PREINJURY RELEASES AND WAIVERS

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I. Introduction

Preinjury releases are becoming more common in both the legal arena and in day-to-day activities. A properly worded preinjury release can be an effective way to insulate a party from liability. However, there are many ways plaintiff's counsel can defeat a poorly worded preinjury release. Knowing the law of preinjury releases will help you educate your client and be a better advocate for their interests.

II. What is a Preinjury Release?

A preinjury release or waiver[1] is a document that an individual signs prior to any activity that purports to release the owner/operator from claims an individual may bring as a result of the owner/operator's negligence.

This release of future liability is a contractual arrangement where one party surrenders his legal rights or obligations. *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W. 2d 505 (Tex. 1993); *Van Voris v. Team Chop Shop, LLC*, 402 S.W.3d 915 (Tex. App.—Dallas 2013). Such a release operates to extinguish a claim or defense "as effectively as would a prior judgment and is an absolute bar to any right of action on the released matter." *Id.* As a result, preinjury releases represent an "extraordinary shifting of risk." *Id.*

Often individuals are asked to sign both a preinjury release and an indemnification. A release is an affirmative defense. An indemnity agreement is, on the other hand, a cause of action because it is a promise to safeguard a party against existing or anticipated loss. *Dresser* at 505. While this paper discusses releases, the law is very similar for indemnity agreements. *Id.*

[1] A release and waiver can be used interchangeably. Most cases use the term release when referring to preinjury releases or waivers.

Common examples of places requiring a participant sign a preinjury release are: health clubs, amusement parks, driving schools, scuba schools, swimming schools, shooting clubs, and rock-climbing gyms…to name a few.

III. Requirements for a Preinjury Release to be Valid

In order for a preinjury release to be valid it must (a) meet the fair notice requirements, (b) constitute a meeting of the minds, and (c) be supported by valid consideration. *Dresser Indus., Inc., v. Page Petroleum., Inc.*, 853 S.W.2d 505, 508-509 (Tex. 1993).[2] Fair notice requires: (1) that the party seeking to enforce a release provision comply with the express negligence doctrine; and (2) that the release provision be conspicuous. *Id; Storage Processors, Inc. v. Reyes*, 134 S.W.3d 190, 192 (Tex. 2004). If a release does not satisfy both of the fair notice requirements, then it is unenforceable as a matter of law. *Id.* Because preinjury releases exculpate a party from the consequences of its own negligence, such agreements are narrowly construed against the released party. *Littlefield v. Schaefer*, 955 S.W.2d 272, 274 (Tex. 1997).

A. Fair Notice Requirements

(i) Express Negligence Doctrine

The express negligence doctrine provides that a party's intent to be released from all liability caused by its own future negligence must be expressed in unambiguous terms within the four corners of the contract. *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 707-09 (Tex. 1987). *Dresser Indus., Inc., v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508-509 (Tex. 1993). The purpose of the express negligence rule is to provide notice to the signing party against whom the release will operate for the specific claims he is releasing. *Tamez v. Sw. Motor Transp., Inc.*, 155 S.W.3d 564, 569-71 (Tex. App.—San Antonio 2004). Absent an expressly stated intent to release claims

[2] *Dresser* was the first Supreme Court decision to hold that the fair notice requirements of conspicuousness and the express negligence doctrine apply to both indemnity agreements and releases when such exculpatory agreements are utilized to relieve a party of liability for its own negligence in advance. Prior to *Dresser*, the fair notice requirement was limited to indemnity agreements.

based upon the releasee's own negligence, such an intent will not be inferred. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 8 (Tex. 1990). Any claims not within the release's subject matter are not released, and the Court is required to construe general releases narrowly against the released party. *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991).

