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Election of Remedies and Settlement - New Lyrics to an Outworn Tune Lawyer's Forum - Settlements - New Perspectives.

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**ELECTION OF REMEDIES AND SETTLEMENT—NEW LYRICS
TO AN OUTWORN TUNE**

LES MENDELSONH*

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I. RIGHTS AND REMEDIES—A NEW AWARENESS

I Don't Get No Satisfaction is rock music which was performed for the first time by Mick Jagger and the Rolling Stones in the 1960's to screaming throngs of teenage worshipers. Today, almost

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two decades later, these same persons and those who are consumers, insureds, employees, businessmen, and victims of tortious conduct are singing that very same tune—" [we] don't get no [sic] satisfaction."¹

In this enlightened age of the 1980's, there is an increased awareness of legal rights, an expanded availability of legal remedies, and an enlarged opportunity for the public to be represented by competent counsel.² The legal rights and remedies of Texas consumers, for example, have been increased substantially by the enactment of the Texas Deceptive Trade Practices Act³ and other consumer protection legislation.⁴ Additionally, federal civil rights legislation in the areas of equal employment opportunity,⁵ equal education opportunity,⁶ and fair housing⁷ has provided the courts with the ability to grant relief previously overlooked. Class action practice

1. Rolling Stones, (*I Don't Get No*) Satisfaction, *OUT OF OUR HEADS* (London 1965), also recorded on *HOT ROCKS* (London 1971). See generally N. NITE & R. NEWMAN, *ROCK ON, THE ILLUSTRATED ENCYCLOPEDIA OF ROCK AND ROLL* 403-04 (1978); L. ROXON, *ROCK ENCYCLOPEDIA* 425 (1971).

2. The Supreme Court of Texas, in recent years, has recognized numerous new tort actions including: *Whittlesey v. Miller*, 572 S.W.2d 665, 669 (Tex. 1978) (loss of consortium by wife); *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 517-19 (Tex. 1978) (abolition of no-duty doctrine in premises cases); *Bounds v. Caudle*, 560 S.W.2d 925, 926-27 (Tex. 1977) (interspousal tort immunity abolished in case of willful and intentional torts); *Farley v. MM Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975) (abolition of voluntary assumption of risk); *Felsenthal v. McMillan*, 493 S.W.2d 729, 730 (Tex. 1973) (criminal conversation); *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621-22 (Tex. 1971) (dominant estate limited by rule of reasonable necessity).

3. See TEX. BUS. & COM. CODE ANN. §§ 17.41-63 (Vernon Supp. 1980). See generally Comment, *An Analysis of the 1979 Texas Deceptive Trade Practices Act and Possible Ramifications of Recent Amendments: Is the Act Still Consumer Oriented?*, 11 ST. MARY'S L.J. 885, 887-94 (1980).

4. See, e.g., Fair Credit Billing Act, 15 U.S.C. §§ 1666a-1666j (Supp. 1975-1979); Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (1974 & Supp. 1975-1979); TEX. REV. CIV. STAT. ANN. arts. 5069-1.01 to -2.06 (Vernon 1967) (Texas Credit Code); *id.* art. 5236c (Vernon Supp. 1980) (penalty for interruption of utilities); *id.* art. 5236d (Vernon Supp. 1980) (landlord's liens); *id.* art. 5236e (Vernon Supp. 1980) (return of security deposits); *id.* art. 5236f (Vernon Supp. 1980) (landlord-tenant relations); *id.* art. 6573b (Vernon Supp. 1980) (residential service contracts); TEX. BUS. & COM. CODE ANN. § 9.404 (Vernon Supp. 1980) (removing financing statements on consumer goods); *id.* § 9.507 (repossession and resale procedures).

5. See 42 U.S.C. §§ 2000e-1 to -6, -8 to -9, -13 to -17 (1974 & Supp. 1974-1979) (Civil Rights Act of 1964, Title VII, as amended).

6. See 20 U.S.C. §§ 1228, 1608, 1701-1710, 1712, 1718, 1720-1721, 1751-1758 (1978 & Supp. 1980) (Equal Education Opportunities Act of 1974).

7. 42 U.S.C. §§ 3601-3619 (1977) (Fair Housing Act of 1968).

on both the federal and state levels has been simplified and used in civil rights, commercial, and tort actions.⁸ Congress and the Texas Legislature have enacted legislation to permit the finder of fact to award reasonable attorney's fees in cases never before contemplated.⁹ In the field of tort law, the Texas Legislature substituted comparative negligence for contributory negligence,¹⁰ amended the automobile guest statute,¹¹ enacted a tort claims act against the State of Texas,¹² and provided for personal injury protection automobile insurance.¹³ Meanwhile, in the past decade, Texas courts abolished various immunities from liability and other harsh defenses,¹⁴ adopted and expanded the concept of strict liability in tort,¹⁵ eased the requirements for establishing liability in professional negligence cases,¹⁶ and expanded concepts for damages awards.¹⁷

Nevertheless, an ever present frustration abounds. Counteracting the newly achieved status of increased legal rights, members of

8. See *Frank v. Bowman Transp. Co.*, 424 U.S. 747, 756 (1976); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 160 (1974); *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558, 562 (S.D. Fla. 1973), *aff'd*, 507 F.2d 1278 (5th Cir. 1975); FED. R. CIV. P. 23; TEX. R. CIV. P. 42.

9. See TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon Supp. 1980) (attorney's fees in deceptive trade practice cases); TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1980) (citing instances in which attorney's fees allowed).

10. See TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971) (contribution between tortfeasors); *id.* art. 2212a (Vernon Supp. 1980) (comparative negligence).

11. See *id.* art. 6701b (Vernon 1977) (Automobile Guest Statute).

12. See *id.* art. 6252-19 (Vernon 1970 & Supp. 1980) (Texas Tort Claims Act).

13. See TEX. INS. CODE ANN. art. 5.06, § 3 (Vernon Supp. 1979) (Automobile Insurance).

14. For example, the following have been abolished: interspousal immunity for intentional torts, *Bounds v. Caudle*, 560 S.W.2d 925, 926-27 (Tex. 1977); charitable immunity, *Howle v. Camp Amon Carter*, 470 S.W.2d 629, 632 (Tex. 1971); *Villarreal v. Santa Rosa Medical Center*, 443 S.W.2d 622, 625 (Tex. Civ. App.—San Antonio 1969, no writ); voluntary assumption of risk, *Farley v. MM Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975); no duty doctrine, *Highland Park, Inc. v. Parker*, 565 S.W.2d 512, 517 (Tex. 1977); imminent peril, *Davila v. Clayton Sanders and Forsage Trucking Co.*, 557 S.W.2d 770, 771 (Tex. 1977) (per curiam); discovered peril, *French v. Gregsby*, 571 S.W.2d 867, 867 (Tex. 1978) (per curiam).

15. Texas first adopted the concept of strict liability in 1967. *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 790 (Tex. 1967). See generally Edgar, *Products Liability in Texas*, 11 TEX. TECH L. REV. 23 (1980).

16. See, e.g., *Webb v. Jorns*, 488 S.W.2d 407, 411 (Tex. 1972); *Richardson v. Holmes*, 525 S.W.2d 293, 298 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.); *Christian v. Jeter*, 455 S.W.2d 51, 53-54 (Tex. Civ. App.—Waco 1969, writ ref'd n.r.e.).

17. See, e.g., *Bedgood v. Madalin*, 600 S.W.2d 773, 776, 779 (Tex. 1980) (Spears, J., concurring); *Whittlesey v. Miller*, 572 S.W.2d 665, 667 (Tex. 1978); *Landreth v. Reed*, 570 S.W.2d 486, 489-90 (Tex. Civ. App.—Texarkana 1978, no writ).

the general public, who make a claim alleging that a legal wrong has been done to them, are faced with added delays in getting their cases to trial, additional delays in receiving appellate review of trial court determinations, spiraling court costs and expenses for the preparation of litigation, higher attorney's fees, and increased confusion as to the effect of legal rights that they seek to enforce.¹⁸ The effect of these factors upon the legal rights of a non-litigating claimant or a litigating plaintiff may preclude the maintenance of a cause of action against an alleged wrongdoer to full satisfaction.

The legitimate purpose of any claim for relief is to make the victim whole.¹⁹ This is true whether the claim is initiated by private action between parties in order to effect a settlement or institutionally initiated by the filing of a legal action in a court of competent jurisdiction.²⁰ The claimant seeks to be satisfied; to be fully compensated for the alleged wrong that deprived him of his legal rights or status. The attorney for the claimant, or plaintiff, in order to satisfy his client, must gather the available arsenal of substantive and procedural weapons and commence fire upon the alleged wrongdoer's fortress.²¹ Settlement or trial on the merits is the goal. In more simple, less populous times, when the arsenal was less sophisticated, the successful practitioner and the able jurist faced lighter loads of responsibility, so that, notwithstanding all of the modern conveniences of electronic wizardry, a case could be prepared and tried more quickly than today.²² For the accused or

18. See Branton, *Opposition to Proposed Constitutional Amendment*, 43 TEX. B.J. 915, 915-16 (1980).

19. See Seavey, *Principles of Torts*, 56 HARV. L. REV. 72, 72 (1942). The entire group of remedial actions serve five distinct purposes: (1) to give to a person what another has promised him (usually vindicated in an action upon a contract); (2) to restore to a person what another has unjustly obtained at his expense (usually the basis of a quasi-contractual action); (3) to punish for wrongs (the historical function of the criminal law) and to deter future wrongdoing; (4) to compensate for harm (the most important function of tort actions); and (5) to determine the rights in property (the basis of many different types of actions). *Id.* at 72; cf. *Ashby v. White*, 92 ENG. REP. 126, 129 (1703) (for every interference with a recognized legal right the law will provide a remedy).

20. See generally AMERICAN BAR ASSOCIATION, *CODE OF PROFESSIONAL RESPONSIBILITY* EC 7-7 (1976); L. PATTERSON & E. CHEATHAM, *THE PROFESSION OF LAW* 115-27 (1971); Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 757-60 (1976).

21. See Traynor, *Lawsuits: First Resort or Last?*, 1978 UTAH L. REV. 635, 635 (1978).

22. See Bell, *Crisis in the Courts: Proposals for Change*, 31 VAND. L. REV. 3, 4 (1978). Attorney General Bell stated in a lecture before the Sims Lecture Series, Vanderbilt Law School, November 4, 1977:

party defendant, counsel is called upon to defend the fortress against the vexatious and vicious assaults upon the "bastions of goodness and purity"; and from that moment at Runnymede when trial by battle began to give way to battle by trial, i.e., trial by jury, we have enjoyed, agonized over, and endured the problems of the disposition and trial of disputes between and among decent and honest people with opposing points of view.²³

Our legislatures and judiciaries have provided the public with an expansion of their civil and human rights and have established by statute and common law new remedies for old rights and new rights to which old remedies are applied. These alternative choices available for disposing of disputes, therefore, have caused settlement and tort litigation to become more complicated. Furthermore, the congestion of courts, expense of litigation, and time difficulties in handling complex litigation have necessitated the creation of vehicles for the settlement of disputed claims, rather than proceeding to trial for an all or nothing victory for one party.²⁴ Although settlement of disputes always has been a favorite of both the bench and bar, its necessity today is even greater than previously required.²⁵

To counterbalance the judicial "good" that is achieved by a

The pressures imposed upon the court system by the law explosion are severe, and the courts may not be equal to the task. Important rights may be lost. Defendants charged with crimes may be free on bail, some to commit other crimes. Defendants already convicted of crimes may be free on bail pending delayed appeals. Business controversies may go unresolved because of lack of a forum. Hapless plaintiffs with meritorious claims may go uncompensated because of delay in the trial and appellate courts.

Id. at 4. See generally Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567, 567-69 (1975); Discussion: *Crisis in the Courts*, 31 VAND. L. REV. 1, 1-31 (1978).

23. A. HORNE, *THE MIRROR OF JUSTICES* 157-62 (1768) (discussing trial by battle); L. MOORE, *THE JURY TOOL OF KINGS PALLADIUM OF LIBERTY* 44-45 (1973) (trial by battle existed until early thirteenth century before Magna Carta); see TEX. REV. CIV. STAT. ANN. art. 2175 (Vernon 1967) (Texas abrogated common law trial by battle in 1846).

24. See, e.g., *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 808 (Tex. 1980); *Gilliam v. Alford*, 69 Tex. 267, 271-72, 6 S.W. 757, 759 (1887); *Fidelity-Southern Fire Ins. Co. v. Whitman*, 422 S.W.2d 552, 558 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd. n.r.e.); *Lunch, Settlement of Civil Cases: A View From the Bench*, 5 LITIGATION 8, 8 (1978).

