Case Summaries
January 14, 2022

CONTRACTS
Implied Revocation of Offer
Angel v. Tauch, ___ S.W.3d ___ (Tex. Jan. 14, 2022) [19-0793]

This contract dispute involves the seldom invoked doctrine of implied revocation. The issue is whether an offer to settle a debt was revoked when the offeree learned from a third party that the offeror had assigned the debt for collection.

South State Bank held a $4.6 million judgment against Kyle Tauch, which the bank purportedly offered to settle for $2 million while admonishing Tauch that he needed to act "quickly" because the bank would "likely be look[ing] at other collection alternatives." Two days later, the Bank executed an agreement assigning the judgment to another of Tauch's creditors, the Gobsmack Gift Trust, for collection. Almost immediately thereafter, the trust's attorney emailed Tauch's attorney, notifying him about the assignment and demanding payment in full on the judgment. At Tauch's request, the trustee's attorney forwarded a copy of the assignment agreement, which bore a stated effective date of the following day. On receipt of the assignment agreement, Tauch promptly emailed the bank to accept the settlement offer.

The bank and the trust rejected Tauch's assertion that a binding contract to settle the debt for $2 million had been formed by his acceptance before the assignment agreement's effective date. Cross actions for declaratory and other relief ensued, and on cross motions for summary judgment, the trial court held that any offer was revoked on Tauch's receipt of the assignment agreement. The court of appeals reversed in a split decision, holding that the assignment did not render the bank unable to go forward with the offer at the time of acceptance because it's stated effective date was the following day. The dissent opined that the effective date was immaterial because precedent set the standard for an implied revocation as requiring

only “some act inconsistent with the offer,” not an act precluding the offer from materializing into a contract.

The Supreme Court reversed and rendered judgment that no contract to settle the debt was formed. More than 75 years ago, in *Antwine v. Reed*, the Court held that an offer could be revoked without express words of revocation, so long as the offeree had knowledge that the offeror had acted inconsistently with the offer. 199 S.W.2d 482, 485 (Tex. 1947). *Antwine* was the first and last time the Court applied the doctrine. Because *Antwine* involved a land transaction and information communicated to the offeree by the offeror’s agent, the parties disputed whether other types of offers can be impliedly revoked and whether the doctrine is applicable when the offeree learns about the offeror’s inconsistent action indirectly rather than directly from the offeror or its agent.

The Court held that the doctrine is not constrained to land transaction and the touchstone is inconsistent action manifesting the offeror’s unwillingness to enter the proposed bargain. The assignment agreement’s effective date did not preclude its execution from manifesting the bank’s unwillingness to enter the settlement. The dispositive issue is not the offeror’s ability to enter the proposed bargain but continued willingness to do so, and assigning the judgment for collection was inconsistent with an intent to release the judgment. Tauch’s receipt of the assignment agreement was sufficiently reliable information about the bank’s action to effectuate a revocation of the settlement offer.

ANTITRUST
Evidence of Agreement
AMC Ent. Holdings, Inc. v. iPic-Gold Class Ent., LLC, — S.W.3d — (Tex. Jan. 14, 2022) [20-0014].

This case concerns an allegation by boutique-theater chain iPic that megaplex-theater chain AMC conspired with another megaplex-theater chain under Section 15.05(a) of the Texas Free Enterprise and Antitrust Act to put iPic out of business. The evidence turned on a film-industry practice in which a theater asks a film’s distributor to grant it a “clearance”—an exclusive license to show the film in the theater’s geographic market for a period of time. The evidence showed that on the same day in July 2014, AMC asked several film-distribution companies to grant it clearances against an iPic theater that was planned in Frisco, while AMC’s rival, Regal Entertainment Group, asked the same distribution companies to grant it clearances against an iPic under construction in Houston. iPic alleged that AMC and Regal conspired to assert clearances against these iPic theaters in order to put iPic out of business in Frisco and Houston. After iPic and Regal settled, the trial court granted summary judgment for AMC, but the First Court of Appeals reversed.

