

**Supreme Court of Texas**  
**June 13, 2014**

***HMC Hotel Properties II Ltd. Partnership v. Keystone-Tex. Property Holding Corp.***

No. 12-0289

Case Summary written by Carter Bowers, Staff Member.

Justice Brown delivered the opinion of the Court.

Keystone-Texas Property Holding Corporation (Keystone) placed two San Antonio properties up for sale—The Rivercenter Mall and the land under the Marriott Riverwalk hotel in 2004. The petitioners in this case, HMC Properties, et al. (Host, collectively), own the Marriott Riverwalk hotel. Keystone notified Host in early January 2005 of a pending sale of both properties for \$166 million to a New York investor, Ben Ashkenazy. Section 14.02 of the lease between Keystone and Host required Keystone to give Host ninety (90) days’ notice of a possible sale to a third party, and to give Host the opportunity to offer its own proposal to purchase the land under the hotel. Keystone wanted Host to waive the section 14.02 rights because the proposed sale to Ashkenazy was seventy-five days after Host’s notice of the proposed sale.

In February and March of 2005, Host did not make an offer on the property, but did manifest that it was close to agreeing to the waiver. Moreover, Host and Ashkenazy met at least two times to determine the latter’s plans for the hotel property. Because Host valued the land at \$35 million, it was uncertain about Ashkenazy’s offer of \$65 million (the remaining \$101 million to go to the Rivercenter Mall, not involved in this case). Host believed this inflated price was meant to fend off any offer that Host would make on the property. Thus, on April 18, 2005, Host sent a letter to Keystone declaring that Host would not agree to a waiver of section 14.02 of the lease. Furthermore, Host wanted a new ninety-day period to reopen negotiations for a “fair market price” for the property. Title insurers in the deal refused to issue a clean title for the property unless Host agreed to the waiver. Without such title, the negotiations between Keystone and Ashkenazy fell through.

Host sued Keystone, seeking an injunction to block the sale of the property and for breach of the lease. In response, Keystone counterclaimed on the basis of slander of title and for tortious interference with a contract. On every issue, the jury found for Keystone, giving it \$39 million in actual damages and \$7.5 million in punitive damages. The trial court granted Host’s motion notwithstanding the verdict and removed the punitive damages award. The court of appeals affirmed both the actual and punitive damages awards.

Issue: Whether Host’s actions were the cause-in-fact and proximate cause of the demise of the contract between Keystone and Ashkenazy, and whether Host was under any obligation to relinquish its rights under the lease agreement.

The jury was presented with a proximate-cause standard as to Host's liability in the case, which required Host's actions (namely, the letter) to be both the cause-in-fact and the proximate and foreseeable cause of the demise of the property sale. Host's primary contention on appeal was that its actions were not the cause of the deal's failure. Instead, Host argued, the sale did not go through because Ashkenazy failed to get title insurance. The title insurers in the deal would not provide title insurance unless Host waived its rights under the section 14.02 lease provision. The court notes, however, that Host was never under any obligation to waive its rights and the title insurers sought such a waiver before and after Host's April 18 letter, suggesting that the letter was not the direct cause of Ashkenazy's failure to obtain title insurance. Because Keystone failed to proffer any evidence that the deal would have succeeded without the April 18 letter, the court determined that the letter was not the direct cause of the deal's failure.

Keystone argued that Host's quick shift from near-agreement to the waiver to adamant denial of the waiver escalated the situation and caused the title insurers to shy away from the sale. Nevertheless, the court held that Keystone's failure to provide evidence that a different fashion or earlier denial of the waiver request would have changed the outcome undermined Keystone's position. Moreover, it was Keystone's failure to obtain the waiver rather than the April 18 letter, which caused the deal to fall through. Since Host was never obligated to agree to the waiver, the manner in which they denied it also was not particularly important in this case.

Ultimately, Host's April 18 letter may have had a large impact on sale of the property, but Keystone's failure to offer evidence that the letter was both the cause-in-fact and the proximate cause of the deal's demise (and that without the letter the deal would have gone through) led the court to hold in Host's favor. Therefore, the court reversed the court of appeals' judgment and also judged that Keystone should take no damages.

## **Moayed v. Interstate 35/Chisam Road, L.P. and Malachi Development Corp.**

No. 12-0937

Case Summary written by C.J. Baker, Staff Member

Justice Willett delivered the opinion of the Court.

Petitioner, a real estate developer, borrowed \$696,000 from Respondents. The agreement granted the lenders a security interest in the land and limited the borrower's personal liability "to \$196,000 plus accrued interest and collection costs." The borrower also waived "any defense (other than the full payment of the indebtedness hereby guaranteed in accordance with the terms hereof)." The borrower defaulted on the loan at a time when the fair market value of the property was \$840,000. One of the Respondents, Interstate 35/Chisam Road, purchased the property in a nonjudicial foreclosure sale for just \$487,000. Interstate 35/Chisam

Road was the only bidder. Interstate 35/Chisam Road then sued the Moayeddi to obtain the unpaid balance, interest, and costs on the note. Property Code § 51.003 provides that, on motion by a party, the court may substitute the fair market value of the property sold in a nonjudicial foreclosure when determining the amount of the deficiency. Moayeddi requested this offset both in his answer and in a motion for summary judgment. The trial court granted the motion for summary judgment for Moayeddi but the court of appeals reversed, holding that the Moayeddi waived that right in the parties' agreement.

