Interoffice Memorandum of Law
Texas Practice Series

TO: Mr. Dudley Knox; Advanced Legal Research and Writing LGLA-2331-53500
FROM: Mr. Chris Rainbolt
DATE: April 2, 2015
IN RE: *Argo Data Resource Corp. v. Shagrithaya*, 380 S.W.3d 249 (Tex.App.—Dallas 2012).
13 Elizabeth S. Miller and Robert A. Ragazzo, *Texas Practice Series: Texas Methods of Practice* § 45.5 (Feb 2015).
49 David R. Dow and Craig Smyser, *Texas Practice Series: Contract Law* § 1.10 (Aug 2014).

Assignment: To research the two main issues from *Argo v. Shagrithaya* in the Texas Practice Series.

I. Minority Shareholder Oppression

A. Headnote #5 - Corporations and Business Organizations 1526(5)

"Depending on the facts of the case, conduct found by the jury in an action for minority shareholder oppression could be oppressive under either or both definitions of oppression, which occurs when majority shareholder conduct substantially defeats minority's expectations that were both reasonable under the circumstances and central to minority shareholder's decision to join venture and when conduct is burdensome, harsh, or wrongful. V.T.C.A., Business Organizations Code § 11.404." *Argo v. Shagrithaya*, 380 S.W.3d 249 (Tex.App.—Dallas 2012).

B. § 45.5. Shareholder oppression

"In publicly held corporations, shareholders generally owe no duties to each other. Although the duty that majority or controlling shareholders[1] owe to other shareholders is an exception to this rule, this duty is limited and usually applies to sales of control and self-dealing transactions.[2] In Texas, shareholders in close corporations were once thought to owe special duties to each other as a result of the special nature of such corporations. This body of law was recently rejected by the Texas Supreme Court. This section examines the history and recent developments involving the duties of shareholders in Texas close corporations.

[1] This section uses the terms "majority" shareholders and "controlling" shareholders interchangeably to designate that person or group with the power to make corporate decisions.
[2] For cases recognizing that controlling stockholders have a fiduciary duty to the minority, see *Pepper v. Litton*, 308 U.S. 295, 306–07, 60 S. Ct. 238, 245, 84 L. Ed. 281 (1939); *Hollis v. Hill*, 232 F.3d 460, 467 n.21 (5th Cir. 2000); *Riebe v. National Loan Investors, L.P.*, 828 F. Supp. 453, 456 (N.D. Tex. 1993) (Texas law); *Drobbin v. Nicolet Instrument Corp.*, 631 F. Supp. 860, 899, Fed. Sec. L. Rep. (CCH) P 92489 (S.D. N.Y. 1986); *Hoggett v. Brown*, 971 S.W.2d 472, 488 n.13 (Tex. App.—Houston [14th Dist.] 1997, pet. denied); *DeBord v. Circle Y of Yoakum, Inc.*, 951 S.W.2d 127, 132 (Tex. App.—Corpus Christi 1997). *Stary v. DeBord*, 967 S.W.2d 352 (Tex. 1998); *Davis v. Sheerin*, 754 S.W.2d 375, 382–83 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Thywissen v. Cron*, 781 S.W.2d 682, 685 (Tex. App.—Houston [1st Dist.] 1989, writ denied); *Duncan v. Lichtenberger*, 671 S.W.2d 948, 952 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.); *Thompson v. Hambrick*, 508 S.W.2d 949, 952 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.); *Morrison v. St. Anthony Hotel, San Antonio*, 295 S.W.2d 246, 251 (Tex. Civ. App.—San Antonio 1956, writ ref'd n.r.e.).

In close corporations, minority shareholders are peculiarly vulnerable. Control is usually concentrated in the hands of one shareholder or a few shareholders. Minority shareholders normally lack an ability to sell their shares if they are dissatisfied with the management decisions made by the majority.[3] Unlike a partnership,[4] minority shareholders are unable to force the corporation to terminate the corporation or purchase their shares at fair value. As a consequence, the majority often has the power to freeze out the minority.

