PJC 303.20 QUESTION AND INSTRUCTIONS ON CESSATION OF PRODUCTION IN PAYING QUANTITIES

PJC 303.20A QUESTION AND INSTRUCTION ON CESSATION OF PRODUCTION IN PAYING QUANTITIES

QUESTION _____

Did the lease cease to produce [*oil/gas*] in paying quantities?

A lease produces in paying quantities where production is sufficient to yield a return in excess of operating and marketing costs over a reasonable period of time; the well is producing in paying quantities even though drilling and equipment costs may never be repaid and the undertaking as a whole may ultimately result in a loss.

~~has ceased to produce oil and gas in paying quantities when (1) the production from the well over a reasonable period of time does not yield a profit after deducting operating and marketing costs, and (2) a prudent operator would not continue, for the purpose of making a profit rather than merely for speculation, to operate the well as it has been operated.~~

~~Where production is sufficient to yield a return in excess of operating and marketing costs, the well is producing in paying quantities even though drilling and equipment costs may never be repaid and the undertaking considered as a whole may ultimately result in a loss.~~

"Operating and marketing costs" include expenses such as taxes, overhead charges, labor, repair, depreciation on salvageable equipment, and periodic expenditures that were allocated to the well and which were used on the well in order to produce or keep it producing. ~~royalty,~~

~~taxes, overhead charges, labor, repair, depreciation of salvable equipment, and periodic expenditures incurred in the operation of the well.~~ You shall not consider any costs or expenses incurred in connection with the original drilling or the reworking of the well.

"Overhead charges" do not include administrative costs that would continue whether or not the well is producing.

"Depreciation on salvageable equipment" does not represent bookkeeping depreciation; rather it is the actual physical depreciation in the salvage value of on-location production equipment as the result of continued operations.

Do not consider any capital expenses in determining whether the production from the well over a reasonable period of time yields a profit after deducting operating and marketing costs. Capital expenses mean one-time investment expenses, such as drilling and equipping costs.

~~In determining whether a prudent operator would continue to operate the well as it has been operated, you must take into consideration all matters that would influence a reasonable and prudent operator. Some factors you may consider are the depletion of the reservoir and the price for which the lessee is able to sell its production, the relative profitability of other wells in the area, the operating and marketing costs of the lease, the lessee's net profit, the lease provisions, a reasonable period of time under the circumstances, and whether the lessee is holding the lease merely for speculative purposes.~~

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question _____ [*303.20A*], then answer the following question. Otherwise, do not answer the following question.

PJC 303.20B QUESTION AND INSTRUCTION ON CONTINUED PRODUCTION BY A REASONABLY PRUDENT OPERATOR

QUESTION _____

Do you find that, under all the relevant circumstances, a reasonably prudent operator would not continue, for the purpose of making a profit and not merely for speculation, to operate the well in the manner in which it was operated?

In deciding whether a prudent operator would not continue, for profit and not merely for speculation, to operate the well in the manner in which it was operated, you must take into consideration all factors which would influence a reasonably prudent operator. Some of the factors are:

- the depletion of the reservoir and the price for which the lessee is able to sell his produce;
- the relative profitableness of other wells in the area;
- the operating and marketing costs of the lease;
- the operator's net profit;
- the lease provisions;

• a reasonable period of time under the circumstances; and

• whether or not the lessee is holding the lease merely for speculative purposes.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 303.20 should be used when the issue is whether a lease has terminated for failure to produce in paying quantities.

Source of question and instruction. PJC 303.20 is derived from *BP America Production Co. v. Laddex*, 513 S.W.3d 476 (Tex. 2017); *Skelly Oil Co. v. Archer*, 356 S.W.2d 774, 780–82 (Tex. 1961); *Clifton v. Koontz*, 325 S.W.2d 684, 691 (Tex. 1959); *Evans v. Gulf Oil Corp.*, 840 S.W.2d 500, 503 (Tex. App.—Corpus Christi 1992, writ denied); and *Pshigoda v. Texaco, Inc.*, 703 S.W.2d 416, 418 (Tex. App.—Amarillo 1986, writ ref'd n.r.e.).

Burden of proof in paying quantities case. Note that the burden of proof in a paying quantities case is on the lessor who alleges a failure to produce in paying quantities. See *Bargsley v. Pryor Petroleum Corp.*, 196 S.W.3d 823, 829 (Tex. App.—Eastland 2006, no writ).

