

1 CAUSE NO. PR-10-1517-3
 2 IN RE: The Estate of () IN THE PROBATE COURT
 3 MAX D. HOPPER ()
 4 DECEASED, ()
 5 ***** () NUMBER THREE OF
 6 JO N. HOPPER, PLAINTIFF, ()
 7 VERSUS ()
 8 JP MORGAN CHASE, N.A., STEPHEN B.
 9 HOPPER AND LAURA S. WASSMER, () DALLAS COUNTY, TEXAS
 10 DEFENDANTS

11 *****
 12 REPORTERS RECORD
 13 *****

14 APPEARANCES:

15 Mr. John C. Eichman	Mr. Thomas H. Cantrill
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15 SB:06494800	SB:03765950
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18 SB: 10632900	SB:20123100

19
 20
 21 Be it remembered that on the 9th day of November,
 22 2011, A.D. the above entitled REPORTERS RECORD took
 23 place, before the HONORABLE JUDGE, Michael E. Miller,
 24 Judge Presiding, and the following proceeding:

25 WAS TAKEN BY MACHINE SHORTHAND:

1 P-R-O-C-E-E-D-I-N-G-S

2 THE COURT: It this is PR-11-3238-3,
3 regarding -- And this is the Hopper Case, JPMorgan Chase
4 is in it, Stephen B. Hopper and Laura S. Wassmer and Jo
5 N. Hopper and Max D. Hopper, in a sense.

6 Okay. Who wants to begin?

7 MR. EICHMAN: Your Honor, John Eichman and
8 Tom Cantrill for JPMorgan Chase Bank, N.A, in its
9 capacity as Independent Administrator for Mr. Hopper's
10 estate, and also in its corporate capacity.

11 And, Judge, we are here this morning on two
12 special exceptions that JPMorgan has filed. One of
13 those exceptions have filed in both capacities and the
14 other exception we filed it in its capacity as
15 Administrator. And the two exceptions which are in the
16 answer and counterclaim that we filed a few weeks back
17 address two deficiencies in Mrs. Hopper's petition in
18 this case.

19 Mrs. Hopper, as the court has probably seen
20 from the materials we submitted yesterday, has filed a
21 50 page petition which we would submit is not a model of
22 clarity. One of our special exceptions attacks the
23 pleadings because of a lack of clarity and a lack of
24 certainty in one respect, and the other special
25 exception attacks the pleading concerning a family

1 allowance claim or cause of action because it fails --
2 the pleading fails to adequately plead a cause of action
3 because there is a -- one or more missing elements of
4 the cause of action that is present, or I should
5 say absent, in the pleading.

6 And if I could, Judge, I handed up before
7 we started, a little group of materials here that have
8 -- this, I think will make this move more smoothly so
9 the court won't have to flip around between pleadings
10 and what have you, in cases.

11 The first thing I wanted to point out to
12 the court is -- because there seems to be something of a
13 difference of opinion between the parties' own purpose
14 of special exceptions -- and the supreme court has
15 recently spoken very clearly on the purpose of special
16 exceptions in Texas courts -- In the Baylor Case that we
17 quote there on the first page is, is very certain: "The
18 purpose of a special exception is to compel
19 clarification of pleadings when the pleadings are not
20 clear or sufficiently specific or fail to plead a cause
21 of action." And both parts of what the supreme court's
22 talking about there are implicated by our special
23 exceptions here today. In the Baylor Case, there was a
24 failure to plead an element of a breach of contract
25 cause of action, a special exception was granted, and

1 ultimately the Supreme Court said that's the -- that was
2 the right way to proceed.

3 In addition, on the second page of our
4 materials there, there's a Dallas Court of Appeals case
5 that we quote where the Dallas Court of Appeals in a
6 fashion similar to what the Supreme Court has said,
7 notes that special exception, one of the purposes is to
8 attack pleadings when they fail to state a cause of
9 action. Now another reason that this is particularly
10 important is -- I don't know if we're going to hear it
11 today from counsel for Mrs. Hopper -- but in our, you
12 know, we tried to confer, we did confer a couple of
13 times about these special exceptions, and in the course
14 of those discussions the assertion was made that "oh, on
15 this family allowance issue, you can just handle that
16 by, if you think there's a problem, you can file a
17 motion for summary judgment." We don't think that
18 that's the, necessarily the appropriate remedy. And
19 what the Dallas Court of Appeals says is, the
20 appropriate tool to attack a problem like this is by
21 special exception. So with that context, with that
22 legal context, let me go ahead and talk about the first
23 of the special exceptions.