25. "The law favors settlement" is an oft quoted phrase encompassing the mood of bench and bar to compromise first and litigate only when negotiation is unproductive. See, e.g., *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 857 (Tex. 1977); *McGuire v. Commercial Union Ins. Co.*, 431 S.W.2d 347, 352 (Tex. 1968); *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 772 (Tex. 1964). See generally L. PATTERSON & E. CHEATHAM, *THE PROFESSION OF LAW* 115-27 (1971); H. ROSS, *SETTLED OUT OF COURT* 136-75 (1970).

claimant receiving full satisfaction, various doctrines of preclusion have developed in American jurisprudence.²⁶ These doctrines operate to prevent a person from pursuing a claim for relief after he has previously asserted a legal right and received something of value either by way of settlement or adjudication.²⁷ Various justifications for the preclusion doctrines have been asserted by both the judiciary and legal scholars.²⁸ The legitimate purposes for the doctrines that have emerged are that a party plaintiff should be prevented from receiving a double recovery for an alleged single wrong, a party defendant should not be twice vexed for the same cause, judicial economy in requiring all matters in controversy to be considered and concluded in one proceeding, as well as an amorphous concept of fundamental fairness.²⁹ When there are multiple parties from whom a potential plaintiff may seek relief, the question arises as to how he may receive a partial settlement without being subjected to one of the numerous preclusion doctrines, particularly, election of remedies.³⁰

Initially, this article will review the various preclusion doctrines and their elements. Secondly, the doctrine of election of remedies,

26. These preclusionary doctrines include: (1) *res judicata*, *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 362-63 (Tex. 1971); (2) collateral estoppel, *Hanrick v. Gurley*, 93 Tex. 458, 480, 56 S.W. 330, 330 (1900); (3) doctrine of satisfaction, *Bradshaw v. Baylor Univ.*, 126 Tex. 99, 104, 84 S.W.2d 703, 705 (1935); (4) judicial estoppel, *Long v. Knox*, 155 Tex. 581, 585, 291 S.W.2d 292, 295 (1956); (5) equitable estoppel, *Swilley v. McCain*, 374 S.W.2d 871, 875 (Tex. 1964); (6) estoppel in pais, *Gulbenkian v. Penn.*, 151 Tex. 412, 418, 252 S.W.2d 929, 932 (1952); (7) estoppel by waiver, *Ford v. State Farm Mut. Auto. Ins. Co.*, 550 S.W.2d 663, 665-66 (Tex. 1977); (8) estoppel by ratification, *Texas & Pac. Coal & Oil Co. v. Kirtley*, 288 S.W. 619, 622 (Tex. Civ. App.—Eastland 1926, writ ref'd); (9) election of remedies, *American Sav. Ass'n v. Musick*, 531 S.W.2d 581, 588-89 (Tex. 1975).

27. See, e.g., Merrem, *Election of Remedies in Texas*, 8 Sw. L.J. 109, 110-12 (1954); Mooney, *The Doctrine of Preclusion in Negligence Cases*, 1968 INS. L.J. 747, 747 (1968); Steakley & Howell, *Ruminations on Res Judicata*, 28 Sw. L.J. 355, 356-57 (1974).

28. See, e.g., *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971); *Morris Plan Bank v. Continental Nat'l Bank*, 155 S.W.2d 407, 409 (Tex. Civ. App.—Fort Worth 1941, no writ); Hine, *Election of Remedies, A Criticism*, 26 HARV. L. REV. 707, 707-08 (1913).

29. See Steakley & Howell, *Ruminations on Res Judicata*, 28 Sw. L.J. 355, 358-60 (1974). Justice Steakley enumerates some of these purposes as being freedom from vexatious litigation, the danger of double recovery, desirability of stable decisions, and economy of court time. *Id.* at 359.

30. See generally Hine, *Election of Remedies, A Criticism*, 26 HARV. L. REV. 707, 713 (1913); Merrem, *Election of Remedies In Texas*, 8 Sw. L.J. 109, 125-26 (1954); Comment, *Election of Remedies—Inconsistency and Availability of Remedies Under Texas Cases*, 11 TEXAS L. REV. 218, 219-20 (1932); 30 TEXAS L. REV. 772, 772 (1952).

recently redefined by the Texas Supreme Court in *Bocanegra v. Aetna Life Insurance Co.*,³¹ will be considered and analyzed. Finally, a concept will be proposed that would help resolve the uncertainty in obtaining satisfaction.

II. THE PRECLUSION DOCTRINES

A. Compulsory Counterclaim

Perhaps the most common, yet overlooked, preclusion doctrine is the compulsory counterclaim.³² The counterclaim's preclusionary characteristic arises from its mandatory assertion in a pending case.³³ Failure to file a compulsory counterclaim in response to the immediate action bars its assertion in a subsequent suit.³⁴ Compulsory counterclaims, as distinguished from permissive counterclaims,³⁵ require the simultaneous existence of six elements. If any one of the elements is missing, however, the failure to file a counterclaim will not bar a claim in future actions.³⁶ Briefly, these elements include:³⁷

1. The counterclaim must be within the jurisdictional forum of the court;
2. It must not be the subject matter of the answer in the pending action;
3. The claim must be mature and acquired prior to the defendant's answer;
4. It must arise "out of the transaction or occurrence that is

31. 23 Tex. Sup. Ct. J. 502 (July 19, 1980).

32. See TEX. R. CIV. P. 97(a).

33. See, e.g., *Griffin v. Holiday Inns of America*, 496 S.W.2d 535, 538-39 (Tex. 1973); *Harris v. Jones*, 404 S.W.2d 349, 350-52 (Tex. Civ. App.—Eastland 1966, writ ref'd); *Ulmer v. Mackey*, 242 S.W.2d 679, 681 (Tex. Civ. App.—Fort Worth 1951, writ ref'd n.r.e.).

34. See, e.g., *Ake v. Chancey*, 149 F.2d 310, 311 (5th Cir. 1945) (applying Texas law); *Western Inn Corp. v. Heyl*, 452 S.W.2d 752, 761 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.); *Beach v. Runnels*, 379 S.W.2d 684, 685 (Tex. Civ. App.—Dallas 1964, writ ref'd).

35. TEX. R. CIV. P. 97(b). Permissive counterclaims include those which do not arise out of the same transaction which is the subject matter of the controversy. See 3 W. DORSANEO, TEXAS LITIGATION GUIDE § 71.02[3][b] (1980); 2 R. McDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS § 7.50(IV) (1970).

36. See 2 R. McDonald, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS § 7.49 (1970).

37. See *id.* See generally 3 W. DORSANEO, TEXAS LITIGATION GUIDE § 71.02[2][a] (1980); *Frumer, Multiple Parties and Claims in Texas*, 6 Sw. L.J. 135, 137-38 (1952).

- the subject matter of the opposing party's claim;"
5. The claim must be brought in the same capacity as that of the opposing party; and
 6. The counterclaim must not include third parties which are outside the reach of the court's jurisdiction.

To avoid preclusion, a party should first examine the anticipated claim in conjunction with the status of the parties in order to determine whether the counterclaim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim."³⁸ Without meeting this threshold requirement, the claim will not be precluded because of the failure to assert a counterclaim. Additionally, in determining whether a counterclaim is mandatory, Texas courts have barred subsequent claims which would create a multiplicity of suits.³⁹

B. *Res Judicata*

Res judicata generally precludes relitigation of matters that have been previously adjudicated by a court of competent jurisdiction.⁴⁰ The underlying principle is that a disputed right, fact, or question determined in one action by a court cannot be disputed in a second action.⁴¹ Involved are concepts of merger, bar, and estoppel.⁴² Merger applies when there is a valid, final money judgment for a plaintiff, the effect of which is that the cause of action is merged

38. TEX. R. CIV. P. 97(a).

39. See, e.g., *Gray v. Kirkland*, 550 S.W.2d 410, 411 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); *Upjohn Co. v. Petro Chem. Suppliers, Inc.*, 537 S.W.2d 337, 340 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.); *Western Inn Corp. v. Heyl*, 452 S.W.2d 752, 761 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.).

40. See, e.g., *Abbott Laboratories v. Gravis*, 470 S.W.2d 639, 642 (Tex. 1971); *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 362-63 (Tex. 1971); *Daly v. Board of Trustees*, 524 S.W.2d 410, 412 (Tex. Civ. App.—San Antonio 1975, no writ).

41. *Steakley & Howell, Ruminations on Res Judicata*, 28 Sw. L.J. 355, 355 (1974); see RESTATEMENT (SECOND) OF JUDGMENTS § 48, Comment a, at 36 (Tent. Draft No. 1, 1973); RESTATEMENT OF JUDGMENTS § 45 (1942); *Brousseau, A Reader's Guide to the Proposed Changes in the Preclusion Provisions of the Restatement of Judgments*, 11 TULSA L.J. 305, 315 (1976); *Currie, Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 325 (1978); 47 U. CINN. L. REV. 328, 328 (1978).

42. See *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 362-63 (Tex. 1971); *Ryan Consol. Petroleum Corp. v. Pickens*, 285 S.W.2d 201, 205 (Tex. 1955); *Weaver v. City of Waco*, 575 S.W.2d 426, 430-31 (Tex. Civ. App.—Waco 1978, no writ); TEX. R. CIV. P. 94; 2 R. McDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS § 7.43 (1970).

into the judgment.⁴³ A bar to subsequent litigation exists when there is a prior adverse decision rendered on the merits of the same cause of action between the same parties.⁴⁴ Two types of estoppel are at issue under the doctrine of *res judicata*. Although some courts have considered collateral estoppel as a form of *res judicata*, it is really a separate concept of preclusion, as will be discussed below. Direct estoppel, the second type of estoppel at issue, is not always recognized as a distinct facet of *res judicata*.⁴⁵ According to section 49 of the Restatement of Judgments, however, direct estoppel applies when the causes of action are the same but the issues involved are other than those of the merits of the cause.⁴⁶ For *res judicata* to preclude a cause of action the following elements must be present:⁴⁷

1. An action or judicial proceeding;
2. A final, valid judgment by a court of competent jurisdiction over the parties and the subject matter of the action;
3. An existing issue, fact, or question; and
4. An identity of parties or their privies.

The effect of the successful assertion of *res judicata* is to preclude that which was litigated in the original controversy, as well as every matter which could have been offered but was not.⁴⁸

43. See RESTATEMENT OF JUDGMENTS § 181 (1942); cf. *Westinghouse Credit Corp. v. Knownslar*, 496 S.W.2d 531, 532-33 (Tex. 1973).

44. See *Cromwell v. County of Sac.*, 94 U.S. 351, 357 (1876); *Peterson v. Peterson*, 548 S.W.2d 83, 85 (Tex. Civ. App.—Tyler 1977, no writ); *McKenzie v. Frost*, 448 S.W.2d 520, 523 (Tex. Civ. App.—El Paso 1969, writ ref'd n.r.e.).

45. Direct estoppel applies when "the issue is actually litigated and determined in an action between the same parties based upon the same cause of action." *Napper v. Anderson, Henley, Shields, Bradford & Pritchard*, 500 F.2d 634, 636 n.4 (5th Cir. 1974); accord, *Estevez v. Nabers*, 219 F.2d 321, 324 (5th Cir. 1955); see *Gee, The Four Facets of Res Judicata*, 23 TEX. B.J. 534, 534 (1960).

46. RESTATEMENT OF JUDGMENTS § 49 (1942); see RESTATEMENT (SECOND) OF JUDGMENTS § 48.1, Comment b, at 56 (Tent. Draft No. 1, 1973).

47. *Lemons v. State*, 570 S.W.2d 593, 596 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.); *Oak Lawn Preservation Soc'y v. Board of Managers*, 539 S.W.2d 167, 169 (Tex. Civ. App.—Dallas 1976, no writ); accord, *Abbott Laboratories v. Gravis*, 470 S.W.2d 639, 642 (Tex. 1971).

48. See *Hull v. Hull*, 183 S.W.2d 275, 277-78 (Tex. Civ. App.—Waco 1944, writ ref'd w.o.m.); *McFarlane v. Griffin*, 80 S.W.2d 1100, 1101 (Tex. Civ. App.—Fort Worth 1935, no writ); TEX. R. CIV. P. 94; *Gee, The Four Facets of Res Judicata*, 23 TEX. B.J. 534, 534 (1960).

C. *Satisfaction*

The basic underlying principle at work in the doctrine of satisfaction is that there can be but one satisfaction for the injuries sustained by an individual.⁴⁹ The following elements are involved:⁵⁰

1. An action or judicial proceeding;
2. A judgment;
3. Adjudication of facts by a fact finder; and
4. Payment of the adjudicated amount.
5. Identity of parties, however, is not necessary.

One problem within the doctrine of satisfaction, not yet articulated by the courts, may be the distinction between an unliquidated claim, which by its very nature is uncertain and undetermined, and a liquidated claim, which is certain and determined. In the latter, a party conceivably could be satisfied by the recovery of a liquidated amount, when his recovery is from a wrongdoer for his legal indebtedness under the law of torts. When, however, a claim is based upon a contractual theory for which a consideration has been paid there will be no satisfaction of the tort claim. For example, the recovery of certain medical expenses under an insurance policy is not a satisfaction which will preclude recovery for the same medical expenses against the wrongdoer.⁵¹ The same result is achieved when a spouse beneficiary of a life insurance contract is allowed to recover not only on the insurance policy, but also against the wrongdoer on a theory of tort liability. In both situations, the contract value of the life and of the medical services has been established in consideration for the payment of a premium.

49. *T. L. James & Co. v. Statham*, 558 S.W.2d 865, 868 (Tex. 1977); *Bradshaw v. Baylor Univ.*, 126 Tex. 99, 104, 84 S.W.2d 703, 705 (1935); *accord*, *McMillen v. Klingensmith*, 467 S.W.2d 193, 196-97 (Tex. 1971). "Full satisfaction will bar a claim because the law will not permit double redress." *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 504 (July 19, 1980).