Although no Texas case has specifically dealt with the issue of whether a preinjury release signed on a particular date will operate to bar claims brought by the plaintiff in perpetuity, a Florida case has held such a preinjury release invalid. In *Cain v. Banta*, 932 So.2d 575, 576-80 (Fl. App.—5th Dist. 2006), the defendant attempted to enforce a release executed by Cain in 1999 for injuries he sustained while riding a motorcycle on defendant's track in 2002. The Florida Court of Appeals reversed the trial court's order granting summary judgment in the defendant's favor because the "release itself contained no express language informing the plaintiff that it covered each and every occasion in future that he visited the track." *Id*. The Court reasoned that because preinjury releases are disfavored in law and strictly construed, releases that are intended to include future events as well as present ones must "state so with clarity and precision." *Id*. Moreover, the Court stated, preinjury releases are effective and enforceable only in cases in which "the intention to be relieved from liability [is] made clear and unequivocal." *Id*.

Preinjury releases are generally signed shortly before the activity being release. *E.g. Littlefield v. Schaefer*, 955 S.W.2d 272, 273 (Tex. 1997). However, in a factual scenario where a plaintiff signs a release on a particular date and then later (days, weeks, months or years later) suffers an injury, plaintiffs counsel may be able to demonstrate "ambiguity" and "lack of express intent" under the rationale set forth in the *Cain* case. Specifically, the *Cain* Court expressed that time is an essential component of a prospective release because circumstances change. *See Cain* at 580. The circumstances and potential risks that exist today can be appreciated and released by a person of reasonable competence, while future risks under different circumstances cannot be foreseen or released. *Id*.

(a) Ordinary Negligence

The language required to meet the express negligence test, with regards to ordinary negligence, appears quite straightforward. In fact, language that simply refers to any negligent act of the released party appears to be sufficient to define the parties' intent. *See Atlantic Richfield Co. v. Petroleum Pers., Inc.*, 768 S.W.2d 724, 726 (Tex. 1989); *Quintana v. Crossfit Dallas, LLC*, 347 S.W.3d 445 (Tex. App.—Dallas 2011); *Sydlik v. REEIII, Inc.*, 195 S.W.3d 329 (Tex. App.—Houston 2006); *Tamez v. Sw. Moto Transp., Inc.*, 155 S.W.3d 564 (Tex. App.—San Antonio 2004).

(b) Gross Negligence

A supermajority of courts in Texas have found that a preinjury release cannot relieve a defendant from liability for damages caused by its own gross negligence because such a release is void against public policy. *Akin v. Bally Total Fitness Corp.*,No. 10-05-00289-CV, 2007 WL 475406 (Tex. App.—Waco Feb 14, 2007); *Tex. Moto-Plex, Inc. v. Phelps*, No. 11-03-0036-CV, 2006 LEXIS 892, at *4(Tex. App.—Eastland Feb 2, 2006); *Keszler v. Mem'l Med. Ctr.*, 931 S.W.2d 61, 63 (Tex. App.—Beaumont 1996), *rev'd on other grounds*, 943 S.W.2d 433 (Tex. 1997); *Rosen v. Nat'l Hot Rod Ass'n*, No. 12-94-00775-CV, 1995 LEXIS 3225, at *20, (Tex. App.—Houston Dec. 21, 1995); *Smith v. Golden Triangle Raceway*, 708 S.W.2d 574, 576 (Tex. App.—Beaumont1986, no writ); *see* also *Mem'l Med. Ctr. v. Keszler*, 943 S.W.2d 433, 435 (Tex. 1997) (per curium); *Sydlik v. REEIII, Inc.*, 195 S.W.3d 329, 336 (Tex. App.—Houston 2006).

The first case to address the gross negligence waiver issue in Texas was *Smith v. Golden Triangle Raceway*, 708 S.W.2d 574, 576 (Tex. App.—Beaumont 1986, no writ). In *Smith*, the plaintiff, Mr. Smith, attended a car race and signed a waiver to gain access to the infield. *Id.* at 575. He was injured while in the pit area and filed suit on claims of both negligence and gross negligence. The waiver that he signed released the track owners and operators "from all liability to the undersigned…for any and all claims or demands therefor on account of injury to the person or property or resulting in death of the undersigned, whether caused by the negligence of the releasees or otherwise…I HAVE READ THIS DOCUMENT. I UNDERSTAND IT IS A RELEASE OF ALL CLAIMS." *Id.* The trial court granted the raceway's motion for summary judgment based on the release signed by Mr. Smith. The court of appeals noted that the case was one of first impression in Texas and cited several other jurisdictions that had adopted the rule that liability for gross negligence cannot be waived. The court concluded that public policy barred a waiver and reversed the trial court's granting of summary judgment. *Id.*

