AGREEMENT TO AGREE

COUNSEL'S CORNER

Ray Fischer owned a tax-consulting business called Corporate Tax Management, Inc., and negotiated to sell the business assets to Mark Boozer and Jerrod Raymond. In 2007, the parties signed an Asset Purchase Agreement in which Fischer agreed to sell his business to CTMI, LLC, an entity created by Boozer and Raymond to own the assets and operate the business.

The purchase price was $900,000, subject to adjustments, to be paid in a series of payments over several years. The first payment of $300,000 was paid to Fischer at the 2007 closing. The balance consisted of "*earn-out*" payments over a four year term, one for each of the years in which Fischer was employed by CTMI.

Payments were timely made in 2007, 2008 and 2009. The 2010 payment consisting of the final earn-out included an additional component based on revenues that CTMI would receive after 2010 for work performed in 2010 but not completed by year's end.

Regarding the 2010 work payable by CTMI to Fischer in 2011, the parties agreed in their Asset Purchase Agreement that the percentage of completion "will have to be mutually agreed upon" by CTMI and Fischer. That provision – *the percentage of completion will have to be mutually agreed upon* – generated a lawsuit.

CTMI asserted in the litigation that the 2010 adjustment clause was unenforceable because it provided that future completion percentages "*will have to be mutually agreed upon,*" and Texas law provides that agreements to agree in the future are unenforceable because they lack definition and specificity.

In June 2011 the trial court entered judgment for Ray Fischer, declaring that the 2010 adjustment was not an unenforceable agreement to agree. Fischer won.

CTMI appealed to the Texas Court of Appeals.

The Court of Appeals reversed the decision of the trial court, and rendered judgment that the 2010 was an unenforceable agreement to agree. CTMI won.

Fischer appealed to the Texas Supreme Court.

The Supreme Court started its analysis by stating that contract terms must be definite and certain as to terms that are material and essential to the parties' agreement. The Court then applied these principles to the CTMI – Fischer facts.

The Court reasoned that CTMI and Fischer intended a reasonable price since a formula was used to compute amounts owing in previous years. And then the Court determined that the Contract also intended that parties should engage in the same process in 2011 as they did in previous years.

Consequently, the Supreme Court of the State of Texas held that the trial court's Judgment was correct and the Texas Court of Appeals was mistaken. So the Judgment of the Court of Appeals was reversed, and the Judgment of the trial court was reinstated.

Fischer wins. CTMI loses.

See *Fischer v. CTMI;* Cause No. 13-0977-CV; Texas Supreme Court; January 21, 2016.

Lessons learned:

1. This is the first "*agreement to agree*" case I can recall reading where the Contract was upheld.

2. Don't put yourself and your clients in this position. Use formulas and algorithms if needed to specify how and when future monies will be tabulated and paid, but don't trust that Courts will uphold a contractual provision that is ambiguous, confusing or overly-complex.

3. Despite the ruling of this Court – do not count on "agreements to agree" to be enforceable in Texas. In this unique situation, the Supreme Court was able to look back on four years of timely contractual performance and used that as a springboard for the one remaining payment. Without that history, this Contract would likely have failed.

Stuart A. Lautin, Esq.*****

***** Board Certified, Commercial (1989) and Residential (1988) Real Estate Law,
Texas Board of Legal Specialization

Licensed in the States of Texas and New York

Higier Allen & Lautin, PC
2711 N. Haskell Avenue, Suite 2400
Dallas Texas 75204
P: 972.716.1888
E: slautin@higierallen.com

W: www.higierallen.com