50. *See T. L. James & Co. v. Statham*, 558 S.W.2d 865, 869 (Tex. 1977); *Rexroat v. Prescott*, 570 S.W.2d 457, 459 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.). *See also Prosser, Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 423 (1937) (distinction between a satisfaction and a release).

51. *Cf. Eichel v. New York Central R.R.*, 375 U.S. 253, 254 (1963) (per curiam) (disability pension not relevant to mitigate damages); *St. Paul Fire & Marine Ins. Co. v. Murphree*, 163 Tex. 534, 536, 357 S.W.2d 744, 748 (1962) (settlements obtained in prior compensation claim not admissible); *Myers v. Thomas*, 143 Tex. 502, 504-06, 186 S.W.2d 811, 813-14 (1945) (Industrial Accident Board claim award not admissible).

On the other hand, the contract value neither sets the value of the deceased's life or the medical services in the tort action nor precludes it.⁵²

The central problem with the doctrine of satisfaction arises when a subsequent action is filed after a prior action is settled between a victim and one tortfeasor.⁵³ The issue whether there should be a "satisfaction" emerges when an order, concluding the prior action, is entered by a court, be it a judgment, order of dismissal with prejudice, or non-suit with prejudice, and the amount of the settlement is recited therein.⁵⁴ The San Antonio Court of Civil Appeals in *Nielsen v. Ford Motor Co.*⁵⁵ recently held that when an order of dismissal merely recites that the plaintiff no longer wishes to pursue his action against the defendant, there is not a satisfaction.⁵⁶ In that case Nielsen was involved in a rear end collision with Mabry. He filed suit against Mabry and settled before trial on the merits. An order of dismissal was entered merely stating Nielsen wished to dismiss his action.⁵⁷ A release was prepared releasing Mabry and any and everyone else conceivable. The abolition of the unity of release rule, however, prevented the release of unnamed parties.⁵⁸ Nielsen filed a subsequent action against Ford Motor Company under a strict liability in tort theory for enhancement of injury, pursuant to the crashworthiness doctrine, alleging certain design and/or manufacturing defects in the automobile he had been operating.⁵⁹ Concluding that the settle-

52. *Cf. Eichel v. New York Central R.R.*, 375 U.S. 253, 254 (1963) (per curiam) (disability payments not admissible to offset or mitigate adjudication of damages).

53. *See, e.g., Bradshaw v. Baylor Univ.*, 126 Tex. 99, 104, 84 S.W.2d 703, 705 (1935); *Deal v. Madison*, 576 S.W.2d 409, 414-15 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.); *Hodges, Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 171-72 (1947).

54. *McMillen v. Klingensmith*, 467 S.W.2d 193, 195 (Tex. 1971). *See also Miller v. Beck*, 79 N.W. 344, 344-45 (Iowa 1899); *Ellis v. Essau*, 6 N.W. 518, 520-23 (Wis. 1880); *Prosser, Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 422-23 (1937).

55. No. 16282 (Tex. Civ. App.—San Antonio, July 9, 1980).

56. *See id.*

57. *See id.*

58. *See id.* The unity of release rule was founded upon the belief "that there is such a unity of the obligation or injury that a release of one is a release of all." *McMillen v. Klingensmith*, 467 S.W.2d 193, 195 (Tex. 1971). The rule, however, has been abandoned in Texas. Today, "[u]nless a party is named in a release, he is not released." *Id.* at 196.

59. *See Nielsen v. Ford Motor Co.*, No. 16282 (Tex. Civ. App.—San Antonio, July 9, 1980).

ment with Mabry was a satisfaction, the trial court sustained a plea in bar which asserted the release, the "judgment," and the merger of the settlement payment into the "judgment." The court of civil appeals in reversing the dismissal pointed out that the terms of the settlement were not mentioned in the order of dismissal and held there was no judgment to be satisfied.⁶⁰ A question arises, however, whether a satisfaction would have been achieved by including in the judgment the amount of the first settlement rather than entering an order of dismissal without reference to the amount of the settlement.

In *Hunt v. Ziegler*,⁶¹ the court relied upon both satisfaction and the unity of release rule to hold that when Mrs. Ziegler settled a wrongful death claim on behalf of herself and her children against an employee, her action against the employer was precluded.⁶² The enunciated principle of allowing but one satisfaction appears sound; however, the holding does not. Merely because the plaintiff settled her claim on behalf of her children, the amount of which was recited in the judgment as required by Texas law due to the involvement of minors,⁶³ is no reason to conclude that there was a "judgment" as to Mrs. Ziegler's claim which was satisfied when the settlement was paid.⁶⁴

Texas courts have not dealt with the issue of "satisfaction" in terms of defined principles. Nevertheless, there should not be a satisfaction in any case in which a settlement agreement involving an unliquidated claim is incorporated into a "judgment," because there has not been an adjudication by a finder of fact as to the amount of damages sustained by the plaintiff.⁶⁵ Generally, the

60. *See id.*

61. 271 S.W. 936 (Tex. Civ. App.—San Antonio 1925), *aff'd*, 280 S.W. 546 (Tex. Comm'n App. 1926, judgment adopted).

62. *See id.* at 938.

63. *See* TEX. R. CIV. P. 44, 173.

64. Two recent court of civil appeals cases have correctly held there is no satisfaction when suit is brought on behalf of another as required by law. *See* *Rexroat v. Prescott*, 570 S.W.2d 457, 459 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.); *Leong v. Wright*, 478 S.W.2d 839, 845 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.).

65. Only two Texas cases have been found which attempt to assign meaning to "adjudication." An adjudication contemplates a judicial hearing for the purpose of determining certain facts from the evidence advanced. It "implies a hearing by a court, after notice, of legal evidence of the factual issues involved." *Genzer v. Phillip*, 134 S.W.2d 730, 732 (Tex. Civ. App.—Austin 1939, writ dismissed judgment corrected). Adjudicate means "to hear or try, and determine judicially; to settle by judicial decree; to adjudge; to act as 'judge.'" *Nueces Co. Water*

damages suffered by one in a tort action of any kind are unliquidated, and they are, therefore, uncertain and undetermined.⁶⁶ The question is whether the claim for this uncertain and undetermined amount should be considered "satisfied" without a determination of precisely what the amount is, or whether the plaintiff's settlement agreement with one potentially liable tortfeasor should constitute the determination of the amount. Both the practical and fair way to make the damage amount certain is to require an adjudication of the amount of the unliquidated claim. It is only when the uncertain and undetermined amount has been made certain by a fact finder that there can be a real satisfaction of a known claim.⁶⁷ Unless adjudication is viewed as the cornerstone of satisfaction of an unliquidated claim, the recitation of the amount of a partial settlement in a legal document, a matter of form over substance, will determine the victim's legal rights.

D. *Judicial Estoppel*

The principle underlying judicial estoppel is that a sworn statement or sworn pleading in one action cannot be contradicted in a second action.⁶⁸ The Texas Supreme Court recognized that the historical public purpose of judicial estoppel is to uphold the sanctity of an oath and to prohibit a party who has made a sworn statement, even in another action, from subsequently disavowing the statement when he thinks it is to his benefit.⁶⁹ To apply judicial estoppel the following elements must exist:⁷⁰

1. An action or judicial proceeding; and
2. A party's sworn allegation or admission in an un-superseded pleading from a prior proceeding.
3. Identity of parties is unnecessary.

Control & Improvement Dist. No. 3 v. Texas Water Rights Comm'n, 481 S.W.2d 924, 930 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.). See also Rank v. Krug, 142 F. Supp. 1, 73 (S.D. Cal. 1956) (adjudication is only by a court or judge); Vasquez v. Courtney, 537 P.2d 536, 537 (Ore. 1975) (adjudication is a decree in a cause).

66. See Scheuing v. Challis, 104 S.W.2d 581, 582 (Tex. Civ. App.—San Antonio 1937, writ ref'd).

67. Cf. T. L. James & Co. v. Statham, 558 S.W.2d 865, 868 (Tex. 1977) (judgment of \$15,000 accepted in negligence action against one tortfeasor amounted to satisfaction).

68. See Long v. Knox, 155 Tex. 581, 585, 291 S.W.2d 292, 295 (1956).

69. *Id.* at 585, 291 S.W.2d at 295; accord, Sartain v. Dixie Coal & Iron Co., 266 S.W. 313, 316-17 (Tenn. 1924).

70. See Long v. Knox, 155 Tex. 581, 585, 291 S.W.2d 292, 295 (1956).

This strict doctrine, however, does not apply in cases where a sworn statement is made by inadvertance, fraud, mistake, or duress.⁷¹

E. Collateral Estoppel

The Texas Supreme Court has recognized "collateral estoppel" or "estoppel by judgment" as a bar to relitigation, "in a subsequent action upon a different cause of action of fact issues actually litigated and essential to a prior judgment."⁷² Stated another way, one may not relitigate in a subsequent action upon a different cause of action those facts which were litigated and essential to a prior judgment.⁷³ The elements to obtain an estoppel include the following:⁷⁴

1. An action or judicial proceeding;
2. Identity of parties or their privies;

71. See *Johnson Serv. Co. v. Transamerica Ins. Co.*, 485 F.2d 164, 174-75 (5th Cir. 1973); *Long v. Knox*, 155 Tex. 581, 585, 291 S.W.2d 292, 295 (Tex. 1956); cf. *Metroflight, Inc. v. Shaffer*, 581 S.W.2d 704, 709 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (fraud or mistake may be asserted as a defense to the application of judicial estoppel).

72. *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 362 (Tex. 1971).

73. See *Kirby Lumber Corp. v. Southern Lumber Co.*, 145 Tex. 151, 154-55, 196 S.W.2d 387, 388-89 (1946); *Houston Terminal Land Co. v. Westergreen*, 119 Tex. 204, 205-06, 27 S.W.2d 526, 528 (1930); *Hardy v. Fleming*, 553 S.W.2d 790, 792 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.). The doctrine is modernly called issue preclusion and is distinct from *res judicata* which properly can be called claim preclusion. The most famous delineation of the distinction of the doctrine was expounded by Justice Field in *Cromwell v. County of Sac.*, 94 U.S. 351 (1877):

In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

Id. 352-53.

74. See *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 362-63 (Tex. 1971); *Kirby Lumber Corp. v. Southern Lumber Co.*, 145 Tex. 151, 154-55, 196 S.W.2d 387, 388-89 (1946); *Houston Terminal Land Co. v. Westergreen*, 119 Tex. 204, 205-06, 27 S.W.2d 526, 528 (1930). One decision contended that the requirement of mutuality is also necessary, and that if the judgment is not mutually binding estoppel will not be available. See *Atchley v. Superior Oil Co.*, 482 S.W.2d 883, 896 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.).

3. Identity of issues;
4. A different claim or cause of action; and
5. A final prior valid judgment.

F. *Equitable Estoppel*

A party is precluded from asserting a right in a second action inconsistent with a right previously asserted in the first action.⁷⁵ The Texas Supreme Court has referred to the preclusion doctrine of equitable estoppel as an election of rights within the doctrine of election of remedies,⁷⁶ when in fact the doctrines are distinct.⁷⁷ Even today the Justices of the Texas Supreme Court are not of the same mind as to the nature of equitable estoppel.⁷⁸ The doctrine is applied when the following elements exist:⁷⁹

1. An action or judicial proceeding;
2. Identity of the parties or their privies;
3. Assertion of a right in a subsequent action which is inconsistent with admissions or unsworn allegations in the prior proceeding; and
4. Detriment suffered as a result of such rights having been asserted.

G. *Estoppel In Pais*

The application of the preclusion principles of estoppel in pais invokes the traditional detrimental reliance estoppel theory.⁸⁰ A

75. See *Swilley v. McCain*, 374 S.W.2d 871, 875 (Tex. 1964); *Smith v. Chipley*, 118 Tex. 415, 432-33, 16 S.W.2d 269, 276-77 (1929).

76. See *Seamans Oil Co. v. Guy*, 115 Tex. 93, 99-100, 276 S.W. 424, 426 (1925).

77. Election of rights is distinguishable from election of remedies in that the former is an election between "ends to be attained. . ." whereas the latter is an "election between different types of redress. . ." Merrem, *Election of Remedies in Texas*, 8 Sw. L.J. 109, 111 (1954).

78. Compare *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 506 (July 19, 1980) (Justice Pope discussing *Seamans Oil Co. v. Guy*, 115 Tex. 93, 276 S.W.2d 424 (1925) as an opinion based on election and full satisfaction) with *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 507 (July 19, 1980) (Campbell, J., concurring) (Justice Campbell discussing *Seamans Oil Co. v. Guy*, 115 Tex. 93, 276 S.W.2d 424 (1925) as a "clear-cut equitable estoppel").

79. See *Swilley v. McCain*, 374 S.W.2d 871, 875 (Tex. 1964); *Smith v. Chipley*, 118 Tex. 415, 432-33, 16 S.W.2d 269, 276-77 (1929).