Most recently, last year in *Van Voris v. Team Chop Shop*, the Dallas Court of Appeals overturned a trial court's granting of summary judgment on a

preinjury release of gross negligence claims. 402 S.W.3d 915, 924 (Tex. App.—Dallas 2013). Without addressing the issue of whether a gross negligence release would be void against public policy the court held that unless the release expressly and conspicuously states that gross negligence claims are released, such gross negligence claims will *not* be released. *Id.* Because the preinjury release did not include an express waiver of gross negligence, the fair notice requirements were not met and the gross negligence claim was allowed. *Id.*

Notwithstanding the significant case law in support of the inability to release gross negligence claims, there is one "outlier" case that upheld a granting of summary judgment on behalf of defendants—even where the plaintiffs' plead gross negligence. *Newman v. Tropical Visions, Inc.*, 891 S.W.2d 713 (Tex. App.—San Antonio 1994). Newman was a wrongful death and survival action brought against a diving school and diving instructors after Jean Newman died during a scuba certification course. *Id.* The defendants filed a motion for summary judgment based on a preinjury release signed by Ms. Newman. *Id.* The plaintiffs apparently failed to raise any issues to avoid the release in their summary judgment response and, thus, the appellate court's only question on appeal was whether the defendants properly plead and proved an affirmative defense of release. *Id.* The court held that gross negligence was not a separate claim from negligence and that the defendants satisfied their summary judgment burden of pleading and proving that the preinjury release absolved the defendants from liability.[3]

(ii) Release Must be Conspicuous

The second requirement of the fair notice standard is that the release must be conspicuous. The conspicuous requirement mandates that something must appear on the face of the contract to attract the attention of a reasonable person when he looks at it. In *Dresser,* the Texas Supreme Court adopted the UCC standard for conspicuousness. 853 S.W.2d at 511. The UCC standard for conspicuousness contained in section 1.201(10) provides that a term or clause is conspicuous "when it is so written that a *reasonable person* against whom it is to operate ought to have noticed it." (emphasis added). Specifically, 1.201(10) states

> (10) "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following:
>
> (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
>
> (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

TEX. BUS. & COM. CODE ANN. 1.201(b)(10) (West 2009).

The Texas Supreme Court has stated that "language in capital headings, language in contrasting type or color, and language in an extremely short document, such as a telegram, is conspicuous." *Dresser*, 853 S.W.2d at 511.

The issue of conspicuousness is question of law to be determined by the court. *Id*. at 509.

Case Examples

An example of where the conspicuous requirement was not met is in *Littlefield v. Schaefer*. 955 S.W.2d. 272 (Tex. 1997). In *Littlefield*, Buddy Walton, a novice motorcycle racer, died after he struck the end of an uncovered metal rail in a fence surrounding the raceway. *Id*. 273. Walton's wife, Marsha Littlefield, brought a wrongful death and survival action against the owners of the track ("Schaefer"). *Id*. Littlefield alleged that the uncovered metal pole constituted a premises defect because it was not shielded with hay bales, as were all the other poles around the raceway. *Id*. In a summary judgment motion, Schaefer argued that Walton signed a preinjury release prior to the race and the release should be enforced. *Id*. at The trial court granted summary judgment in favor of Schaefer and the court of appeals affirmed. Id. at The Texas Supreme Court

[3] In a case unrelated to preinjury releases, the Houston Court of Appeals has taken the *Newman* court's position that in the context of a release, negligence and gross negligence are not separable. *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118 (Tex. App.—Houston 2003).

held that the release was not conspicuous and, thus, reversed. *Id*. at 272.

The release in question contained ten blank lines spaced approximately one-quarter of an inch apart on which Walton filled in his name, address, and other basic information. *Id*. at 274. The typeface and font was easily readable. *Id*. After the basic information the document contained a release which was approximately six paragraphs of 30 lines of text in black type, compressed into a 3 x 4.25 inch square in the lower-left-hand corner of the form. *Id*. The court held that notwithstanding that the release heading was larger in font than the release language, because the terms of the release were printed so small and illegibly, they were not conspicuous.[4] *Id*.

