

Use the Magnifying Glass: Contractual Language Defeats

\$100,000,000 Fraud Verdict as a Matter of Law

By: Keith A. Langley

It is no secret that creative plaintiffs or counter-claimants will pursue every argument they have to go after a deep pocketed foe. Their goal: get to the jury, pull on their heart strings just right, and hope for an outsized verdict. A common vehicle to get to this point is a fraud claim. In *Mercedes-Benz USA, LLC v. Carduco, Inc.*, a creative plaintiff (Carduco) rode a fraud claim all the way to a \$100 million verdict against Mercedes-Benz USA (“MBUSA”). Unfortunately for Carduco, the Texas Supreme Court poured it out on appeal because a contractual clause between itself and MBUSA negated the justifiable reliance element of its fraudulent inducement claim as a matter of law.



In *Carduco*, a very successful business man (through one of his corporate entities, Carduco) bought his son’s Harlingen, Texas Mercedes-Benz franchise. According to Carduco, it only bought the business because it thought it would be able to relocate it to McAllen, Texas – a nearby town in Texas’ Rio Grande Valley. Indeed, Counsel for Carduco said this was the clearest case of fraud he has encountered in a 20-year career of trying business disputes. However, the dealer agreement between Carduco and MBUSA prohibited Carduco from relocating the dealership without MBUSA’s written consent, and it also specifically permitted MBUSA to add new dealers to Carduco’s “area of influence.” When MBUSA brought in a new dealer to McAllen and refused Carduco’s request to relocate, Carduco filed suit and obtained a jury verdict of over \$100 million.

In a well-reasoned opinion, the Texas Supreme Court reversed and rendered judgment that Carduco take nothing. Specifically, the Court found that, as a matter of law, the contractual clauses negated the justifiable reliance element of Carduco’s fraud claim. For Texas defendants faced with creative fraud claims, the importance of this opinion cannot be understated. If the contract allows the defendant to do what the plaintiff is complaining of, a fraud claim should be kicked out as a matter of law.

For example, almost all General Indemnity Agreements give a Surety absolute discretion to resolve payment and performance bond claims. Accordingly, should an Indemnitor later claim fraud against a Surety for resolving a claim over its protestations, *Carduco* should be invoked to defeat the claim as a matter of law. This is why, whenever our clients are faced with a fraud claim, our first step in preparing a defense is to train our magnifying glass to the contract to see if it negates the claim as a matter of law.

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To "Go Green", our firm uses recyclable paper or ceramic cups and no longer uses Styrofoam cups. In addition, we have adopted a less-paper office environment.

We hope that these changes make big differences in the future.

Well done is better than well said.

- Benjamin Franklin



The Indemnity Agreement: Protector of Obligees and Sureties Alike

By: Brandon K. Bains

The Surety has long been considered a favorite of the law, and as part of this, indemnity agreements are broadly enforced. Texas is particularly favorable to sureties on indemnity issues, as there is no duty of good faith and fair dealing, *prima facie* evidence clauses are alive and well, and indemnity agreements – like any other contract – will be enforced according to the terms (even if onerous on one of parties). The assignment of rights in most indemnity agreements is utilized by sureties to obtain contract balances (in addition to equitable subrogation). This is nothing new. A recent case, however, out of the Dallas Court of Appeals has a new spin – an obligee using this provision to avoid liability.

The case involves Primestar Construction. Primestar's surety successfully obtained a full judgment on indemnity several years ago. Primestar, however, remained undeterred and set its sights on suing the obligee for wrongful termination (a suit that did not happen until long after the surety entered into a Takeover Agreement). The obligee's primary argument was that Primestar lacked standing to bring a claim because it previously assigned all rights to its surety under the terms of the Indemnity Agreement. Although Primestar argued that it reserved claims against the obligee in emails and other letters, the appellate court was unconvinced. In its view, none of this mattered given the unequivocal language in the Indemnity Agreement assigning all rights – including contract rights – to the surety.

One immediate take away from this case is that a surety should remember an additional bargaining chip that can be used in negotiating performance with obligees. Indeed, a surety can feel confident that the powers of its indemnity agreement can extend to an obligee as added protection, which could serve as a good basis for an obligee being flexible on things like liquidated damages, time for completion, and payment of contract balances.

For any additional information, please contact Brandon Bains at (214) 722-7171. While resolution of the performance bond claim was handled by the surety internally, Brandon was the attorney that handled the indemnity lawsuit.