequence of the [Breaching Party’s] failure to comply with the agreement with [Claimant]? Answer “Yes” or “No”ANSWER:                                                                |
|   | Liquidated Damages | **Liquidated Damages – Failure to Meet Performance Criteria****Question No. \_\_\_\_\_** Do you find from a preponderance of the evidence that the Defendant failed to meet or achieve the [*performance criteria*] stated in Section \_\_ of the Agreement? Answer “Yes” or “No”ANSWER:                                                               If you answered “Yes” to Question \_\_ *,* above, answer the following question; otherwise, do not answer the following question. **Question No. \_\_\_\_\_** What amount of performance liquidated damages, if any, must Defendant pay to Plaintiff according to the method or formula for calculation of such damages stated in Section       of the parties’ Agreement for failure to meet or achieve the [*performance criteria*]? Answer in dollars and cents the amount of performance liquidated damages, if any: ANSWER: $                                                              For the amount stated above, if any, do not include any amount for interest. For the amount state above, if any, do not include any amount that you find Plaintiff could have avoided by the exercise of reasonable care. [*If the enforceability of the performance liquidated damages provision is subject to challenge on the grounds that it imposes an unreasonably excessive amount of damages when compared to the Plaintiff’s actual damages, use the following additional question.*] If you answered “Yes” to Question \_\_ *,* above, also answer the following question; otherwise, do not answer the following question. **Question No. \_\_\_\_\_**Alternatively, and without regard to the method or formula for calculation of performance liquidated damages described in such Section \_\_ of the Agreement ,what sum of money, if any, if paid now in cash, would fairly and reasonably compensate Plaintiff for his damages actually sustained, if any, as a resulted of Defendant’s failure to meet or achieve the [*performance criteria*]?  Answer in dollars and cents the amount of actual liquidated damages, if any: ANSWER: $                                                              For the amount stated above, if any, do not include any amount for interest. For the amount state above, if any, do not include any amount that you find Plaintiff could have avoided by the exercise of reasonable care. **Liquidated Damages – Failure to Timely Complete Work****Question No. \_\_\_\_\_** Do you find from a preponderance of the evidence that the Defendant failed to timely complete the work in accordance with Section \_\_ of the Agreement?Answer “Yes” or “No”ANSWER:                                                               If you answered “Yes” to Question \_\_ *,* then proceed to answer the following question; otherwise, do not answer the following question. **Question No. \_\_\_\_\_** What amount, if any, must Defendant pay to Plaintiff as liquidated damages for delay based on the method or formula for calculation of such damages under Section       of the Agreement for the failure to timely complete the work? Answer in dollars and cents the amount, if any: ANSWER: $                                                             For the amount stated above, if any, do not include any amount for interest. For the amount state above, if any, do not include any amount that you find Plaintiff could have avoided by the exercise of reasonable care. [*If the enforceability of the delay liquidated damages provision is subject to challenge on the grounds that it imposes an unreasonably excessive amount of damages when compared to the Plaintiff’s actual damages for delay, use the following additional question.*] If you answered “Yes” to Question \_\_ *,* above, then also answer the following question; otherwise, do not answer the following question. **Question No. \_\_\_\_\_**Alternatively, and without regard to the method or formula described in Section \_\_ of the Agreement for the calculation of the delay liquidated damages, if any, stated in your answer to Question No. ­    , above, what sum of money, if any, if paid now in cash, would fairly and reasonably compensate Plaintiff for the damages actually sustained, if any, as a result of the Defendant’s failure to timely complete the work? Answer in dollars and cents the amount of actual liquidated damages, if any: ANSWER: $                                                              For the amount stated above, if any, do not include any amount for interest. For the amount state above, if any, do not include any amount that you find Plaintiff could have avoided by the exercise of reasonable care.  |

# Residential Questions and Instructions

While the classic breach of contract, negligence, DTPA and other causes of action found in the Texas Pattern Jury charges will apply to many residential cases/charges, the RCLA contains a unique set of standards and concepts that should find their way into charges. Below are examples of RCLA-specific questions and submissions from actual trials.