24 Our first special exception -- And this is
25 on page 3 -- our first special exception attacks the

1 vagaries of the Plaintiff's pleading, despite its 50
2 pages of length. The Plaintiff sues JPMorgan in two
3 capacities in this case, and that's why Mr. Cantrill and
4 I represent Morgan here as Defendant in two capacities;
5 it sues them as Independent Administrator and in its
6 corporate capacity. And as set forth here in the
7 materials, in the Plaintiff's petition they define
8 JPMorgan in such a way that basically, the Independent
9 Administrator and the corporate capacity are referred to
10 interchangeably. They might call them "the Bank" they
11 might call them "IA", they may call them "Defendant
12 Bank", or they may call them "Independent
13 Administrator", and they're basically saying, they all
14 mean the same thing.

15 THE COURT: Well, what does the bank as
16 distinguished from the Independent Executor have to do
17 with this case, if anything?

18 MR. EICHMAN: Well, that's a good question,
19 Your Honor. They have sued the bank and it's not quite
20 clear what they're asserting as claims against the bank
21 in its corporate capacity, versus what they're asserting
22 as a claim against the Independent Administrator in that
23 capacity. And they probably, they probably are saying
24 that there was fraud by "the Bank" at the front end of
25 the administration -- or before the administration

1 started that the Bank somehow defrauded Mrs. Hopper,
2 but, again, it's not entirely, it's not entirely clear
3 because of the way they define things and the way that
4 they refer to matters throughout the petition
5 interchangeably. Now there are instances where they
6 attempt to say as "Independent Administrator," for
7 instance, but because of the way they've defined
8 Independent Administrator in this definition that we
9 cite here, they've injected further confusion. And the
10 reason that this is a problem -- And I'll walk the court
11 real quickly through some instances in the petition
12 where they've created confusion -- but the reason that
13 this, or reasons that this confusion and lack of
14 specificity is a problem is, first and probably most
15 importantly, under Rule 92 -- or excuse me -- Rule 93,
16 which we cite here, certain pleadings have to be
17 verified. And one of the pleadings that has to be
18 verified is the plea saying, "we're not liable in the
19 capacity in which we're sued." Well, if somebody, if
20 somebody's going to swear to that defense, it's pretty
21 darned important for that person and for that defendant
22 to know "What am I being sued for," so in this instance,
23 that's a problem for the bank in the respective
24 capacities because it can't tell for sure what it is
25 that it's being sued for. We think it's going to be a

1 problem because we're quite certain that in the not too
2 distant future we're going to be filing motions for at
3 least partial summary judgment, and we need to know what
4 it is that we're being sued for. And if this case is
5 not earlier resolved and it needs to be tried, I think
6 there's going to be a heck of a problem at the charge
7 conference with figuring out "how is the court going to
8 charge the jury if we're not sure exactly what capacity
9 the bank is being -- the claims are being asserted
10 against the bank".

11 Continuing on, Judge, here are some
12 examples on page 4 of my materials here. For instance,
13 in the Breach of Contract claim, I've excerpted some of
14 the allegations from page 33 and 34 of the petition
15 where the Plaintiff alleges "the actions described above
16 constitute multiple breaches of the contract between
17 Plaintiff and Defendant Bank, the Bank did not honor and
18 has not kept the terms and conditions of the
19 contract..." and then continuing on "...as a result of
20 these numerous breaches of contract, Plaintiff has been
21 damaged by the Bank." The problem we've got there is,
22 we're not sure, "Is it Bank as Independent Administrator
23 or Bank in its corporate capacity?

24 Then on another claim, Breach of Fiduciary
25 Duty-Count 5. This is on page 5 of the materials, where

1 they allege on page 40 of the petition, "Defendant Bank
2 owed and has admitted it owes fiduciary duties to
3 Plaintiff..." Well, we're not sure if they're saying
4 that that's the Independent Administrator, we would
5 expect that's what they're saying but we're not certain.
6 And then it goes on to say, "By its actions described
7 above, the Bank acting as Independent Administrator
8 breached its fiduciary duties to Plaintiff." And then
9 down below, they talk about the Bank's breaches of
10 fiduciary duties, so here, we sort of think they're
11 talking about the Independent Administrator but we're
12 not sure, particularly because the way they've defined
13 Independent Administrator, that can mean anybody; it
14 could mean any of the capacities based on that
15 definition we saw back at the front end.

