

**THE “CONTORTED” CONTRACT AND
USE OF THE TEXAS “ECONOMIC LOSS” RULE
TO DIS-TORT THE CON-TORT**

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I. INTRODUCTION

Over the past decade, almost every substantial commercial or construction case has contained breach of contract claims along with a variety of tort causes of action asserted alternatively or as additional and independent theories of recovery. Given the uncertain state of the law, it would be imprudent for plaintiffs’ counsel to plead otherwise. The difficulty in dealing with such cases has eased to some degree based upon the Texas Supreme Court’s invocation of an economic loss or “contort” analysis in its decisions in *Jim Walter Homes, Inc. v. Reed* and *Southwestern Bell Telephone Co. v. DeLanney* to deny negligence recovery in contract.

Subsequent appellate and Supreme Court decisions have both clarified and extended the Court’s analysis, but other appellate and Supreme Court decisions have left additional questions unanswered. Does the Court’s analysis reach only negligence claims or does it conclude all tort claims? How are fraudulent inducement cases affected? Can a fraud claim co-exist with an enforceable contract and/or unenforceable contract? What does an “independent” tort mean under the current state of the law? This paper will address these issues and provide conclusions.

II. THE “ECONOMIC LOSS” RULE

Technically speaking, the “Economic Loss” Rule only applies to negligence and strict liability causes of action and precludes recovery where the only loss sustained is nothing more than economic loss rather than loss as a consequence of personal injury or property damage.¹ True “Economic Loss” Rule cases can be neatly segregated into either one of two categories: (1) cases where the parties are complete strangers with no contractual or other relationship, and (2) cases where the parties are in privity of contract, either directly or, with respect to a product, in a transactional chain. Negligence and strict liability cases demonstrate the rule’s utility.

Few Texas cases have thoroughly discussed the application of the Economic Loss Rule in any significant detail and no reported Texas decisions of any consequence deal with the application

¹For a more thorough and exhaustive discussion of the history, scope, and applications of the rule, see Powers & Niver, *Negligence, Breach of Contract, and the “Economic Loss” Rule*, 23 Tex. Tech.L.Rev. 477 (1992). See also, Marple, *Requiescat for an Epitaph: Breach of Contract Is Not a Tort*, 56 Tex. B.J. 656 (July 1993).

of the Rule to cases between complete strangers.² In this regard, the most recent example of the application of the Economic Loss Rule among strangers comes from the Fifth Circuit in the case of *Louisiana, ex rel., Guste v. M/V Testbank*, 752 F.2 1019 (5th Cir. 1985), *cert denied, sub nom., White v. M/V Testbank*, 477 U.S. 903 (1986). In *Testbank*, a group of business owners along the Mississippi River sued a vessel and its owners for negligence to recover the business interruption losses sustained when the *Testbank* foundered in the Mississippi River causing an oil spill which required river traffic to be halted for an extended period of time. No personal injury or property damage for the incident and resulting oil spill was alleged. The Fifth Circuit (en banc), relying upon circuit precedence based on the decision of the United States Supreme Court in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), completely denied the plaintiffs any recovery on their claims based upon the Economic Loss Rule.

The second group of cases are those where the parties are not contractual strangers either being in privity of contract or related through a transaction chain of title. It is in these cases where the common law distinction in Texas between damages available for tort and contract are most clearly defined by the Economic Loss Rule. For example, a defective product can give rise to either a strict liability cause of action or a breach of warranty cause of action depending on the nature of the harm sustained. When a defective product is unreasonably dangerous to users or consumers, a seller is liable for physical harm caused to the ultimate user or his property regardless of privity. *McKisson v. Sales Affiliates, Inc.*, 416 S.W. 2d 787 (Tex. 1967) (adopting *Restatement (2d) of Torts* § 402A in Texas). The rationale is to provide a legal duty to protect consumers from injury.

When, on the other hand, the damage sustained is simply the economic loss which results from defective workmanship and materials, there is no recovery in strict liability. The lost value resulting from a failure of the product to perform is governed by the warranty provisions of the Uniform Commercial Code. *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977).³ In other words, unless the defective product causes personal injury or damage to property (Other than to the defective product itself), the Economic Loss Rule precludes recovery in tort for strict liability and confines the plaintiff to remedies under the Uniform Commercial Code. *Mid-Continent Aircraft Corp. v. Curry County Spring Serv., Inc.*, 572 S.W.2d 308 (Tex. 1978) (defect

²For example, Powers & Niver (*supra* n.1.) describe the following hypothetical: If a driver plows his car through a shop window, damaging the shop owner's store, the owner, and his goods, forcing the business to shut down for a period of time, the owner has a negligence claim for personal injury, property damage, and consequential economic loss, all of which are recoverable. On the other hand, if the same driver causes a wreck on the street which blocks traffic and disrupts the shop owner's business, the shop owner has no injury other than economic loss and hence, no negligence cause of action against the driver. Any recovery for his loss is foreclosed unless he has business interruption insurance. 23 Tex. Tech L. Rev. 477, 480-81.

³In that case, a mobile home purchaser sued the manufacturer, rather than the dealer, seeking to recover the diminished value of the home due to defects, asserting strict liability and breach of the implied warranty of fitness. Since the home was not dangerous and caused no injury, the plaintiff was limited to a warranty claim. Direct contractual privity was not required. *Id.* at 79-81.

causing injury to product itself is an economic loss not covered by strict liability); *Melody Home Mfg. Co. v. Morrison*, 455 S.W.2d 825 (Tex. Civ. App.–Houston [1st Dist.] 1970, no writ).

III. THE “CONTORT” DILEMMA

A. Introduction

In recent years, Texas courts have applied an analysis similar to the Economic Loss Rule to decide whether tort and contract claims can simultaneously exist and/or whether recovery can be had in tort for what otherwise is a breach of contract. This is the so-called “contort” analysis and is based upon the Supreme Court opinions in *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617 (Tex. 1986) and *Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493 (Tex. 1991). A related issue is whether a negligent breach of contract is also a tort. See, *Montgomery Ward & Co. v. Scharrenbeck*, 146 Tex. 153, 204 S.W.2d 508 (1947). Whether a given set of facts give rise to recovery in contract or in tort can have a number of ramifications, not the least of which is the ability to recover punitive damages. Clearly, punitive damages are available to a tort litigant, but are such damages ever available to a contract litigant?

In Texas, a breach of contract alone, no matter how intentional or malicious, cannot support the recovery of exemplary or punitive damages. *Bellefonte Underwriters Ins. Co. v. Brown*, 704 S.W.2d 742 (1986); *Amoco Production Co. v. Alexander*, 622 S.W.2d 563 (Tex. 1981). In a breach of contract case, however, a party may recover exemplary damages if that party can prove an “independent” tort together with a finding of actual damage as a result of that conduct. *Texas Nat’l Bank v. Karnes*, 717 S.W.2d 901 (Tex. 1986). In a “contort” case, the rub lies with the word “independent.” These ramifications will be discussed later. However, suffice it to say, punitive damages have become the catalyst making it extremely important to determine whether a given set of facts gives rise to coexisting contract and tort claims, mutually exclusive contract and tort claims, alternative contract and tort claims, or mere breach of contract.

