

# A Punch List for Construction of Statutes & Contracts

Prepared by: Scott Brister and Eric Osborne, Andrews Kurth Kenyon LLP

General Principles	
<input type="checkbox"/>	<b>Goal in statutes:</b> legislative intent. <i>Tex. Mut. Ins. Co. v. Ruttiger</i> (Tex. 2012) <ul style="list-style-type: none"> <li>normally derived from the text. <i>Texas Student Hous. Auth. v. Brazos Cnty. Appr. Dist.</i> (Tex. 2015)</li> </ul>
<input type="checkbox"/>	<b>Goal in contracts:</b> parties' intent. <i>Plains Explor'n &amp; Prod. Co. v. Torch Energy Advisors Inc.</i> (Tex. 2015) <ul style="list-style-type: none"> <li>objective intent, not subjective intent. <i>In re Dillard Dep't Stores, Inc.</i> (Tex. 2006)</li> <li>measured at time of contracting. <i>FPL Energy, LLC v. TXU Portfolio Mgmt. Co., LP</i> (Tex. 2014)</li> </ul>
<input type="checkbox"/>	<b>Purpose stated in statute.</b> <i>Gov't Code § 311.023(1); RRC v. Tex. Citizens for Safe Future</i> (Tex. 2011)
<input type="checkbox"/>	<b>Plain meaning.</b> <i>Life Partners, Inc. v. Arnold</i> (Tex. 2015); <i>Plains Exploration v. Torch Energy</i> (Tex. 2015)
<input type="checkbox"/>	<b>No part meaningless.</b> <i>Entergy Gulf States v. Summers</i> (Tex. 2009); <i>Plains Expl. v. Torch Energy</i> (Tex. 2015)
<input type="checkbox"/>	<b>Consequences.</b> <i>Govt Code § 311.023(5); Texas Student Hous. Auth. v. Brazos Cty. App. Dist.</i> (Tex. 2015)
<input type="checkbox"/>	<b>Absurdity.</b> avoid absurd results. <i>Bridgestone/Firestone, Inc. v. Glyn-Jones</i> (Tex. 1994)
<input type="checkbox"/>	<b>Cannot rewrite statute/contract.</b> <i>Iliff v. Iliff</i> (Tex. 2010); <i>Fiess v. State Farm Lloyds</i> (Tex. 2006)
<input type="checkbox"/>	<b>Freedom of contract.</b> <i>Moayedi v. Interstate 35/Chisam Rd., L.P.</i> (Tex. 2014)
<input type="checkbox"/>	<b>Enforcement is sacred.</b> <i>Fairfield Ins. Co. v. Stephens Martin Paving, LP</i> (Tex. 2008)

Definitions	
<input type="checkbox"/>	<b>Defined terms.</b> Use that definition. <i>Univ. of Texas Sw. Med. Ctr. v. Gentilello</i> (Tex. 2013) <ul style="list-style-type: none"> <li>unless context suggests otherwise. <i>In re Ford Motor Co.</i> (Tex. 2014)</li> <li>caveat: definition in one chapter may not apply to others. <i>Texas Dept. Ins. v. Am. Nat'l Ins. Co.</i> (Tex. 2012); <i>Matagorda County Appraisal Dist. v. Coastal Liquids Partners, L.P.</i> (Tex. 2005)</li> </ul>
<input type="checkbox"/>	<b>Undefined terms.</b> Use generally accepted meaning. <i>Govt. C § 312.002; SORM v. Cart</i> (Tex. 2014) <ul style="list-style-type: none"> <li>consider dictionaries. <i>Zachry Const. Corp. v. Port of Houston Auth. of Harris County</i> (Tex. 2014)</li> <li>consider treatises &amp; Restatement. <i>Jaster v. Comet II Const., Inc.</i> (Tex. 2014)</li> <li>harmonize with other usages in statute. <i>In re Mem'l Hermann Hosp. Sys.</i> (Tex. 2015)</li> </ul>
<input type="checkbox"/>	<b>Repeated terms.</b> Construe consistently throughout statute. <i>City of Lorena v. BMTP Holdings</i> (Tex. 2013)
<input type="checkbox"/>	<b>Terms with multiple meanings.</b> Look to context. <i>Beeman v. Livingston</i> (Tex. 2015)
<input type="checkbox"/>	<b>Custom &amp; usage.</b> Use industry terms or technical meaning parties intended. <i>Govt Code § 311.011(b)</i> <ul style="list-style-type: none"> <li>exception: can't alter unambiguous contract. <i>Kachina Pipeline Co., Inc. v. Lillis</i> (Tex. 2015)</li> </ul>
<input type="checkbox"/>	<b>Common grammar rules apply.</b> <i>Govt Code § 311.011(a); Marks v. St. Luke's Episcopal Hosp.</i> (Tex. 2010) <ul style="list-style-type: none"> <li>but remember the "Semicolon Court." <i>Ex parte Rodriguez</i> (Tex. 1874)</li> </ul>

Context	
<input type="checkbox"/>	<b>Context.</b> Can't divorce text from context. <i>In re Office of Atty. General</i> (Tex. 2015); <i>Zanchi v. Lane</i> (Tex. 2013)
<input type="checkbox"/>	<b>Surrounding circumstances.</b> <i>Sun Oil Co. (Delaware) v. Madeley</i> (Tex. 1981)
<input type="checkbox"/>	<b>Construe as whole, harmonize to give effect to all.</b> <i>FPL Energy, LLC v. TXU Portfolio Mgmt. Co.</i> (Tex. 2014)