80. See *Concord Oil Co. v. Alco Oil & Gas Corp.*, 387 S.W.2d 635, 639 (Tex. 1965). The court held "[i]n order for an estoppel to exist, it devolves upon the party seeking the advantage thereof to establish that he has been misled to his injury." *Id.* at 639.

party to an action is precluded from asserting rights that otherwise exist against one who relies in good faith on the party's prior conduct. No prior action or judicial proceeding is necessary. The requisite elements include:⁸¹

1. A false representation or concealment of material facts;
2. Made with knowledge, actual or constructive, of the facts;
3. To a party without knowledge or means of knowledge of the real facts;
4. With the intent that the misrepresentation should be acted on; and
5. Detrimental reliance by the party to whom the representation was made.

H. Waiver

Waiver under Texas law is generally considered to be the "intentional relinquishment of a known right or intentional conduct inconsistent with claiming it."⁸² There can be no waiver of a right, intentional or otherwise, if the party charged with waiver neither acts nor makes statements which appear inconsistent with the intention to rely on that right.⁸³ Waiver is a concept requiring action by only one party; that party, however, must be the party charged with relinquishing a right.⁸⁴

81. See *Barfield v. Howard M. Smith Co.*, 426 S.W.2d 834, 838 (Tex. 1968); *Concord Oil Co. v. Alco Oil & Gas Corp.*, 387 S.W.2d 635, 639 (Tex. 1965); *Gulbenkian v. Penn*, 151 Tex. 412, 418, 252 S.W.2d 929, 932 (1952).

82. *Massachusetts Bonding & Ins. Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396, 401 (Tex. 1967); *Texas & Pac. Ry. v. Wood*, 145 Tex. 534, 540, 199 S.W.2d 652, 656 (1947); see, e.g., *Smith v. Dallas*, 425 S.W.2d 467, 469 (Tex. Civ. App.—Dallas 1968, no writ) ("waiver occurs only when one intentionally relinquishes a known right"); *American Nat'l Ins. Co. v. Allen*, 370 S.W.2d 140, 143-44 (Tex. Civ. App.—Waco 1963) (waiver is intentional relinquishment of known right with full knowledge of material facts), *rev'd on other grounds*, 380 S.W.2d 604, 608-09 (Tex. 1964); *Brightwell v. Norris*, 242 S.W.2d 201, 204 (Tex. Civ. App.—Waco 1951, writ ref'd n.r.e.) (waiver is intentional relinquishment of known right or conduct warranting inference of relinquishment).

83. *Maryland Cas. Co. v. Palestine Fashions, Inc.*, 402 S.W.2d 883, 888 (Tex. 1966); see *Ford v. Culbertson*, 158 Tex. 124, 138-39, 308 S.W.2d 855, 865 (1958). See generally Comment, *Waiver and Estoppel*, 20 BAYLOR L. REV. 325, 330-34 (1968). A waiver takes place when one dispenses with the performance of something which he has a right to exact. It occurs when one in possession of any right, whether conferred by law or by contract, with full knowledge of the material facts, does or forbears to do something, the doing of which or the failure or forbearance to do is inconsistent with the right or his intention to rely upon it. *Ford v. Culbertson*, 158 Tex. 124, 138-39, 308 S.W.2d 855, 865 (1958).

84. *Keel v. Kilgore Transfer & Storage Co.*, 238 S.W.2d 738, 741 (Tex. Civ. App. —

A waiver can be distinguished from estoppel in pais by comparing the requisite elements of these two preclusion doctrines.⁸⁵ For a waiver to be preclusive, it is not necessary for the opposite party to act in response to the statement relied upon as constituting a waiver.⁸⁶ Some case law has included detrimental reliance as a necessary element in constituting a waiver.⁸⁷ These cases, however, are based upon fact situations constituting estoppel rather than waiver.⁸⁸ The only elements necessary to constitute a waiver are:⁸⁹

1. Intent to waive;
2. Acts constituting a surrender of a right;
3. Relinquished right in existence at the time of waiver; and
4. Knowledge of the existence of such right by the party waiving the right.

I. Ratification

Ratification occurs when a party acts or assents in a manner so as to "confirm one's prior act or that of another."⁹⁰ *Texas &*

Texarkana 1951, writ ref'd); see *Equitable Life Assur. Soc'y v. Ellis*, 105 Tex. 526, 538-39, 147 S.W. 1152, 1157 (1912); *Dockery v. Hanan*, 54 S.W.2d 1017, 1022 (Tex. Civ. App. — Fort Worth 1932, writ ref'd).

85. *Farmers' & Mechanics' Nat'l Bank v. Head*, 7 S.W.2d 61, 62-63 (Tex. Comm'n App. 1928, judgment adopted); *Langley v. Norris*, 167 S.W.2d 603, 613 (Tex. Civ. App.—Eastland 1942), *aff'd*, 141 Tex. 405, 173 S.W.2d 454 (1943); see *Roberts v. Griffith*, 207 S.W.2d 443, 446 (Tex. Civ. App.—Eastland 1947, writ ref'd n.r.e.).

86. *Langley v. Norris*, 167 S.W.2d 603, 613 (Tex. Civ. App.—Eastland 1942), *aff'd*, 141 Tex. 405, 173 S.W.2d 454 (1943). "A waiver, as such, must be distinguished from ordinary estoppel in pais, for it is not essential to the former that the opposite party do anything whatever upon the strength of the statement or act relied upon as constituting a waiver." *Id.* at 613.

87. *Capital Rental Equip. Co. v. Pacific Indem. Co.*, 193 F. Supp. 897, 900 (W.D. Tex. 1961).

88. See *id.* at 900. Compare *Langley v. Norris*, 167 S.W.2d 603, 613 (Tex. Civ. App.—Eastland 1942) (no act required for waiver), *aff'd*, 141 Tex. 405, 173 S.W.2d 454 (1943) with *Capital Rental Equip. Co. v. Pacific Indem. Co.*, 193 F. Supp. 897, 900 (W.D. Tex. 1961) (waiver must be made distinctly).

89. *Bering Mfg. Co. v. W. T. Carter & Bro.*, 255 S.W. 243, 252 (Tex. Civ. App. — Beaumont 1923), *aff'd*, 272 S.W. 1105 (Tex. Comm'n App. 1925, judgment adopted); see Comment, *Waiver and Estoppel*, 20 BAYLOR L. REV. 325, 332 (1968); cf. *McCracken v. Wright*, 157 P.2d 814, 818 (Kan. 1945) (waiver is voluntary and intelligent choice); *Hosch v. Howe*, 16 P.2d 699, 700 (Mont. 1932) (waiver is renunciation of a known existing right); *Hood v. Sioux Steel Co.*, 287 N.W. 636, 639 (S.D. 1939) (waiver is relinquishment or abandonment of a right); *Sommerfield v. Klinkowitz*, 15 N.W.2d 850, 854 (Wis. 1944) (waiver is intentional surrender of right).

90. *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 504 (July 19, 1980); see

Pacific Coal & Oil Co. v. Kirtley,⁹¹ the leading Texas case on ratification, describes the doctrine as encompassing an affirmation of a course of conduct, including mere passive acquiescence in that conduct so long as the party intends to be bound.⁹² Confusion between the concepts of ratification, estoppel, and waiver are common;⁹³ unlike estoppel, however, ratification requires no showing of prejudice to the opposing party.⁹⁴ Additionally, ratification can be distinguished from estoppel by the necessity in the former of determining whether the precluded party exhibited the intent to ratify an act or transaction.⁹⁵ The elements of ratification include:⁹⁶

1. The intention of a party to be bound by an act or transaction;
2. Without the requirement of a change of position or prejudice to the opposing party.

J. Election of Remedies

Before *Bocanegra* the doctrine of election of remedies had been defined many ways, including the selection of one of several inconsistent remedies or existing modes of procedure and relief allowed

Texas & Pac. Coal & Oil Co. v. Kirtley, 288 S.W. 619, 622 (Tex. Civ. App.—Eastland 1926, writ ref'd).

91. 288 S.W. 619 (Tex. Civ. App.—Eastland 1926, writ ref'd).

92. *Id.* at 622. The court stated:

The learned trial court held that appellees were not estopped because there was no change of position on the part of appellants and for lack of prejudice. One of these elements is essential to estoppel, but not to ratification. Ratification and estoppel are very often closely associated, and many times the terms are used interchangeably, although there is a clear line of demarcation between the two, in that prejudice is a necessary element of estoppel, while ratification requires no change or condition or prejudice.

Id. at 622.

93. See *Carlile v. Harris*, 38 S.W.2d 622, 624 (Tex. Civ. App.—Galveston 1931, no writ); cf. *Norman v. Safeway Prods., Inc.*, 404 S.W.2d 69, 71-72 (Tex. Civ. App.—Dallas 1966, no writ) (distinction between ratification and estoppel); *Jordan v. City of Beaumont*, 337 S.W.2d 115, 118 (Tex. Civ. App.—Beaumont 1960, writ ref'd n.r.e.) (distinction between ratification and waiver); *Farris v. Moore*, 293 S.W.2d 683, 686 (Tex. Civ. App.—Texarkana 1956, writ ref'd n.r.e.) (similarities between estoppel and ratification).

94. See *Carlile v. Harris*, 38 S.W.2d 622, 624 (Tex. Civ. App.—Galveston 1931, no writ).

95. *Id.* at 624; see *Texas & Pac. Coal & Oil Co. v. Kirtley*, 288 S.W. 619, 622 (Tex. Civ. App.—Eastland 1926, writ ref'd).

96. See *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 504 (July 19, 1980); *Carlile v. Harris*, 38 S.W.2d 622, 624 (Tex. Civ. App.—Galveston 1931, no writ); *Texas Pac. Coal & Oil Co. v. Kirtley*, 288 S.W. 619, 622 (Tex. Civ. App.—Eastland 1926, writ ref'd).

by law on the same state of facts.⁹⁷ The following elements traditionally have been required:⁹⁸

1. An action or judicial proceeding;
2. A judgment or receipt of something of value under a claim asserted, or incurring a detriment without a judgment;
3. Knowledge that inconsistent remedies or rights exist at the same time;
4. Same facts, not different transactions; and
5. Choice of one right or remedy, thereby abandoning the other.
6. Identity of parties is unnecessary.

III. THE NEW ELECTION DOCTRINE

A. *Development of the Doctrine*

The underlying purpose of the doctrine of election of remedies is to prevent double redress for a single wrong, prevent double recoveries, and prevent unjust enrichment.⁹⁹ Election of remedies originated in Roman law¹⁰⁰ and was premised upon equitable principles sometimes confused with the law of estoppel and waiver.¹⁰¹ For many years the doctrine has been criticized by legal writers.¹⁰²

97. See *American Sav. & Loan Ass'n. v. Musick*, 531 S.W.2d 581, 588 (Tex. 1975); *Custom Leasing, Inc. v. Texas Bank & Trust Co.*, 491 S.W.2d 869, 871 (Tex. 1973); cf. *Shriro Corp. v. Ward*, 570 S.W.2d 395, 397 (Tex. 1978) (per curiam) (one may plead independent wrongs which interact to contribute to a single harm).

98. See *American Sav. & Loan Ass'n. v. Musick*, 531 S.W.2d 581, 588 (Tex. 1975); *Custom Leasing, Inc. v. Texas Bank & Trust Co.*, 491 S.W.2d 869, 871 (Tex. 1973). But see *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 505 (July 19, 1980) (court redefined the election doctrine).

99. See *McKenzie v. Carte*, 385 S.W.2d 520, 527 (Tex. Civ. App.—Corpus Christi 1964, writ ref'd n.r.e.); *Mosher Mfg. Co. v. Eastland W.F. & G.R. Co.*, 259 S.W. 253, 255 (Tex. Civ. App.—El Paso 1924, writ ref'd.).

100. See *Cashen v. Owens*, 29 N.W.2d 440, 443 (Minn. 1947); *Anaconda Aluminum Co. v. Sharp*, 136 So. 2d 585, 588-89 (Miss. 1962); 25 AM. JUR. 2d, *Election of Remedies* § 2 (1966).

101. See *Cashen v. Owens*, 29 N.W.2d 440, 442-43 (Minn. 1947); *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 504 (July 19, 1980); *McKenzie v. Carter*, 385 S.W.2d 520, 526-27 (Tex. Civ. App.—Corpus Christi 1964, writ ref'd n.r.e.).

102. Hine, *Election of Remedies, A Criticism*, 26 HARV. L. REV. 707, 719 (1913); Merrem, *Election of Remedies*, 8 SW. L.J. 109, 126 (1954); Note, *Election of Remedies: A Delusion?*, 38 COLUM. L. REV. 292, 292-93 (1938); Note, *Election of Remedies: The California Basis*, 19 HASTINGS L. REV. 1233, 1246 (1968); Comment, *Election of Remedies-Inconsistency and Availability of Remedies Under Texas Cases*, 11 TEXAS L. REV. 218, 224-25 (1932).