The Houston Court of Appeals appears to agree with the *Littlefield* dissent in *Sydlik v. REEIII, Inc*.. 195 S.W.3d 329 (Tex. App.—Houston 2006). In *Sydlik*, the court stated that actual notice may serve as a substitute for the conspicuousness prong of the fair notice doctrine. *Id.* at 333. In addition to the release document being only one page with three paragraphs, the plaintiff admitted in her deposition that she had actual notice of the release. *Id.* Thus, the court stated that utilizing either the conspicuousness requirement or actual notice, the conspicuousness prong of the fair notice doctrine was satisfied. *Id.* However, the court would not go as far with the express negligence prong and stated that actual notice is not a substitute for express negligence. *Id.*

In 2011, the Dallas Court of Appeals found a release to meet the conspicuous requirement even though *both* the heading and the text were not larger or contrasting from the rest of the document. *Quintana v. Crossfit Dallas, LLC*, 347 S.W.3d 445 (Tex. App.—Dallas 2011). The court held that the text does not require both the heading and the text to be larger or contrasting, but rather that the release be written or displayed so that "a reasonable person against which it is to operate ought to have noticed it." *Id.* at 450-451. The court noted that the entire document was two pages long and that the word "release" was near the top of the second page. *Id*. The text appeared in larger type and bolded. *Id*. Moreover, the release language was three paragraphs, including twelve lines of text, and included a blank where the participant's signed their initials. *Id.*

B. Meeting of the Minds

In order for a release to be valid it must encompass the contractual element of mutual intent and whether the minds of the parties have been met. *Tamez v. Sw. Motor Transp., Inc.*, 155 S.W.3d 564 (Tex. App.—San Antonio 2004). In *Tamez*, the injured party who signed a preinjury release argued that because the injured party had only a limited ability to read and write English, he was unable to understand a complex legal document. Thus, there was no meeting of the minds and no binding contractual release.

However, the court disagreed and stated that a person who signs a contract will be held to have known what words were used in the contract and to have known their meaning, and he must be held to have known and fully comprehended the legal effect of the contract. *Id.* Thus, illiteracy is not an adequate defense and will not relieve a party of the consequences of the contract. *Id.; Vera v. N. Star Dodge Sales, Inc.*, 989 S.W.2d 13, 17 (Tex. App.—San Antonio 1998).

C. Consideration

A release agreement, like any other contract, must be supported by valid consideration. *Id.* Thus, in accordance with the general rules of contracts, consideration sufficient to support a release must consist of either a benefit to the releaser or a detriment to the person released. *Id.* Generally, this requirement may not be difficult to prove. S*ee Vera v. N. Star Dodge Sales, Inc.*, 989 S.W.2d 13 (Tex. App.—San Antonio 1998)(holding that absent proof of mental incapacity, a person who signs a contract [even if such person is illiterate] is presumed to have read and understood the contract, unless he was prevented from doing so by trick or artifice.).

D. Defenses

Since preinjury releases are contracts, defenses would as be any defense relative to an invalid contract such fraud, duress, misrepresentation, concealment, etc.

[4] Justices Baker and Enoch dissented and argued that they believed the conspicuousness test had been met because notwithstanding the fact that the actual release language was illegible, there were numerous times in the document where the word "release" was clearly marked and the document in bold-faced, capitalized, and underlined stated: "**I UNDERSTAND MOTORCYCLE RACING IS DANGEROUS, YES, I HAVE READ THIS RELEASE.**" Also, the dissent believed that the plaintiff had actual notice of the release.