Date of cessation of production. If the jury answers "Yes" to both PJC 303.20A and 303.20B, see PJC 303.21 for a question regarding the date of the cessation.

PJC 305.19 QUESTION AND INSTRUCTION ON AMBIGUOUS PROVISIONS

The following language is at issue:

[Insert ambiguous language.]

Did the parties mutually intend [insert plaintiff's contention]?

You must determine 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.

Answer 'yes' or 'no' _____.

COMMENT

When to use. PJC 305.19 can be used in cases in which the court has made a determination that a contract or other instrument contains ambiguous terms and it is necessary to determine the meaning of those terms. The determination of whether a contract is ambiguous is a question of law for the court. *Endeavor Energy Resources L.P. v. Discovery Operating, Inc.*, 554 S.W.3d 586, 601 (Tex. 2018); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003); *Coker v. Coker*, 650 S.W. 2d 391, 394 (Tex. 1983). Whether the contract is ambiguous is determined by looking at the contract as a whole, in light of the circumstances present when the parties entered into the contract. *Universal Health Services, Inc. v. Renaissance Women's Group,*

P.A., 121 S.W.3d 742, 746 (Tex. 2003). A contract is ambiguous if it is susceptible to more than one reasonable interpretation. *Frost Nat'l Bank v. L & F Distributors, Ltd*, 165 S.W.3d 310, 312 (Tex. 1995). That the parties disagree about a contract's meaning does not render it ambiguous. *Endeavor Energy Resources*, 554 S.W.3d at 601. See PJC 305.9 for an instruction on ambiguity that can be used in appropriate circumstances.

An ambiguity creates a fact issue as to the parties' intent. *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd*, 940 S.W2d 587, 589 (Tex. 1996); see also *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1980). The court may conclude that a contract is ambiguous in the absence of such pleading by any party. *See Progressive County Mutual Insurance Co. v. Kelley*, 284 SW.3d 805, 808-809 (Tex. 2009)(per curiam)(summary judgment appeal where supreme court concluded contract was ambiguous even though neither party asserted ambiguity); *see also Sage St. Associates v. Northdale Construction Co.*, 863 S.W2d 438, 445 (Tex. 1993).

If a contract is unambiguous or if it is ambiguous but parol evidence of circumstances is undisputed, construction of the contract is an issue for the court. *Brown v. Payne*, 176 S.W.2d 306, 308 (Tex. 1943); *In re Hite*, 700 S.W.2d 713, 718 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

Source of question. PJC 305.19 is derived in part from *Trinity Universal Insurance Co. v. Ponsford Bros.*, 423 S.W.2d 571, 575 (Tex. 1968); *Recognition Communications, Inc. v. American Automobile Association, Inc. & AAA Club Services, Inc.*, 154 S.W.3d 878, 886-887 (Tex. Civ. App.—Dallas, 2005, pet. denied).

Intent must be understandable. Parties to a contract must express their intentions understandably. See *City of Houston v. Williams*, 353 S.W.3d 128, 138, 143–44 (Tex. 2011); *Montgomery County Hospital District v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998). To be

enforceable, a contract must be sufficiently certain to enable the court to determine the legal obligations of the parties. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992); *Bendalin v. Delgado*, 406 S.W.2d 897, 899 (Tex. 1966).

Parties' interpretation given great weight. The most significant rule of contractual interpretation is that great, if not controlling, weight should be given to the parties' interpretation. The court and the jury should assume that parties to a contract are in the best position to know what they intended by the language used. *James Stewart & Co. v. Law*, 233 S.W.2d 558, 561 (Tex. 1950); see also *Trinity Universal Insurance Co. v. Ponsford Bros.*, 423 S.W.2d 571, 575 (Tex. 1968). One factor to be considered in determining the parties' interpretation is their conduct. *Consolidated Engineering Co. v. Southern Steel Co.*, 699 S.W.2d 188, 192–93 (Tex. 1985).

Patent and Latent Ambiguities. An ambiguity in a contract may be either "patent" or 'latent." *Nat'l Union Fire Insurance Co. v. CBI Industries, Inc.*, 907 S.W.2d 517, 520 (Tex. 1995). A patent ambiguity is evident on the face of the contract, while a latent ambiguity arises when a contract, unambiguous on its face, is applied to subject matter with which it deals, and an ambiguity appears by reason of some collateral matter. *Nat'l Union Fire Insurance Co.*, 907 S.W.2d at 520.