|  |  |
| --- | --- |
| Residential Construction Liability Act(RCLA)-Reasonable offer | Was BUILDER’S [date] offer reasonable?Answer “Yes” or “No”ANSWER:                                                               |
| RCLA- Fair market value of offer | What is the fair market value of BUILDER’S [date] offer of settlement?Answer “Yes” or “No”ANSWER:                                                               |
| RCLA-Proximate cause (as a standalone question) | Did BUILDER’S [tie to previous theory of liability question: e.g., (1) negligence; (2) failure to comply with the Contract] proximately cause PLAINTIFFS damages'?In an action to recover damages resulting from a construction defect, the Plaintiffs must prove that the construction defect existed at the time of completion of the construction and the damages were proximately caused by the construction defect. "Proximate cause" means a cause that was a substantial factor in bringing about an event and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.Answer “Yes” or “No”ANSWER:                                                              Tex. Prop. Code 27.006. |
| RCLA- Implied warranty of good workmanshipProximate cause instruction | Was the failure, if any, of BUILDER to comply with a warranty a proximate cause of damages to PLAINTIFFS?In an action to recover damages resulting from a construction defect, the Plaintiffs must prove that the construction defect existed at the time of completion of the construction and the damages were proximately caused by the construction defect. "Proximate cause" means a cause that was a substantial factor in bringing about an event and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event."Failure to comply with a warranty'' means failing to perform services in a good and workmanlike manner. “A good and workmanlike manner” is that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work.Answer “Yes” or “No”ANSWER:                                                              Tex. Prop. Code 27.006. |
| RCLA-Damages | What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the PLAINTIFFS for their economic damages, if any, that were proximately caused by BUILDER’s negligence in the construction of the Home.Consider the following elements of damages, if any, and none other:a. Reasonable and necessary Cost for Mold Remediation. ANSWER:                                                              b. Reasonable and necessary Cost for Build Back and repairs.ANSWER:                                                              c. Reasonable and necessary engineering and consulting fees.ANSWER:                                                              d. Reasonable and necessary expenses for temporary housing during any repairs.ANSWER:                                                              e. The reasonable and necessary cost for the replacement or repair of any goods damaged.ANSWER:                                                               |
| RCLA-Damagesinstruction | Do not include in your answer any amount that you find was due to the failure of Plaintiffs to take reasonable action to mitigate the damages or take reasonable action to maintain the Residence.Do not include in your answer any amount that you find was due to the negligence of a person other than BUILDER or an agent, employee, or subcontractor of BUILDER.Tex. Prop. Code 27.003 (a)(1)(A) - (B). |
| Alternative RCLA Defenses | Was the negligence, if any, of those listed below a proximate cause of damages to [*homeowner*]?Answer “Yes” or “No” for each of the following.1. Homeowner.

Answer: \_\_\_\_\_\_\_\_\_\_1. The negligence of Subcontractor 1.

Answer: \_\_\_\_\_\_\_\_\_\_1. The negligence of Subcontractor 2.

Answer: \_\_\_\_\_\_\_\_\_\_Was the failure of Homeowner, if any, to take reasonable action to mitigate damages a proximate cause of his damages?Answer “Yes” or “No.” Answer: \_\_\_\_\_\_\_\_\_\_Was the failure of Homeowner, if any, to take reasonable action to maintain his residence a proximate cause of his damages?Answer “Yes” or “No.” Answer: \_\_\_\_\_\_\_\_\_\_Was normal wear, tear, or deterioration a producing cause of damages, if any, to Homeowner?Answer “Yes” or “No.” Answer: \_\_\_\_\_\_\_\_\_\_Was normal shrinking due to drying or settlement of construction components a producing cause of damages, if any, to Homeowner?Answer “Yes” or “No.” Answer: \_\_\_\_\_\_\_\_\_\_Tex. Prop. Code § 27.00(a)(2). |
| RCLA Comparative Causation | Find the percentages of damages caused by each of the persons or situations below found by you in answer to Questions [*submitted above*]:

|  |  |
| --- | --- |
| 1. Builder
 | % |
| 1. Negligence of Homeowner
 | % |
| 1. Negligence of Subcontractor 1
 | % |
| 1. Negligence of Subcontractor 2
 | % |
| 1. Failure of Homeowner to mitigate
 | % |
| 1. Failure of Homeowner to maintain
 | % |
| 1. Normal Wear and Tear
 | % |
| 1. Normal Shrinkage
 | % |
| **Total** | **100%** |

John T. Montford Will G. Barber Robert L. Duncan, *1989 Texas Dtpa Reform: Closing the Dtpa Loophole in the 1987 Tort Reform Laws and the Ongoing Quest for Fairer Dtpa Laws*, 21 St. Mary’s L.J. 525(1990) |

# Defenses

|  |  |  |
| --- | --- | --- |