E. Minor Children

Many times a parent or other guardian will sign a release on behalf of a minor child prior to the child participating in a potentially hazardous activity. Due to Texas' long-standing interest in protecting minor children (*Williams v. Patton*, 821 S.W.2d 141, 145 (Tex. 1991)), at least two courts in Texas have held that parents cannot release a child's cause of action for personal injury.[5]

The leading case on this issue is *Munoz v. II Jaz Inc.*. 863 S.W.2d 207 (Tex. App.—Houston 1993). In *Munoz*, the parents sued an amusement park for damages resulting from personal injuries their daughter suffered on a ride. *Id.* The trial court granted summary judgment based upon a preinjury release signed by the child's older, adult sister. *Id.* The appellate court reversed the summary judgment and held that although the Texas Family Code allows a parent to make legal decisions concerning their child, it does not give parents the power to waive a child's cause of action for personal injuries. *Id.*; Texas Family Code §12.04(7).

More recently, the Federal District Court in Houston also held that a preinjury release executed by a minor's parent is not enforceable against the minor. *Paz v. Lifetime Fitness, Inc.*, 757 F.Supp.2d 658 (S.D. Tex. 2010). The court noted that there were not any Texas Supreme Court cases addressing this issue but stated that the guidance provided by the *Munoz* case and applicable statutes provided a basis for the Court to make an *Erie* prediction about how the Texas Supreme Court would rule. *Id.* at 663. In light of the Texas case, statutes and similar cases in other jurisdictions, the Court held that it believed Texas law would provide that preinjury releases executed by a minor's parent are not enforceable. *Id.*[6]

IV. Practical Considerations

A. Plead Multiple Causes of Action

Since a valid preinjury release must contain express language of the causes of action to be released, it will be beneficial for plaintiffs to allege all potential causes of action. In particular, given that the clear majority of Texas Appellate Courts have invalidated preinjury releases for gross negligence, plaintiff counsel should consider pleading gross negligence if applicable so that at least this portion of the plaintiff's claim would survive summary judgment—even if the preinjury release is found valid as to negligence or other claims.

If drafting a preinjury release, counsel should consider including gross negligence specifically in the laundry list of released claims so that the issue can be preserved for appellate review if the language of the preinjury release is litigated.

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[5] This legal precedent that a parent may not release a child's potential personal injury claims (particularly preinjury) appears consistent with Texas' requirement that a *guardian ad litem* should be used to assess the fairness and adequacy of consideration for releases or settlements involving minor children.

[6] The court cited other state and federal court cases supporting the holding that parents cannot waive a minor's claim. *See e.g. Johnson v. New River Scenic Whitewater Tours, Inc.*, 313 F.Supp.2d 621, 629-32 (S.D. W.Va. 2004) (finding that a parent could not waive liability on behalf of a minor child and also could not indemnify a third party against the parents minor child for liability for conduct that violated a safety statute); *In re Complaint of Royal Caribbean Cruises Ltd.*, 459 F.Supp.2d 1275, 1279-81 (S.D. Fla. 2006)(under Florida law, parent's pre-injury release of liability on behalf of minor child was unenforceable to exonerate the commercial lessor or personal watercraft from liability for injuries sustained by child in accident that occurred while minor was a passenger); *Meyer v. Naperville Manner, Inc.*, 262 Ill.App.3d 141, 146-47,(Ill. App. Ct. 1994) (finding a preinjury waiver unenforceable in a case involving a minor child injured after falling off a horse at a horseback riding school); *Smith v. YMCA of Benton Harbor/St. Joseph*, 216 Mich.App. 552, 550 N.W.2d 262, 263 (Mich. Ct. App.1996) ("It is well settled in Michigan that, as a general rule, a parent has no authority, merely by virtue of being a parent, to waive, release, or compromise claims by or against the parent's child."); *Hojnowski v. Vans Skate Park*, 187 N.J. 323, 901 A.2d 381, 383 (N.J. 2006) (holding that a parent may not bind a child to a preinjury release); *Hawkins v. Pearl*, 37 F.3d 1062, 1066 (Utah 2001) (holding that parent does not have authority to release child's claim before an injury); *Scott v. Pac. W. Mountain Resort*, 119 Wash.2d 484, 492-93, 834 P.2d (Wash. 1992) (holding that enforcement of an exculpatory agreement signed by parent on behalf of minor participating in ski school is contrary to public policy).