One of the earliest and more eloquent evaluations is that of Charles P. Hine.¹⁰³ He began with a declaration "that underlying every rule of the common law is a principle" and "it is necessary to understand the principle upon which the rule is founded."¹⁰⁴ Hine noted that the courts differed as to the principles on which the rule of election of remedies depended.¹⁰⁵ Consequently, decisions applying the rule were in conflict. Furthermore, Hine observed that the rule was a harsh one, reasoning the principle upon which the election rule rested was not consistent with other rules of law. He concluded with the following observation, still true today, that "a great majority of the cases disposed of by the application of this rule would have been disposed of in exactly the same way by the application of other established rules of the common law, particularly those relating to estoppel, waiver, and ratification."¹⁰⁶

By reviewing the application of the preclusion doctrines discussed above, reasonable minds could agree that in Texas jurisprudence there are sufficient doctrines of preclusion to protect the public adequately without resorting to preclusion by election of remedies when there has been a prior settlement.¹⁰⁷ Although described as a harsh and obsolete rule,¹⁰⁸ election of remedies has persisted in Texas as a viable preclusion doctrine.¹⁰⁹ The history of the doctrine of election of remedies, however, has been characterized by the uncertainty of its application.¹¹⁰ Election of remedies

103. See Hine, *Election of Remedies, A Criticism*, 26 HARV. L. REV. 707, 707-19 (1913).

104. *Id.* at 707.

105. *Id.* at 707.

106. *Id.* at 708.

107. See *id.* at 719. As Mr. Hine analogizes:

The modern rule of election of remedies is a weed which has recently sprung up in the garden of the common law, its roots stretching along the surface of *obiter dicta* but not reaching the subsoil of principle. The judicial gardeners through whose carelessness it has crept in should be able to eliminate it, or at least prevent its further growth.

Id. at 719.

108. See *Friederichsen v. Renard*, 247 U.S. 207, 213 (1918); *Slay v. Burnett Trust*, 143 Tex. 621, 649, 187 S.W.2d 377, 393 (1945); *Metroflight, Inc. v. Shaffer*, 581 S.W.2d 704, 707 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

109. One author, in 1954, stated he agreed "with those . . . who recommended abandoning the rule and would like to see the legislature, or the courts, in the not too distant future abolish it completely." Merrem, *Election of Remedies in Texas*, 8 Sw. L.J. 109, 126 (1954). Yet today, nearly three decades later, the rule is still in existence. See *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 504 (July 19, 1980).

110. See *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 504 (July 19, 1980)

became a firmly established preclusion doctrine with the Texas Supreme Court's adoption of the opinion in *Seamans Oil Co. v. Guy*.¹¹¹ The decision itself, however, turned on the application of equitable estoppel, not election of remedies.¹¹² Nevertheless, the dicta in the case referring to election of remedies laid the predicate for the doctrine in Texas.

Certain rules of application began to develop delineating the indefinite doctrine. Election of remedies was held not to apply unless the claimant actually had two valid and available, but inconsistent, remedies at the time the election was made.¹¹³ A party having but a single avenue of relief could not be said to have made an election.¹¹⁴ Moreover, before the election doctrine could apply to estop a party from asserting an inconsistent remedy, he must have been aware of the possibility of more than one remedy at the time he

(election doctrine often confused with other preclusion doctrines); Merrem, *Election of Remedies in Texas*, 8 Sw. L.J. 109, 109 (1954) ("[t]he doctrine of election of remedies, . . . has been a problem child of the law for many years. . .").

111. See *Seamans Oil Co. v. Guy*, 115 Tex. 93, 99, 276 S.W. 424, 426 (1925), quoting 10 RULING CASE LAW (R.C.L.) 703 (1915), wherein it was stated:

[I]f one having a right to pursue one of several inconsistent remedies, makes his election, institutes suit, and prosecutes it to final judgment or receives anything of value under the claim thus asserted, or if the other party has been affected adversely, such election constitutes an estoppel thereafter to pursue another and inconsistent remedy. . . . [T]he party is estopped though the former suit may not have proceeded to judgment. But where the inconsistency is in the remedies it is generally considered that there is no estoppel where the former suit was dismissed without trial or before judgment.

10 R.C.L. 703, 703-04 (1915).

112. See *Seamans Oil Co. v. Guy*, 115 Tex. 93, 100, 276 S.W. 424, 426 (1925); cf. *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 507 (July 19, 1980) (Campbell, J., concurring) (*Seamans* "decided upon a clear-cut equitable estoppel"). But cf. *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J., 502, 506 (July 19, 1980) (*Seamans* is "instance of full satisfaction"). Part of the confusion in the area of election of remedies was "due to a failure to distinguish between election of rights and election of remedies." Merrem, *Election of Remedies in Texas*, 8 Sw. L.J. 109, 111 (1954). The Texas Supreme Court, however, has apparently abandoned this distinction by lumping together in one category election of remedies, rights, and states of facts. See *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 504 (July 19, 1980).

113. See *Leonard v. Hare*, 161 Tex. 28, 31, 336 S.W.2d 619, 621 (1960); *Poe v. Continental Oil & Cotton Co.*, 231 S.W. 717, 719 (Tex. Comm'n App. 1921, judgment adopted); *Metroflight, Inc. v. Shaffer*, 581 S.W.2d 704, 707 (Tex. Civ. App.—Dallas 1979, writ refused n.r.e.).

114. See *Poe v. Continental Oil & Cotton Co.*, 231 S.W. 717, 719 (Tex. Comm'n App. 1921, judgment adopted); *American Cent. Ins. Co. v. Crespi & Co.*, 218 S.W.2d 269, 271 (Tex. Civ. App.—Austin 1949, no writ); *Bandy v. Cates*, 97 S.W. 710, 711 (Tex. Civ. App.—1906, writ refused).

made his election.¹¹⁵ The rationale was that if one did not know two choices existed, he could not be held to have made a selection.¹¹⁶ Consistent with this was the rule that a party could not be precluded, by a choice of alternative remedies, unless he made that choice with knowledge of the facts.¹¹⁷ Additionally, when a litigant believed that he had a particular remedy, but his suit failed because that remedy did not in fact exist, it has been held not to constitute an election within the election of remedies doctrine.¹¹⁸

Texas courts apparently confined the election doctrine to choosing between two or more inconsistent but concurrent courses of procedure and relief based upon a single set of facts.¹¹⁹ In *Custom Leasing, Inc. v. Texas Bank & Trust Co.*,¹²⁰ the Texas Supreme Court recited:

[W]here remedies pursued against different persons are repugnant and inconsistent, the election of one bars the other, but concurrent and consistent remedies may all be pursued until satisfaction is had. The bar of an election does not apply to the assertion of distinct causes of action against different persons arising out of the independent transactions with such persons.¹²¹

115. See *Leonard v. Hare*, 161 Tex. 28, 31, 336 S.W. 619, 621 (1960); *Slay v. Burnett Trust*, 143 Tex. 621, 651, 187 S.W.2d 337, 394 (1945); *Loveless v. Texas Employers Ins. Ass'n*, 269 S.W.2d 454, 455 (Tex. Civ. App.—Austin 1954, writ ref'd).

116. See *Leonard v. Hare*, 161 Tex. 28, 31, 336 S.W. 619, 621 (1960); *Hedgeman v. Berwind Ry. Serv.*, 512 S.W.2d 827, 829 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.); *Loveless v. Texas Employers Ins. Ass'n*, 269 S.W.2d 454, 455 (Tex. Civ. App.—Austin 1954, writ ref'd).

117. See *Leonard v. Hare*, 161 Tex. 28, 31, 336 S.W.2d 619, 621 (1960); *Slay v. Burnett Trust*, 143 Tex. 621, 651, 187 S.W.2d 377, 394 (1945); *A.E. Swift & Sons, Concrete Contractors, Inc. v. Sam Sanders, Inc.*, 405 S.W.2d 402, 406 (Tex. Civ. App.—Amarillo 1966, no writ).

118. See *Linz v. Eastland County*, 39 S.W.2d 599, 606 (Tex. Comm'n App. 1931, holding approved); *Poe v. Continental Oil & Cotton Co.*, 231 S.W.2d 717, 719 (Tex. Comm'n App. 1921, judgment adopted); *Metroflight, Inc. v. Shaffer*, 581 S.W.2d 704, 708 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.); *A.E. Swift & Sons, Concrete Contractors, Inc. v. Sam Sanders, Inc.*, 405 S.W.2d 402, 406 (Tex. Civ. App.—Amarillo 1966, no writ).

119. See *Custom Leasing, Inc. v. Texas Bank & Trust Co.*, 491 S.W.2d 869, 871 (Tex. 1973). The court described election of remedies as "the act of choosing between two or more inconsistent but coexistent modes of procedure and relief allowed by law on the same state of facts." *Id.* at 869.

120. 491 S.W.2d 869 (Tex. 1973).

121. *Id.* at 871; accord, *Lomas & Nettleton Co. v. Huckabee*, 558 S.W.2d 863, 864 (Tex. 1977) (per curiam); see *Shriro Corp. v. Ward*, 570 S.W.2d 395, 397 (Tex. 1978) (per curiam) ("one may plead independent wrongs which interplay to contribute to a single harm without being inconsistent under . . . election doctrine"); *American Sav. & Loan Ass'n v. Musick*,

The doctrine of election of remedies, therefore, does not apply when the available remedies are alternative and concurrent, although a plaintiff may be barred if satisfaction is obtained.

B. *Huckabee & Metroflight—An Expansion of the Doctrine*

Far from chopping the weed of the election of remedies doctrine, the Texas Supreme Court in *Lomas & Nettleton Co. v. Huckabee*¹²² felt content to allow it to grow yet larger. In that case, Mr. and Mrs. Huckabee first asserted in their lawsuit that they were insured by two insurance companies for the loss of real and personal property destroyed by fire. Huckabee settled with the insurance companies which were then dismissed with prejudice from the lawsuit.¹²³ Huckabee subsequently amended his petition and adopted the inconsistent position that he was not insured, alleging that his agent, the Lomas and Nettleton Company, had negligently failed to secure insurance.¹²⁴ The supreme court ruled that the Huckabees, after successfully asserting their claim on one set of facts, could not thereafter recover in a subsequent suit based on an inconsistent factual theory.¹²⁵

The Dallas Court of Civil Appeals, in *Metroflight, Inc. v. Shaffer*,¹²⁶ speaking through Justice Akin, criticized the *Huckabee* rule by stating that it does not fall within the traditional election of remedies doctrine.¹²⁷ In *Metroflight* as in *Huckabee* the claimant initially affirmed insurance coverage, settled, and then in a subsequent action asserted non-coverage.¹²⁸ Although feeling bound by *Huckabee*, the Dallas Court of Civil Appeals pointed out that *Metroflight* did not actually have two available remedies as required under the election of remedies doctrine to preclude a subsequent action.¹²⁹ The insurance policy was either valid or it was not; there-

531 S.W.2d 581, 588 (Tex. 1975) (suit for trespass to try title not inconsistent with claim against title insurance company for failure of title).

122. 558 S.W.2d 863 (Tex. 1977) (per curiam).

123. See *Huckabee v. Lomas & Nettleton Co.*, 550 S.W.2d 371, 372 (Tex. Civ. App.—Waco), *rev'd per curiam*, 558 S.W.2d 863, 865 (Tex. 1977).

124. See *id.* at 372.

125. See *Lomas & Nettleton Co. v. Huckabee*, 558 S.W.2d 863, 864 (Tex. 1977) (per curiam).

126. 581 S.W.2d 704 (Tex. Civ. App.—Dallas 1979, writ *ref'd n.r.e.*).

127. See *id.* at 709.

128. See *id.* at 707.

129. See *id.* at 708.

fore, Metroflight had but one legitimate remedy. Metroflight could either claim under the policy or claim negligence on the part of Shaffer in failing to procure a valid policy. The Dallas court concluded that the rule in *Huckabee* was "based on the principle that a party should not be permitted to abuse the judicial process by obtaining one recovery based first on affirming a certain state of facts, and then another recovery based on denying the same state of facts."¹³⁰

Election of remedies as applied to prior settlements was, therefore, only a preclusion when rights were asserted in a subsequent action seeking a recovery of damages or other relief pursuant to a legal theory which was repugnant to or inconsistent with a legal theory on which a prior claim or action was settled. That is, the facts to support a recovery in the subsequent action, of necessity, would be either different than or directly opposite to the facts to support a recovery in the settled matter.¹³¹

C. *Bocanegra v. Aetna*—A Redefinition

The Texas Supreme Court after extending the election doctrine in *Huckabee* felt obliged, in *Bocanegra v. Aetna Life Insurance Co.*,¹³² to limit its application in the name of equity and good conscience. The court's attempt, however, fell short, since many questions remain regarding when the doctrine will be applied to preclude a subsequent action against one tortfeasor after there has been a previous settlement between an alleged victim of wrongful conduct and a different alleged tortfeasor.¹³³

130. *Id.* at 709.

131. *See, e.g.,* Lomas & Nettleton Co. v. Huckabee, 558 S.W.2d 863, 864 (Tex. 1977) (per curiam) (election doctrine precluded plaintiff in action against agent for wrongfully preventing insurance policy from being in effect after obtaining settlement with insurance company under insurance policy); Safeco Ins. Co. v. Broadnax, 601 S.W.2d 466, 466 (Tex. Civ. App.—Dallas 1980, no writ) (plaintiff precluded from action asserting he was "borrowed servant" after settlement on inconsistent factual theory of employment); Metroflight, Inc. v. Shaffer, 581 S.W.2d 704, 705 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (plaintiff precluded in subsequent action after settlement on inconsistent factual theory against a different alleged tortfeasor).