In a typical freeze out scheme the majority uses its control to deny the minority employment[5] and suppress dividends.[6] In this circumstance, minority shareholders receive no return on their investments and usually are unable to receive a return of their capital by selling their shares. The majority often magnifies the economic impact of a freezeout scheme by diverting portions of the corporation's income stream to its

[3] In a publicly held corporation, there is usually not any shareholder that owns a significant percentage of shares. Shareholders who are dissatisfied with management may invoke the "Wall Street rule" and sell their shares.

[4] See § 38:3.

[5] For cases relying on the discharge of a minority shareholder in finding illegal conduct by the majority, see *McCallum v. Rosen's Diversified, Inc.*, 153 F.3d 701 (8th Cir. 1998); *Notzke v. Art Gallery, Inc.*, 84 Ill. App. 3d 294, 39 Ill. Dec. 860, 405 N.E.2d 839 (3d Dist. 1980); *W & W Equipment Co., Inc. v. Mink*, 568 N.E.2d 564 (Ind. Ct. App. 1991); *Wilkes v. Springside Nursing Home, Inc.*, 370 Mass. 842, 353 N.E.2d 657 (1976); *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 484 N.Y.S.2d 799, 473 N.E.2d 1173 (1984); Application of Topper, 107 Misc. 2d 25, 433 N.Y.S.2d 359 (Sup 1980); Balvik v. Sylvester, 411 N.W.2d 383 (N.D. 1987). One commentator has argued that employment in a close corporation has an investment value based on its superiority over alternative employment opportunities, see Moll, Shareholder Oppression v. Employment At Will in the Close Corporation: The Investment Model Solution, 1999 U. Ill. L. Rev. 517, 547–50.
The courts have found that lack of access to employment by the minority was not problematic where the expectation of employment had no reasonable basis, see *Brenner v. Berkowitz*, 134 N.J. 488, 634 A.2d 1019, 1033–34 (1993) (a minority shareholder who received shares as a gift from her father and never worked for the company had no reasonable expectation that her son and daughter-in-law would receive employment), or the discharge was not part of any freezeout scheme, see *Merola v. Exergen Corp.*, 423 Mass. 461, 668 N.E.2d 351, 354, 12 I.E.R. Cas. (BNA) 219 (1996) (finding no relationship between the employee's shares and his job and noting that the employee was able to sell his shares back to the corporation at a fair price). Two New York cases hold that the majority may discharge the minority for the purpose of taking advantage of a contractual requirement that the employee offer the shares back to the corporation without breaching any fiduciary duty. *Gallagher v. Lambert*, 74 N.Y.2d 562, 549 N.Y.S.2d 945, 549 N.E.2d 136 (1989); *Ingle v. Glamore Motor Sales, Inc.*, 73 N.Y.2d 183, 538 N.Y.S.2d 771, 535 N.E.2d 1311, 4 I.E.R. Cas. (BNA) 200, 117 Lab. Cas. (CCH) P 56458 (1989). There is a contrary view. See *Jordan v. Duff and Phelps, Inc.*, 815 F.2d 429, Fed. Sec. L. Rep. (CCH) P 93196 (7th Cir. 1987); *Jensen v. Christensen & Lee Ins., Inc.*, 157 Wis. 2d 758, 460 N.W.2d 441, 121 Lab. Cas. (CCH) P 56866 (Ct. App. 1990).