There are cases in other jurisdictions enforcing preinjury releases executed by parents on behalf of minor children, but these cases involve a minor's participation in school-run or community sponsored activities. *See e.g. Hohe v. San Diego Unified Sch. Dist.*, 224 Cal.App.3d 1559, 1564-65, 274 Ca.Rptr. 647 (Cal.Ct.App. 1990); *Sharon v. City of Newton*, 437 Mass. 99, 112, 769 N.E.2d 738 (Mass. App. Ct. 2002); *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201, 205 (Ohio 1998).

B. Have Preinjury Release Issue Resolved Early

Since a ruling on a preinjury release can be dispositive of a party's claims, it makes sense to have the release issue heard early in the litigation process. Quite simply, plaintiffs want the issue heard early so they do not spend time and money on a case that is going to be lost on summary judgment. Likewise, defendants want the issue resolved early so they are not forced to spend unnecessary fees and expenses. One practical way to have the release issue resolved early is to include a provision in a scheduling order which allows for early resolution of the release issue. Get opposing counsel to agree to a deadline in the scheduling order to have the issue briefed and heard by the court. An example of possible language for a scheduling order is as follows:

> **DISPOSITIVE MOTIONS;** any dispositive motion on the issue of any release signed by plaintiff will be filed by **September 5, 2014** and set for hearing by **October 17, 2014**. All other dispositive motions shall be filed by January 30, 2015.

Be mindful to set the deadline early before the parties spend significant time and expense on case work up, expert fees, etc. If opposing counsel will not agree to a provision in the scheduling order set a hearing on the issue and explain to the court the significance and practicalities of why it is important that the issue be heard early.

C. Pay Close Attention to: (1) the Date Preinjury Release Signed and (2) Exact Language

Plaintiff's counsel should pay close attention to the date the release was signed, as compared to the date of the injury. If the injury occurred weeks, months or even years after the preinjury release was signed, then under the rationale argued in the *Cain* case (discussed *Supra*, Section II (A) (ii)) plaintiff's counsel should argue the release is "ambiguous" and "lacks the specific intent" to be valid due to the passage of time. Plaintiff's counsel will likely be more successful with this argument when citing to summary judgment evidence demonstrating the specific changes in circumstances since the date of the release.

Plaintiff's counsel should look closely at the exact language and if the preinjury release purports to release negligence for "the race", or "the event" or "the practice held"—and the injury occurs after the date the release was signed—argue "ambiguity" and "lack of specific intent" in the language of the release. Specifically, plaintiff's counsel should argue that the *singular* nature of the wording does not come close to expressing in "specific terms" that the plaintiff was releasing all claims in perpetuity.

D. Choice-of-Law

Parties should keep in mind choice-of-law issues that may impact a ruling on a preinjury release. If the contract was drafted, negotiated or signed in a state other than Texas, consider moving for the application of the foreign jurisdiction's law. Defendants could consider having a choice-of-law provision in the preinjury release document. Defense counsel could then argue that the parties are bound to follow the law of a preselected, favorable forum.

E. Venue

Location…location…location. As with any case ripe for dispositive relief, plaintiff's counsel should be mindful of venue. If you are concerned of an adverse ruling on a preinjury release, file the case in a court or appellate division which gives more favorable treatment to your client's legal position. Further, if the plaintiff counsel represents a client who is from out of state, and a suit can be filed and maintained out of state (even if the injury occurred in Texas) consider filing outside of Texas—particularly, if the other state's preinjury release law is more favorable to your client's position.

The reverse of these venue issues is also true. Defense counsel should be ready to file an appropriate Motion to Transfer Venue or *Forum Non Conviens* Motion if the plaintiff's venue choice is improper, or if there is a more convenient venue. If drafting a preinjury release, counsel could consider having a venue selection clause in the preinjury release document. Defense counsel could then argue that case must be heard in the selected venue.

F. Federal Court Considerations

Since Texas release law is substantive in nature—as opposed to procedural—federal courts will follow the Texas law generally cited in this paper. In the appropriate circumstance federal courts will make an *Erie*-guess on matters unresolved by the Texas Supreme Court. *See Paz v. Life Time Fitness, Inc*., 757 F.Supp.2d 658, 663 (S.D. Tex. 2010).