motion for partial summary judgment.
HOLDING: Affirmed with modifications.
REASONING: The court agreed with the lower court that issues of fact did exist as to whether Dow's oral and written objections were sufficient to defeat Ween's fee claim. Additionally, Ween failed to make a prima facie case for non-payment because the invoices submitted did not show his hourly rate, the billable hours expended, or the particular services rendered. The Court also agreed that Dow's partial payments did not necessarily mean she believed the fees were correct. By raising an issue of misrepresentation (not rebutted by Ween), she created an issue of material fact to be determined by a jury.

Turning to the defendant's cross motion for dismissal of fees, the court analyzed how attorney-client fiduciary duties affected Dow's claim. Citing Judge Bellacosa, the court stated "[t]his unique fiduciary reliance, stemming from people hiring attorneys to exercise professional judgment on a client's behalf-giving counsel' - is imbued with ultimate trust and confidence." *Matter of Cooperman*, 83 N.Y.2d 465, 472 (1994). Moreover, when dealing with attorney fee arrangements, courts, as a matter of public policy, should give particular scrutiny to the reasonableness of the arrangement. *King v. Fox*, 7 N.Y.3d 181, 191 (2006); *Matter of First Nat'l. Bank of E. Islip v. Brower*, 42 N.Y.2d 471, 474 (1977). The attorney has the burden of showing that "a fee contract is fair, reasonable, and fully known and understood by the client." *Jacobson v. Sassower*, 66 N.Y.2d 991, 993 (1985); *Koral v. Koral*, 185 A.D.2d 298, 299-300, 586 N.Y.S.2d 288 (2d Dep't 1992). The court found the provision permitting recovery of attorneys' fees by the attorney should he prevail in a collection action, without a reciprocal allowance for attorneys' fees should the client prevail, fundamentally unfair, unreasonable and unenforceable. The court also noted that interest on the fees may be charged but such interest must be fair and reasonable.

LANDLORD–TENANT

LANDLORD FAILED TO GIVE PROPER NOTICES UNDER TEXAS PROPERTY CODE TO TENANT IN AN EVICTION ACTION

Kennedy v. Andover Place Apartments, 203 S.W.3d 495 (Tex. App.—Houston [14th Dist.] 2006).

FACTS: Kennedy signed a one year written lease with Andover Place Apartments requiring that Andover give Kennedy ten days to respond to an eviction notice. After sending Kennedy several notices of lease violations, Andover sent Kennedy an eviction notice. The eviction notice indicated that Kennedy had ten days to respond and thirty days to vacate. Kennedy did not respond within ten days, and Kennedy did not vacate the apartment. Andover filed an action for forcible detainer. Texas Property Code §24.002 states that "a tenant commits a forcible detainer by refusing to surrender possession of real property after the landlord has lawfully terminated the tenant's right to possession."

Kennedy argued that Andover was not entitled to prevail in its forcible detainer action because Andover did not lawfully terminate her possession. Kennedy believed that the termination of her lease was not lawful because it violated Texas Property Code § 24.005 providing that if the lease gives a tenant the chance to respond to a proposed eviction, "a notice to vacate may not be given until the period provided for the tenant to respond to the eviction notice has expired." Andover argued the contrary, that § 24.005 required only a single notice. The trial court found that Kennedy violated her lease, that Andover lawfully terminated her lease, and that Andover was entitled to possession of Kennedy's apartment.
HOLDING: Reversed.
REASONING: The court agreed with Kennedy that Andover did not lawfully terminate her lease under § 24.005. Kennedy's lease required that she have ten days to respond to the eviction notice. Andover complied with the lease requirements by giving Kennedy ten days to respond. However, the Court recognized that Andover violated §24.005 by failing to provide Kennedy with a separate notice to vacate after the ten day notice period had expired. The court held that Andover was not entitled to prevail in its forcible detainer action, reversed the trial court's judgment, and rendered judgment for Kennedy.

LANDLORD DID NOT ACT IN BAD FAITH IN RETAINING SECURITY DEPOSIT

LANDLORD ENTITLED TO RECOVER FOR DAMAGE TO RENTAL PROPERTY

Pulley v. Milberger, 198 S.W.3d 418 (Tex. App.—Dallas 2006).

FACTS: Milberger had a rental property that he leased to Pulley. The initial one year lease agreement was a form contract which included a security deposit, from which he could deduct his costs for property damage caused either by Pulley or resulting from negligent or improper use of the property.

After the initial one year lease agreement ended, Pulley renewed on a monthly basis. After six years of renting, Pulley gave one month notice of his intent to vacate the house. Milberger then tried to re-lease the house but was unable to due to the poor condition of the property. It took three months to repair the damage before the house could be shown to prospective tenants. Within days of Pulley vacating, Milberger sent Pulley a letter describing the damage to the house and that he would be keeping the security deposit since cost to repair this damage exceeded the deposit. Milberger also tried multiple times to contact Pulley directly but did not get a response.