| **Source:** | **Issue:** | **Examples:** |
| *Four B* *Paving v.* *Williams and* *Moltz* | Excuse | Was ANN WILLIAMS' failure to comply with the agreement (if any) excused because FOUR B PAYING accepted a different performance as full satisfaction of the original obligations of the agreement? Answer “Yes” or “No”ANSWER:                                                               |
| Fraudulent Inducement | Was ANN WILLIAMS' failure to comply with an agreement (if any) excused because FOUR B PAVING fraudulently induced ANN WILLIAMS into an agreement? Instruction No. \_\_\_\_:  Fraudulent  Inducement  is the act of intentionally  causing another  party to  take a certain course of action by fraudulent actions or words. Answer “Yes” or “No”ANSWER:                                                                |
| E. Link Beck (Beck & Hall, P.C.) | Affirmative Defenses (Broad) | Was General Contractor’s failure to comply excused? Answer “Yes” or “No”ANSWER:                                                               |
| PJC Contracts (2022) | Affirmative Defense – Misappropriation of Funds | If you answered “Yes” to Question \_\_\_\_\_\_ [101.47], then answer the following question. Otherwise, do not answer the following question. **Question No. \_\_\_\_\_**\_\_ Is Don Davis’s misapplication of trust funds excused? [Insert instructions; see PJC 101.49.] Answer “Yes” or “No”ANSWER:                                                              INSTRUCTION: Misapplication of trust funds by Don Davis is excused if— 1. the trust funds were used by Don Davis to pay Don Davis’s actual expenses directly related to the construction or repair of the improvement; [or] 2. the trust funds have been retained by Don Davis, after notice to the beneficiary who has made a request for payment, as a result of Don Davis’s reasonable belief that the beneficiary is not entitled to such funds; [or] 3. Don Davis paid the beneficiaries all trust funds that they are entitled to receive no later than thirty days following written notice to Don Davis of the filing of a criminal complaint or other notice of a pending criminal investigation.  |

|  |  |  |
| --- | --- | --- |
| Jury Issues – The Court’s Charge: Final Chance to Get the Message Across by Richard E. Schellhammer | Estoppel | **Question No. \_\_\_\_\_**Do you find from a preponderance of the evidence that \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ is estopped from denying the enforceability of its promises, if any, to do the \_\_\_\_\_\_ and \_ \_ \_ \_ \_ \_ \_ Projects on a time and materials basis? Answer “Yes” or “No”ANSWER:                                                              You are instructed  that for a party to be estopped  (1)  there must be a  promise  on the part of that party, (2)  foreseeability by that  party  that  the other  party  would rely thereon, (3) substantial reliance thereon by the other party to his detriment, and (4) a finding that injustice can be avoided only by enforcement of the premises . In answering this issue you are instructed to only consider promises or representations made by persons with actual or apparent authority to make them. You are instructed that the term 'actual authority" denotes that authority which a principal intentionally confers upon an agent, or intentionally or by want of ordinary care, allows the agent to believe himself to possess. The term "actual authority" includes both express authority, as where a principal  expressly delegates authority to an agent either orally or in writing, and implied authority, as where an agent's authority to act in a limited circumstance, implied embraces authority to do whatever is reasonably necessary and proper to perform an act or transaction. You are instructed that the term "apparent authority" is defined as being such authority as a reasonably prudent person, using diligence and  discretion in view of the principal's conduct, would naturally and reasonably support the agent to possess. In other words, an "apparent agent" is one who the principal either intentionally or else by lack of ordinary care, includes third persons to believe is his agent, even though no actual authority, either express or implied, has been granted to such agent.  |
| Excused/Waiver | Was Subcontractor's failure to comply excused? Compliance is excused if one or more of the following events occurred: a.   General Construction unjustifiably failed to comply with one or more of the terms and provisions of the same subcontract, or was itself  negligent. Failure to comply with a term was justified if Subcontractor waived compliance with that term. b.  Compliance was waived by General Construction. c. The damages allegedly incurred by General Construction under the subcontract were the result of its own actions or inactions. ANSWER:                                                                 |
| Duress | On May 21, 1991, the date Joint Exhibit 98 was signed, did general contractor pay any money to Subcontractor in addition to the amount then due and owing to Subcontractor? ANSWER:                                                               Was the May 21, 1991, release signed by Subcontractor under duress caused by general contractor? Duress is the economic coercion of another, causing that party to act contrary to his free will and interest. ANSWER:                                                                 |