16 Then continuing on, the Unjust Enrichment
17 Claim on page 6 of my materials. In Count 6, once
18 again, they say that the Defendant Bank has been
19 unjustly enriched in certain ways. We don't know
20 whether that's the Independent Administrator or the bank
21 in its corporate capacity.

22 Then continuing on in page 7 of my
23 materials, they make a claim, a very broad claim for
24 Attorneys' Fees, Interest and Costs. They're seeking
25 their attorneys' fees on a number of theories. And once

1 again, they say, "...by reason of Defendant Bank's
2 conduct in the matters alleged elsewhere herein..." they
3 go on to say why they're entitled to attorneys' fees.
4 Once again, we don't know whether they're talking about
5 fees being claimed against the Independent Administrator
6 or the bank in its corporate capacity.

7 So the bottom line Judge, is, we're dealing
8 with a lot of uncertainty here, this is precisely the
9 kind of thing that special exception practice is
10 supposed to relate to, and what we're asking the court
11 to do is sustain this special exception and require
12 Mrs. Hopper to replead within 15 days. We're not asking
13 that her claims be dismissed or anything of that nature
14 at this point in time but that she replead within 15
15 days in order to --

16 THE COURT: Well, your order says, "in all
17 capacities it shall be stricken", so.

18 MR. EICHMAN: Pardon?

19 THE COURT: Your order says --

20 MR. EICHMAN: -- "if she fails to do it."

21 THE COURT: "...fails to do it, stricken"?

22 MR. EICHMAN: Yes, Your Honor.

23 THE COURT: Okay.

24 MR. EICHMAN: But we're asking that she be
25 allowed an opportunity to replead, and that if she

1 doesn't comply with the court's order, yes, that the
2 pleading, the relevant pleadings be stricken. But we're
3 asking that the court order her to replead to satisfy
4 this deficiency.

5 Now that's the end of my presentation on
6 Number One. And I've got some things to say about
7 Number Two, I don't know if you want me to --

8 THE COURT: Go right ahead on everything.

9 MR. EICHMAN: Okay. Very good, Your,
10 Honor.

11 The second one continues on at page 8 of
12 these materials, and this addresses the claim that
13 Mrs. Hopper makes for a knowing violation -- or an
14 intentional violation of the family allowance provision
15 that's in Section 286 of the Probate Code. And she says
16 that, that JPMorgan -- And again, she doesn't specify in
17 which capacity -- hopefully, she's only saying within
18 its Independent Administrator capacity --

19 THE COURT: I would assume so.

20 MR. EICHMAN: -- But, anyway, the pleading
21 attempts to assert this claim, saying we violated this
22 family allowance provision. And she says -- and I've
23 quoted here the paragraph from her pleading where she
24 makes this complaint and she says, about two-thirds of
25 the way down, "Further, it has wholly failed to fix and

1 pay the family allowance for the support of the
2 Surviving Spouse for the year following the Decedent's
3 death..." "...this is an intentional breach of Probate
4 Code Section 286(a)." Then she seeks at least one form
5 of relief with respect to that allegation. Although,
6 we're not certain that this is the only form of relief
7 she's seeking but at least this form of relief and
8 that's on page 9. And the relief she's seeking is a
9 declaratory judgment where she's asking this court to
10 declare, basically, that there has been a violation of
11 this statute and that the Independent Administrator is
12 to immediately fix and pay an appropriate family
13 allowance. Here's our problem with that set of
14 allegations, Judge: This falls squarely within what the
15 Supreme Court is talking about in the Baylor Case where
16 special exceptions are a proper way to attack the
17 failure to properly plead an element of a cause of
18 action, and there are two elements that Plaintiff, under
19 Section 286, has failed to plead. And we question
20 whether -- well, she certainly can't plead one and we
21 question whether she'd be able to plead the other but
22 certainly, she ought to be given the opportunity to take
23 a crack at it. The two things that she has failed to
24 plead are specific requirements under Section 286. And
25 we've got Section 286 set out at page 10 of the