PJC 305.20 Question and Instruction on Reformation as an Affirmative Cause of Action

PJC 305.20A

QUESTION _____

Prior to the time the [*instrument*] was reduced to writing, did *Paul Payne* and *Don Davis* agree that [*insert all disputed terms*]?

Answer "Yes" or "No."

Answer: _____

PJC 305.20B

If you answered yes to Question _____ [PJC 305.20A], then answer the following question. Otherwise, do not answer the following question.

Did the failure of the [*instrument*] to set out the [*disputed terms*] result from a mutual mistake?

Mutual mistake occurs when the parties have previously reached an agreement but because of a mistake common to both parties, the [*instrument*] as written does not reflect the prior agreement.

Unilateral mistake by one party, and knowledge of that mistake by the other party, is equivalent to mutual mistake.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 305.20 is appropriate for use when a party claims that a mutual mistake in reducing the agreement to writing failed to accurately reflect the prior agreement and that the instrument should be "reformed" by the court to correctly state the prior agreement.

Source of question. PJC 305.20 is derived from *Davis v. Grammar*, 750 S.W. 2d 766, 768 (Tex. 1988) and *Sun Oil Co. v. Bennett*, 125 Tex. 540, 546 (Tex. 1935). The broad form of this question is adapted from the Texas Supreme Court's analysis in *Cherokee Water Company v. Forderhause*, 741 S.W.2d 377, 380(Tex. 1987). Although the court disapproved of the jury questions actually given in that case, it held that the charge would have been correct had the jury been instructed to find (i) the terms of an agreement that was made prior to reducing the relevant instruments to writing and (ii) that a mutual mistake was made in presenting those terms within the documents.

Requirements for reformation. "Reformation of an instrument is a proper remedy when two requirements are satisfied; (1) the true agreement of the parties is shown; and (2) the provision erroneously written into the instrument is there by mutual mistake." *Parker v. HNG Oil*, 732 S.W.2d 754, 755 (Tex. App- Corpus Christi – Edinburg 1987, no writ.). An exception to the requirement that the mistake be mutual is the unilateral mistake by one party "accompanied by fraud or other inequitable conduct of the remaining party." *Cambridge Companies, Inc. v. Williams*, 602 S.W.2d 306, 308 (Tex. App.—Texarkana 1980), *aff'd on other grounds*, 615

S.W.2d 172 (Tex. 1981). Knowledge by one part of another's mistake in the expression of the contract is equal to mutual mistake. *Davis v. Grammar*, 750 S.W.2d 766, 768 (Tex. 1988) (citing *Cambridge*, 602 S.W.2d at 308).

See PJC 312.9 for an instruction on the Defense of Mutual Mistake due to a Scrivener's Error.

Disputed terms. The disputed terms inserted into the question should reflect the contention of the party bearing the burden of proof.

Burden of proof. Reformation requires clear, exact, and satisfactory evidence of mutual mistake. *Sun Oil Co.*, 125 Tex 540 at 548; *Estes v. Republic National Bank of Dallas*, 462 S.W.2d 273, 275 (Tex. 1970). The general rule, however, is that the burden of proof in civil cases is by a preponderance of the evidence. *See, e.g., Ellis County State Bank v. Keever*, 888 S.W.2d 790 (Tex. 1994); *State v. Turner*, 556 S.W. 2d 563, 565 (Tex. 1977). *But cf. Hardy v. Bennefield*, 368 S.W.3d 643, 648 (Tex. App – Tyler 2012, no pet.) (citing *Estes* and noting "burden at trial is proof by clear and convincing evidence" for reformation).

Burden of proof. The party pleading the statute of frauds bears the initial burden of establishing its applicability. Tex. R. Civ. P. 94; *Dynegy, Inc. v. Yates*, 422 S.W.3d 638 (Tex. 2013). Once that party meets its initial burden, the burden shifts to the opposing party to establish an exception that would take the verbal contract out of the statute of frauds. *Dynegy, Inc.*, 422 S.W.3d at 641. A party relying on the main purpose doctrine therefore must plead and establish facts to take a verbal contract out of the statute of frauds. *Dynegy, Inc.*, 422 S.W.3d at 641.