| Westlake Chemical v. James Construction | Excuse – waiver, preclusion, ratification | **Question No. \_\_\_\_\_**Was James' failure to comply with Section 17.2 of the Construction Contract excused? Answer “Yes” or “No” for each of the following. 1. Failure to comply by James is excused if compliance with Section 17.2 is waived by Westlake Chemical. Waiver is an intentional surrender of a known right or intentional conduct inconsistent with claiming the right. Answer “Yes” or “No”ANSWER:                                                              2. Failure to comply by James is excused if Westlake Chemical is legally precluded from complaining about the failure to comply with Section 17.2. The law precludes Westlake Chemical from asserting, to James's disadvantage, a right or position that is inconsistent with a position previously taken by Westlake Chemical while it had knowledge of all material facts. This legal principle applies if it would be unconscionable to allow Westlake Chemical to avoid corresponding obligations or effects by maintaining a position inconsistent with one to which it earlier acquiesced or from which it earlier accepted a benefit while having knowledge of all material facts. Answer “Yes” or “No”ANSWER:                                                               3. Failure to comply by James is excused if the failure to comply was ratified by Westlake Chemical.Ratification is the adoption or confirmation by a party, while having knowledge of all material facts, of a prior act which did not then legally bind that party and which it had the right to repudiate. Answer “Yes” or “No”ANSWER:                                                               **Question No. \_\_\_\_\_**Was James' failure to comply with Section 21.3 of the Construction Contract excused? Answer “Yes” or “No” for each of the following.1. Failure to comply by James is excused if compliance with Section 21.3 is waived by Westlake Chemical. Waiver is an intentional surrender of a known right or intentional conduct inconsistent with claiming the right. Answer “Yes” or “No”ANSWER:                                                               2. Failure to comply by James is excused if Westlake Chemical is legally precluded from complaining about the failure to comply with Section 21.3. The law precludes Westlake Chemical from asserting, to James's disadvantage, a right or position that is inconsistent with a position previously taken by Westlake Chemical while it had knowledge of all material facts. This legal principle applies if it would be unconscionable to allow Westlake Chemical to avoid corresponding obligations or effects by maintaining a position inconsistent with one to which it earlier acquiesced or from which it earlier accepted a benefit while having knowledge of all material facts. Answer “Yes” or “No”ANSWER:                                                               3. Failure to comply by James is excused if the failure to comply was ratified by Westlake Chemical. Ratification is the adoption or confirmation by a party, while having knowledge of all material facts, of a prior act which did not then legally bind that party and which it had the right to repudiate. Answer “Yes” or “No”ANSWER:                                                              **Question No. \_\_\_\_\_\_**Was James' failure to comply with Section 19.1 of the Construction Contract excused? Answer “Yes” or “No” for each of the following.1. Failure to comply by James is excused if compliance with Section 19.1 is waived by Westlake Chemical. Waiver is an intentional surrender of a known right or intentional conduct inconsistent with claiming the right. Answer “Yes” or “No”ANSWER:                                                               2. Failure to comply by James is excused if Westlake Chemical is legally precluded from complaining about the failure to comply with Section 19.1. The law precludes Westlake Chemical from asserting, to James's disadvantage, a right or position that is inconsistent with a position previously taken by Westlake Chemical while it had knowledge of all material facts. This legal principle applies if it would be unconscionable to allow Westlake Chemical to avoid corresponding obligations or effects by maintaining a position inconsistent with one to which it earlier acquiesced or from which it earlier accepted a benefit while having knowledge of all material facts. Answer “Yes” or “No”ANSWER:                                                               3. Failure to comply by James is excused if the failure to comply was ratified by Westlake Chemical. Ratification is the adoption or confirmation by a party, while having knowledge of all material facts, of a prior act which did not then legally bind that party and which it had the right to repudiate. Answer “Yes” or “No”ANSWER:                                                              **Question No. \_\_\_\_\_**Was Westlake Chemical's failure to comply with Section 21.3 of the Construction Contract excused? Answer “Yes” or “No” for