B. Development

Two early decisions laid the groundwork for the Supreme Court’s more recent “contort” analysis. In *International Printing Pressman & Assistants Union v. Smith*, 145 Tex. 399, 198 S.W.2d 729 (1946), the plaintiff sued to recover actual and exemplary damages for wrongful expulsion from his union. A judgment n.o.v. was entered by the trial court in favor of the union based on the contention the plaintiff’s cause of action was a tort rather than contract and therefore barred by the two-year statute of limitations. *Id* at 735. The Supreme Court was required to address the general distinction between contract and tort actions, observing it to be often difficult to determine with “no universally accurate or acceptable definition of either class.”

[G]enerally speaking, “actions in contract and in tort are to be distinguished in that an action in contract is for the breach of a duty arising out of a contract either express or implied, while an action in tort is for a breach of duty imposed by law.” . . . It is sometimes said that “if the action is not maintainable without pleading

and proving the contract, where the gist of the action is the breach of the contract, either by malfeasance or nonfeasance, it is, in substance, an action on the contract whatever may be the form of the pleading.”

Id. at 735 (citation omitted). Looking to the facts, the Court determined the constitution and bylaws of the union constituted a contract between the organization and its members; the plaintiff complied with this contract and the union breached it; all of the rights for which the plaintiff sought redress arose by virtue of the agreement; and, therefore, his action was founded upon a contract in writing. *Id.* at 736. The fact the plaintiff sought (although he did not recover) exemplary damages did not preclude a contract recovery since, according to the Court, tort and contract theories could alternatively be alleged. *Id.*

The second but more problematic case is *Montgomery Ward & Co. v. Scharrenbeck*, 146 Tex. 153, 204 S.W.2d 508 (1947). There, Montgomery Ward’s employee undertook for a fee to repair a water heater in the plaintiff’s home. Shortly after the repair and while the repairman was still on site, the heater ignited the roof, destroying the house and its contents. In the Supreme Court, the question was whether the trial court properly denied the defendant’s special exceptions as to the plaintiff’s pleadings of negligence. *Id.* at 510. The springboard of the Court’s opinion and that portion which is most often cited is a quotation from *American Jurisprudence on Negligence*.

A contract may create the state of things which furnishes the occasion of a tort. The relation which is essential to the existence of the duty to exercise care may arise through an express or implied contract. Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of contract. In such a case, the contract is mere inducement creating the state of things which furnishes the occasion of the tort. In other words, the contract creates the relation out of which grows the duty to use care.

Id. (emphasis added). Regrettably, the Court did not discuss in detail the ramifications of whether the case before it sounded in contract or in tort. Clearly, contract and tort law were implicated, however, the Court discussed only negligence and found the defendant owed a legal duty not to physically damage person or property.

The appealing generality of the Court’s quote in *Scharrenbeck* is enticing to litigants, especially in construction and service-related cases. Most contracts expressly (or at least impliedly) call for work to be performed in a “good and workmanlike” manner and free from defect. Traditional notions say a failure to so perform is a failure of consideration or a breach of contract. *Westbrooke v. Watts*, 268 S.W.2d 694, 697 (Tex. Civ. App.–Waco 1954, writ ref’d

n.r.e).⁴ Casual reading and reliance on *Scharrenbeck* could have led litigants astray. Remarkably, in the fifty years this case has been on the books, no Texas appellate court has ever truly held or found that negligent performance of contractual duties actually give rise to tort liability and punitive damages between contracting parties, ala *Scharrenbeck*.

A listing of *Scharrenbeck's* progeny demonstrates it has only been cited as a general statement of the law routinely utilized by courts in an introductory manner with no decisions turning on the quote from *Scharrenbeck*. In every case of an action between parties to a contract, the *Scharrenbeck* common law duty was discussed in contractual terms without regard to a tort analysis.⁵ On the other hand, in every case involving tort recovery for negligence, a third party to the contract was physically injured on a construction site or otherwise by a contracting party's negligence. In each case, clearly recognized legal duties to provide safe workplaces or exercise ordinary care was found.⁶ Finally, in one venue case, the Austin Court of Appeals found a bulkhead contractor had no contract or negligence cause of action against the owner's engineer for defective plans since the engineer was the owner's agent and the owner was a party to the suit.⁷

Thus, until the mid-1980's, litigants were fairly content to rely on traditional concepts of negligence or contract and confined the relief sought to either theory of recovery; injury begat negligence cases and failure to perform (negligent or otherwise) stayed in the family of contract. In this setting, Mr. and Mrs. Reed sued Jim Walter Homes to recover actual and punitive damages due to the defective construction of their home.

⁴There, Plaintiff sued to recover the balance due him for his well drilling services which the defendant failed to pay, claiming the work was not performed in a good and workmanlike manner. In affirming a judgment for plaintiff, the Court's discussion focused on this contractual duty and the trial court's definition in a defensive issue in the jury charge. *Id.* at 696-98.

⁵*Coulson v. Lake LBJ M.U.D.*, 734 S.W.2d 649 (Tex. 1987) (negligent performance of contract as an affirmative defense in a contract action); *Texas P&L v. Barnhill*, 639 S.W.2d 331 (Tex. App.–Texarkana 1982, writ ref'd n.r.e.) (same); *Compton v. Polonski*, 567 S.W.2d 835 (Tex. Civ. App.–Corpus Christi 1978, no writ); *New Trends, Inc. v. Stafford-Lowden, Inc.*, 537 S.W.2d 778 (Tex. Civ. App.–Fort Worth 1976, writ ref'd n.r.e.); *Westbrook v. Watts*, *supra*.

⁶*Coastal Constr. Co. v. Tex-Kote, Inc.*, 571 S.W.2d 400 (Tex. Civ. App.–Waco 1978, writ ref'd n.r.e.) (fall from Astrodome Roof); *Davis v. Anderson*, 501 S.W.2d 459 (Tex. Civ. App.–Texarkana 1973, no writ) (ditch cave-in); *HMR Constr. Co. v. Woolco Houston, Inc.*, 422 S.W.2d 214 (Tex. Civ. App.–Houston [14th Dist.] 1967, writ ref'd n.r.e.); *Panhandle Gravel Co. v. Wilson* 248 S.W.2d 779 (Tex. Civ. App.–Amarillo 1952, writ ref'd n.r.e.) (failure to properly load gravel truck launched rock into car).

⁷*Bernard Johnson, Inc. v. Continental Constructors, Inc.*, 630 S.W.2d 365 (Tex. App.–Austin 1982), writ ref'd n.r.e.). Although this case did not trigger a “contort” analysis as such, for a venue case, the opinion provides a significantly detailed analysis of distinctions between contractual duties and legal duties.

IV. THE “CONTORT” ANALYSIS

A. Jim Walter Homes

In *Jim Walter Homes, Inc. v. Reed*, the plaintiffs brought suit seeking damages arising out of the sale and construction of a home. The jury found the defendant breached the warranty of good workmanship in the contract and that it was grossly negligent in its supervision of the construction. The jury found actual damages, additional DTPA damages, gross negligence, exemplary damages, and attorney’s fees. The trial court awarded actual damages, attorney’s fees, disallowed the DTPA additional damages, and remitted a portion of the exemplary damages. The Court of Appeals modified the judgment by awarding DTPA damages only and attorney’s fees but, in addition, ordered a remittitur further reducing the exemplary damages. The Supreme Court was solely concerned with the award of punitive damages.

In reversing the award of punitive damages, the Supreme Court invoked the true Economic Loss Rule in combination with an amplification of its decisions in *Pressman* and *Scharrenbeck*.