132. 23 Tex. Sup. Ct. J. 502 (July 19, 1980).

133. Questions pertaining to the election doctrine will arise because the *Bocanegra* majority declined to overrule *Huckabee* or *Metroflight*, but chose to distinguish the cases. Even upon careful reading, however, it is difficult to see that the cases are truly distinguishable. *See id.* at 506-07.

The facts in *Bocanegra* are simple and straightforward. Janie P. Bocanegra worked as a book binder for Clegg Company. Upon arising from bed one morning in April, 1975, she experienced a sharp pain in her lower back. She continued to report to work and experienced a second severe pain while at work on June 3, finally leaving work on June 29, when the pain became so severe that she went to the hospital. To be hospitalized Mrs. Bocanegra offered Aetna as her hospitalization insurance carrier, but later filed various claims with three insurance companies claiming both a job related accident and an illness.¹³⁴ The emergency room physician thought that she probably injured her back at work.¹³⁵ A neurosurgeon performed surgery to remove a herniated lumbar disc.¹³⁶ After the operation, Mrs. Bocanegra filed a claim for workers' compensation benefits with the Industrial Accident Board asserting she had been injured on or about June 3, 1975, while lifting telephone books in the course and scope of employment. Mrs. Bocanegra settled her workers' compensation claim for \$12,000.00 "solely for lost wages and future impaired earning capacity," exclusive of past and future medical expenses.¹³⁷

Mrs. Bocanegra, after the settlement, commenced an action against Aetna Life Insurance Company to recover medical and hospital bills. She asserted, inconsistently with her prior workers' compensation claim, that she was not injured on the job, but that her medical expenses resulted from a non-occupational disease.¹³⁸

134. *See id.* at 503.

135. *See id.* at 503; Statement of Facts at 89.

136. *See Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 503 (July 19, 1980). Referred to by the court as a "slipped disc," *id.* at 503, a herniated lumbar disc is a rupture or protrusion of an intervertebral disc of the spine, which may impinge nerve roots, within the region of the five vertebrae lying generally between the lower ribs and the upper edge of the hipbones. *See DORLAND'S ILLUSTRATED MEDICAL DICTIONARY* 706, 890 (25th ed. 1974).

137. *See Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 503 (July 19, 1980). The settlement was accomplished by the execution of a compromise settlement agreement by Mrs. Bocanegra and the workers' compensation insurance carrier after a pre-hearing conference with the Industrial Accident Board (IAB). The compromise settlement agreement was approved by the IAB. Such approval is neither an award of compensation nor denial thereof. *See, e.g., Pearce v. Texas Employers Ins. Ass'n*, 412 S.W.2d 647, 649 (Tex. 1967); *Industrial Accident Bd. v. Glenn*, 144 Tex. 378, 382, 190 S.W.2d 805, 807 (1945); *Lowry v. Anderson-Berney Bldg. Co.*, 139 Tex. 29, 34, 161 S.W.2d 459, 463 (1942).

138. *See Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 503 (July 19, 1980). In Mrs. Bocanegra's group insurance policy and in the jury instructions the term "non-occupational disease" was defined as "a disease which does not arise, and which is not caused or contributed to by, or as a consequence of, any disease which arises out of or in the

Mrs. Bocanegra admitted in the trial court that she had made, in filing claims with various insurance companies, inconsistent statements relating to the source of her condition.¹³⁹ Based upon the evidence, the jury awarded Mrs. Bocanegra \$4,500.00 for her medical bills plus attorney's fees.¹⁴⁰

The San Antonio Court of Civil Appeals applied the *Huckabee* rule in reversing the trial court and held that settlement of the workers' compensation claim was an election which barred the later suit against Aetna.¹⁴¹ The Texas Supreme Court reversed the court of civil appeals, holding that Mrs. Bocanegra, due to the complex and uncertain nature of her injury, lacked the requisite knowledge to bind her to an informed election.¹⁴²

The supreme court's opinion written by Justice Pope, went into great detail comparing and contrasting the various preclusion doctrines in an attempt to clarify and distinguish the election doctrine. The court recognized that no single underlying principle for the election of remedies doctrine has been found. The election doctrine, the court explained, has been found at various times to bar remedies, rights, and inconsistent positions arising out of the same

course of any employment or occupation for compensation or profit." *Id.* at 503 n.1.

139. See Statement of Facts at 113-18; *cf.* *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 503 (July 19, 1980) (she checked box on insurance claim forms which indicated condition was accident; later she checked "no" box as to whether condition was accident). Mrs. Bocanegra swore in her hardship affidavit to the IAB that she was hurt on the job. See *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 503 (July 19, 1980). The question arises whether the sworn hardship affidavit filed with the IAB is a judicial proceeding within the doctrine of judicial estoppel precluding a plaintiff from later denying its contents. *Cf.* *Aetna Life Ins. Co. v. Wells*, 557 S.W.2d 144, 147 (Tex. Civ. App.—San Antonio 1977, writ *ref'd n.r.e.*) (workers' compensation IAB pre-hearing conference is not a judicial proceeding). The overwhelming authority in Texas is that the IAB is not a court, but, rather, an administrative body not intended to be governed by rules of procedure and evidence in court, so that a statement made before the IAB is not made in a "judicial proceeding" pursuant to the doctrine of judicial estoppel. Compare *Moore v. Means*, 549 S.W.2d 417, 418-19 (Tex. Civ. App.—Beaumont 1977, writ *ref'd n.r.e.*) (stating in dicta that the IAB is quasi-judicial in nature and award is like judgment of court) with *Burton v. I.C.T. Ins. Co.*, 304 S.W.2d 292, 295 (Tex. Civ. App.—Texarkana 1957, no writ) (IAB is vested with no judicial power) and *Middleton v. Texas Power & Light Co.*, 108 Tex. 96, 103, 185 S.W. 556, 561 (1916) (IAB is not judicial body).

140. See *Aetna Life Ins. Co. v. Bocanegra*, 572 S.W.2d 355, 355 (Tex. Civ. App.—San Antonio 1978), *rev'd*, 23 Tex. Sup. Ct. J. 502 (July 19, 1980).

141. See *id.* at 356.

142. See *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 503, 506 (July 19, 1980).

state of facts.¹⁴³ An all inclusive definition of election of remedies has been elusive because of the variable situations in which an election may arise. The courts, in attempting to define election of remedies, therefore, often borrow terms from, and confuse election with principles of judicial estoppel, equitable estoppel, ratification, waiver, or satisfaction.¹⁴⁴ In *Bocanegra*, the supreme court discussed these doctrines lumping together judicial estoppel and collateral estoppel, on the one hand, and equitable estoppel and estoppel in pais, on the other.¹⁴⁵

After referring to these doctrines, the supreme court identified the problem as follows: "Those doctrines sometimes do not reach a situation that equity and *good conscience* need to reach through the doctrine of election."¹⁴⁶ In effect, the supreme court in 1980 may be doing what Mr. Hine recommended in 1913.¹⁴⁷ If so, the court is saying that in those rare cases not fitting within the four corners of another restrictive preclusionary doctrine, when the facts are so outrageous as to cause a knee jerking, thigh slapping, head shaking, nose twitching reaction resulting in an exclamation of "T'aint Fair!", election of remedies is to be applied.¹⁴⁸ If the judiciary resorts to this principle, then the "T'aint Fair!" doctrine just isn't half bad.

The court also pointed out that uncertainty in many complex areas of medicine and law is more the rule than the exception.¹⁴⁹ It would be a harsh rule, therefore, to charge a party-layman with knowledge of medical causes when neither physicians nor lawyers know them.¹⁵⁰ The court enunciates this principle by stating that "election should not bar a suit when a previous course of action or a settlement for less than the claim is grounded upon uncertain

143. *Id.* at 504.

144. *Id.* at 504.

145. *Id.* at 504.

146. *Id.* at 504 (emphasis added).

147. *See id.* at 504-06. The principle sought by Mr. Hine in 1913 and ignored by Texas Courts for years emerges in *Bocanegra*. "[A]n election will bar recovery when the inconsistency in assertion of a remedy, right or state of facts is so unconscionable, dishonest, contrary to fair dealing, or so stultifies the legal process or trifles with justice of the courts as to be manifestly unjust." *Id.* at 505.

148. *See id.* at 505-06.

149. *Id.* at 505.

150. *Id.* at 505.

and undetermined facts."¹⁵¹ Unfortunately, the court does not assign any meaning to the concept of "uncertain and undetermined facts." Therein lies a problem for future litigation. The court does, however, establish the following rule which substantially changes the wording of the doctrine of election of remedies. "The election doctrine, therefore, may constitute a bar to relief when

- (1) one successfully exercises an informed choice
- (2) between two or more remedies, rights, or states of facts
- (3) which are so inconsistent as to
- (4) constitute manifest in justice."¹⁵²

Before an analysis is attempted to demonstrate the changes in the application of the election of remedies rules, let us first explore what the supreme court did not change in *Bocanegra*. Election of remedies continues as a largely obsolete rule, not a favorite of equity.¹⁵³ The doctrine apparently does not apply unless the claimant actually has two valid and available remedies at the time he makes his election.¹⁵⁴ One who seeks to enforce or secure a particular right or remedy which proves to be unfounded is not precluded from pursuing the one that is allowed.¹⁵⁵ Furthermore, the claimant must have actual knowledge of the alternative and inconsistent rights or remedies to be precluded.¹⁵⁶

Traditionally, one could assert concurrent and *consistent* rights or remedies against different persons arising out of independent transactions.¹⁵⁷ In *Bocanegra*, however, the supreme court reworded the rule, apparently liberalizing it. "[O]ne may [now] assert concurrent but *inconsistent* remedies or distinct causes of action against different persons arising out of independent transactions."¹⁵⁸ Not only must the rights, remedies, or states of facts be

151. *Id.* at 505.

152. *Id.* at 504; see *Custom Leasing, Inc. v. Texas Bank & Trust Co.*, 491 S.W.2d 869, 871 (Tex. 1973).

153. *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 504 (July 19, 1980).

154. *Id.* at 504. *But see Metroflight, Inc. v. Shaffer*, 581 S.W.2d 704, 708 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (criticizing Texas Supreme Court for applying election doctrine when claimant did not have two valid existing remedies).

155. *Id.* at 505.

156. *Id.* at 505.

157. See *Custom Leasing, Inc. v. Texas Bank & Trust Co.*, 491 S.W.2d 869, 871 (Tex. 1973); 28 C.J.S. *Election of Remedies* § 8, at 1073 (1941).

158. *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 505 (July 19, 1980) (em-

inconsistent, so that assertion of one is a repudiation of the other,¹⁵⁹ they must be so inconsistent as to constitute manifest injustice.¹⁶⁰ The nature of the inconsistent conduct equaling manifest injustice remains uncertain and undetermined. The court in *Bocanegra* delineated certain inconsistencies which do not equal an election and, therefore, do not amount to a choice between rights or remedies which are so inconsistent as to constitute manifest injustice:

A number of seemingly inconsistent positions do not rise to the level of an election which will bar recovery. One may, for example, plead alternative and inconsistent facts without being barred. Rules 48 and 51, Texas Rules of Civil Procedure, authorize such procedures. One who pleads alternative or inconsistent facts or remedies against two or more parties may settle with one of them and still recover a judgment against the others based on the pleaded alternative or inconsistent remedies or facts.¹⁶¹

Perhaps only a case by case analysis of various fact situations will provide any guidance as to what constitutes manifest injustice.

Additionally, the supreme court states that a party plaintiff may plead inconsistent facts as to one party defendant without making an election as to a second party defendant.¹⁶² Furthermore, the court specifies that if this is done, and the plaintiff settles with one party defendant on the basis of one claim or remedy, the plaintiff, *without making an election*, may proceed to judgment against another party defendant on pleaded inconsistent, but alternative, facts, claims, or remedies.¹⁶³ The supreme court cites no authority for the basis of this sound conclusion. Therefore, why may not this same result be achieved when there is a settlement and a subsequent action or when there are two separate actions? The court does not discuss this problem; however, so long as other preclusion doctrines are not violated, there does not appear to be any legiti-

phasis added).

159. *Id.* at 504.

160. *Id.* at 504-05. *But see* Lomas & Nettleton Co. v. Huckabee, 558 S.W.2d 863, 864 (Tex. 1977) (per curiam); Hedgeman v. Berwind Ry. Serv. Co., 512 S.W.2d 827, 830 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.).

161. *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 504-05 (July 19, 1980).

162. *Id.* at 505.