each of the following.1. Failure to comply by Westlake Chemical is excused if compliance with Section 21.3 is waived by James. Waiver is an intentional surrender of a known right or intentional conduct inconsistent with claiming the right. Answer “Yes” or “No”ANSWER:                                                               2. Failure to comply by Westlake Chemical is excused if James is legally precluded from complaining about the failure to comply with Section 21.3. The law precludes James from asserting, to Westlake Chemical's disadvantage, a right or position that is inconsistent with a position previously taken by James while it had knowledge of all material facts. This legal principle applies if it would be unconscionable to allow James to avoid corresponding obligations or effects by maintaining a position inconsistent with one to which it earlier acquiesced or from which it earlier accepted a benefit while having knowledge of all material facts. Answer “Yes” or “No”ANSWER:                                                               3. Failure to comply by Westlake Chemical is excused if the failure to comply was ratified by James. Ratification is the adoption or confirmation by a party, while having knowledge of all material facts, of a prior act which did not then legally bind that party and which it had the right to repudiate. Answer “Yes” or “No”ANSWER:                                                              If you answered “Yes” to any part of Question No. \_\_\_, \_\_\_, \_\_\_, or \_\_\_, then answer the following question. Otherwise, do not answer the following question.   |
| *Zachry Construction v. Port of* *Houston Authority* | Excuse – waiver, estoppel, release | **Question  No. \_\_\_\_\_**Was the Port's failure to comply excused? Answer "yes" or "no" for each of the following:A. WaiverAnswer “Yes” or “No”ANSWER:                                                              Failure to comply by the Port is excused if compliance was waived by Zachry. Waiver is an intentional surrender of a known right or intentional conduct inconsistent with claiming the right. B. Equitable estoppelAnswer “Yes” or “No”ANSWER:                                                              Failure to comply by the Port is excused if Zachry is equitably estopped from asserting that failure to comply. Equitable estoppel is established if all of the following circumstances occurred: 1. Zachrya. by words or conduct made a false representation or concealed material facts when there was a duty to disclose,b. with knowledge of the facts or with knowledge or information that would lead a reasonable person to discover the facts, andc.  with the intention that the Port would rely on the false representation or concealment in acting or deciding not to act; and 2. The Porta. did not know and had no means of knowing the real facts andb. relied to its detriment on the false representation or concealment of material facts. A duty to disclose may arise when (1) a person voluntarily discloses partial information but fails to disclose the whole truth; (2) a person makes a representation but fails to disclose new information that makes the earlier representation misleading or untrue; or (3) a person makes a partial disclosure and conveys a false impression. A.  Quasi-estoppel Failure to comply by the Port is excused if the doctrine of quasi-estoppel applies. Quasi­ estoppel bars a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by that party. This doctrine applies when it would be unconscionable to allow a party to maintain a position inconsistent with one in which it had acquiesced, or from which it had accepted a benefit. Answer “Yes” or “No”ANSWER:                                                               A. Release Failure to comply by the Port is excused if you find Zachry released its claims that the Port failed to comply. In answering this Subsection D of this Question, you must decide the meaning of Exhibits DXl 112.013 and PX884.014I (re Payment Estimate 21); DXl 113.013 and PX884.0150 (re Payment Estimate 22); DXl 114.012 and PX884.0159 (re Payment Estimate 23); DXl 115.017 and PX884.0168 (re Payment Estimate 24); DXl 116.012 and PX884.0177 (re Payment Estimate 25); DXl 117.013 and PX884.0185 (re Payment Estimate 26); DXl 117.011 and PX884.0l 93 (re Payment Estimate 27); DXl 118.013 and PX884.0203 (re Payment Estimate 28); DXI 120.020 and PX884.0213 (re Payment Estimate 29); DXl 121.013 and PX884.0223 (re Payment Estimate 30); DXl 122.047 and PX884.0233 (re Payment Estimate 31). You must decide the meaning of the above-listed exhibits by determining the intent of the parties at the time of the agreement. Consider all the facts and circumstances surrounding the making of the agreement, the interpretation placed on the agreement by the parties, and the conduct of the parties. In determining the meaning of an agreement, you may also consider a trade custom or usage, if any, if you find that such trade custom or usage existed. However, a trade custom or usage, if any, cannot vary, control, impair, restrict or enlarge the express language of the Contract. A trade custom or usage exists if it is a practice so generally or universally well known and used