PJC 305.22 Third-Party Beneficiaries (Comment)

Third-party beneficiaries. A third party may enforce an agreement as a beneficiary to that agreement if the contracting parties (1) "'intended to secure a benefit to th[e] third party'" and (2) "'entered into the contract directly for the third party's benefit.'" *First Bank v. Brumitt*, 519 S.W.3d 95, 102 (Tex. 2017). *See also Basic Capital Management, Inc. v. Dynex Commercial, Inc.*, 348 S.W.3d 894, 900 (Tex. 2011) (quoting *MCI Telecommunications Corp. v. Texas Utilities Electric Co.*, 995 S.W.2d 647, 651 (Tex. 1999)); *see City of Houston v. Williams*, 353 S.W.3d 128, 145 (Tex. 2011). The "'intention to contract or confer a direct benefit to a third party must be clearly and fully spelled out or enforcement by the third party must be denied.'" *Basic Capital Management, Inc.*, 348 S.W.3d at 900 (quoting *MCI Telecommunications Corp.*, 995 S.W.2d at 651).

It is presumed that parties contract solely for themselves, "only a clear expression of the intent to create a third-party beneficiary can overcome that presumption" and doubts regarding the parties' intent "must be resolved against conferring third-party beneficiary status. *First Bank*, 519 S.W.3d at 103; *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 420 (Tex. 2011). A court will not create a third-party-beneficiary contract by implication. *Basic Capital Management, Inc.*, 348 S.W.3d at 900.

It is not enough that the third party would benefit—whether directly or indirectly—from the parties' performance, or that the parties knew that the third party would benefit. *First Bank*, 519 S.W.3d at 102; *Sharyland Water Supply Corp.*, 354 S.W.3d at 421. Nor does it matter that the third party intended or expected to benefit from the contract, for only the "intention of the contracting parties in this respect is of controlling importance." *First Bank*, 519 S.W.3d at 102 (quoting *Banker v. Breaux*, 133 Tex. 183, 128 S.W.2d 23, 24 (1939)).

Form of question. Ordinarily, construction of an unambiguous written instrument to determine third-party-beneficiary status is a question of law for the court. *See First Bank*, 519 S.W.3d at 105-106 (the court should determine whether the agreement is ambiguous and whether it "clearly, fully, and unequivocally express[es] the parties' mutual intent" to confer third-party beneficiary status); *Basic*

Capital Management, Inc., 348 S.W.3d at 900. When deciding whether the parties to an unambiguous contract intended to create a third-party beneficiary, the court must look solely to the contract's language construed as a whole. *First Bank*, 519 S.W.3d at 106.

If the court determines the agreement is ambiguous such that there is a fact issue regarding whether the contracting parties intended to confer third-party beneficiary status on a non-party, the Committee recommends that the following question be submitted to the jury:

QUESTION _____

Did *Paul Payne* and *Don Davis* enter into the agreement with the intent to confer some direct benefit on *Third-Party Tom*?

[Insert instructions and definitions, if appropriate.]

Answer "Yes" or "No."

Answer: _____

See First Bank, 519 S.W.3d at 102-104; *Basic Capital Management, Inc.*, 348 S.W.3d at 899-900; *MCI Telecommunications Corp.*, 995 S.W.2d at 651. For more detailed discussion regarding what may constitute a "direct benefit," see *Sharyland Water Supply Corp.*, 354 S.W.3d at 421; *City of Houston*, 353 S.W.3d at 145; and *Basic Capital Management, Inc.*, 348 S.W.3d at 900.

Upon an affirmative answer to this question, the third-party beneficiary may submit PJC 101.2 to determine compliance of the party allegedly in breach.

PJC 305.25 Money Had and Received (Comment)

Texas has long recognized a claim for money had and received if a defendant holds money that "in equity and good conscience" belongs to the plaintiff. *See Plains Exploration & Production Co. v. Torch Energy Advisors Inc.*, 473 S.W.3d 296, 302 n.4 (Tex. 2015); *Merryfield v. Willson*, 14 Tex. 224, 225 (1855). But the boundaries of the claim are not always clear, as it is "less restricted and fettered by technical rules and formalities than any other form of action." *Staats v. Miller*, 243 S.W.2d 686, 687–88 (Tex. 1951) (quoting *U.S. v. Jefferson Electric Mfg. Co.*, 291 U.S. 386, 402–03 (1934)).