163. *Id.* at 504-05; *see* Hine, *Election of Remedies, A Criticism*, 26 HARV. L. REV. 707, 713 (1913); Merrem, *Election of Remedies in Texas*, 8 SW. L.J. 109, 125-26 (1954).

mate reason to deny the practice.¹⁶⁴

A final consideration of the new election of remedies rule in *Bocanegra* is the meaning to be assigned to the phrase "one successfully exercises an informed choice."¹⁶⁵ As discussed above, an "informed choice" is made by actual knowledge of certain and determined facts, that is, a full and clear understanding of the problem, facts, and remedies essential to the exercise of an intelligent choice.¹⁶⁶ What, however, is meant by successful? How much of a claim must one recover to be "successful"? When the claim is unliquidated, how much is enough? The difficulties arising from these questions are exemplified in a workers' compensation claim, which is both unliquidated and liquidated. The workers' compensation claim is unliquidated in that the extent of disability is uncertain and undetermined. It is, however, liquidated to the limited extent that the maximum and minimum amount of compensation per week is within a specified range.¹⁶⁷ Workers' compensation should be treated solely as an unliquidated claim because it utilizes tort principles of injury and involves concepts of law and medicine. As previously discussed there should be no "success" as to a liquidated claim unless the full amount is recovered; and there should be no "success" as to an unliquidated claim without an adjudication.

D. Bye, Bye to *Seamans v. Guy*

The supreme court has plowed a new field of fertile controversy as to how the newly defined election of remedies rule will be applied. To be determined in the future is what conduct "T'aint Fair!", how much success is enough, and what facts are so uncertain and undetermined that a choice between two remedies is not an informed one. The answers from subsequent litigation may not be known for years to come. The court has, however, provided a marvelous service to not only the bench and bar but also to the beleaguered teaching profession by overruling the language in *Sea-*

164. *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 505 (July 19, 1980).

165. *Id.* at 505.

166. *Id.* at 505.

167. *See id.* at 505; TEX. REV. CIV. STAT. ANN. art. 8306 §§ 10-11, 29 (Vernon Supp. 1980).

mans Oil Co. v. Guy,¹⁶⁸ which distinguished between election of rights and election of remedies.¹⁶⁹

Reliance by the Texas Supreme Court in 1925 upon *Ruling Case Law* which defines and distinguishes election of rights from election of remedies has perplexed jurists and confused the bar as well as text writers for all fifty-five years of the rule's application.¹⁷⁰ The supreme court in *Bocanegra* has rejected this definition explaining that an election may arise short of one's prosecution of a claim to final judgment; while one may receive something by settlement, even of substantial value under an uncertain claim, without making an election barring recovery against another person.¹⁷¹

IV. APPLYING ELECTION OF REMEDIES

The Texas Supreme Court's decisions in *Huckabee* and *Bocanegra* have confounded the election doctrine at a time when there is a pressing need for clarification of the preclusion doctrines. The court apparently believes the substantive principle of the election doctrine is founded upon fairness and justice,¹⁷² a noble premise. Yet, a more vague principle would be hard to imagine. The rule for application, or elements of the election doctrine, although succinctly stated, contains words so indistinct as to prohibit its uniform application.¹⁷³

Accepting as a premise that the election doctrine applies to fact situations illustrated by *Huckabee*, *Metroflight*, and *Bocanegra*, upon what logical basis may the decisions be distinguished? *Bocanegra* distinguishes the cases by pointing to the certainty or un-

168. 115 Tex. 93, 276 S.W. 424 (1925).

169. *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 506 (July 19, 1980); 10 R.C.L. 703, 704 (1915).

170. *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 506 (July 19, 1980).

171. *Id.* at 506; see *Seamans Oil Co. v. Guy*, 115 Tex. 93, 101, 276 S.W. 424, 426 (1925); 10 R.C.L. 703, 704 (1915).

172. See *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 504 (July 19, 1980) ("an election will bar recovery when the inconsistency in the assertion of a remedy, right, or state of facts is so unconscionable, dishonest, contrary to fair dealing . . . as to be manifestly unjust").

173. See *id.* at 504. The four elements listed by the *Bocanegra* majority will require the bench and the bar to attempt to uniformly interpret such indefinite terms as "successfully," "informed," and "manifest injustice." See *id.* at 504. The listed elements allow so much room for subjective determination that they may support any result reached by a court. The effect of this may be that the election doctrine will evolve to be a doctrine based purely on balancing the equities involved.

certainty of the facts inconsistently asserted.¹⁷⁴ Although certainty versus uncertainty is a proper rule, the supreme court's yardstick to measure the same is unpredictable because no precise standard is established.¹⁷⁵ The *Bocanegra* majority attempts to correlate the certainty of the facts asserted with the "success" in the prior matter, i.e., the amount of the prior settlement.¹⁷⁶ This rule is a sincere attempt to explain the doctrine; however, it fails as a general rule for it contains errors.

One man's success, for example, may be another man's failure; a glass half full to one court may be half empty to another. The result in the *Metroflight* case is a perfect example. There the plaintiff settled a prior case for eighty percent of the loss.¹⁷⁷ To the *Bocanegra* majority this settlement showed the validity of the prior claim and that "insurance actually existed."¹⁷⁸ To the *Metroflight* court the settlement was in spite of the fact that "coverage was excluded by a policy provision . . . not . . . waived by the insurer."¹⁷⁹ Therefore, there is no positive correlation between the amount of a settlement and the existence or knowledge of two remedies or the certainty of the facts thereunder. The amount of the settlement, however, correlates with various elements including economic and business considerations, human factors such as the judge and jury, and the strength or weakness of a case against the particular defendant.

Application of the election doctrine in all recent cases has been based upon the making of an informed election, which in turn has been founded upon the certainty of the event causing the injury or wrong giving rise to the right or remedy.¹⁸⁰ In *Huckabee* a fire, a

174. See *id.* at 506-07.

175. The court apparently intends the certainty or uncertainty of the facts to be determined on an ad hoc basis. Cf. *id.* at 504, 506-07 (court draws fine line distinctions between facts in *Huckabee*, *Metroflight*, and *Bocanegra*). The degree of uncertainty as to facts is, therefore, left up to each court's opinion. See *id.* at 507 (Campbell, J., concurring).

176. See *id.* at 506-07. For example, the supreme court reasoned that settlement for eighty percent of a large claim indicated the certainty of a fact relied upon for recovery. See *id.* at 506-07.

177. See *Metroflight, Inc. v. Shaffer*, 581 S.W.2d 704, 705 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

178. *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 507 (July 19, 1980).

179. *Safeco Ins. Co. v. Broadnax*, 602 S.W.2d 466, 467 (Tex. Civ. App.—Dallas 1980, no writ); see *Metroflight, Inc. v. Shaffer*, 581 S.W.2d 704, 708 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

180. Cf. *A. E. Swift & Sons, Concrete Contractors, Inc. v. Sam Sanders, Inc.*, 405

certain event, gave rise to the rights or remedies under the insurance policy. The uncertainty was the existence of insurance coverage, a legal consequence of the conduct of the insurance agency.¹⁸¹ In *Metroflight* an airplane crash, a certain event, gave rise to the rights or remedies under the insurance policy. The uncertainty was the existence of insurance coverage, a legal consequence of the conduct of the insurance agent, the same as in *Huckabee*.¹⁸² In *Thate v. Texas & Pacific Railway Co.*¹⁸³ the plaintiff was injured after being forced to jump off a railroad car, a certain event. The uncertainty involved was whether, by law, Thate was an employee of a trucking company or a railroad company.¹⁸⁴ Similarly, in *Safeco Insurance Co. of America v. Broadnax*¹⁸⁵ the plaintiff in a prior settled action claimed to be an employee of Labor Placement and later claimed to be a borrowed servant of Bill Jackson, Inc.¹⁸⁶ In the foregoing cases, the uncertainty, therefore, was the legal effect of certain known facts.

In *Bocanegra v. Aetna Life Insurance Co.*,¹⁸⁷ however, there was no certain event causing Mrs. Bocanegra's herniated lumbar disc, which gave rise to her rights or remedies.¹⁸⁸ Due to the uncertain and complex nature of her condition, she did not know the origin of her degenerative disc.¹⁸⁹ It was this uncertainty which prevented her from making an informed election.¹⁹⁰ The existence of Mrs.

S.W.2d 402, 406 (Tex. Civ. App.—Amarillo 1966, no writ) (party not precluded by election unless made with knowledge of facts or events giving rise to supposed remedy).

181. See *Lomas & Nettleton Co. v. Huckabee*, 558 S.W.2d 863, 864 (Tex. 1977) (per curiam) (if insurance policy was valid they could recover under it, if invalid was due to wrongful actions of agent).

182. See *Metroflight, Inc. v. Shaffer*, 581 S.W.2d 704, 705 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (agent of insured failure to inform principal of requirement necessary for insurance coverage created question of validity or invalidity of policy).

183. 595 S.W.2d 591 (Tex. Civ. App.—Dallas 1980, no writ).

184. *Thate v. Texas & Pac. Ry.*, 595 S.W.2d 591, 595 (Tex. Civ. App.—Dallas 1980, no writ) (legal uncertainty was status of his employment, whether plaintiff employee of trucking company or borrowed servant of railroad company).

185. 601 S.W.2d 466 (Tex. Civ. App.—Dallas 1980, no writ).

186. See *Safeco Ins. Co. v. Broadnax*, 601 S.W.2d 466, 466 (Tex. Civ. App.—Dallas 1980, no writ) (uncertainty was legally whose employee he was).

187. 23 Tex. Sup. Ct. J. 502 (July 19, 1980).

188. Neither Mrs. Bocanegra nor her doctors knew the precise event which triggered her condition or, in fact, whether there was a triggering event at all. She made several contradictory statements concerning her belief of the source of the injury. See *id.* at 503.

189. See *id.* at 505-06.

190. See *id.* at 506.

Bocanegra's herniated disc was as certain as the Huckabees' fire or Metroflight's crash. The cause of Mrs. Bocanegra's injury was as uncertain to her as was the legal identity of Thate's and Broadnax's employer. Was the legal effect of the action or inaction of the agents in *Huckabee* and *Metroflight* any more certain than the legal effect of Mrs. Bocanegra's herniated lumbar disc? The ultimate fact of "non-occupational disease" or "occupational injury" in *Bocanegra* turned upon proof of uncertain evidentiary facts.¹⁹¹ The ultimate fact of the insurance agent's negligence in *Huckabee*, likewise, turned upon proof of uncertain evidentiary facts.¹⁹² Furthermore, in *Metroflight* the ultimate fact issues of the agent's alleged breach of various duties was contingent upon proof of yet undetermined evidentiary facts.¹⁹³ It is apparent, therefore, that no real distinction can be made between the earlier decisions in *Huckabee* and *Metroflight* and the more recent opinion in *Bocanegra*.

Perhaps the *Bocanegra* concurring opinion was correct in stating the court "should not attempt to draw an artificial distinction between [*Bocanegra*] and the decisions in *Huckabee* and *Metroflight* merely to avoid an admission that those decisions were erroneous."¹⁹⁴ It is apparent the *Bocanegra* rule does not fit within the traditional definition of the doctrine of election of remedies. The *Bocanegra* court, however, argues the reason for this discrepancy is that the traditional definition of the election doctrine contains errors.¹⁹⁵ Whether the election doctrine has been extended or merely correctly redefined is immaterial at this juncture. The fact remains that no longer is the doctrine only applicable when the claimant has two valid or existing rights or remedies; the election of inconsistent factual theories may also invoke the doctrine.¹⁹⁶

191. See *id.* at 503, 505.

192. See *Lomas & Nettleton Co. v. Huckabee*, 558 S.W.2d 863, 864 (Tex. 1977) (*per curiam*).

193. See *Metroflight, Inc. v. Shaffer*, 581 S.W.2d 704, 705 (Tex. Civ. App.—Dallas 1979, writ *ref'd n.r.e.*).

194. *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 507 (July 19, 1980) (Campbell, J., concurring).

195. The court stated that 10 R.C.L. 703, 704, *cited in Seaman v. Guy*, 115 Tex. 93, 101, 276 S.W. 424, 426 (1925), which had been the premise for the doctrine of election of remedies cases, contained errors and, therefore, decisions based upon it were incorrectly reasoned. See *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 506 (July 19, 1980).

196. See, *e.g.*, *Lomas & Nettleton Co. v. Huckabee*, 558 S.W.2d 863, 864 (Tex. 1977)

V. SUBROGATION AS A PLAUSIBLE SOLUTION TO THE ELECTION DILEMMA

One area to consider as a solution to the election dilemma may be the law of subrogation.¹⁹⁷ Reason abounds to permit a victim of wrongdoing to pursue alternative rights against different parties to achieve satisfaction and be compensated fully for a loss.¹⁹⁸ Operating within the boundaries of the established preclusion doctrines, satisfaction can be achieved by permitting subrogation. For example, if Mrs. Bocanegra's settlement with the workers' compensation insurance carrier had included payment of a portion of her past medical expenses, this inclusion should not be a satisfaction, regardless of whether any lawsuit was filed. Even though the medical expenses were certain and determined, there should be no election

(per curiam); *Safeco Ins. Co. v. Broadnax*, 601 S.W.2d 466, 467 (Tex. Civ. App.—Dallas 1980, no writ); *Metroflight, Inc. v. Shaffer*, 581 S.W.2d 704, 709 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.). This is further evidenced by the *Bocanegra* court's lumping together rights, remedies, and states of facts as an element of the election doctrine. See *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 504 (July 19, 1980).