The main issue in the Supreme Court of Texas was whether iPic had raised a fact issue on the existence of a conspiratorial agreement between AMC and Regal. The Court explained that the Texas statute is construed in accordance with federal law construing Section 1 of the Sherman Antitrust Act and that decisions of the Supreme Court of the United States limit what inferences can reasonably be drawn from circumstantial evidence of a conspiracy. Specifically, the jurisprudence of the Supreme Court of the United States teaches that (1) parallel business conduct, alone, is insufficient evidence of conspiracy; (2) when the conspiracy alleged is implausible, more persuasive evidence is needed to survive summary judgment; and (3) the plaintiff's evidence must tend to exclude the possibility that the defendants acted independently.

The Supreme Court of Texas first held that the factual context of the case rendered iPic's conspiracy claim implausible. The Court pointed out the undisputed evidence that a Regal executive had informed an iPic executive that Regal planned to "clear" iPic's Houston theater several months before iPic began planning a theater in Frisco. The Court also observed that AMC and Regal did not need to work together in order to seek the clearances that each sought.

The Court went on to examine the evidence in light of the "plus factors" that federal courts have found to suggest an agreement. The Court characterized iPic's evidence as resting on parallel business conduct and suspicion and concluded that it did not tend to exclude the possibility that AMC acted independently of Regal.

DAMAGES

Consequential Damages

Signature Indus. Servs., LLC v. Int'l Paper Co., — S.W.3d —, — WL — (Tex. Jan. 14, 2022) [20-0396]

The principal issue in this case was whether the plaintiff was entitled to recover consequential damages for breach of contract. Signature Industrial Services (Signature) had a contract with International Paper (IP) to upgrade equipment at an IP paper plant. Signature claimed it was owed an additional $2.4 million for the work performed, documented in invoices it sent to IP. The dispute resulted in a jury trial in which the jury awarded $2.4 million in direct damages for breach of contract as requested by Signature. The jury also awarded about $56 million in consequential damages. The consequential damages were based on expert testimony that a $42 million sale of Signature as a company to a suitor named Primoris had fallen through as a result of IP's breach, and that Signature had also suffered a loss of about $12 million in "book value" as a result of the breach and about $2 million in penalties for non-payment of payroll taxes.

The trial court awarded all of these damages as found by the jury. The court of appeals held that the $2.4 million in direct damages and the $12 million in lost book value could be awarded, but that the evidence in support of the $2 million and the

$42 million figures were not supported by legally sufficient evidence under Texas law governing consequential damages.

Both sides appealed to the Supreme Court. As to consequential damages, Signature sought reinstatement of the $42 million amount for the lost sale of the company, while IP argued that none the consequential damages were recoverable.

The Court affirmed in part and reversed in part. It held that about $600,000 of the $2.4 million in direct damages could not be awarded because this amount reflected overhead costs that could not be billed to IP under the terms of the parties' contract. The Court affirmed a judgment for the remainder of the direct damages.

The Court held that none of the consequential damages could be awarded. Under Texas law, consequential damages are not available unless the parties contemplated at the time they made the contract that such damages would be a probable result of the breach. Consequential damages must also be proved with reasonable certainty. The Court held that the $42 million in damages that reflected the loss of the sale of the company could not be awarded because IP was unaware of the pending sale of Signature to Primoris. Signature argued that the $42 million could be viewed as part of the decline in Signature's "market value," but assessing the award in these terms did not overcome the bar that such damages were not foreseeable at the time the agreement was made. The $12 million figure allegedly reflecting the loss in Signature's "book value" was also not recoverable because this figure was not established with reasonable certainty. Signature's expert had arrived at this figure by simply looking at balance sheets before and after the breach, and attributing all of the difference in book value to the breach, a method that did not provide the requisite proof with reasonable certainty of damages attributable to the breach.

The Court addressed other issues. It held that (1) Signature's president Jeffry Ogden was not entitled to recover on his contract claims against IP, and (2) under the contract and the Insurance Code, IP was not entitled to indemnification from Signature of IP's expenses incurred in defending the suit brought by Ogden.