[6] The minority is usually indifferent as to whether it receives a return on investment through salary or dividends. For example, in *Clark v. Dodge*, 269 N.Y. 410, 199 N.E. 641 (1936), an agreement between a 75% shareholder and a 25% shareholder permitted the 25% shareholder to receive 25% of corporate net income by way of either salary or dividends. The court upheld this provision against a charge that it unlawfully limited the discretion of the board of directors by implying a directors' ability to first set aside whatever portion of corporate profits they deemed wise. For cases relying on suppression of dividends in finding illegal conduct by the majority, see *Crowley v. Communications For Hospitals, Inc.*, 30 Mass. App. Ct. 751, 573 N.E.2d 996, 1001, 1003 (1991); *Miller v. Magline, Inc.*, 76 Mich. App. 284, 256 N.W.2d 761, 770–71 (1977); *Fox v. 7L Bar Ranch Co.*, 198 Mont. 201, 645 P.2d 929, 933–35 (1982); *Bonavita v. Corbo*, 300 N.J. Super. 179, 692 A.2d 119, 126–28 (Ch. Div. 1996); *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 484 N.Y.S.2d 799, 473 N.E.2d 1173, 1178–80 (1984); *Hirschkorn v. Severson*, 319 N.W.2d 475, 479–80 (N.D. 1982); cf. *Brenner v. Berkowitz*, 134 N.J. 488, 634 A.2d 1019, 1021, 1030–34 (1993) (finding certain majority actions illegal but refusing to require dissolution where a minority shareholder received dividends or de facto dividends ranging from $17,500 to $26,000 per year).

personal benefit[7] and supplements its economic freezeout with a participatory freezeout that removes the minority from corporate decision-making processes and denies the minority access to corporate information.[8] Finally, the majority often administers the coup de grace by attempting to force the minority to sell its shares to the majority at a bargain price.[9]"

"Three important Texas cases found breaches of fiduciary duty or shareholder oppression in the close corporation context. In Patton v. Nicholas,[10] three partners formed a corporation to settle a dispute over whether certain employees were in fact partners in an unincorporated business. Patton owned 60% of the new corporation, and the two employees owned 20% each. Friction between the parties continued and, within a year after the corporation's formation, both employees resigned their corporate offices. Although the corporation prospered, Patton, who controlled the board of directors, refused to pay any dividends. In a classic freezeout maneuver, Patton suggested that 'he would not buy the stock of [the minority] for even a small fraction

[7] Common self-dealing tactics in this context include: paying unreasonably high salaries to the majority; granting leases and loans to the majority on favorable terms; concluding other contracts between the corporation and the majority that are unfavorable to the corporation; having the corporation purchase shares from the majority at more than their fair value; allowing the majority to appropriate corporate assets for personal use; and allowing the majority to usurp corporate opportunities. Courts have often proscribed illegal self-dealing by the majority in the close corporation context. See, e.g., *McCallum v. Rosen's Diversified, Inc.*, 153 F.3d 701 (8th Cir. 1998) (majority usurped corporate opportunities and commingled personal ventures with the corporation's affairs); *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 484 N.Y.S.2d 799, 473 N.E.2d 1173, 1175–76 (1984) (majority shareholders paid themselves de facto dividends in the form of extra compensation bonuses); cf. *Brenner v. Berkowitz*, 134 N.J. 488, 634 A.2d 1019, 1024 (1993) (declining to find that majority shareholder's salary, which had reached $476,206, was unreasonable but noting that any future compensation increases might be viewed unfavorably by the court); see also *Redmon v. Griffith*, 202 S.W.3d 225 (Tex. App.—Tyler 2006, pet. denied) (denying a summary judgment motion where the minority submitted evidence that controlling shareholders used corporate funds to pay personal expenses).

[8] Voting a minority shareholder off the board of directors, see *Wilkes v. Springside Nursing Home, Inc.*, 370 Mass. 842, 353 N.E.2d 657, 662–63 (1976); *Brenner v. Berkowitz*, 134 N.J. 488, 634 A.2d 1019, 1024–25 (1993); *Balvik v. Sylvester*, 411 N.W.2d 383, 388 (N.D. 1987), and denying the minority access to corporate information, see *McCallum v. Rosen's Diversified, Inc.*, 153 F.3d 701 (8th Cir. 1998) (granting minority shareholder's petition for a buyout that alleged, inter alia, that the plaintiff had been excluded from decision-making and denied access to the corporation's books and records); *Kelley v. Axelsson*, 296 N.J. Super. 426, 687 A.2d 268, 271 (App. Div. 1997) (majority engaged in oppressive conduct by maintaining an accounting system that made it impossible for the minority to ascertain and verify the corporation's income), have contributed to findings of illegal conduct by the majority in the close corporation context. See also *Redmon v. Griffith*, 202 S.W.3d 225 (Tex. App.—Tyler 2006, pet. denied) (denying a summary judgment motion where there was evidence that minority shareholders were denied access to information concerning the financial condition of the corporation). Removing the minority from the board and denying the minority access to the corporation's records (or making such access as difficult as possible) makes it more difficult for the minority to determine whether the corporation could pay reasonable dividends, the majority is receiving excessive compensation or other benefits, or the majority is otherwise engaged in illegal self-dealing. Denying access to financial records also makes it difficult for the minority to value its shares accurately in the event the majority makes a purchase offer.