Thirty days after vacating, Pulley sent Milberger a letter demanding the security deposit within 15 days, stating he would otherwise initiate collection. The day after receiving the letter, Milberger responded by inviting Pulley to review the documented damages and costs incurred in repairing the damages. One year later, Pulley sued Milberger for the security deposit. Milberger asserted an affirmative defense that he sent Pulley an itemized notice and counterclaimed for damages in excess of the original

deposit. The trial court found for Milberger and awarded him attorneys fees and additional money if he prevailed on appeal.
HOLDING: Affirmed.
REASONING: Pulley attempted to prove two causes of action: bad faith retention of security deposit under Tex. Prop. Code Ann. §92.109(a); and bad faith failure to account for security deposit under Tex. Prop. Code Ann. §92.109(b). Both of these require showing the landlord acted in bad faith.

The court noted that Tex. Prop. Code §92.109 allows the tenant to sue a landlord who keeps security deposit without providing an itemized list of damages and deductions within thirty days of surrender. The court also found that Milberger did not have to plead absence of bad faith as an affirmative defense since he denied Pulley's claim of bad faith retention of the deposit. The court then noted that presumption of bad faith can be rebutted by showing: "(1) the landlord is an amateur lessor because the residence is his only rental property; (2) the landlord had no knowledge of the requirement to submit an itemized list of all deductions from the security deposit; (3) extensive damage was done to the residence; (4) the landlord attempted to do some of the repairs himself to save money; or (5) the landlord had a reasonable excuse for the delay."

The Court then noted that a landlord must prove that his retention of security deposit was reasonable, which can be shown when: "the tenant is legally liable under the lease or as a result of breaching the lease; (2) the damages did not exist before the tenant leased the premises; or (3) the damages or charges are equal to or in excess of the security deposit." The evidence showed that: Milberger was an amateur landlord; he believed he could retain the deposit to cover the damages; the damages did not exist prior to leasing the house to Pulley; he had photographs of the extensive damage to house; he had sent Pulley a written description of damage; and he offered to show Pulley documentation of the damages. Therefore he had not acted in bad faith in keeping the security deposit, and was entitled to recover for these damages.

A landlord must prove that his retention of security deposit was reasonable.

ARBITRATION

IN DETERMINING THE UNCONSCIONABILITY OF AN ARBITRATION CLAUSE, COURT SHOULD LOOK TO FACTS AT THE TIME THE CLAUSE WAS SIGNED, NOT WHEN ENFORCED

Overstreet v. Contigroup Companies, Inc., 462 F.3d 409 (5th Cir. 2006).

FACTS: In 2001, Contigroup Companies contracted to provide baby chickens to be raised and cared for by Overstreet. The contract required all disputes between the two parties to be settled by arbitration. Shortly after signing the contract, Overstreet sold her chicken farm and informed Contigroup that she would no longer raise chickens. In 2004, Overstreet sued Contigroup. She alleged fraud, negligence, and wrongful termination of contract.

Contigroup moved for stay and to compel arbitration. Overstreet opposed the motion, and argued that the arbitration clause was unconscionable. The district court found the arbitration clause unconscionable after comparing the high cost of arbitration with Overstreet's current financial situation. The district court denied Contigroup's motion for stay and to compel arbitration. Contigroup appealed.
HOLDING: Reversed and remanded.
REASONING: The court noted that the district court erred by relying on Overstreet's current financial status to determine whether the arbitration clause was unconscionable. In *Results Oriented, Inc. v. Crawford*, 538 S.E.2d 73, 79 (Ga. Ct. App. 2000), the court held that unconscionability should be analyzed by looking to "the circumstances existing at the time the contract was made, rather than those existing … later." Overstreet currently has no real property and no cash savings. However, at the time Overstreet signed the contract with Contigroup, she owned her chicken farm.

Citing *Am. Heritage Life Ins. Co. v. Lang*, 321 F.3d 533 (5th Cir. 2003), the court recognized that the party opposing arbitration bears the burden of proving that the dispute is not arbitrable. The court held that Overstreet did not satisfy her burden of proving that the dispute is not arbitrable because she did not address the circumstances existing at the time she signed the contract with Contigroup. The court remanded the case with instructions to stay the proceedings and compel arbitration.

CLASS ACTION WAIVER IN ARBITRATION CLAUSE UNENFORCEABLE

Kinkel v. Cingular Wireless, L.L.C. 857 N.E.2d 250 (Ill. 2006).

FACTS: In July 2001, Plaintiff entered into a two-year service agreement with Cingular Wireless ("Cingular") for cellular telephone service by signing Cingular's standard service agreement. Although the two-year term was not to expire until July 2003, plaintiff canceled her service in April 2002. In the service agreement Cingular charged an early termination fee, which the Plaintiff paid under protest. In July 2003, Cingular revised the arbitration provision, notifying all then-current customers of the change. The change contained an agreement by Cingular to pay for all American Arbitration Association filing, administration and arbitrator fees. Plaintiff brought action individually and on behalf of a class, against Cingular. They alleged that an early-termination fee constituted an illegal penalty and that the imposition of that fee was both a breach of the service agreement and statutory fraud under state Consumer Fraud and Deceptive Business Practices Acts. Cingular filed a motion to compel arbitration of the customer's individual claim and stay the litigation by invoking the arbitration clause of the service agreement. The Circuit Court of Madison County denied Cingular's motion, finding that the arbitration clause was unenforceable on the basis of unconscionability. The appellate court reversed and remanded, and found that the class