Issues: Is § 51.003 of the Property Code an affirmative defense to indebtedness that can be waived or is it an alternate method of calculating a deficiency? If it is a defense, did the borrower knowingly and intentionally waive that defense in the parties' agreement?

First, the Court rejected Moayeddi's assertion that § 51.003 creates two methods of calculating a deficiency. Rather, under the Property Code, the traditional definition of a deficiency remains the default position and a request for offsetting that amount under § 51.003 is properly categorized as a defense. The purpose of § 51.003 is to protect against improper results in a nonjudicial foreclosure sale where lenders are the sole bidders but the statute does not redefine a deficiency. It merely provides a right for borrowers that would not otherwise exist; that right can be waived.

Second, the Court requires waiver language to be "clear and specific" in order to be effective. Moayeddi argued that the "any defenses" waiver in the parties' agreement did not meet that standard. The Court acknowledged that heightened specificity of notice is required where lenders assert certain rights, such as acceleration of a debt. However, in those instances, the heightened specificity stems from the fact a lender's right to acceleration is not created unless it is done so with specificity in the lending agreement. The common law rights of borrowers, on the other hand, do not require heightened specificity in order to be waived. Here the Court refused to treat a defense created by statute any differently than a defense at common law. Therefore, the "any defense" waiver, though broad, had a clear meaning: Moayeddi waived all available defenses except for full payment of the debt. The judgment from the court of appeals was affirmed.

***Venture Cotton Cooperative and Noble Americas Corp. v. Freeman, et al.***

No. 13-0122

Case Summary written by Linda Castillo, Staff Member.

Justice Devine delivered the Opinion of the Court.

Venture Cotton Cooperative (Venture) operated a pool for the exclusive sale and marketing of its members' cotton production. In 2010, two groups of cotton farmers (Farmers) joined Venture's pool, but during the growing season the price of cotton rose significantly, which led to dispute with some member-farmers as to how much cotton was committed to the pool. The dispute led to the two lawsuits filed by

the Farmers claiming that Venture misled them to believe that cotton produced on designated land in excess of the estimate given by the Farmers would be under the Farmers' control. Venture denied any sort of misrepresentation.

Venture moved to stay litigation and compel arbitration in both suits because the agreements to join the pool call for arbitration of all disputes under the Federal Arbitration Act (FAA). The trial court refused to stay litigation or compel arbitration, finding that the arbitration agreements were unconscionable. Venture filed interlocutory appeals in both cases and the court of appeals consolidated them for decision.

The court of appeals affirmed the trial court's order denying Venture's motion to compel, finding that the agreements were unconscionable because Venture: (1) forced the Farmers to waive substantive rights and remedies afforded to them by the Deceptive Trade Practices Act (DTPA) statute; and (2) the agreements were one-sided, not allowing the Farmers to receive attorney fees if Venture breached the contract, but affording Venture that right if the Farmers breached.

The Supreme Court of Texas first addressed the validity of the arbitration agreement that mandates all disputes be settled through arbitration, while the American Cotton Shippers Association (ACSA) Arbitration Rules in the agreement bars the Farmers' statutory claim for attorney's fees through section 8(k). The court relied on its decision in *In re Poly-America, L.P.* where the court found that it would be unconscionable for an arbitration agreement to mandate arbitration of a statutory claim and at the same time eliminate the rights and remedies afforded by statute. *In re Poly-America, L.P.*, 262 S.W.3d 337 (Tex. 2008). There, the court severed the invalid limitation from the agreement and permitted the arbitration to proceed. Here, the court found that while DTPA remedies could be contractually waived, the requirements of a valid waiver were not met. To properly waive DTPA remedies the waiver must be prominent and in bold-face type of at least 10 points in size, identified by a specific heading that indicates waiver and include language similar to the statute, but that was not in the agreement here. Therefore, the implied waiver under ACSA rule 8(k) was found invalid and contrary to public policy.

Next, the court addressed whether Venture could sever the invalid limitation from the arbitration agreement. The court continued to rely on their decision in *Poly-America*, where they noted that an unconscionable provision of a contract could be severed as long as it does not make up the essential purpose of the agreement. *In re Poly-America, L.P.*, 262 S.W.3d 337 (Tex. 2008). The court concluded that the court of appeals erred when it declined to sever the invalid limitation because the arbitration agreement's essential purpose was to provide a speedy and efficient resolution of disputes. The statutory rights and remedies were not the essential purpose of the arbitration agreement, and therefore, severable.

Finally, the court addressed whether the arbitration agreement was unconscionably one-sided due to Venture's ability to collect attorney's fees and the Farmers' inability to do so. The court concluded, that neither the agreement's attorney's fee provision nor its effect on attorney's fees under § 38.001 of the Civil

Practice and Remedies Code is sufficient to invalidate the arbitration agreement as unconscionable. The court reasoned that parties are free to contract for attorney's fees as they see fit; therefore, the imbalance of the attorney's fee provision here is not unconscionable per se. However, the relevancy of the provision was questioned because of the finding that the Farmers did not waive their statutory right to attorney's fees.

The judgment of the court of appeals was reversed and the case was remanded to the court of appeals for consideration of Venture and the Farmers' unaddressed arguments.