1 materials there. Now as the court is certainly very
2 knowledgeable on this point, a family allowance under
3 Section 286 is not to be fixed until the inventory has
4 been filed and approved. In this case, the inventory
5 has been filed but objections have been made to it, so
6 it has not been approved. So, she would need to be able
7 to plead, it's either been, it's either been filed and
8 approved or that she falls within the exception to that
9 requirement. And the exception is crystal clear, that
10 element requires that if the inventory hasn't been
11 approved by the court, the spouse must have submitted an
12 application and an affidavit about her needs and about
13 her property, so she must make this sworn request for
14 the family allowance. So, Mrs. Hopper, the way we read
15 the law has to be able to plead either one or the other
16 of those elements in order to say that this Independent
17 Administrator has intentionally breached section -- the
18 requirements of Section 286 of the Probate Code.

19 Now of course, Section 286 speaks in terms
20 of, "the court shall set..." and the like, always
21 referring to court, but of course in the context of an
22 Independent Administration that role is effectively that
23 of the Independent Administrator because, of course --
24 and we've got this under or on page 11 of the materials
25 -- under Section 146(A)(4) of the Probate Code: The

1 Duties of an Independent Executor are set out there and
2 among the duties are that it "shall set aside and
3 deliver to those entitled thereto exempt property and
4 allowances for support" and then continuing on "...as if
5 the independent executor's actions had been accomplished
6 and under the orders of the court." And then, of
7 course, under Section 3(q), the definition section which
8 we've got on the next page: Independent Executor is
9 defined to encompass the Independent Administrator, so
10 based on those provisions in the statute, Judge,
11 Mrs. Hopper needs to plead one or the other of these
12 elements; she hasn't done so. The affidavit proof, the
13 sworn proof has -- she needs to plead that it's been
14 submitted to the administrator. The Administrator is
15 under the statutory scheme standing in the shoes for
16 these purposes of the court, and so her pleading is
17 deficient because she has not pled those two key
18 elements, one in the alternative to the other. And
19 that's our presentation on exceptions.

20 THE COURT: Wasn't there a case out of Fort
21 Worth last year about family allowance? Do any of
22 you-all have that on the tip of your tongue?

23 MR. EICHMAN: I have read a Fort Worth case
24 but I don't recall, I don't recall the name of it.

25 THE COURT: I don't recall the name of it

1 either.

2 Wasn't it about the adequacy of a family
3 allowance, just, uh, it's not really relevant?

4 MR. EICHMAN: I think that the Fort Worth
5 case as I recall, Judge, and this is from, I think I
6 read it a few weeks ago, it dealt with what does and
7 doesn't constitute the separate property for purposes of
8 determining the family allowance, but we aren't to that,
9 we aren't to that point yet.

10 THE COURT: Okay, I was just throwing that
11 out.

12 MR. EICHMAN: Yes, sir.

13 THE COURT: All right.

14 Go right head, Gentlemen.

15 MR. TOMLINSON: Your Honor, Ken Tomlinson
16 and Jim Jennings for Plaintiff, Jo Hopper.

17 Frankly, Your Honor, why we're here today
18 is a little indicative of how the administration of this
19 estate has been inefficient and a waste of the parties'
20 time (inaudible) --

21 (AUDIO DIFFICULTIES)

22 THE COURT: May I have one moment?

23 (SHORT BREAK IN PROCEEDINGS)

24 THE COURT: Okay, I'm sorry. Go ahead.

25 MR. TOMLINSON: Your Honor, Ken Tomlinson

1 and Jim Jennings for Plaintiff, Jo Hopper. Frankly, why
2 we're here today is indicative of the inefficiency in
3 which this administration has been administered by the
4 bank in whatever capacity. We are going to replead
5 because we have a DTPA cause of action -- we've told
6 them that --

7 THE COURT: You have a what contract?

8 MR. TOMLINSON: A DTPA client and we're
9 just waiting -- we were waiting for the time period from
10 the letter notice to expire. And we told Counsel for
11 the bank that we disagree with your special exceptions
12 but because we're already amending we'll try to take
13 care of your concerns, and if we don't then you can go
14 ahead with this hearing, we don't want to waste the
15 court's time, nor six lawyers time, given that they're
16 here today.

17 THE COURT: So what you're telling me is,
18 you want me to grant both special exceptions and give
19 you more than 15 days?