[9] Such an offer has often been part of a freezeout scheme invalidated by the courts. See *McCallum v. Rosen's Diversified, Inc.*, 153 F.3d 701, 703–04 (8th Cir. 1998) (majority offered to redeem minority's shares at an artificially low price); *Wilkes v. Springside Nursing Home, Inc.*, 370 Mass. 842, 353 N.E.2d 657, 664 n.14 (1976) (majority offered to purchase the minority's shares for a price that a member of the majority group would not accept for his own shares). By contrast, courts have found no difficulty with the majority's conduct where the majority has offered to purchase the minority's interest at a fair price. See *Merola v. Exergen Corp.*, 423 Mass. 461, 668 N.E.2d 351, 355, 12 I.E.R. Cas. (BNA) 219 (1996); *Ingle v. Glamore Motor Sales, Inc.*, 73 N.Y.2d 183, 538 N.Y.S.2d 771, 535 N.E.2d 1311, 1314, 4 I.E.R. Cas. (BNA) 200, 117 Lab. Cas. (CCH) P 56458 (1989).

[10] *Patton v. Nicholas*, 154 Tex. 385, 279 S.W.2d 848 (1955).

of its value.'[11] In upholding a jury verdict in the minority shareholders' favor, the Texas Supreme Court noted that 'the malicious suppression of dividends is a wrong akin to breach of trust for, which the courts will afford a remedy.'[12] The Patton court also approved an injunction requiring the corporation to pay reasonable dividends in the future.[13]

Duncan v. Lichtenberger[14] is a variation on the same theme, except that the corporation in question did poorly instead of well. In Duncan, five partners contributed their partnership interests to a newly formed corporation and each partner received 20% of the corporation's shares. One of these shareholders subsequently purchased the shares of two of the other shareholders, raising his ownership stake to 60%. When the corporation did poorly, the 60% shareholder discharged the two remaining 20% shareholders from their corporate positions on the ground that the corporation could no longer afford them. Since the corporation never paid any dividends, the minority shareholders had no way to receive any return on their investments. The appellate court upheld a jury finding that the majority shareholder's conduct constituted a breach of fiduciary duty.[15] Interestingly, despite the fact that the jury did not find that the 60% shareholder had fraudulently induced the original corporate investments, damages were fixed on a rescissionary basis. The two 20% shareholders were allowed a return of their contributions to the corporation.[16]

Finally, in Davis v. Sheerin,[17] a 45% shareholder sued a 55% for breach of fiduciary duty and/or dissolution based on the majority shareholder's oppressive conduct. The Davis case is unusual because the minority shareholder did not challenge his lack of corporate employment and the jury found that dividends were not suppressed. The illegal conduct in this case consisted of: (a) denying the 45% shareholder's interest on the ground that he had previously made a gift of that interest to the 55% shareholder; (b) contributing corporate funds to a profit sharing plan in which only the majority shareholder had an interest; and (c) spending the corporation's money to pay the majority shareholder's attorney's fees. The appellate court noted the absence of 'some of the typical "squeeze out" techniques used in closely held corporations' but held that the majority's conduct constituted a breach of fiduciary duty and 'oppression' for which dissolution may be ordered because it frustrated the minority's reasonable investment