For example, the textbook money-had-and-received claim involves a mistaken overpayment to a defendant, *see Pickett v. Republic Nat. Bank of Dallas*, 619 S.W.2d 399, 400 (Tex. 1981), or payment to the wrong party, *see Amoco Prod. Co. v. Smith*, 946 S.W.2d 162, 165 (Tex. App.—El Paso 1997, no writ). But recovery for money had and received may not be available in either case, depending on the circumstances. *Samson Exploration, LLC v. T.S. Reed Properties, Inc.*, 521 S.W.3d 766, 780 (Tex. 2017) (denying recovery of overpayment deemed voluntary); *Holden Business Forms Co. v. Columbia Medical Center of Arlington Subsidiary, L.P.*, 83 S.W.3d 274, 278 (Tex. App.—Fort Worth 2002, no pet.) (denying recovery of insurer's mistaken payment to hospital); *see also Best Buy Co. v. Barrera*, 248 S.W.3d 160, 162 (Tex. 2007) (presuming without deciding that claim applied to restocking fee charged for returned items). Circumstances that may permit or limit the claim are discussed below.

Prerequisite findings. Money had and received "is not premised on wrongdoing." *Plains*, 473 S.W.3d at 302 n.4. Thus, a bank that puts too much money in a customer's account can

recover it even if the customer did nothing wrong. *See Pickett*, 619 S.W.2d at 400. But "equity follows the law," so equitable doctrines like money had and received generally must conform to legal rules. *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 648 (Tex. 2007). For example, when a valid contract addresses a matter, recovery under equity cannot rewrite the parties' contract. *Fortune Production Co. v. Conoco, Inc*., 52 S.W.3d 671, 685 (Tex. 2000). Thus, if a plaintiff's claim to money held by another depends on a contract, statute, will, or other legal claim, failure to establish the prerequisite claim may defeat the money-had-and-received claim too. *Southwestern Electric Power Co. v. Burlington Northern R.R. Co*., 966 S.W.2d 467, 471 (Tex. 1998). This is true whether the contract is written or oral. *Tex Star Motors, Inc. v. Regal Finance Co., Ltd*., 401 S.W.3d 190, 202 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

While a claim for money had and received cannot seek more than a contract specifies, it can seek a refund of amounts overpaid according to the contract's own terms. *Sw. Elec.*, 966 S.W.2d at 469. Recovery for money had and received may also be available if a contract "is unenforceable, impossible, not fully performed, thwarted by mutual mistake, or void for other legal reasons." *City of Harker Heights, Tex. v. Sun Meadows Land, Ltd*., 830 S.W.2d 313, 319 (Tex. App.—Austin 1992, no writ); *see also McCullough v. Scarbrough, Medlin & Associates, Inc*., 435 S.W.3d 871, 891 (Tex. App.—Dallas 2014, pet. denied). The Texas Supreme Court has noted only that equity "might" allow recovery of money when a contract is voidable. *Gotham Insurance Co. v. Warren E & P, Inc*., 455 S.W.3d 558, 563 n.11 (Tex. 2014); *cf. Neese v. Lyon*, 479 S.W.3d 368, 391 (Tex. App.—Dallas 2015, no pet.) ("If the instrument is voidable rather than void, the party must sue for rescission and cannot sue for money had and received."). One court has allowed recovery for money had and received despite no damages

under the related contract. *See Norhill Energy LLC v. McDaniel*, 517 S.W.3d 910, 917 (Tex. App.—Fort Worth 2017, pet. filed).

Money received. Money had and received requires that the defendant actually received the money. Receipt of goods is not enough. *Hurst v. Mellinger*, 11 S.W. 184, 185 (Tex. 1889). Nor is a claim that the defendant will receive money in the future. *Mary E. Bivins Foundation v. Highland Capital Mgmt. L.P.*, 451 S.W.3d 104, 112 (Tex. App.—Dallas 2014, no pet.). The claim does not include other damage measures like benefit of the bargain or cost of replacement. *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 860 (Tex. App.—Fort Worth 2005, no pet.). It is no defense that the defendant no longer has the same money on hand. *Pickett*, 619 S.W.2d at 399. But it is a defense that the defendant materially changed its position in reliance on a mistaken payment. *Bryan v. Citizens National Bank in Abilene*, 628 S.W.2d 761, 763 (Tex. 1982).