20 MR. JENNINGS: No.

21 MR. TOMLINSON: No. What I'm saying is, we
22 shouldn't be wasting time for six lawyers; it's costing
23 the estate a lot of money.

24 Let's start with where they left off, and
25 that's Special Exception Number Two with respect to the

1 family allowance. They're right. There are two
2 provisions of 286, one dealing with after an approved
3 inventory. Well, Mr. Hopper died in January of 2010, I
4 believe, so it's almost two years and we still don't
5 have a final inventory. After two or three extensions
6 they filed what they call a work in progress, so we
7 couldn't satisfy that one.

8 With respect to the (b) provision of that
9 same statute in which it says, "An affidavit showing the
10 need", the problem with that, Your Honor, is, we have an
11 Independent Administrator that has said, and we have
12 pled, that I'm going to provide it. They didn't ask for
13 an Affidavit of Need. They had all our records, they
14 knew she had a need and they said "We're going to
15 provide it," which is what we've pled. And in that
16 case, we don't have to provide an affidavit. And,
17 particularly, when you've got, you know, and I'll hand
18 the court a case, the Gross National Bank of San
19 Antonio. And it happens all the time -- (proffers
20 documents) -- in which you have an independent
21 administration or an independent executor that grants
22 themselves a family allowance without an affidavit, so
23 when you have a case like this in which we plead, the
24 administrator has said we're going to give it to you,
25 and they don't ask for a sworn pleading, and then they

1 say, no, we're not going to do it anymore, we're not
2 obligated to provide --

3 THE COURT: In other words, you're saying
4 that they told you they were going to pay a family
5 allowance, lulled you into lethargy or whatever --

6 MR. TOMLINSON: Yeah.

7 THE COURT: -- by claiming -- you thought
8 they meant, you thought they meant that you didn't have
9 to comply strictly with what they're now requiring you
10 or want to require you to comply with? And so, you say
11 they've waived it?

12 MR. TOMLINSON: Exactly. And that's what
13 we've said in our pleading, Your Honor, that they -- We
14 asked for it and they said we're going to give it to
15 you. And now they've changed their mind and say, no,
16 we're not.

17 THE COURT: Why isn't that their
18 prerogative?

19 MR. TOMLINSON: Because they have waived
20 the requirement of the affidavit.

21 THE COURT: Okay.

22 MR. TOMLINSON: Now with respect to their
23 first special exception on not having fair notice of
24 what claims are against which entity, I would, you know,
25 they've cited some things, and let me read from -- it's

1 the Wortham Case. And these are cited.

2 MR. EICHMAN: I've got a copy of that.

3 MR. TOMLINSON: Then the court says,
4 "Generally, a pleading provides fair notice of a claim
5 when an opposing attorney of reasonable competence can
6 examine the pleadings and ascertain the nature and basic
7 issues of the controversy and relevant testimony."
8 Well, they're more than competent counsel, they're very
9 good counsel. We have defined in the very first
10 sentence of our petition, the Bank in both its
11 capacities to be either the Bank or the Independent
12 Administrator; we've combined them. So they may not
13 like the fact that we've made all our claims against
14 both, and they may have defects with that but that's not
15 why we're here on their special exception, they say they
16 don't have fair notice. Well, we've defined them to be
17 the same and so every time it says Bank or Independent
18 Administrator, both of them are being sued. Now, like I
19 said, they may not like that, there's another avenue to
20 address that but they have fair notice of what claims
21 are against which entity; they're against both. That's
22 all I have, Your Honor.

23 MR. EICHMAN: May I respond, Your Honor?

24 THE COURT: Yes, sure.

25 MR. EICHMAN: Judge, let me start in the

1 same order they started with, Number Two, real quickly.
2 If the court looks at, let's see, it was page 8 of my
3 materials there, where we quote their pleadings about
4 the family allowance. The bank. There is no allegation
5 of waiver of the requirements of the family allowance,
6 there's no allegation that the administrator has agreed
7 to fix and pay a family's allowance. What there is, is,
8 they say, "The Bank repeatedly assured the Plaintiff
9 that it would pay from the assets under administration
10 various costs of support of the Plaintiff, particularly,
11 with respect to costs and expenses associated with the
12 homestead." There is nothing in this pleading that says
13 there is an agreement by the Bank to fix and pay a
14 family allowance. The statute is real clear. They're
15 suing us, Judge, for violating the statute. They say we
16 have intentionally breached the statute so they're
17 asserting a cause of action effectively under that
18 statute. So, it is incumbent on them to satisfy the, in
19 their allegations, the requirements of the statute, and
20 they do not here say that -- despite what Mr. Tomlinson
21 represented -- that there was a request for an allowance
22 and an agreement by the bank to in any way waive the
23 requirements of the statute, so, that's our response on
24 that point.