[11] *Patton*, 279 S.W.2d at 852.
[12] *Patton*, 279 S.W.2d at 854.
[13] See *Patton*, 279 S.W.2d at 857. The court denied the minority shareholders' request for dissolution. In light of the obvious bad blood between the parties, the modern approach is to permit dissolution in such circumstances.
[14] *Duncan v. Lichtenberger*, 671 S.W.2d 948 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).
[15] By contrast, *Willis v. Bydalek*, 997 S.W.2d 798 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) reversed a jury finding in favor of a 49% shareholder who had been discharged by a 51% shareholder in the following circumstances: (a) the majority shareholder never took any salary; (b) the corporation never made any money since its inception and was unable to pay dividends; and (c) the majority did not engage in any illegal self-dealing. The court also noted that the result would be different if the minority is discharged as part of a freezeout scheme. See *Willis*, 997 S.W.2d at 802.
[16] More usual relief would be: (a) requiring the majority to compensate the minority for the value of their lost employment; (b) requiring the majority to buy out the minority at a fair price; or (c) liquidating the corporation. The relief in *Duncan* appears to have a punitive aspect because it takes no account of the diminution in the value of the minority interest flowing from the corporation's poor performance.
[17] *Davis v. Sheerin*, 754 S.W.2d 375 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

expectations.[18] However, in addition to awarding damages based on the misappropriation of corporate monies, the court, instead of ordering dissolution, ordered the majority shareholder to buy out the minority shareholder at a fair price determined by the jury.[19]

Until recently, Texas was squarely within the mainstream of national jurisprudence in applying sanctions for misconduct by the majority in a close corporation. This body of law has been drastically changed by the Texas Supreme Court's decision in *Ritchie v. Rupe*.[20] In *Ritchie*, the Court of Appeals held that a controlling group's refusal to cooperate with a minority shareholder's attempt to sell her stock constituted shareholder oppression and ordered a fair-value buyout of the minority's shares.[21] The Supreme Court reversed. The Supreme Court argued that the Texas oppression statute applies equally to all corporations and that minority shareholders in closely held corporations should receive no special protection under the statute. The Supreme Court rejected the definition of oppression described above and held that 'a corporation's

[18] *Davis*, 754 S.W.2d at 381–82. The court, relying on a line of New York authority, noted that "oppression should be deemed to arise only when the majority's conduct substantially defeats the expectations that objectively viewed were both reasonable under the circumstances and were central to the minority shareholder's decision to join the venture." *Davis*, 754 S.W.2d at 381; see *Matter of Kemp & Beatley*, Inc., 64 N.Y.2d 63, 484 N.Y.S.2d 799, 473 N.E.2d 1173, 1179 (1984); *Matter of Wiedy's Furniture Clearance Center Co., Inc.*, 108 A.D.2d 81, 487 N.Y.S.2d 901, 903 (3d Dep't 1985). Although Davis emphasizes that the reasonableness of a minority shareholder's expectations is measured at the time of investment, courts are beginning to recognize that such expectations may evolve over time in a way that is entitled to judicial respect. See *A.W. Chesterton Co., Inc. v. Chesterton*, 128 F.3d 1, 6, 97-2 U.S. Tax Cas. (CCH) P 50809, 80 A.F.T.R.2d 97-7280 (1st Cir. 1997); *Meiselman v. Meiselman*, 309 N.C. 279, 307 S.E.2d 551, 565–66 (1983).