in the industry that the parties to a contract are charged with knowledge of its existence to such an extent as to raise the presumption that the parties contracted with reference to it Answer “Yes” or “No”ANSWER:                                                               If you answered "yes" to Question No. \_\_\_\_\_, then answer the following question. Otherwise, do not answer the following question. **Question No. \_\_\_\_\_**Was the Port's failure to comply found by you in Question No. I excused by Zachry's fraudulent inducement, if any, of Change Order 4? For purposes of this question, fraudulent inducement occurs when- 1. a party makes a material misrepresentation, or a party who has a duty to disclose fails to disclose a material fact within the knowledge of that party, 2. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion, or the party knows that the other party is ignorant of the undisclosed fact and does not have an equal opportunity to discover the truth, 3. the misrepresentation is made with the intention that it should be acted on by the other party, or the party intends to induce the other party to take some action by failing to disclose the fact, and 4. the other party suffers injury as a result of its reliance on the misrepresentation or as a result of acting without knowledge of the undisclosed fact. For purposes of this question, "misrepresentation" means a false statement of fact or a promise of future performance made with an intent, at the time the promise was made, not to perform as promised. A duty to disclose may arise when (1) a person voluntarily discloses partial information but fails to disclose the whole truth; (2) a person makes a representation but fails to disclose new information that makes the earlier representation misleading or untrue; or (3) a person makes a partial disclosure and conveys a false impression.Answer “Yes” or “No”ANSWER:                                                               If you answered "yes" to Question No. \_\_\_\_\_, then answer the following question. Otherwise, do not answer the following question. **Question No. \_\_\_\_\_**Is the Port barred from asserting its defense of fraudulent inducement? The Port is barred from asserting its defense of fraudulent inducement if the doctrines of waiver, quasi-estoppel, and/or ratification apply. Answer "yes" or "no" for each of the following: A. Waiver Waiver is an intentional surrender of a known right or intentional conduct inconsistent with claiming the right. Answer “Yes” or “No”ANSWER:                                                               B. Quasi-Estoppel Under the doctrine of quasi-estoppel, a party may not assert, to another's disadvantage, a right inconsistent with a position previously taken by that party. This doctrine applies when it would be unconscionable to allow a party to maintain a position inconsistent with one in which it had acquiesced, or from which it had accepted a benefit. Answer “Yes” or “No”ANSWER:                                                               C. Ratification Ratification is the adoption or confirmation by a person, with full knowledge of the fraud, and of all material facts, and with the intention, clearly manifested, of abiding by the contract and waiving all right to assert the deception. Answer “Yes” or “No”ANSWER:                                                               If you answered Question No. \_\_\_\_\_ "yes," then answer the following Question. Otherwise, do not answer the following Question. **Question No. \_\_\_\_\_**Was the Port's failure to comply excused? The Port's failure to comply is excused if you find, by a preponderance of the evidence, that Zachry released its claim with respect to that failure to comply. In answering this question, you must decide the  meaning  of  DX1114.0 I 2  and PX884.0159 (re Payment Estimate 23); DXl 115.017 and PX884.0168  (re  Payment Estimate 24); DXl 116.012 and PX884.0177 (re Payment Estimate 25); DX! 117.013 and PX884.0185 (re Payment Estimate 26); DXl 117.011 and PX884.0193 (re  Payment  Estimate 27); DXl 118.013 and PX884.0203 (re Payment Estimate 28); DXl 120.020 and PX884.0213 (re Payment Estimate 29); DXI 121.013 and PX884.0223  (re  Payment Estimate 30); DXl 122.047 and PX884.0233 (re Payment Estimate 3 I). You must decide the meaning of the above-listed exhibits by determining the intent of the parties at the time of the agreement. Consider all the facts and circumstances surrounding the making of the agreement, the interpretation placed on the agreement by the parties, and the conduct of the parties. In determining the meaning of an agreement, you may also consider a trade custom or usage, if any, if you find that such trade custom or usage existed.  However, a trade custom or usage, if any, cannot vary, control, impair, restrict or enlarge the express language of the Contract. A trade custom or usage exists if it is a practice so generally or universally well known and used in the industry that the parties to a contract are charged with knowledge of its existence to such an extent as to raise the presumption that the parties contracted with reference to it.Answer “Yes” or “No”ANSWER:                                                               |