25 Now with respect to his argument on Number

1 One. What he's trying to do right now is, it sounded
2 like he was asking to amend his pleading to say that
3 they are asserting every claim against JPMorgan Chase
4 Bank in both capacities -- that's what I'm hearing
5 him --

6 THE COURT: That's what I heard him say.

7 MR. EICHMAN: -- him say. That's not, I
8 don't think, what they've done in their current
9 pleading. It is very hard to tell what they've done in
10 their current pleading but it is far from clear that
11 that's what they're pleading, in other words, that every
12 single claim as being asserted against Morgan in both
13 capacities; if that's what they want to amend their
14 pleadings to say, that's certainly within their power.
15 I would question whether they would be able to do that
16 under the requirements for a lawyer to, in signing a
17 pleading in good faith but if they think they can then
18 they're free to do that but that's not what their
19 current pleading says.

20 And lastly, Judge, this Wortham Case.
21 Although, I appreciate the comment that, we're at least,
22 that they believe that Mr. Cantrill and I are at least
23 competent, competent lawyers, in the Wortham Case there
24 weren't special exceptions even addressed in that case.
25 In that case the court was looking to see whether

1 certain pleadings justified the submission of certain
2 questions. And in my reading of it -- and they can
3 correct me if I'm wrong -- I didn't see any reference to
4 a special exception. The standard is different when
5 you've actually filed a special exception than when you
6 haven't. And in fact --

7 THE COURT: What do you mean, where is this
8 reference to the Wortham Case? I don't see that.

9 MR. EICHMAN: That's the case they handed
10 up to you.

11 THE COURT: I have a Gross National Bank
12 versus Merchant.

13 MR. EICHMAN: I think it was the second
14 case that they --

15 MR. JENNINGS: Here's another copy, Your
16 Honor.

17 THE COURT: I think I only got one case.

18 MR. JENNINGS: Here, we'll give you another
19 copy.

20 THE COURT: Okay. Thank you, sir.

21 MR. TOMLINSON: Here it is, Your Honor.

22 MR. EICHMAN: They cited another -- I
23 actually like some of their cases that they've cited in
24 their Response. Let me make this last point, Judge, in
25 one of the cases that they've cited, was a supreme court

1 case called -- it's called Warrick versus Allen (ph).
2 The Supreme Court says, "When there are no special
3 exceptions, a petition will be construed liberally in
4 favor of the pleader." Meaning, that if there are
5 special exceptions then the court is within its
6 discretion to scrutinize the pleadings, and that's what
7 we're asking the court to do here.

8 And then on that -- Since you raised the
9 case, the issue of that case involving the family
10 allowance and that executor there paying herself a
11 family allowance, there's no allegation in that case of
12 a breach of, an intentional breach of the requirements
13 of Section 286, like there is in this case, so we don't
14 think that that's germane.

15 Thank you, Judge.

16 THE COURT: Thank you, sir.

17 Can you tell me roughly when you intend to
18 amend your pleadings on a DTPA issue?

19 MR. JENNINGS: Well, Your Honor, I think
20 that the -- this conversation only took place last night
21 so we don't have a date in mind yet.

22 THE COURT: Okay. I thought you were
23 waiting to satisfy some --

24 MR. JENNINGS: Well, we don't really think
25 that there was 60 day requirement at all, Your Honor.

1 We had sent them a notice letter; it's a long story
2 about how the timing worked out. We had a notice letter
3 prepared, it was sent out, like, the next day, I
4 believe, if my memory serves right. They filed a
5 counterclaim. Under the DTPA statute, it says that if
6 there is a claim on file which you're, that you're
7 putting your DTPA claim in opposition against, you don't
8 have to wait 60 days. So, frankly, had they filed their
9 pleading beforehand, we probably never would have sent
10 out the 60 day notice letter. It was just kind of one
11 of those cross through the mail situations, so we didn't
12 -- we didn't do what we would have probably done, which
13 was simply just file a counterclaim already.