[19] The most conservative remedy for breach of fiduciary duty in the close corporation context is to provide compensation to the minority for past economic injuries, perhaps combined with injunctive relief to help guarantee fairness in the future. For example, the remedy for an illegal discharge of a minority shareholder might be reinstatement or lost wages. The remedy for suppressing dividends might be, as in Patton, an injunction requiring the corporation to pay reasonable dividends in the future. There are three difficulties with such purely compensatory forms of relief: (a) it involves the court in continuing supervision of an acrimonious relationship; (b) by the time such shareholder disputes get to court, the relationship between the parties has usually deteriorated to the point where it is often impractical to expect the parties to continue in business together; and (c) after substantial illegal conduct has been proved, it is unfair to a minority shareholder to require him to continue to trust the majority to treat him and his investment in a fair manner. As a consequence of these difficulties, Texas and 38 other states, see Douglas K. Moll & Robert A. Ragazzo, The Law of Closely Held Corporations 7-163 to 7-180 (2009) (collecting statutes), permit dissolution for oppression. Other courts have followed Davis in holding that the court may impose a buyout at a judicially determined fair price in lieu of the statutory remedy of dissolution. See *Alaska Plastics, Inc. v. Coppock*, 621 P.2d 270, 274–76 (Alaska 1980); *Sauer v. Moffitt*, 363 N.W.2d 269, 274–75 (Iowa Ct. App. 1984); *Maddox v. Norman*, 206 Mont. 1, 669 P.2d 230, 237 (1983); *McCauley v. Tom McCauley & Son, Inc.*, 104 N.M. 523, 1986-NMCA-065, 724 P.2d 232, 235–36 (Ct. App. 1986); *Matter of Wiedy's Furniture Clearance Center Co., Inc.*, 108 A.D.2d 81, 487 N.Y.S.2d 901, 904 (3d Dep't 1985); *Delaney v. Georgia-Pacific Corp.*, 278 Or. 305, 564 P.2d 277, 288–89 (1977); *Baker v. Commercial Body Builders, Inc.*, 264 Or. 614, 507 P.2d 387, 395–97, 56 A.L.R.3d 341 (1973). But see *Giannotti v. Hamway*, 239 Va. 14, 387 S.E.2d 725, 733 (1990) (statutory remedies are exclusive). This form of relief is less harsh than dissolution and gives both parties what they most want. The majority gets to run the business as it sees fit unfettered by the continued participation of the minority. The minority receives a fair value for its shares. Although it is usual for the court to order the corporation or the majority to buy the minority's shares at fair value upon a finding of oppression, one case permitted the minority to purchase the majority's shares because the deal among the parties permitted the minority to run the enterprise. See *Muellenberg v. Bikon Corp.*, 143 N.J. 168, 669 A.2d 1382, 1389 (1996).

[20] *Ritchie v. Rupe*, 57 Tex. Sup. Ct. J. 771, 2014 WL 2788335 (Tex. 2014).

[21] See *Ritchie v. Rupe*, 339 S.W.3d 275 (Tex. App.—Dallas 2011), rev'd, 2014 WL 2788335 (Tex. 2014).

directors or managers engage in "oppressive" actions … when they abuse their authority over the corporation with the intent to harm the interests of one or more of the shareholders, in a manner that does not comport with the honest exercise of their business judgment, and by doing so create a serious risk of harm to the corporation.'[22] The Supreme Court held that the controlling group's conduct in *Ritchie* did not constitute oppression because: (a) the controlling group had no duty to meet with prospective buyers; (b) the controlling group's conduct did not harm the minority shareholder's interest in the corporation; and (c) the controlling group's conduct did not harm the corporation itself.[23] In addition, the Supreme Court held that, where oppression exists, a Texas court lacks the power to order a fair-value buyout of the minority's shares. The Court held that a buyout may not be ordered as ancillary to the statutory remedy of dissolution and that Texas does not recognize a common law action for shareholder oppression.[24] As a result of *Ritchie*, Texas has gone from being one of the jurisdictions most protective of minority shareholder rights in closely held corporations to one of the least protective jurisdictions." (Miller § 45.5).

II. Sufficiency of Evidence of Existence of Implied Contract

A. Headnote #43 – Corporations and Business Organizations 1530, 1578

"There was legally insufficient evidence of a legally enforceable agreement that majority shareholder and minority shareholder would receive same annual compensation while they remained active in corporation to support jury's verdict in favor of minority shareholder in minority shareholder's action for breach of implied contract; that shareholders had received same annual compensation in the past did not demonstrate agreement to continue same compensation scheme in the future, there was no indication that shareholders had any meeting of the minds over any other terms of minority shareholder's employment, such as his specific job obligations or duration of employment, and agreement to 'remain active' was not sufficiently clear and definite." *Argo v. Shagrithaya*, 380 S.W.3d 249 (Tex.App.—Dallas 2012).