Equity and good conscience. "A claim for money had and received is equitable in nature." *Plains*, 473 S.W.3d at 302 n.4. Texas courts have traditionally submitted such claims to a jury. *See Staats v. Miller*, 243 S.W.2d 686, 688 (1951) ("[T]he trial court erred in refusing to submit to the jury the petitioners' case on the theory of money had and received."). "As a general rule, the trial court, not the jury, determines the 'expediency, necessity, or propriety of equitable relief.'" *Hill v. Shamoun & Norman, LLP*, 544 S.W.3d 724, 741 (Tex. 2018) (quoting *State v. Tex. Pet Foods, Inc.*, 591 S.W.2d 800, 803 (Tex. 1979)). But "'when contested fact issues must be resolved before equitable relief can be determined, a party is entitled to have that resolution made by a jury.'" *Hill*, 544 S.W.3d at 741 (quoting *Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999)). "Once any such necessary factual disputes have been resolved, the weighing of all equitable considerations ... and the ultimate decision of how much, if any, equitable relief

should be awarded, must be determined by the trial court." *Hill*, 544 S.W.3d at 741. (citation omitted).

But "equity and good conscience" is a term of art unfamiliar to most jurors. Many factors might bear on what "equity and good conscience" require, so it is not possible to comprehensively list all the instructions jurors should receive in such cases. *See, e.g., Stonebridge Life Insurance Co. v. Pitts*, 236 S.W.3d 201, 206 (Tex. 2007) (listing factors like knowledge of and consent to credit card charges, and desire for product regardless of the charges); *Edwards v. Mid-Continent Office Distributors, L.P.*, 252 S.W.3d 833, 841 (Tex. App.—Dallas 2008, pet. denied) (listing factors like the parties' business practices, communications, reliance, and the *status quo ante*). Some relevant factors may be legal questions beyond the competence of jurors. *See* Restatement (Third) Of Restitution and Unjust Enrichment § 32, Comment c (2011) (noting that availability of restitution when a contract is illegal or unenforceable "involves a complex assessment of interrelated factors" including "the nature of the illegality; the strength of the prohibition; the extent of the claimant's culpability; whether illegal conduct was central or merely tangential to the performance in question; the deterrent effect, if any, of a decision one way or the other; the cost and difficulty of the adjudications necessitated by alternative legal rules; and the extent to which a remedy in restitution would tend to carry out (or, conversely, to frustrate) a transaction that the law has in some way sought to suppress.").

Adequate legal remedy. Equitable claims are sometimes supplanted if an adequate legal remedy exists. *Best Buy Co. v. Barrera*, 248 S.W.3d 160, 161 n.1 (Tex. 2007). For example, a

claim for money had and received may not be available if a statutory remedy supplants it. *See Bryan v. Citizens Nat. Bank in Abilene*, 628 S.W.2d 761, 763 (Tex. 1982) (supplanted by Tex. Bus. & Com. Code § 4.403); *Vista Medical Center Hospital v. Texas Mutual Insurance Co.*, 416 S.W.3d 11, 40 (Tex. App.—Austin 2013, no pet.) (supplanted by workers compensation administrative procedures). The Supreme Court has noted but not decided the issue of whether a claim for money had and received requires proof that no adequate legal remedy exists in other contexts. *See Best Buy Co. v. Barrera*, 248 S.W.3d 160, 161 n.1 (Tex. 2007); *Stonebridge Life Insurance Co. v. Pitts*, 236 S.W.3d 201, 203 n.1 (Tex. 2007).

But equity may require a plaintiff to pursue legal remedies against a wrongdoer rather than an equitable claim for money had and received against an innocent bystander. Thus, an insured's claim that policy proceeds were wrongly paid to a third party must pursue a contract claim against the insurer, not a money-had-and-received claim against the third party who received the proceeds. *Evans v. Opperman*, 13 S.W. 312, 313 (Tex. 1890). Similarly, if A fraudulently causes B to pay a debt A owes to C, B must sue A for fraud rather than suing C for receiving money it was rightfully due. *Edwards v. Mid-Continent Office Distributors, L.P.*, 252 S.W.3d 833, 841 (Tex. App.—Dallas 2008, pet. denied)

Defenses. The defendant may "raise any defenses that would deny the claimant's right or show that the claimant should not recover." *Best Buy Co.*, 248 S.W.3d at 162 . Since "equity and good conscience" may depend on the validity of those defenses, the Supreme Court has indicated they may relate to the plaintiff's case-in-chief, and do not present independent affirmative defenses as traditionally defined. *Id*. at 163.

