the terms of their FINRA Submission Agreements. The FINRA agreement granted the arbitration panel the express authority to determine all awards pursuant to a dispute, including attorneys' fees. The court noted that errors in an arbitration panel's factual findings, or its interpretation and application of the law, do not justify vacating an award. The court reasoned that even if the panel awarded attorneys' fees in error based on the terms of the retirement agreement, the court was not at liberty to overturn the panel's holding because all three parties had expressly delegated authority to award attorneys' fees to the panel in their FINRA agreements.

## LANDLORD TENANT

### PROPERTY CODE CANCELLATION AND RESCINDING OF CONTRACT REQUIRES BUYER TO RESTORE SELLER TO ORIGINAL POSITION

Morton v. Nguyen, 412 S.W.3d 506 (Tex. 2013).

**FACTS:** Petitioner, Morton, and Respondent, Nguyen, entered into a contract for deed. Pursuant to the Texas Property Code, Morton, as seller, continuously failed to provide Nguyen, as buyer, with required information in the annual statements. After thirty-four months, Nguyen sought to cancel and rescind the contract for deed. Additionally, Nguyen demanded restoration of all amounts paid under the contract and damages for breach of the Texas Property Code.

The trial court held for Nguyen, finding Morton did not comply with the Texas Property Code disclosure requirements and awarded Nguyen actual and liquidated damages. The appellate court reversed and remanded the trial court's judgment. Nguyen appealed.

**HOLDING:** Remanded.

**REASONING:** The Texas Supreme Court held that if the seller of a contract for deed fails to comply with disclosure requirements, Texas Property Code's Subchapter D requires the seller to cancel and *rescind* the contract for deed and give a *full refund* to the buyer.

The court, however, then addressed the definition of "rescission." Rescission is not a one-way street. Instead, it is a term that requires each party to restore property received from the other. To hold otherwise would create an unjust windfall to a rescinding buyer. The court defined "full refund" under Subchapter D. The court disagreed with the dissent's view that "full refund" was a unilateral refund. Instead, the court looked to the plain meaning of "refund," which is a transactional exchange where both parties give back what they previously received.

Applying this analysis, the court found that under a contract for deed transaction, the buyer cannot refund the title to the property because the buyer receives title only after all payments have been made. Instead the buyer must return what he received under the contract—the value of the occupation of the property. The Court remanded the case to the trial court for the determination of the value of Nguyen's occupation on the property.

### LANDLORD WHO FAILS TO RETURN SECURITY DEPOSIT WITHIN STATUTORY TIME PERIOD MUST DEFEAT PRESUMPTION OF BAD FAITH

Johnson v. Waters at Elm Creek L.L.C., 416 S.W.3d 42 (Tex. App.—San Antonio 2013).

**FACTS:** Plaintiff, Shannon Johnson ("Johnson"), leased an apartment from and paid a security deposit to Defendant, Waters at Elm Creek ("Waters"). Waters was required to mail the security deposit refund and an itemized accounting of any deductions no later than 30 days after Johnson surrendered possession of the apartment.

Johnson surrendered possession of the apartment on October 5. Johnson received a check dated November 10 in the mail. The postmark on the envelope was dated November 11; however, the accounting was dated October 23. The trial court signed a take-nothing judgment in favor of Waters. Johnson appealed.

**HOLDING:** Reversed in part and affirmed in part.

**REASONING:** The court stated that under §92.109 of the Texas Property Code, a landlord is presumed to have acted in bad faith if she either fails to return a security deposit or fails to provide a written description and itemization of deductions on or before the 30th day after the date the tenant surrenders possession. Waters failed to do both of these things on or before the 30th day after the date Johnson surrendered possession.

The court noted that a landlord bears the burden to rebut the presumption of bad faith by presenting evidence that it acted in good faith. The court found good faith is established by showing honesty in fact in the conduct or transaction concerned. The court was provided testimony that showed the check was initially mailed to the address Johnson listed on her notice of intent to move out. The check was then returned to the corporate office of Waters. When Johnson called the property manager inquiring about the check, Johnson provided a new address and the check was re-sent. The court held that the property manager's testimony was sufficient evidence to rebut the presumption of bad faith.

**The court found that under a contract for deed transaction, the buyer cannot refund the title to the property because the buyer receives title only after all payments have been made.**

**THE ONLY ISSUE IN A FORCIBLE ENTRY-DETAINER ACTION IS THE RIGHT TO POSSESSION**

Williams v. Bayview-Realty Assocs., 420 S.W.3d 358 (Tex. App.—Houston [14th Dist.] 2014).