| Payment Excuses – offset, withholding, release | **Question No. \_\_\_\_\_** The Court has determined that Port failed to comply with the Contract by failing. To pay Zachry $2.36 million that the Port withheld as liquidated damages. Was the Port's failure to comply excused, in whole or in part for any of the following reasons? A.  Offset and/or Withholding (i) You may find excuse if you find, by a preponderance of the evidence, that the Port is entitled to withhold for fenders under § 6.05 of the General Conditions of the Contract and/or that the Port is entitled to offset for fenders under § 6.17 of the General Conditions of the Contract. The Port is entitled to withhold and/or offset for fenders under these provisions if you find, by a preponderance of the evidence, that, with respect to the fenders, Zachry failed to comply with the Contract resulting in a loss to the Port. Answer:(ii) If you answered "yes" to the prior question A(i), then answer the following question. Otherwise, do not answer the following question. To what extent, in dollars and cents, is the Port's failure to comply excused by offset and/or withholding?Answer in dollars and cents, if any.ANSWER: $                                                             B. Release 1. You may also find excuse if you find, by a preponderance of the evidence that Zachry released its claim for the failure to comply. In answering this question, you must decide the meaning of DX1114.012 and PX884.0159 (re Payment Estimate 23); DXl 115.017 and PX884.0168 (re Payment Estimate 24); DXl 116.012 and PX884.0l 77 (re Payment Estimate 25); DX1117.013 and PX884.0185 (re Payment Estimate 26); DX1117.0ll and PX884.0193 (re Payment Estimate 27); DXl 118.013 and PX884.0203 (re Payment Estimate 28); DX1120.020 and PX884.0213 (re Payment Estimate 29); DXl 121.013 and PX884.0223 (re Payment Estimate 30); DXl 122.047 and PX884.0233 (re Payment Estimate 31). You must decide the meaning of the above-listed exhibits by determining the intent of the parties at the time 0£ the agreement.-Consider all- the facts and- - circumstances surrounding the making of the agreement, the interpretation placed on the agreement by the parties, and the conduct of the parties. In determining the meaning of an agreement, you may also  consider  a  trade custom or usage, if any, if you find that such trade custom or usage existed.  However, a trade custom or usage, if any, cannot vary, control, impair, restrict or enlarge the express language of the Contract. A trade custom or usage exists if it is a practice so generally or universally well known  and used  in the industry  that  the parties to a contract arc charged with knowledge of its existence to such  an  extent as to raise the presumption that the parties contracted with reference to it. Answer “Yes” or “No”ANSWER:                                                               Otherwise, do not answer the following question. To what extent, in dollars and cents, is the Port's failure to comply excused by release? Answer in dollars and cents, if any.ANSWER: $                                                              |
| Mustang Pipeline v. Driver Pipeline | Estoppel | Instruction: Failure to comply by Driver is excused if the following circumstances occurred: 1. Mustang kept silent when it had a duty to speak; and2. By its silence or omission misled Driver to its detriment.   |
| Waiver | Instruction: Failure to comply by Driver was excused if compliance was waived by Mustang. Waiver is an intentional surrender of a known right or intentional conduct inconsistent with claiming the right. (PJC 101.24).  |
| Kokles v. Lowrance(Kaufman County) | Unclean HandsCAUTION | Do you find that the Kokleses’ claim for tortious interference against the Lowrances is barred by unclean hands?You are instructed that a party may be denied relief if its conduct has been inequitable, unfair, and dishonest or fraudulent and deceitful with regard to the controversy in issue.* Jury answered “Yes,” but there is case law that “Unclean hands is an affirmative defense available when the plaintiff is seeking an equitable remedy.  For an action at law for damages for breach of contract, the equitable defense of unclean hands is not applicable.” *See Madhavan A. Pisharodi, MD PA v. United Biologics L.L.C.*, No. 04-18-00324-CV, 2020 WL 1443561, at \*6-7 (Tex. App.—San Antonio, pet. denied) (“unclean hands” is an equitable defense that does not apply to legal claim); *see also Spencer v. Eagle Star Ins. Co. of Am.,* 876 S.W.2d 154, 156 (Tex. 1994) (question which calls for a finding beyond the province of the jury, such as a question of law, may be deemed immaterial).
* We could find no cases disallowing unclean hands as a defense to tortious interference, but also none applying the doctrine to a tort claim.
* Accordingly, to be safe, apply the unclean hands defense to equitable claims, such as that for a permanent injunction. *City of Fredericksburg v. Bopp*, 126 S.W.3d 218, 222-233 (Tex. App.—San Antonio 2003, no pet.); *1717 Bissonnet, LLC v. Loughhead,* 500 S.W.3d 488, 508 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

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