Although the principles of contract and tort causes of action are well-settled, often it is difficult in practice to determine the type of action that is brought. We must look to the substance of the cause of action and not necessarily the manner in which it was pleaded. [*Pressman*]

The contractual relationship of the parties may create duties under both contract and tort law. [*Scharrenbeck*] The acts of a party may breach duties in tort or contract alone or simultaneously in both. The nature of the injury most often determines which duty or duties are breached. When the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone. [*Mid-Continent and Nobility*]

Id. at 617-18 (emphasis added). According to the Court, the nature of the injury to plaintiffs was the house they were promised and the house for which they paid was not the house they received—breach of contract. Therefore, a grossly negligent breach of contract “will not entitle an injured party to exemplary damages because even an intentional breach will not.” *Id.*

Jim Walter Homes is significant to say the least. From the above-quoted paragraph, the “contort” analysis sprang. Recognizing punitive damages are misplaced in a case without a distinctly tortious injury, the Court reiterated the rule that a breach of contract, even if intentional, cannot support the recovery of exemplary damages. It also developed a “nature of injury” analysis for distinguishing between a contract in tort case. However, because the substantive question before the Court was the recoverability of punitive damages only, the scope of *Jim Walter Homes* was viewed by some courts as limited.

B. *Southwestern Bell v. DeLanney*

The most significant application of *Jim Walter Homes* was the case of *Southwestern Bell Tel. Co. v. DeLanney*. In that case, the plaintiff sued Southwestern Bell alleging negligence and the DTPA based upon Southwestern Bell's failure to publish his Yellow Pages advertisement in its 1980-81 directory.⁸ The jury found the deletion of the advertisement caused the plaintiff to suffer lost profits of almost \$100,000 during the year and \$40,000 for lost future profits. The DTPA case of action was dismissed by directed verdict. The Texarkana Court of Appeals affirmed the trial court's judgment in a plurality opinion. *Southwestern Bell Tel. Co. v. DeLanney*, 762 S.W.2d 772 (Tex. App.–Texarkana 1988).

In the Court of Appeals, Southwestern Bell complained of the submission of a negligence theory to the jury claiming the plaintiff's cause of action sounded in contract alone. Southwestern Bell relied upon *Pressman* claiming an action in contract is for a breach of duty arising from contract while an action in tort is for breach of a duty imposed by law. Southwestern Bell also relied on *Jim Walter Homes* for the proposition the "nature of the injury" alleged precluded a negligence cause of action. The majority disregarded both lines of cases opining casually that the focus on those cases was on the award of exemplary damages.⁹ Instead, the majority determined a negligence cause of action was stated based upon *Scharrenbeck*. That is, since a party to a contract owes a common-law duty to perform the contract with care, skill, and reasonable expedience, a negligent failure in performing any of these conditions can be the basis for recovery in tort as well as a breach of contract. *Id.*

The Chief of Justice wrote a separate concurring opinion to emphasize the "narrow and peculiar circumstances" which he believed permitted a tort recovery in that case. According to the Chief Justice, the distinction was based upon the difference between nonfeasance and misfeasance.

The complete failure to perform is only a breach of contract, and is not a tort unless the duty imposed by the contract is one which is also imposed by law. . . . The negligent performance of a contract, however, can be a tort as well as a breach of contract.

⁸Because his advertising contract with Southwestern Bell contained a clause limiting liability to a refund, the plaintiff presumably chose not to bring a breach of contract claim.

⁹"Exemplary damages are not involved in this case. The only damages awarded to DeLanney were for lost profits, which are actual damages." *Id.* at 774.

Id. at 777 (Cornelius, C.J., concurring) (emphasis in the opinion, citations omitted). The Chief Justice believed negligent performance rather than a failure to perform was the gist of the plaintiff's case and allowed recovery in tort.¹⁰

According to the dissent, a negligent breach of contract did not change the action into a tort. The dissent analyzed the various factors judicially employed to separate tort and contract theories of recovery: (1) *Pressman*—an action in contract is for the breach of a duty arising out of a contract, while an action in tort is for a breach of duty imposed by law; (2) *Jim Walter Homes*—the nature of the injury most often determines the duty or duties which are breached; and (3) the proposition of no tort liability for nonfeasance (based upon the concurring opinion interpreting *Scharrenbeck*). According to the dissent, the application of all three tests demonstrated plaintiff's cause of action based upon contract.¹¹ (*Id.* At 778) (Grant, J., dissenting).

The Supreme Court of Texas granted the application for writ of error, reversed the Court of Appeals' judgment, and rendered judgment that plaintiff take nothing. *Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493 (Tex. 1991). The majority downplayed the Court of Appeals reliance on *Scharrenbeck* in favor of the nature of duty and injury analysis from *Jim Walter Homes*.

If the defendant's conduct—such as negligently burning down a house—would give rise to liability independent of the fact that a contract exists between the parties, the plaintiff's claim may also sound in tort. Conversely, if the defendant's conduct—such as failing to publish an advertisement—would give rise to liability only because it breaches the parties' agreement, the plaintiff's claim ordinarily sounds in contract.

Id. at 494.¹² According to the Court, the phone company's duty to publish the advertisement arose solely from the contract rather than a duty imposed by law. The plaintiff's damages in the form of lost profits were only for the economic loss caused by the failure to perform. Although the plaintiff pleaded a cause of action stated in negligence, "he clearly sought to recover the

¹⁰The Chief Justice, without reference to the merits of them, string-cited *Scharrenbeck* and its progeny (*see*, n. 5 and 6, *supra*) to support his conclusion.

¹¹Justice Grant, it should be noted, found *Scharrenbeck* to be questionable and distinguished its utility with respect to each of its progeny. (*Id.* At 778-79) (Grant, J., dissenting). The Texas Supreme Court agreed.

¹²In a footnote the Court stated, "Of course, some contracts involve special relationships that may give rise to duties enforceable as torts, such as professional malpractice." *Id.* at 494 n.1. In his concurring opinion, Justice Doggett recognized another—the special relationship between insurer and insured. *Id.* at 500 (Doggett, J., concurring). Two subsequent appellate courts have agreed. *Sanus/New York Life Health Plan, Inc. v. Dube-Seybold-Sutherland Mgmt., Inc.*, 837 S.W.2d 191 (Tex. App.—Houston [1st Dist.] 1992, no writ); *USAA v. Pennington*, 810 S.W.2d 777 (Tex. App.—San Antonio, 1991, writ denied). Justice Grant's dissent in *DeLanney* also identified breach of fiduciary duty arising from contract as another instance. *DeLanney*, 762 S.W.2d at 778 n. 1 (Grant, J., dissenting).

benefit of his bargain” and therefore, the phone company’s failure to publish the advertisement was not a tort but, rather, a claim solely in contract pursuant to *Jim Walter Homes*. *Id.* at 495.¹³

A concurring opinion by Justice Gonzalez further diluted the continuing vitality of *Scharrenbeck*. According to Justice Gonzalez, relying on *Pressman*, if the action cannot be maintained without pleading and proving the contract, the action is for breach of contract either by malfeasance or nonfeasance.

I believe that this information comes closer than *Scharrenbeck* to stating a general rule to distinguish contract from tort and that the broad language in *Scharrenbeck* must be read in light of the particular circumstances of that case. The opinion in *Scharrenbeck* is correct in its observations that a contract may be the occasion that brings the parties together, but it is the relationship or situation of the parties that give rise to a duty in law, the breach of which is a tort. . . . Had Montgomery Ward repaired the heater gratuitously, it would have owed Scharrenbeck a duty not to create a dangerous condition. . . . Thus the duty to not create a dangerous condition existed independent of any contractual relationship.