Voluntary payment. Voluntary payment may be an additional defense to claims for money had and received. A party cannot recover for voluntary payments made on a claim of right, with full knowledge of all the facts and in the absence of fraud, deception, duress, or compulsion, even if the party was mistaken about the law. *Samson Exploration, LLC v. T.S. Reed Properties, Inc.*, 521 S.W.3d 766, 779 (Tex. 2017).

"Voluntary payment" is a term of art that may turn on the facts in each case, so it is not possible to comprehensively list all the instructions jurors should receive. *See BMG Direct Mktg., Inc. v. Peake*, 178 S.W.3d 763, 771 (Tex. 2005)("[A]lthough the voluntary-payment rule may have been widely used by parties and some Texas courts at one time, its scope has diminished as the rule's equitable policy concerns have been addressed through statutory or other legal remedies.")

PJC 305.26 Unjust Enrichment (Comment)

The doctrine of unjust enrichment is appropriate "'when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage.'" *Southwestern Bell Tel. Co. v. Marketing on Hold Inc.*, 308 S.W.3d 909, 921 (Tex. 2010) (quoting *Heldenfels Brother, Inc. v. Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992)). Because unjust enrichment is quasi-contractual, it may not be submitted to the jury "when a valid, express contract covers the subject matter of the parties' dispute". *Fortune Production Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000) (citing *TransAmerican Natural Gas Corp. v. Finkelstein*, 933 S.W.2d 591, 600 (Tex. App.—San Antonio 1996, writ denied) (no recovery for unjust enrichment if the same subject is covered by an express contract)). But overpayments under a contract can be recovered under unjust enrichment. *Southwestern Electric Power Co. v. Burlington Northern RR. Co.*, 966 S.W.2d 467, 469–70 (Tex. 1998).

The Committee has not identified any authority specifically defining "undue advantage" in this context. But the Dallas, San Antonio, and Corpus Christi-Edinburg courts of appeals have explained that unjust enrichment occurs when someone "has wrongfully secured a benefit or has passively received one which it would be unconscionable to retain." *Tex. Integrated Conveyor System v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 367 (Tex. App.—Dallas 2009, pet. denied) (citing *Villarreal v. Grant Geophysical, Inc.*, 136 S.W.3d 265, 270 (Tex. App.—San Antonio 2004, pet. denied) (quoting City of Corpus v. S.S. Smith & Sons Masonry, Inc., 736 S.W.2d 247, 250 (Tex. App.—Corpus Christi 1987, writ denied))).

The Texas Supreme Court has referred to unjust enrichment as an independent "cause of action" (*HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 891 (Tex. 1998)), "claim" (*Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 870 (Tex. 2007) (per curiam)), and "theory" of recovery (*Marketing on Hold*, 308 S.W.3d at 921). Some courts of appeals have questioned whether unjust enrichment is an independent cause of action as opposed to a remedy for fraud or other improper conduct. *See, e.g.*, *Casstevens v. Smith*, 269 S.W.3d 222, 229 (Tex. App.—Texarkana 2008, pet. denied) (not an independent cause of action); *R.M. Dudley Construction Co. v. Dawson*, 258 S.W.3d 694, 703 (Tex. App.—Waco 2008, pet. denied) (same); *Argyle ISD ex rel. Board of Trustees v. Wolf*, 234 S.W.3d 229, 246 (Tex. App.—Fort Worth 2007, no pet.) (same); *Mowbray v. Avery*, 76 S.W.3d 663, 679 (Tex. App.—Corpus Christi 2002, pet. denied) (same); *Walker v. Cotter Properties*, 181 S.W.3d 895, 900 (Tex. App.—Dallas 2006, no pet.) (same); *but see, e.g.*, *Pepi Corp. v. Galliford*, 254 S.W.3d 457, 460 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (is an independent cause of action); *Elledge*, 240 S.W.3d at 870 (determining "unjust enrichment claims are governed by the two-year statute of limitations"); *Clark v. Dillard's, Inc.*, 460 S.W.3d 714, 720–21 (Tex. App.—Dallas 2015, no pet.) (same).

