

## COURT HOLDS TEXAS DAMAGES CAP NOT A “RAISE IT OR LOSE IT” DEFENSE

by  
Judith R. Blakeway

Is the Texas statutory cap on exemplary civil damages an avoidance or affirmative defense, which, under state civil procedure rules, courts will deem waived if defendants do not specifically plead it?

Until recently, the answer to that question had depended on where in Texas a defendant was sued. Courts of appeals in Fort Worth, Corpus Christi, and Houston have held that the exemplary damages cap was an affirmative defense that must be pleaded. In contrast, courts in San Antonio and Amarillo held that the statutory damages cap was not an affirmative defense, and thus need not be pleaded.

The Texas Supreme Court resolved the conflict on June 12, 2015 in *Zorrilla v. Aypco Constr., II, LLC*, 58 Tex. S.Ct.J. 1140 (Tex. June 12, 2015). The case arose when a homeowner refused to pay a construction company for work done. The construction company sued the homeowner for breach of contract and fraud. The jury found that the homeowner had defrauded the construction company and awarded \$56,654 in economic damages and \$250,000 in exemplary damages. In her motion for new trial, the homeowner challenged the award of exemplary damages, arguing that she was not required to plead the statutory cap and that an exemplary damages award of \$250,000 based on \$56,654 in economic damages exceeded the statutory cap and should be reduced under Section 41.008 of the Texas Civil Practice and Remedies Code.

The Texas Rules of Civil Procedure require that specific defenses in any matter “constituting an avoidance or affirmative defense” shall be set forth affirmatively in a responsive pleading. Tex. R. Civ. P. 94. If an affirmative defense or avoidance is not expressly pleaded, the party cannot rely on the defense as a bar to liability. Rule 94 does not categorize an exemplary damages limitation as an affirmative defense or an avoidance, nor does it specify that such a damages cap be affirmatively pleaded. The court thus had to decide whether the damages cap was an affirmative defense, an avoidance, or neither of the two.

Aypco argued that the court should construe the terms “affirmative defense” and “avoidance” as separate concepts, and that the term “avoidance” was sufficiently broad as to include damages caps. It acknowledged that some courts have considered the terms as distinct. After explaining these distinctions, the court alternatively noted that “courts frequently use the words interchangeably,” and “the modern legal lexicon has muddled the distinction.” The terms share one key “hallmark characteristic,” the court added: “the burden of proof is on the defendant to present sufficient evidence to establish the defense and obtain the requisite jury findings.”

A damages cap “applies automatically to claims not expressly excepted,” the court wrote, and thus the defendant bears no burden to prove additional facts. “Moreover,” the court added, “there is no defense to it.” Because the defense is “a matter of law,” plaintiffs will not be surprised “by its application in any given case.”

The court thus concluded that the exemplary damages cap was neither an affirmative defense nor an avoidance under Texas procedural rules. Therefore, defendants do not lose the benefit of the cap even if its applicability is not raised in the early stages of civil litigation.

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**Judith R. Blakeway** is a Partner with Strasburger & Price, LLP in its San Antonio office.

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