Id. at 496 (emphasis added) (Gonzalez, J., concurring). Although the majority in *DeLanney* did not overrule *Scharrenbeck*, it is very difficult to now conceive of a situation where a negligent breach of contract can ever be turned into a tort cause of action. Nevertheless, because the Supreme Court failed to officially limit *Scharrenbeck*, Texas courts are still confronted with cases which seek a tort recovery for a negligent breach of contract.

The root of the problem is not only the failure to expressly limit *Scharrenbeck*, but also in the failure of the Court to make clear that its “contort” analysis was not a bright line, formulaic “test,” but merely an analytical approach. To understand the present state of the law in this regard, it is helpful to overview selected “contort” cases following *DeLanney*.

V. CONTORTS POST-DELANNEY

A. The Supreme Court

Two post-*DeLanney* cases from the Supreme Court are worthy of note. First, in *Southwestern Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572 (Tex. 1991), the Court reaffirmed its position that a cause of action for negligence is not stated when the claimed harm is nothing more than lost profits for failure to publish an advertisement. According to the Court, a claim of lost profits is cognizable in contract, but not in tort. *Id.* at 577. In the second, the Court’s opinion in *Schindler v. Austwell Farmers Co-Op*, 841 S.W.2d 853 (Tex. 1992) does not touch on the “contort” analysis, however, its affirmance of the Court of Appeals’ opinion has caused confusion.

¹³The use of the label “benefit of bargain,” though apt., has created problems.

In *Schindler*, the Supreme Court modified a Court of Appeals opinion to delete a punitive damage award, finding there was no evidence the defendant had no intention of honoring a promise to pay at the time the promise was made, relying on *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432 (Tex. 1986).¹⁴ Because of this finding, the Court did not address the propriety of allowing the plaintiff to recover both attorney's fees for breach of contract and punitive damages for fraud based upon the same event and the same inquiry. To understand the extent of the problem created, the Court of Appeals' decision must be examined.

The dispute before the Corpus Christi Court of Appeals involved a plaintiff's suit for breach of contract and fraud in response to which the jury found \$65,000 owed on the account; the defendant fraudulently obtained products from plaintiff causing damages in the amount of \$65,000; and the recovery of punitive damages for fraud and attorney's fees for breach of contract. *Schindler v. Austwell Farmers Co-Op*, 829 S.W.2d 283, 285 (Tex. App.– Corpus Christi 1992). In summary, the Court of Appeals held, although failure to perform a contract usually yields contract rather than tort liability, a fraud claim is stated when a promise to perform is made with no intention to perform. *Id.* at 286.

Although the amounts were the same, the *Schindler* jury answered two separate damage questions for breach of contract and fraud. In a lengthy opinion on rehearing, the Court of Appeals reexamined but refused to change its opinion in response to a *Jim Walter Homes* argument concerning the duplicate contract and tort damages. Simply stated, the Court of Appeals rejected the need for a distinctly tortious damage in addition to contract damage, believing a party who enters a contract with no intention of performing, shows intent to harm and is liable for exemplary damages even if the nature of the harm sounds in contract. *Id.* at 291.¹⁵ In response to the contention of the identical damages dictated a contract recovery, the Court bolstered its opinion by citing *American Nat'l Petrol. Corp. v. Transcontinental Gas Pipeline Corp.*, 798 S.W.2d 274 (Tex. 1990) (“ANPC”).

In a commercial relations tort, the fact that the damages are “economic” does not mean that they may not be damages for the tort. The basic measure of actual damages for tortious interference with contract is the same as the measure of damages for breach of the contract interfered with, to put the plaintiff in the same economic position he would have been in had the contract interfered with been actually performed.

¹⁴*Spoljaric* is authority for a species of fraud characterized by a promise of future performance made with no intent to perform. *Spoljaric*, 708 S.W.2d at 435. No alternative breach of contract claim was asserted and, since the case predates *Jim Walter Homes*, no “contort” analysis was applied. However, since the fraud was a broken promise to implement a bonus plan without a contract of employment, it can be surmised a statute of frauds defense may have applied to the contract claim if raised.

¹⁵Only under the rarest of circumstances will a party be able to show some personal injury or harm to property not the subject of the contract to support a tort finding. If Appellant's position is the state of the law and the policy of the courts of this state, *Spoljaric* would not be constantly cited for the proposition that fraudulent entry to contract is a tort.” *Id.* This is an oversimplification of *Spoljaric*, supra, n. 14.

Id. at 279. *ANPC* stands for the proposition that a plaintiff may simultaneously recover actual damages and attorney’s fees for breach of contract and, in addition, punitive damages from a defendant if an independent tort is pleaded and findings made of the distinctly tortious act and injury as a result. In that case Transco breached its contract with ANPC and also tortiously interfered with contracts ANPC had with others.¹⁶ The *Schindler* Court of Appeals’ reading of *ANPC* is flawed in a “contort” analysis since the fraud and contract claims were based on the same facts and asserted against the same defendant.¹⁷

It is difficult to harmonize *Schindler* with *DeLanney*. The Court embraced *Spoljaric*, casually distinguished *ANPC*, and totally dismissed *Jim Walter Homes* and *DeLanney*. Unfortunately, the Supreme Court in *Schindler* chose not to reach the issues concerning the relationship between contract and fraud in the inducement. This refusal, coupled with the Court’s use of labels such as “benefit of the bargain” to distinguish contracts from torts in general and the eagerness of litigants and courts of appeals to grasp for bright-line tests, have created post-*DeLanney* blues. A sampling of post-*DeLanney* appellate court opinions is illustrative.

B. Courts of Appeals

1. Houston

In *River Consulting, Inc. v. Sullivan*, 848 S.W.2d 165 (Tex. App.–Houston [1st Dist.] 1992, writ denied), the Court affirmed a summary judgment against any engineering firm which filed suit against several defendants to collect for engineering and construction supervision services asserting claims of breach of contract, tort, and DTPA seeking to recover its account receivable. On appeal, the Court found the claimed damages under the alleged causes of action of negligence, negligent misrepresentation, and *Spoljaric* fraud were the same and represented the loss of the amount of the unpaid invoices, interest, and profits. *Id.* at 169. Relying upon *DeLanney*, the Court found these were not tort duties “independent” of the contract and affirmed the summary judgment against the engineering firm. *Id.* at 170.

In *Leach v. Conoco, Inc.*, 892 S.W.2d 954 (Tex. App.–Houston [1st Dist] 1995, writ dismissed, w.o.j.), the Court found the plaintiff’s alleged oral agreement with an employer concerning the duration of an assignment overseas was barred by the statute of frauds and not

¹⁶In *ANPC*, the Supreme Court affirmed a trial court judgment allowing a plaintiff to recover actual damages and attorney’s fees for breach of contract together with punitive damages based upon jury findings of Transco’s tortious interference with ANPC’s contracts with others—an independent tort. The issue was whether an independent tort had been shown absent a jury finding of injury as a result of the tortious conduct. The Court held the independent tort rule was satisfied since the parties had stipulated that damages for breach of contract were the same as the damages for the defendant’s tortious interference with other contracts between the plaintiff and third parties.