**FACTS:** Appellee, Bayview-Realty Associates ("Bayview"), initiated a forcible-detainer action against appellant, Marcus Williams ("Williams"), alleging that Williams violated a property rental agreement between the two parties and refused to vacate the premises. Bayview sought unpaid rent and a writ of possession.

The lower court rendered a final judgment in favor of Bayview in a bench trial. Williams appealed but failed to perfect the appeal, prompting Bayview to file a motion for default judgment. The county court granted Bayview's motion. Williams subsequently moved to set aside the default judgment and for a new trial. The county court denied his motions and signed an amended judgment. Williams appealed.
**HOLDING:** Affirmed.
**REASONING:** The court held that the sole issue in a forcible-detainer action under Texas law is the right to immediate and actual possession of a premise. A property owner does not need to produce proof of title, but instead needs to produce enough evidence of ownership to prove his superior right to immediate possession. Both a justice court and a county court at law have jurisdiction to hear forcible-detainer actions, but they do not have jurisdiction over title to land disputes.

## MISCELLANEOUS

**COMPANIES UNABLE TO REMOVE STATE-BROUGHT CONSUMER PROTECTION CASES TO FEDERAL COURT**

Miss. ex rel. Hood v. AU Optronics Corp., 134 S.Ct. 736 (2014).

**FACTS:** Petitioner, State of Mississippi, filed a *parens patriae* suit against Respondent, AU Optronics, in state court, alleging that Optronics engaged in an illegal price-fixing scheme detrimental to numerous but unnamed state citizens. Optronics removed the case pursuant to the Class Action Fairness Act ("CAFA"), which lowers diversity jurisdiction requirements to allow removal of mass actions involving 100 or more persons.

**The Court held that the CAFA requires mass action claims to be filed by 100 or more individually named plaintiffs seeking joint relief.**

The district court held that the suit qualified as a mass action, but remanded it on grounds that it fell within the CAFA's "general public" exception. The Fifth Circuit reversed, concurring with the district court that the suit was a mass action, but finding the "general public" exception inapplicable. The Supreme Court granted certiorari.
**HOLDING**: Reversed and remanded.
**REASONING:** In a unanimous decision, the Court held that the CAFA's "100 or more persons" phrase, a prerequisite for removal, does not apply in cases where a state is the sole plaintiff and no individual persons are parties to the suit. While the CAFA substantially lowers barriers to filing mass actions in federal court, the Court held that the Act's plain language indicates that Congress did not intend for unnamed parties in interest to be included for numerosity purposes. Instead, the Court held that the CAFA requires mass action claims to be filed by 100 or more individually named plaintiffs seeking joint relief. Because the State of Mississippi was the sole named plaintiff in this suit, the Court remanded the case to state court.

**DEFENDANT'S ATTORNEYS' FEE AWARD MUST SEGREGATE FEES**

Goldman v. Olmstead, 414 S.W.3d 346 (Tex. App.—Dallas 2013).

**FACTS:** Appellee, Olmstead, entered into a contract to sell a home to Appellant, Goldman. After entering into the contract, Goldman gave written notice to terminate the contract.

Olmstead sued Goldman for breach of contract. In turn, Goldman sued his real estate agent and her associated broker, NRT Texas, L.L.C. (collectively "NRT"). NRT counterclaimed against Olmstead for fraud.

The court ruled in favor of Olmstead and awarded damages, costs, and attorneys' fees. The court also entered a take nothing against Goldman and awarded attorneys' fees to NRT. Goldman appealed the awards of attorneys' fees.
**HOLDING:** Remanded.
**REASONING:** On appeal, Goldman argued that NRT failed to segregate their attorneys' fees for the defense against Goldman and for the fraud counterclaim. The court held that a party seeking to recover attorneys' fees has the burden to show that the fees were reasonable and necessary and incurred on a claim that allowed recovery of such fees. Therefore, unless legal services advanced both recoverable and non-recoverable claims, the party must segregate recoverable fees and non-recoverable fees.

The court observed that NRT defended Goldman's claim and prosecuted a fraud claim against Olmstead. NRT's testifying expert on attorneys' fees did not segregate the fees between the defense of Goldman's claims and the prosecution of NRT's fraud claim. The expert also failed to testify the claims were so intertwined as to be inseparable. For this reason, the court remanded the determination of NRT's award of attorneys' fees to the lower court.