B. § 2.10. Offer and Acceptance—Implied Offer and Acceptance

"At times, the acceptance (and perhaps even the offer) will be manifested not by a written document but by oral communication of even conduct. Under such circumstances, the question of whether an offer and acceptance have been formed is a question of fact.[25] If the minds of the parties met with respect to the essential terms of an agreement, an implied contract can be formed even in the absence of a writing.[26] The test to be used by the fact-finder in an implied contract context is an objective one; the issue is whether the inferences drawn by one party from the conduct of another are

[22] *Ritchie v. Rupe*, 57 Tex. Sup. Ct. J. 771, 2014 WL 2788335, *9 (Tex. 2014).
[23] *Ritchie v. Rupe*, 57 Tex. Sup. Ct. J. 771, 2014 WL 2788335, *10 (Tex. 2014).
[24] *Ritchie v. Rupe*, 57 Tex. Sup. Ct. J. 771, 2014 WL 2788335, *12,22 (Tex. 2014).
[25] *Buxani v. Nussbaum*, 940 S.W.2d 350, 352 (Tex.App.—San Antonio 1997, no writ); *Estate of Townes v. Townes*, 867 S.W.2d 414, 419 (Tex.App.—Houston [14th Dist.] 1993, writ denied).
[26] *E.g.*, *Smith v. Renz*, 840 S.W.2d 702, 704 (Tex.App.—Corpus Christi 1992, writ denied); *City of Houston v. First City*, 827 S.W.2d 462, 473 (Tex.App.—Houston [1st Dist.] 1992, writ denied).

reasonable.[27] One court has held that an implied contract can be found from the behavior of the parties where there is a written agreement but it is not signed by the party against whom enforcement is sought.[28] As one court of appeals has correctly observed, however, once an implied-in-fact contract is found to exist, it will be treated exactly as is an express contract.[29] Put differently, the distinction between an express and an implied-in-fact contract has very little doctrinal significance.[30]" (Dow § 1.10).

[27] *See E-Z Mart Stores, Inc. v. Hale*, 883 S.W.2d 695, 699 (Tex.App.—Texarkana 1994, writ denied); *see, e.g., Hallmark v. Hand*, 885 S.W.2d 471, 476 (Tex.App.—El Paso 1994, error denied) (holding that where one party signed a letter agreeing to sell certain stock, and the other party "accepted" the letter, there was no meeting of the minds because the party who had "accepted" was simply agreeing to help locate a buyer for the stock, which the seller knew or should have known based on his relationship with the party and on the series of conversations he had had with him; seller was without reasonable basis to believe, notwithstanding the other party's language, that the other party himself was agreeing to purchase the property); *Willingham v. Thompson*, 133 S.W.2d 833, 835 (Tex.Civ.App.—Dallas 1939, no writ) (holding that a real estate broker who was never hired by the owner of property but who submitted a prospective buyer's offer for the property to the seller did not have a contract with the seller even though a different offer by the same buyer was eventually accepted over a year later; the agent's assumption that submitting a single offer to the property owner created a contractual relationship between himself and the owner was inadequate to establish a meeting of the minds).

[28] *Sibley v. Brentwood Inv.*, 356 S.W.3d 659, 653-54 (Tex. App.—El Paso 2011). The court's decision in *Sibley* is sound with respect to its implied contract analysis, in view of the fact the parties had significantly performed, but problematic with respect to its treatment of the statute of frauds issue raised by this scenario. *See infra* §§ 4.6, 4.15.

[29] *Houston Medical Testing Services v. Mintzner*, 417 S.W.3d 691, 698 (Tex.App.—Houston [14th Dist.] 2013).

[30] *Houston Medical*, 417 S.W.3d at 698 (citing *Haws & Garrett Gen. Contractors v. Gorbett Bros. Welding*, 480 S.W.2d 607, 609 (Tex. 1972)).