¹⁷In *ANPC*, the only mention of “contort” was in Justice Gonzalez’ dissent. The dissent involved *Jim Walter Homes* and opined, if the damages for tort and contract are the same, a simultaneous recovery in tort and contract should not be permitted. This logic ignores the nature of tortious interference: the defendant is a third party to plaintiff’s contract.

saved by promissory estoppel. *Id.* at 959. The Court of Appeals determined the plaintiffs' fraud cause of action was also barred by the statute of frauds. Moreover, after examining the promise allegedly made and the nature of the damages sought based upon *Jim Walter Homes*, the fraud claim was likewise held barred because plaintiff sought to obtain the "benefit of the bargain" he would have had had the promise been performed. This case is one of a growing group which routinely forbids recovery for any fraud under a "contort" analysis if the damages sought are "benefit of bargain."¹⁸

The case of *Barbouti v. Munden*, 866 S.W.2d 288 (Tex. App.–Houston [14th Dist.] 1993, writ denied) involved a claim by Munden that Barbouti promised to exchange a 20 percent interest in a holding company or companies in return for Munden's 20 percent interest in a foreign pipe coating operation. Munden's petition alleged breach of contract, fraud, and conspiracy, all based upon the same facts. Looking to the nature of the plaintiff's loss to determine the nature of his theory of recovery, the Court noted the plaintiff's alleged theories all sought actual damages equaling the amount represented by a 20 percent interest in the holding companies. Since Munden sought to recover what he would have gained had the promise been performed, the Court held the action to be for breach of contract. Unfortunately, since the contract was unenforceable by virtue of the statute of frauds and there was insufficient evidence to support fraud or conspiracy to defraud, the plaintiffs' \$10.6 million judgment was reversed and rendered.¹⁹

Although it predated *DeLanney*, the case of *Hebisen v. Nassau Dev. Co.*, 754 S.W.2d 345 (Tex. App.–Houston [14th Dist.] 1988, writ denied) is frequently cited primarily for its reliance on *Jim Walter Homes*. In that case, a lessor sued former lessees to recover amounts allegedly due asserting causes of action for breach of contract and fraud. The trial court rendered judgment for actual damages, punitive damages, and attorney's fees. The Court of Appeals analyzed the verdict and judgment under *Jim Walter Homes* by looking to the nature of the injury and whether it sounded in contract or tort. In answer to one question, the jury found the unpaid balance due and owing under the lease contract and, in response to another question, found the same amount (less 84¢) to be the damages proximately caused by reliance upon misrepresentations. The Court found these items of damage were not fraud damages but were contract damages recoverable under the terms of the lease agreement. *Id.* at 348. According to the Court, since there was no evidence of any recoverable actual damages for fraud, punitive damages could not be awarded.

¹⁸Because the statute of frauds precludes recovery of the fruits of an unenforceable contract through fraud claims, a contort analysis was unnecessary. *Webber v. W. M. Kellogg Co.*, 720 S.W.2d 124, 129 (Tex. App.–Houston [14th Dist.] 1986, writ ref'd n.r.e.). Pleading of reliance damages which were not asserted could have saved this claim.

¹⁹This is another case where, if damages sought sound like or are the same as contractual damages, a fraud will not be actionable even if the contract action pleaded cannot stand.

Both Houston Courts of Appeal consistently apply the “contort” analysis to preclude recovery for a no intent to perform fraud concluding “benefit of bargain” fraud damages are recoverable only in contract whether an enforceable contract exists or not.²⁰

2. Austin

In *Doe v. Smithkline Beecham Corp.*, 855 S.W.2d 248 (Tex. App.–Austin 1993), *aff’d*, 903 S.W.2d 347 (Tex. 1995), a prospective employee sued a prospective employer and a drug testing laboratory after the employer withdrew a job offer based on the results of pre-employment drug screening tests. The plaintiff asserted her positive test for opiates was the result of her consumption of several poppy seed muffins in the days before she provided a urine sample. Aside from a breach of contract claim, the plaintiff asserted the defendants were negligent in not determining the true reason for her positive test results. On appeal from the rendition of an adverse summary judgment, the plaintiff attempted to utilize *Scharrenbeck*. The Court of Appeals noted *Scharrenbeck*’s broad language but likewise observed *Scharrenbeck* had been significantly limited in scope after *Jim Walter Homes* and *DeLanney*. *Id.* at 257. Consistent with those two cases, the Court examined the nature of the loss or damage alleged and found the plaintiff’s only alleged loss was her expected earnings and thus the benefit of her alleged bargain—a contract cause of action.

In a more significant decision, the Austin Court of Appeals dealt with an action brought by a property owner against an engineering and consulting firm alleging breach of contract for engineering and design services and for inspection services regarding construction of an apartment complex as well as negligence in the performance of duties under those contracts. *Thomson v. Espey Huston & Assoc., Inc.*, 899 S.W.2d 415 (Tex. App.–Austin 1995, no writ). In that case, a joint venture contracted with two of its partners for the construction of an apartment complex and those partners, in turn, entered into two contracts with Espey, an engineering consulting firm. The first contract required Espey to perform a variety of engineering and design services including the design of drainage structures, facilities for controlling storm water runoff, and for water and wastewater distribution systems. Espey was also responsible for soil testing and recommendations concerning the foundation and pavement. The second contract required Espey to perform inspections on the construction site and report upon the process of the construction of the apartment complex, as a condition to continued financing. Following substantial completion of the project, “it became apparent that the complex was riddled with design and construction defects” related to drainage and water runoff. *Id.* at 417. On summary judgment, the trial court dismissed the plaintiff’s claim in its entirety including the plaintiff’s negligence claims as being barred by the Economic Loss Rule.

On appeal, the Court of Appeals examined both contracts to determine whether any of Espey’s actions caused injury beyond the economic loss of the two contracts. With regard to the draw inspection contract, the Court found Espey had no duty to inspect or report problems on the

²⁰See also, *Collins v. Allied Pharmacy Mgmt.*, 871 S.W.2d 926, 936 (Tex. App.–Houston [14th Dist.] 1994, no writ); *Janicek v. KIKK, Inc.*, 853 S.W.2d 780 (Tex. App. –Houston [14th Dist.] 1993, writ denied).

construction site absent the contract. Therefore, since the plaintiff merely sought the failure to receive the benefit of its bargain, “Espey’s performance under the contract, however negligent, could violate only a contractual duty unless, as in *Scharrenbeck*, the negligence caused damage beyond the subject of the contract itself.” *Id.* at 421.

With regard to the other contract, the Court found Espey’s engineering and design services could give rise to a tort cause of action. In that regard, the plaintiff alleged Espey was negligent in the design of the drainage system which caused damage to other parts of the apartment complex outside of the scope of Espey’s contract.

Such damage is beyond the subject of the contract itself, distinguishing this case from *Jim Walter Homes*, wherein the defendant was contractually obligated to provide the entire house. . . . If Thomson were merely complaining that the drainage system was inadequate and that he had been forced to repair or improve it, he would have only a contractual claim. Likewise, if Thomson were merely complaining that the soil testing services were inadequate and that he had been forced to supplement Espey’s services at his own expense, he would have only a contractual claim. However, to the extent that the alleged inadequacies caused damage to parts of the property beyond Espey’s contract, Thomson also has a tort claim.

Id. at 422. The Court of Appeals found Espey had an independent legal duty outside of the contract not to damage the plaintiff’s property or the property of his neighbors. To that extent, the Court of Appeals reversed the entry of summary judgment and remanded the case to resolve that issue only.²¹

3. Dallas

In *Motsenbocker v. Potts*, 863 S.W.2d 126 (Tex. App.–Dallas 1993, no writ), the plaintiff, who had sold his business and had been retained as a consultant by the buyer, brought an action against the buyer and other parties for breach of contract, fraud, and intentional infliction of emotional distress. Following trial, the jury found a breach of contract and that the defendants had maliciously committed intentional infliction of emotional distress.²² The jury found no fraud. The trial court awarded actual damages and attorney’s fees for breach of contract and actual damages and exemplary damages for intentional infliction of emotional distress. *Id.* at 131. On appeal, the defendants contended the intentional infliction of emotional distress issue should not have been submitted because the plaintiff’s theory of recovery allegedly sounded in

²¹This case is the most thoughtful and thorough post-*DeLanney* application of the Court’s “contort” analysis. The Court did not apply the analysis as a bright-line test, but instead, observed the nature of the allegation, duties, and losses to arrive at the correct result.