197. See, e.g., *Yonack v. Interstate Sec. Co.*, 217 F.2d 649, 651 (5th Cir. 1955) (applying Texas law); *Cason v. Westfall*, 83 Tex. 26, 29-30, 18 S.W. 668, 670 (1892); *Forney v. Jorrie*, 511 S.W.2d 379, 386 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

198. The Texas Supreme Court in July 1980, speaking through Justice Pope, enunciated both procedural and substantive principles to assist Texas litigants and their counsel. In *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 504-05 (July 19, 1980), the court established the procedural standard as follows:

One may, for example, plead alternative and inconsistent facts without being barred: Rules 48 and 51 Texas Rules of Civil Procedure, authorize such procedures. One who pleads alternative or inconsistent facts or remedies against two or more parties may settle with one of them on the basis of one remedy or state of facts and still recover a judgment against the others based on the pleaded alternative or inconsistent remedies or facts.

Id. at 504-05. Substantively, the following week, Justice Pope explained why partial settlements are in the public interest stating:

There are reasons, however, which favor a recognition of partial settlements and the application of *Klingensmith* [*McMillen v. Klingensmith*, 467 S.W.2d 193 (Tex. 1971)] We have long recognized that encouraging settlement and compromise is in the public interest.

Knutson v. Morton Foods, Inc., 603 S.W.2d 805, 808 (Tex. 1980).

The Court continues by explaining the benefit of partial settlements - a plaintiff may settle with one potential tortfeasor without losing his cause of action under *respondeat superior*. Also, the party liable under *respondeat superior* retains access to the courts for a full adjudication of his indemnification rights. Thus, the judicial economy of disposing of lawsuits by settlements is balanced against disposing of all issues in one action. These two opinions appear to reach a result whereby the benefits of both are fully available alternatives. *Id.* at 808.

and no satisfaction because they were not fully paid.¹⁹⁹ It may well be manifestly unjust to permit her in a second action to recover the *full* amount from the medical insurance carrier since a part of the amount already was recovered. On the other hand, it may not; but one fact is vividly clear: it is manifestly unjust to preclude consumers, insureds, and workers of Texas from achieving full satisfaction merely because they have received a portion of their full entitlement to recovery in a prior settlement.

By providing for a subrogation procedure, one who paid a claim, that was not in fact owed because of fact findings in a subsequent action, could recover the amount mistakenly paid.²⁰⁰ Subrogation, as a matter of public policy, in such instance, may be sound in order to prevent injustice or unjust enrichment.²⁰¹ The party that mistakenly paid the prior claim either could be made a party to the subsequent action or could bring an independent action to recoup the amount paid but not owed legally to the claimant.²⁰²

199. See *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 807 (Tex. 1980); *McMillen v. Klingensmith*, 467 S.W.2d 193, 195 (Tex. 1971); *Rexroat v. Prescott*, 570 S.W.2d 457, 459 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.).

200. See 2 LARSON, WORKMEN'S COMPENSATION LAW §§ 97.20, 97.30, 97.35, 97.40 (1976) (discussing the principle of allowing an offset to workers' compensation recovery as a form of subrogation, rather than being an election). See also *Richardson v. Belcher*, 404 U.S. 78, 82 (1921) (social security offset); *City of Los Angeles v. Industrial Accident Comm'n*, 404 P.2d 801, 808, 46 Cal. Rptr. 97, 104 (1965) (pension offset); *California Comp. Ins. Co. v. Industrial Accident Comm'n*, 276 P.2d 148, 152 (Cal. Dist. Ct. App. 1954) (unemployment compensation subrogation); *Pierce's Case*, 92 N.E.2d 245, 251 (Mass. 1950) (unemployment compensation offset); *Dillon v. City of St. Paul*, 52 N.W.2d 726, 730 (Minn. 1952) (pension offset); *Janovsky v. American Motorists Ins. Co.*, 93 A.2d 1, 3-4 (N.J. 1952) (workers' compensation disability offset). One Texas court, however, has held that the amount of a workers' compensation award may not be reduced by the amounts he received under "personnel policies." *Austin v. City of Clendennon*, 323 S.W.2d 158, 162-63 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.). See generally 2 LARSON, WORKMEN'S COMPENSATION LAW § 97-42(d) (1976).

201. See *Yonack v. Interstate Sec. Co.*, 217 F.2d 649, 651 (5th Cir. 1955) (applying Texas law); *Forney v. Jorrie*, 511 S.W.2d 379, 386 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.). The doctrine of subrogation is given a liberal interpretation and is broad enough to include every instance in which one person, not acting voluntarily, has paid a debt for which another was primarily liable and which in equity and good conscience should have been discharged by the latter. See *id.* at 386.

202. An alternative subrogation procedure would be to allow the defendant a set off for the amount that previously had been paid to the plaintiff, so that the plaintiff would recover no more than the adjudicated amount found by the fact finder, i.e., satisfaction. See *Texas Employers' Ins. Ass'n v. Miller*, 370 S.W.2d 12, 17 (Tex. Civ. App.—Texarkana 1963, writ ref'd n.r.e.). There, Miller accepted \$2,520 in workers' compensation benefits as a Louisiana employee of W. T. Pipes from Argonaut Insurance Company. Later, he filed a notice of

The claimant, therefore, would receive no more than full satisfaction. He would not make a double recovery or receive double redress for a single wrongdoing to him. There would be no unjust enrichment. The settling payor would have the opportunity to recoup the amount he paid in good faith to effect the purposes of a negotiated settlement vis-a-vis litigation.²⁰³ All of the purposes of a legitimate claim for relief would be accomplished and the principles of the preclusion doctrines would, likewise be honored. A just result to resolve a complex and previously perplexing problem would, therefore, be achieved.

VI. CONCLUSION

This article has attempted to set forth the more common preclusion doctrines to increase the understanding of the doctrines, their distinctions, and effects. Particular attention has been given to the election doctrine and its evolution because of the controversy and confusion created by the trilogy of *Huckabee*, *Metroflight*, and *Bocanegra*.

It is important to be cautious of the various preclusion doctrines so that a claim will not be cut-off before full recovery. Recognizing

injury and claim for compensation as a Texas employee of the same employer for the same injury against Texas Employers' Insurance Association. The Texarkana Court of Civil Appeals held that he did not make an election, but that the judgment would be reduced by the amount recovered as a Louisiana employee. The court did not speak of the procedure as "subrogation," but that was the effect. *Id.* at 17. The policy issue is whether the party found by the trier of fact to be liable should pay the plaintiff the adjudicated amount owed, so that the prior settling party would have to seek the amount previously paid, if it so desired; or whether the party found to be liable should be allowed a credit for the amount paid by the prior settling party. A possible so-called unjust enrichment to the plaintiff, in the former situation must be balanced against permitting the true wrongdoer a so-called unjust enrichment by avoiding payment of his victim's true damages.

203. Texas courts generally have not imposed subrogation against an injured workman when the major medical insurance policy protecting him against non-occupational conditions does not specifically provide for it. See *Southland Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 366 S.W.2d 245, 249 (Tex. Civ. App.—Ft. Worth 1963, writ ref'd, n.r.e.). In *Southland, Brown*, an employee of Union Carbide, made a claim for major medical benefits from Southland. The doctor said the condition was occupational. The employer said it was not. Southland paid. Brown filed a workers' compensation claim against Aetna. Southland intervened. Brown and Aetna settled for \$8,000. Southland continued against Aetna, claiming to be subrogated to Brown's rights, and sought reimbursement of the medical payments made. Without a contract provision for subrogation in Southland's policy, none was allowed. *Id.* at 247; see *Inter-Ocean Gas Co. v. Lenear*, 95 S.W.2d 1355, 1358 (Tex. Civ. App.—Dallas 1936, writ dis'm'd).

satisfaction,²⁰⁴ or being made whole, as the legitimate objective of a claim seeking damages and accepting the somewhat elusive but highly principled concept that an election should be a bar only when the prior conduct is so dishonestly unconscionable as to be manifestly unjust,²⁰⁵ certain conclusions emerge. Given the supreme court's recognition that encouraging settlement and compromise is in the public interest, there should never be a preclusion of a subsequent tort action when the first claim is settled without the institution of a lawsuit.²⁰⁶ When a prior action is filed and the claim is unliquidated, there should be no preclusion of a subsequent action without an adjudication of the amount of the damages²⁰⁷ because an unliquidated claim is, by definition, uncertain and based upon undetermined facts.²⁰⁸ This is the standard established by the supreme court as a principle for not barring a subsequent action²⁰⁹ exemplified by the statement that "[o]ne may also receive something by way of settlement, even of substantial value,

204. A satisfaction must be full and complete recompense in order to bar further action. *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 807 (Tex. 1980); *McMillen v. Klingensmith*, 467 S.W.2d 193, 195 (Tex. 1971) ("a satisfaction is an acceptance of full compensation for an injury"); see *Rexroat v. Prescott*, 570 S.W.2d 457, 459 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 49, at 301 (4th ed. 1971). This "satisfaction" is not to be confused with the "satisfaction" associated with "accord and satisfaction." See *Texas & Pac. Ry. v. Poe*, 131 Tex. 337, 340, 115 S.W.2d 591, 592 (1938).

205. *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 504 (July 19, 1980). "[A]n election will bar recovery when the inconsistency in the assertion of a remedy, right, or state of facts is so unconscionable, dishonest, contrary to fair dealing, or so stultifies the legal process or trifles with justice or the courts as to be manifestly unjust." *Id.* at 504.

206. *Knutson v. Morton Foods, Inc.*, 503 S.W.2d 805, 808 (Tex. 1980). "There are reasons, however, which favor a recognition . . . for a full adjudication of his liabilities and his rights to indemnification." *Id.* at 808.

207. *Scheuing v. Challis*, 104 S.W.2d 581, 582 (Tex. Civ. App.—San Antonio 1937, writ ref'd), holding that a claim for damages for personal injuries "was an unliquidated demand, the amount of which was not susceptible of ascertainment except upon a final judgment establishing such amount." *Id.* at 582; see *Waples-Platter Grocer Co. v. Texas & Pac. Ry.*, 95 Tex. 486, 488, 68 S.W. 265, 266 (1902).

208. "Uncertainty is the essence of the term 'unliquidated.'" *American Ref. Co. v. Simms Oil Co.*, 282 S.W. 894, 897 (Tex. Civ. App.—Ft. Worth), *aff'd*, *Simms Oil Co. v. American Ref. Co.*, 288 S.W. 163, 164 (Tex. Comm'n App. 1926, judgment adopted). "The term 'unliquidated' means simply not liquidated. A demand is not liquidated even if it appears that something is due, unless it appears how much is due. . . ." *Dickson v. Stockman*, 411 S.W.2d 610, 613 (Tex. Civ. App.—Texarkana 1966, writ ref'd n.r.e.).

209. *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 505 (July 19, 1980). "[E]lection should not bar a suit when a previous course of action or a settlement for less than the claim was grounded upon uncertain and undetermined facts." *Id.* at 505.

under an uncertain claim without making an election which bars recovery against another person."²¹⁰ If one settles a liquidated claim²¹¹ against a wrongdoer for the full amount owed, however, there may be a satisfaction precluding a subsequent action.²¹² That result may be considered an application of the assertion made by the supreme court in *Bocanegra* that "an election may arise short of one's prosecution of the claim to final judgment."²¹³

We are faced, nevertheless, with the dilemma posed by Justice Campbell in his concurring opinion in *Bocanegra* that whether a settlement will be viewed as an election will be determined in each case by the court's opinion as to the degree of uncertainty as to the facts inconsistently asserted.²¹⁴ Such a quandry in the law is an unfortunate consequence of the honest attempt at election of remedies rule making in *Bocanegra*. If, however, the facts in *Metro-flight* cause such able jurists as Justice Pope and Justice Akin to differ as to whether "the glass is half full or half empty," i.e., whether the prior settlement was a successful exercise of an informed choice or merely based on uncertain and undetermined facts, how can members of the bar be expected to advise their clients as to the legal consequences of their conduct? What kind of uniformity can be expected in the rulings of trial and intermediate courts when the standard, as defined in *Bocanegra*, is so imprecise and dependent upon subjective interpretations of individual actions, personal knowledge, and concepts of manifest injustice? The time of our judiciary should be better spent than by engaging in a case by case analysis of "how uncertain is it?"

210. *Id.* at 506.

211. *Dickson v. Stockman*, 411 S.W.2d 610, 613 (Tex. Civ. App.—Texarkana 1966, writ ref'd n.r.e.). "Liquidated means made certain as to what and how much is due, and a liquidated claim is one which can be determined with exactness from the agreement between the parties, or by arithmetical process, or by the application of definite rules of law." *Id.* at 613 (quoting 1 TEX. JUR. *Accord & Satisfaction* § 30 (1959)); see *Cleveland v. San Antonio Bldg. & Loan Ass'n*, 148 Tex. 211, 214-15, 223 S.W.2d 226, 228 (1949); *Jones v. Hunt*, 74 Tex. 657, 659, 12 S.W. 832, 833 (1889).

212. See *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 807 (Tex. 1980); *McMillen v. Klingensmith*, 467 S.W.2d 193, 195 (Tex. 1971); *Rexroat v. Prescott*, 570 S.W.2d 457, 459 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 49, at 301 (4th ed. 1971).

213. *Bocanegra v. Aetna Life Ins. Co.*, 23 Tex. Sup. Ct. J. 502, 506 (July 19, 1980).

214. *Id.* at 507 (Campbell, J., concurring).