PJC 312.9 Defenses—Instruction on Mutual Mistake—Scrivener's Error

Failure to comply is excused if the agreement was made as the result of a mutual mistake.

A mutual mistake arises when parties to an agreement have identical intent and understanding of the terms to be embodied in a proposed written agreement, but, in the effort to reduce the agreement to writing, a mistake is made so that the writing does not present the intended agreement.

COMMENT

When to use. PJC 312.9 is appropriate if a party disputes terms of the agreement because they resulted from a mutual mistake in recording the agreement. For an instruction on mutual mistake of fact, see PJC 312.8.

True agreement of the parties. If a scrivener or typist makes a mistake, "an instrument may be reformed and modified by a court to reflect the true agreement of the parties, if the mistake was a mutual mistake." *Henderson v. Henderson*, 694 S.W.2d 31, 34 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

Requirements for reformation. "Reformation of an instrument is a proper remedy when two requirements are satisfied; (1) the true agreement of the parties is shown; and (2) the provision erroneously written into the instrument is there by mutual mistake." *Parker v. HNG Oil Co.*, 732 S.W.2d 754, 755 (Tex. App.—Corpus Christi 1987, no writ). "[K]nowledge by one party of another's mistake in the expression of the contract is equal to mutual mistake." *Goff v. Southmost Savings & Loan Ass'n*, 758 S.W.2d 822, 826 (Tex. App.—Corpus Christi 1988, writ denied).

PJC 312.9 Defenses—Instruction on Mutual Mistake—Scrivener's Error

Failure to comply is excused if [the breached term] resulted from a mutual mistake.

A mutual mistake arises when the parties have previously reached an agreement but, because of a mistake common to both parties, the [instrument] as written does not reflect the prior agreement.

Unilateral mistake by one party, and knowledge of that mistake by the other party, is equivalent to mutual mistake.

COMMENT

When to use. PJC 312.9 is appropriate if a party seeks to avoid the enforcement of a disputed term of the agreement because it resulted from a mutual mistake in reducing the agreement to writing. For an instruction on mutual mistake of fact, see PJC 312.8; for a question and instruction on reformation as an affirmative cause of action resulting from mutual mistake – scrivener's error, see PJC 305.20.

Source of instruction. When addressing the elements of mutual mistake as a defense, Texas courts incorporate the elements of reformation. *See Samson Exploration, LLC v. T.S. Reed Properties*, 521 S.W.3d 26 (Tex. 2015); *CenterPoint Energy Houston Elec., L.L.P. v. Old TJC Co.*, 177 S.W.3d 425, 430 n.3 (Tex. App.—Houston (1st Dist.) 2005, pet. denied) (mutual mistake is an affirmative defense); *Gail v. Berry*, 343 S.W.3d 520, 524 (Tex. App.—Eastland 2011, pet. denied) (recognizing that a scrivener's error is a type of mutual mistake); *Wright v. Gernandt*, 559 S.W.2d 864, 868 (Tex. Civ. App.—Corpus Christi 1977, no writ) (analyzing elements of reformation for affirmative defense of mutual mistake based on scrivener's error).

"[R]eformation requires two elements: (1) an original agreement and (2) a mutual mistake, made *after* the original agreement, in reducing the original agreement to writing." *Cherokee Water Co v. Forderhause*, 741 S.W.2d 377, 379-80 (Tex. 1987) (emphasis added). An exception to the requirement that the mistake be mutual is the unilateral mistake by one party "accompanied by fraud or other inequitable conduct of the remaining party." *Cambridge Companies, Inc. v. Williams*, 602 S.W.2d 306, 308 (Tex. App.—Texarkana 1980), *aff'd on other grounds*, 615 S.W.2d 172 (Tex. 1981). "Unilateral mistake by one party, and knowledge of that mistake by the other party, is equivalent to mutual mistake. *Davis* v. *Grammer*, 750 S.W.2d 766, 768 (Tex. 1988) (citing *Cambridge*, 602 S.W.2d at 308).