14 I haven't drafted it yet. I'm going to be,
15 as they know and I announced the last time we had a
16 hearing down here but not before you -- I am going to be
17 out of the country from about November 29th through the
18 12th. And I had told them last night, I was probably
19 going to amend our pleading around December 15th, and we
20 were going to try to address, you know, whatever
21 concerns they had in their deal as Mr. Tomlinson
22 correctly stated but -- And I should stand up, I'm
23 sorry, Your Honor.

24 THE COURT: That's all right.

25 MR. JENNINGS: But --

1 THE COURT: I mean, I would love you to
2 stand up but if you don't --

3 MR. JENNINGS: -- In any event, that's kind
4 of what happened. So I was planning to basically by
5 December 15th file, it might be sooner if we can get it
6 done, there's a lot of discovery that's out right now
7 and, frankly, we were focused on that more than we were
8 the pleadings because the case had just started, there's
9 not a scheduling in order place which we need to
10 address.

11 But I do want to bring one thing to the
12 court's attention, if I may, Your Honor, as long as I'm
13 standing up. I think that Mr. Eichman has just
14 misstated the law terribly to you on this one point.
15 This is from the, a court of appeals case, the Goldstein
16 Case, Ross versus Goldstein, we've cited it in our
17 Response, Let me just read this to you directly. He
18 says, oh, if you have special exceptions you don't have
19 that liberal construction. That's exactly wrong.
20 Here's what the Goldstein Case says, "We liberally
21 construe pleadings because special exceptions are only a
22 challenge to determine if the fair notice requirements
23 of pleadings have been met. See Wortham versus Dow
24 Chemical," which we just gave you. "If by examining a
25 plaintiff's pleading alone we may ascertain with

1 reasonable certainty the elements of a cause of action
2 and relief sought, the pleading is sufficient." Now,
3 you know, they keep saying, oh, it's a 50 page pleading,
4 a 50 page pleading, a 50 page pleading, like there's
5 something wrong with having a 50 page pleading on file.
6 They've got 50 pages of notes, Your Honor. In 50 pages
7 of notes they found exactly one thing that they think is
8 questionable under the Texas Probate Code. Well, we
9 don't necessarily agree with them, we think that they
10 have engaged in a waiver just as Mr. Tomlinson correctly
11 pointed out, etc, etc, but all that aside, all that
12 aside, they don't have any problem understanding how
13 they're being sued, this isn't two entities.

14 The special except -- I've argued a hundred
15 special or a 1000 special exceptions in 33 years as of
16 two days ago, in 33 years 99 percent of those exceptions
17 are, where there are multiple defendants and the learned
18 counsel can't figure out, well, are you talking about
19 defendant number 1, 2, 3, 4, etc., we're not sure, you
20 know, you pled this cause of action for tortious
21 interference, well, did you mean our client that did it
22 or did you mean Jo's client or Sam's client over here?
23 That's the usual case. This is really trying to eat the
24 peach without breaking the skin, on their part. You
25 can't do that. They know the capacities that they've

1 been sued in, two. They've been sued as Independent
2 Administrator, they've been sued individually as the
3 Bank; they are one and the same.

4 This is why this whole thing -- Well, if
5 they're brave enough to file a pleading against -- well,
6 we're plenty brave, that's not the problem. The problem
7 here, is it's all one entity. It's not two entities or
8 three entities or five entities; it's one entity. We
9 made a contract with "the Bank" before it was invested
10 with the imprimatur of this court by an order granting
11 it powers of Independent Administration, so it's all one
12 entity, it's always been one entity.

13 THE COURT: What about Mr. Eichman's
14 question that Rule 92, I think it is, or 3, says that if
15 he denies anything sued in the correct capacity he has
16 to do it under oath, so he has to know in what capacity
17 the bank is being sued?

18 MR. JENNINGS: May I hand you this case,
19 Your Honor. And we've got it marked at the right page.

20 THE COURT: Thank you.

21 MR. JENNINGS: I'll let Mr. Tomlinson
22 address that if he'd like to 'cause I think he wants to
23 say something else here.

24 MR. TOMLINSON: Well, let me hand you, if I
25 may, the very, the petition that we've been talking

1 about that's 50 pages long.