²²This case represents a good example of a contract action coupled with a free-standing and truly “independent” tort. The defendants, among other things, secretly modified plaintiff’s healthcare plan deductible from \$300 to \$50,000 with full knowledge plaintiff was, at the time, diagnosed with terminal cancer. *Id.* at 129, 133-134.

contract only. *Id.* at 138. The Court of Appeals disagreed, finding a duty not to intentionally inflict emotional harm arises under common law irrespective of the existence of a party's contract. *Id.* Accordingly, the judgement was in all respects affirmed.

4. San Antonio

In another construction case, the San Antonio Court of Appeals dealt with a lawsuit brought by an equipment lessor against a general contractor and a subcontractor for fraud and contract based upon the contractor's failure to issue joint checks to the lessor and subcontractor in exchange for the lessor leaving its equipment at the job site. *Peco Constr. Co. v. Guajardo*, 919 S.W.2d 736 (Tex. App.–San Antonio 1996, writ denied). In that case, Peco was the general contractor for a school district construction project and contracted with R-K to do site preparation work. In order to perform the work, R-K rented certain heavy equipment from Guajardo. R-K failed to pay for the equipment and Guajardo sued both R-K and Peco for the lost rental income. A default judgment was entered against R-K which was severed, leaving for trial the allegation against Peco for breach of its promise to issue payment checks jointly to R-K and Guajardo on theories of breach of contract, *quantum meruit*, and common law fraud. The jury found against Peco on all theories, awarding actual and punitive damages as well as attorney's fees. Guajardo elected recovery on the fraud theory and was awarded judgment. *Id.* at 737-38. The San Antonio Court of Appeals affirmed.

On appeal, Peco contended its refusal to enter into a joint check agreement did not constitute fraud and asserted under *DeLanney*, that Guajardo sought only to recover the benefit of his bargain which was a breach of contract action. Utilizing the guidelines of *DeLanney* and *Jim Walter Homes*, the Court set out to determine first whether there was a contract between the parties and, if so, whether Peco's conduct gave rise to a tort duty independent of the contract. *Id.* at 738. After examining the evidence, the Court found a contract was formed based upon evidence Peco promised to issue joint checks in exchange for which Guajardo left his equipment at the job site.

Although agreeing the damages alleged under both theories were based upon a lost benefit of bargain, the Court disagreed that such precluded recovery for fraud. *Id.* at 739. According to the Court, "benefit of bargain" damages are also recoverable for a misrepresentation.²³ In a footnote, the Court noted the developing split of authority among the courts on the question of whether a fraud claim can ever exist when a party seeks to recover the "benefit of the bargain." *Id.* at 739 n. 4. The schism developing is substantial and seems to turn on the blind application of the term "benefit of bargain." See, *American Nat'l Ins. V. International Bus. Mach.*, 933 S.W.2d 685 (Tex. App.–San Antonio 1996, n.w.h.). However, because the Court found the existence of a contract and the alleged measure of damages was proper for both breach of contract

²³See, *W. O. Bankston Nissan, Inc. v. Walter*, 754 S.W.2d 128, 128 (Tex. 1988) and *Leyendecker & Associates, Inc. v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984) (successful plaintiff can recover either "out-of-pocket" measure" or "benefit-of-bargain" for fraud).

and fraud, a fraud recovery could be sustained only if the evidence supported the finding of a fraud “independent” of the contract action.

In sum, the Court examined the evidence which tended to support each of the elements of a fraud cause of action and concluded that Guajardo was entitled to recover under a fraud theory.²⁴ Despite its stated intention to ascertain the existence of fraud independent of contract, after discussing the fraud evidence, the Court never determined the fraud action was independent of or unrelated to the contract which brought the parties together. The Court was apparently satisfied all elements of a fraud cause of action were supported by the evidence, sustainable without a contract claim, impliedly satisfying the requirement of an “independent” tort. The Court’s rationale indicates it equates an “independent” tort with an “alternatively” pleaded tort.²⁵

5. Amarillo

In *Williford Energy Co. v. Submergible Cable Serv., Inc.*, 895 S.W.2d 379 (Tex. App.–Amarillo 1997, no writ), an oil well operator brought a negligence and contract action against a manufacturer of a pumping system and against the contractor hired to connect the system to production tubing. The plaintiff claimed both defendants were responsible for improper installation of the system and, following a bench trial, a take nothing judgment was entered. The “contort” analysis was triggered by the plaintiff’s assertion the manufacturer of the pump system was liable in tort to the plaintiff for either negligently supervising or failing to supervise the installation of the system by the contractor defendant. After utilizing the factors enumerated in *DeLanney*, the Court found the plaintiff’s only remedy was in contract. *Id.* at 386. In so holding, the Court found the obligation of one contractor to supervise the work of another is not imposed by law but requires manifested intent (contract). Since the plaintiff claimed the manufacturer was negligent in failing to supervise the other contractor (rather than that the supervision was in a negligent manner), the performance of those duties would necessarily arise by virtue of his purchase contract with the manufacturer and not by operation of law.

6. Beaumont

In *Matthews v. Amwest Sav. Ass’n*, 825 S.W.2d 552 (Tex. App.–Beaumont 1992, writ denied), Matthews sued Amwest for breach of contract, fraud, and breach of duty of good faith and fair dealing in a dispute arising out of a real property non-judicial foreclosure sale. Matthews and Amwest (the deed of trust beneficiary) had entered competing bids with Matthews being the

²⁴The most significant evidence to the Court was Peco apparently promised to issue joint checks with no intention of doing so and with the purpose of stalling Guajardo. Apparently, joint checks were against Peco’s policy and, moreover, the evidence supported the conclusion Peco purposefully stalled Guajardo each time he came to the job site to pick up checks. *Id.* at 739-41.

²⁵Conceivably, sine Peco and Guajardo were not in direct contractual privity and their contract arose by virtue of implication or by *quantum meruit*, the Court believed the tort and contract causes of action were truly alternative and, given affirmative findings on all theories, the plaintiff was entitled to recover under the theory which gave him the greatest possible recovery, in this case, fraud.

highest bidder. The sale was adjourned for Matthews to obtain funding. Before resuming the sale, the trustee communicated with Amwest and agreed with Matthews to strike the property off to Amwest for \$20,000 less than Matthews' bid and Matthews would thereafter purchase the property from Amwest for his bid price. Thereafter, Matthews tried to arrange the transaction, Amwest informed him it would only sell the property for more than twice the amount bid by Matthews at foreclosure. Amwest obtained a summary judgment contending the oral agreement was unenforceable, the lack of a duty of good faith and fair dealing between parties at arm's length, and the fraud claim was a barred "contort" since Matthews sought the "benefit of his bargain."

The Beaumont Court of Appeals obviously found the statute of frauds precluded Matthews' oral contract to purchase the property. *Id.* at 553. Matthews attempted to argue Amwest was estopped to assert the statute, however, the issue was raised for the first time on appeal and disregarded. *Id.* More significantly, Matthews argued and the Court agreed, a fact issue concerning the authority of the trustee to make an agreement with Matthews existed. The Court found there was indeed a fact issue raised as to the apparent authority of the trustee to bind Amwest to the deal.