2 THE COURT: I have it.

3 MR. TOMLINSON: You have it? Okay.

4 MR. JENNINGS: We'll let you have another
5 one.

6 THE COURT: I'll have another one. Thank
7 you.

8 MR. JENNINGS: This one is not back and
9 front copy like theirs is.

10 THE COURT: I mean, what's a tree here and
11 there?

12 MR. JENNINGS: That's right. We've already
13 chopped it down.

14 MR. TOMLINSON: As you'll see in the very
15 first sentence we defined the Bank and the Administrator
16 to be one in the same. And we're saying, where we use
17 either the Bank, the Defendant Bank, Independent
18 Administrator or IA, it means both.

19 THE COURT: Where is that?

20 MR. TOMLINSON: That's on the very first
21 sentence, it's on page 1.

22 THE COURT: Page 1, okay. Well, let me
23 think about it.

24 Anybody have anything else to --

25 MR. JENNINGS: In light of what

1 Mr. Tomlinson said, again, if they don't like the fact
2 that we've identified them as both then they can bring
3 that up but not be a special exception, they can say,
4 well, you can't sue us in this, individually in this
5 capacity, individually in this sentence because that's
6 really not a proper cause of action. Well, that's a
7 summary judgment motion he says that it's in the works
8 already, they don't really have any problem with a
9 verified denial under Rule 93, they've got plenty of
10 ability to do that, and parse it any way they want in
11 their verification. So this is all just a phony issue
12 which harkens back to what Mr. Tomlinson said at the
13 beginning, which is, this has been a giant waste of
14 time, they knew we were going to amend our pleadings
15 anyway, they gave us permission by waiver of the DTPA
16 timetable -- if there was one, which we don't really
17 think there was -- last night, we're going to send them
18 a confirming letter today that we're going to amend, and
19 we are planning to amend by December 15th, so in any
20 event, we're going to try address any issues that we
21 thought might be out there, we don't think there really
22 are. That's all.

23 MR. EICHMAN: Judge, just real quickly.
24 This capacity point is fundamental, and it is, their
25 pleadings absolutely confuse and confusing on the issue.

1 And if they say they're going to replead, fine, we would
2 ask that they be required to replead pursuant to the
3 court's order on our special exception so that we aren't
4 back down here again arguing over the same point.

5 THE COURT: Well, let me ask you just
6 something in theory: If I say Jack and Jill went up the
7 hill, why should I have to say "Jack went up the hill
8 and Jill went up the hill"? Why can't I just say "Jack
9 and Jill went up the hill"?

10 MR. EICHMAN: But, Judge, based on some of
11 those examples I showed the court, it's not clear that
12 they're saying both Jack and Jill went up the hill.

13 THE COURT: Even in the face of their
14 definition that they --

15 MR. EICHMAN: For instance, Judge, the
16 breach of fiduciary duty claim that I pointed out to the
17 court where they say "acting as IA" they say, now
18 presumably they're making that claim against the bank in
19 its capacity as Independent Administrator but because of
20 that definitional confusion we aren't sure of that, we
21 aren't sure that that's what they're saying. Earlier in
22 the sentence or in the sentence before they refer to
23 Defendant Bank, we aren't able, we aren't able with
24 certainty to have somebody say, I declare under oath
25 that Defendant Bank in its corporate capacity is not

1 liable for being sued --

2 THE COURT: -- for something that the
3 Independent Administrator did.

4 MR. EICHMAN: -- we aren't sure if they're
5 being sued for that.

6 THE COURT: Yeah, okay.

7 MR. EICHMAN: Thank you, Judge.

8 THE COURT: Thank you all very much.

9 MR. JENNINGS: Thank you, Your Honor.

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1 REPORTER'S CERTIFICATE

2 THE STATE OF TEXAS)
 3 COUNTY OF DALLAS)

4 I, MONA L. RICHARD, Official Court Reporter in and
 5 for the Probate Court Number Three of Dallas County,
 6 State of Texas, do hereby certify that the above and
 7 foregoing contains a true and correct transcription of
 8 all portions of evidence and other proceedings requested
 9 in writing by counsel for the parties to be included in
 10 this volume of the Reporter's Record, in the
 11 above-styled and numbered cause, all of which occurred
 12 in open court or in chambers and were reported by me.

13 I further certify that this Reporter's Record of
 14 the proceedings truly and correctly reflects the
 15 exhibits, if any, admitted by the respective parties.

16 I further certify that the total cost for the
 17 preparation of this Reporter's Record is \$186 and was
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