Matthews also sought to reverse the summary judgment on the fraud cause of action. Matthews had the high bid at the foreclosure sale and was prepared to pay the bid-in-price on the day of the sale. But for Matthews' reliance upon the representation of the trustee that Matthews could purchase the property directly from Amwest at a later date for the foreclosure price, he would have had an enforceable contract. In response, Amwest argued the "contort" analysis of *DeLanney* asserting Matthews' only alleged injury was the economic loss to the subject of the contract. The Court of Appeals distinguished *DeLanney*, finding it only applied to actions for negligence rather than fraud. The court found fraud to be distinct from other tort claims in that it is quasi-contractual in nature. *Williams v. Khalaf*, 802 S.W.2d 651 (Tex. 1990). The Court opined further, since the measures of recover for fraud or misrepresentation are either the "out-of-pocket" or "benefit of the bargain" measures, an attempt to recover the benefit of the bargain does not transform a viable fraud cause of action into a breach of contract.

The *Matthews* opinion unduly restricts the *DeLanney* "contort" analysis to competing claims of negligence and breach of contract. It was clearly inappropriate for Amwest to assert the "contort" doctrine to defend against a fraud claim in light of the fact its alleged fraud prevented formulation of a contract in the first place. On the other hand, it is also inaccurate to exempt all fraud cases from the "contort" analysis.

7. El Paso

One of the more interesting and analytical of the post-*DeLanney* cases is *Airborne Freight Corp., Inc. v. C. R. Lee Enter., Inc.*, 847 S.W.2d 289 (Tex. App.-El Paso 1992, writ denied). *Airborne* also highlights the increasing tension between the no intent to perform promise/fraud case and a contractual cause of action under the *DeLanney* analysis. In this case, the plaintiff obtained a jury verdict against Airborne and its regional manager under a combined theory of

negligent misrepresentation and fraud. The plaintiff had previously lost its two breach of contract claims on summary judgment and to a negative jury finding. *Id.* at 293. On appeal, the Court extensively analyzed the causes of action alleged under the facts as well as the damages sought and concluded the plaintiff's case was a contract rather than a tort.

The lawsuit revolved around a written contractual agreement between Airborne and the plaintiff who, by contract, provided Airborne customers with pickup and delivery services. The contract was terminable at will upon 30 days' written notice. Airborne had similar contracts with other delivery contractors in the area and, in early 1989, terminated its contract with another delivery contractor relying on the 30-day termination clause. The plaintiff was concerned over the status of his contract and in a discussion with Airborne's regional manager, was assured "as long as you do your job, you will have a job." *Id.* at 292. Over the remainder of 1989, when Airborne required a new client, the plaintiff expanded its operation to meet Airborne's needs, acquiring new equipment, new employees, and increasing its borrowings from its lender.

In early 1990, however, Airborne became dissatisfied with the plaintiff's performance and suspected that one of the plaintiff's drivers was stealing freight and another was buying and using drugs while delivering for Airborne. *Id.* at 292. Relying solely upon the contractual 30-day termination clause as its justification, Airborne notified the plaintiff of the termination of the contract without cause. On summary judgment and prior to trial, the trial court found the termination clause was valid and binding and the contract was lawfully terminated. At trial, the jury found for the plaintiff on a hybrid tort theory of fraud/negligent misrepresentation and awarded actual and exemplary damages.

On appeal, the *DeLanney* "contort" analysis was invoked by Airborne. The Court's first step was to analyze the fraud and negligent misrepresentation causes of action. As to the fraud claim, the species of fraud alleged by the plaintiff involved the promise to do an act in the future made with no intention of performing the act based upon *Spoljaric*. With regard to negligent misrepresentation, the court observed such a cause of action is unusually recognized in lieu of a breach of contract claim, generally not available where a contract was actually in force between the parties as in the present case. *Id.* at 295. Next, the Court addressed Airborne's position the damages proven by the plaintiff were strictly based in contract rather than fraud or negligent misrepresentation.

The Court noted, in addition to pleading and proof of consequential damages, in a fraud case, a plaintiff is entitled to either the "out-of-pocket" or the "benefit of the bargain" measure of damages. *Id.* at 296. The evidence presented demonstrated plaintiff sought to recover the latter. Since the liability and damage questions for fraud and negligent misrepresentation were not separated and since "benefit of the bargain" damages are specifically unavailable for negligent misrepresentation, the Court found the plaintiff's damages were truly "only for breach of contract, not for an independent tort at all." *Id.* at 296. In so holding, the Court specifically disagreed with *Matthews*'s limitation of *DeLanney* to negligence and its exemption of fraud cases. The Court found no such distinction in *DeLanney* or *Jim Walter Homes*. *Id.* at 296 n.4. Because the plaintiff was legally terminated pursuant to the contract and because all the plaintiff's damages

flowed from the termination of its contract, there were no independent damages supportable under a fraud or negligent misrepresentation cause of action.

8. Tyler

The case of *Grace Petrol. Corp. v. Williamson*, 906 S.W.2d 66 (Tex. App.–Tyler 1995, no writ) involved in appeal by an oil and gas lessee solely on the award of punitive damages in the amount of \$500,000 in favor of its lessors. The gist of the lessors’ claim was that Grace permitted substantial drainage, had agreed to include all of the plaintiffs’ acreage in oil and gas units, failed to include all of the plaintiffs’ acreage, breached the covenant to develop the plaintiffs’ acreage, and misrepresented that it would place all of the leased acreage into the units. The jury found in favor of the plaintiffs on each of these issues and awarded \$25,000 as lost income from oil and gas revenues as well as the exemplary damages. *Id.* at 68.

On appeal, Grace relied upon *Jim Walter Homes* and *DeLanney* claiming the substance of plaintiffs’ claims was breach of contract which could not support punitive damages. Searching for a distinct tortious injury, the Court looked to the verdict. Three theories of liability had been submitted to the jury (two in contract, one in fraud), but only a single jury question was submitted on actual damages. *Id.* at 69. The Court found no evidence of any injury apart from that proximately caused by the drainage of the lease. The Court also noted the trial court instructed the jury to consider only those damages resulting from the lost income from the lease which, the Court of Appeals found to be contractual in nature.

Specifically relying on *Matthews*, the plaintiffs attempted to similarly convince the Court that fraud was different than other torts and exempt from a “contort” analysis. To distinguish *Matthews*, the Court relied on three cases which had disallowed the recovery of exemplary damages based on fraud where the fraud damages duplicated a companion recovery for breach of contract.²⁶ The Court held plaintiffs’ actual injury was an economic loss to the subject matter of an enforceable agreement, and thus, economic loss sounding in contract rather than tort. The Court also distinguished *Matthews* by observing *Matthews* was attempting to recover the benefit of bargain without an enforceable contract. *Id.* at 69. Thus, since the plaintiffs obtained a recovery for both breach of contract and fraud, with identical contractual damages, their claim was for contract as opposed to *Matthews*, where the contract was unenforceable but the fraud actionable.

C. *Summary of Split in Courts of Appeals*

None of the courts appear to hold a negligence claim between parties to a transaction seeking economic loss can survive in the face of a “contort” analysis. *River Consulting; Doe; Espey; Williford*. Further, a negligent misrepresentation claim seeking to recover the benefit of

²⁶*Hebisen v. Nassau Dev. Co.*, *supra*, p. 12; *Central Savings and Loan v. Stemmons Northwest Bank*, 848 S.W.2d 232, 240 (Tex. App.–Dallas 1992, no writ); *C & C Partners v. Sun Exploration & Prod. Co.*, 783 S.W.2d 707 (Tex. App.–Dallas 1989, writ denied).

the contract will not survive either, especially since the body of negligent misrepresentation law limits a plaintiff to his pecuniary loss and precludes recovery of the “benefit of the plaintiff’s contract with the defendant.” *Federal Land Bank v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991); *Airborne Freight*, 847 S.W.2d at 295. Thus, the current schism between the various Courts of Appeal is confined to the proper treatment to be given a case where a breach of contract and fraud (in the form of a promise made with no intent to perform) are asserted. There are two reasons for the split.

The most significant reason is the difficulty in applying the contort analysis as a formulaic test and equating the “nature of the loss” with “measure of damages.” The body of law traditionally developed for fraud allows a plaintiff to recover “benefit of bargain” damages which, in contract, is the same measure.²⁷ As demonstrated, several courts dismiss or disallow such fraud claims applying the “contort” analysis in a knee-jerk fashion when fraud plaintiffs seek “benefit of the bargain” damages. Although many times correct in result, an automatic application of the “contort” analysis to dismiss fraud claims across the board is contrary to the pragmatic spirit of the *Jim Walter Homes* and *DeLanney* opinions.

Second, it is equally inappropriate to exempt all fraud cases from the reach of a “contort” analysis in reliance on the quasi-contractual nature of the *Spoljaric*-type fraud claim. Courts which follow this line of reasoning do so under the belief the doctrine of “independent tort” will allow a tort claim to coexist with a breach of contract as long as a distinct tortious injury and damages therefrom are shown. *Peco*; *Matthews*. In other words, these courts believe, if the “elements” of fraud are proven, the tort is “independent” of a separately proven contract. However, the “independent” tort theory is itself clouded at present based upon differing interpretations of what “independent” truly means. The tort of intentional infliction of emotional distress demonstrated in *Motsenbocker* was clearly in addition to and independent of the breach of contract claim. The *Schindler* and *Williamson* cases demonstrate there is also a split among the courts as to the recoverability for an independent tort and contract where the damages asserted for both are the same.²⁸

In the middle of this split of authority is the Tyler Court of Appeals which holds a plaintiff may seek to recover the benefit of his bargain asserting a fraud cause of action if the contract, whether asserted or not, is unenforceable. In other words, the existence of an enforceable contract precludes a simultaneous fraud action seeking the same recovery. *Grace Petrol Corp. v.*

²⁷Moreover, as held in *ANPC*, this is also the measure of damage for tortious interference with contract (as quoted, *supra*, pp. 10-11), to which “contort” analysis is inapplicable.

²⁸Justice Gonzalez’s dissent in *APNC* does provide an interesting test which has been followed by one court to decide whether the tort is independent of contract: “If it appears a tort claim is only an alternate theory and a court could not properly enter judgment for compensatory damages on both the contract and tort theories without granting a double recovery, an award of exemplary damages is improper.” *APNC*, 798 S.W.2d at 283 n.6. (Gonzalez, J. dissenting); *Meek v. Bishop Peterson & Sharp, P.C.*, 919 S.W.2d 808 (Tex. App.–Houston [14th Dist.] 1996, writ denied).

Williamson, supra. To resolve this split, the Supreme Court will have to step in and a recent case give some indication of how it may handle this issue.

In *Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12 (Tex. 1996), the Court held contractual nonperformance is not an actionable misrepresentation under the DTPA. In so holding, the Court reiterated its opinion in *DeLanney* and expressly applied the same rationale to deny claims based upon nonperformance of a contract in the face of a contrary representation that performance would occur. *Id.* at 14-15. *Ace Sign* could be a foreshadowing of how the Court will handle *Spoljaric*-type fraud under a *DeLanney* analysis and reject an outright exemption of such a fraud claim from the “contort” analysis.

VI. SUGGESTIONS AND SOLUTIONS

The common tort claims which accompany a breach of contract cause of action in commercial and construction-related cases include: negligence, gross negligence, negligent misrepresentation, fraud, and tortious interference. Before litigants assert any of these tort claims along with a breach of contract action, the cases above strongly suggest an examination of the tort claims with a “contort” analysis and an understanding of whether the tort claims are asserted as “independent” or in the alternative. While the “contort” analysis should not be applied in a formulaic fashion, the following examples are indicative of the solution derived from such an analysis.

As between parties to a contract, it seems clear negligence or gross negligence claims will fail unless the recovery sought is for injury to person or property outside the scope of the contract. *Scharrenbeck; Espy*. Whether such a negligence claim can be asserted against a third party to the contract (e.g., an architect or engineer) remains largely unanswered. However, because of doctrines of agency and third-party beneficiary, such a claim could likewise be precluded. *See, Bernard Johnson, Inc., supra*, n. 7.

On the other hand, tortious interference, by its very nature, should pass master outside of a “contort” analysis. In a properly pleaded tortious interference case, the defendant is a third party to the contract charged with interfering with such contract. A plaintiff’s recovery for benefit of the bargain flows from the defendant’s wrongful interference. However, use of the “benefit of the bargain” measure of damages label could trigger a “contort” challenge. Forewarned is forearmed.

An improperly pleaded claim of negligent misrepresentation will also fail a “contort” analysis. Specifically, the negligent misrepresentation doctrine as adopted in Texas restricts a claimant to pecuniary loss sustained in reliance on the representation and expressly precludes recovery of “benefit of the bargain” type damages. Thus, if recovery of “benefit of the bargain” damages is sought in a negligent misrepresentation case, the claim will not only fail a “contort” analysis but, more importantly, is also improperly pleaded.

The assertion of a fraud cause of action along with a breach of contract claim raises a number of red flags. There are a number of warning signs which should prompt amended pleadings, summary judgment, special exceptions, or a rethinking of the case. If the litigants are parties to an enforceable contract and the relief sought is promised performance, recovery should be limited to breach of contract. Justice Gonzalez's dissent in *ANPC* provides an appropriate litmus test. *Supra*, n. 28.

On the other hand, if formation or entry into a contract is frustrated by fraud, such a claim may survive. Specifically, if the execution of a contract which will survive the statute of frauds is prevented because of the claimant's reliance to his detriment on a misrepresentation, a fraud cause of action seeking to recover the lost bargain, whether a claim of oral contract is asserted or not, should be allowed. In this situation, *Spoljaric* and the opinions in *Matthews v. Amwest* and *Grace v. Williamson* should be thoroughly studied.

Whenever possible, litigants should refrain from leading contract and fraud claims in the alternative where the damages sought are the same without thoroughly examining their case in light of post-*DeLanney* appellate decisions. Indeed, after such an examination, it may become clear an "out-of-pocket" recovery for the fraud claim can coexist with a "benefit of the bargain" recovery for contract which could give rise to recovery of both. In this situation, further analysis of the case in light of the "independent" tort doctrine should be made.

Emerging theories of "contort" and "independent" tort, more than ever before, make it advisable for litigants to carefully analyze their case, their pleadings, and their proof before, during, and after trial. While tort and contract claims can peacefully coexist in many lawsuits, a contract and "contort" cannot. A case-by-case analysis of the nature of the duties between the parties, the nature of the injuries sustained, and the circumstances giving rise to the claim will more often than not provide the solution.