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Context	
<input type="checkbox"/>	<b>Construe contemporaneous contracts/statutes together.</b> <i>In re Laibe Corp. (Tex. 2010)</i> ; <i>Mid-American Indem. v. King (Tex. 1995)</i>
<input type="checkbox"/>	<b>Construe complementary statutes together.</b> <i>POM Wonderful, LLC v. Coca-Cola Co., Inc. (US 2014)</i>
<input type="checkbox"/>	<b>Uniformity with other laws/states.</b> <i>Govt Code § 311.028</i> ; <i>Nathan v. Whittington (Tex. 2013)</i> <ul style="list-style-type: none"> <li>• exception: nonstandard contracts/laws. <i>RSUI Indem. Co. v. The Lynd Co. (Tex. 2015)</i></li> </ul>
<input type="checkbox"/>	<b>Utilitarian view.</b> Consider business activity involved. <i>Frost Nat. Bank v. L &amp; F Distributors, Ltd. (Tex. 2005)</i>
<input type="checkbox"/>	<b>No surplusage.</b> Give meaning to every word so none rendered surplusage. <i>Govt Code § 311.021(2)</i> ; <i>Ewing Const. Co. v. Amerisure Ins. Co. (Tex. 2014)</i> ; <i>Kallinen v. City of Houston (Tex. 2015)</i>
<input type="checkbox"/>	<b>Duplicative provisions.</b> Sometimes included for caution or emphasis. <i>In re City of Georgetown (Tex. 2001)</i>
<input type="checkbox"/>	<b>Legislative history.</b> Irrelevant unless statute is ambiguous. <i>Sullivan v. Abraham (Tex. 2016)</i> <ul style="list-style-type: none"> <li>• court may consider whether ambiguous or not. <i>Govt Code § 311.023</i></li> </ul>
<input type="checkbox"/>	<b>Extrinsic evidence.</b> Admissible only if contract ambiguous. <i>Gallagher HQ v. City of San Antonio (Tex. 2010)</i>

Conflicts	
<input type="checkbox"/>	<b>Specific terms prevail over general.</b> <i>Govt Code 311.026(b)</i> <ul style="list-style-type: none"> <li>• only if can't be reconciled. <i>Texas Indus. Energy Consumers v. CenterPoint Energy Houston (Tex. 2010)</i></li> <li>• only between laws of equal dignity. <i>Nitro-Lift Techs., L.L.C. v. Howard (US 2012)</i></li> </ul>
<input type="checkbox"/>	<b>Handwritten/typed prevail over printed.</b> <i>Bus. &amp; Com. Code § 3.114</i>
<input type="checkbox"/>	<b>Express v. incorporated provisions.</b> Express provisions prevail. <i>Americo Life, Inc. v. Myer (Tex. 2014)</i>
<input type="checkbox"/>	<b>Conflicting statute and common law.</b> Did Legislature intent to override. <i>Dugger v. Arredondo (Tex. 2013)</i>
<input type="checkbox"/>	<b>Conflicting statute and court rule.</b> Most recent prevails. <i>Gov't Code § 22.004</i> ; <i>Jackson v. SOAH (Tex. 2011)</i>
<input type="checkbox"/>	<b>Earlier in contract.</b> Early terms favored over subsequent ones. <i>Coker v. Coker (Tex. 1983)</i>
<input type="checkbox"/>	<b>Later in session.</b> Latest enactment prevails. <i>Govt Code § 311.025</i> ; <i>In re Mem'l Hermann Hosp. Sys. (Tex. 2015)</i> ; <i>Jackson v. SOAH (Tex. 2011)</i>
<input type="checkbox"/>	<b>Comprehensive statutory scheme.</b> Courts refrain from imposing additional claims/procedures. <i>Ritchie v. Rupe (Tex. 2014)</i> ; <i>Liberty Mut. Ins. Co. v. Adcock (Tex. 2013)</i>
<input type="checkbox"/>	<b>Notwithstanding any other...</b> Makes term superior. <i>G.T. Leach Builders, LLC v. Sapphire V.P., LP (Tex. 2015)</i>

Silence	
<input type="checkbox"/>	<b>Silence.</b> Presumed to be purposeful, deliberate choice. <i>Tex. Mut. Ins. Co. v. Ruttiger (Tex. 2012)</i> <ul style="list-style-type: none"> <li>• <b>but</b> may be a mistake, lack of consensus, delegation to courts or agencies, or intent to avoid repetition. <i>PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship (Tex. 2004)</i></li> </ul>
<input type="checkbox"/>	<b>Absence.</b> Lack of limits used elsewhere may mean unlimited. <i>City of Dallas v. TCI West End (Tex. 2015)</i>
<input type="checkbox"/>	<b>Negative inference.</b> Limits on claim don't indicate approval of it. <i>Tex. Mut. Ins. v. Ruttiger (Tex. 2012)</i>

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## Silence

<input type="checkbox"/>	<b>Fallacy of the inverse.</b> That P implies Q does not mean not-P implies not-Q. <i>NLRB v. Canning</i> , (US 2014) ( <i>Scalia, J., dissenting</i> )
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## Editing

<input type="checkbox"/>	<b>Headings &amp; titles.</b> Can consider, but can't expand or limit statute. <i>Govt Code §§ 311.023(7), 311.024; Damuth v. Trinity Valley Community College</i> (Tex. 2014) <ul style="list-style-type: none"> <li>• less weight than text. <i>RSUI Indem. v. Lynd Co.</i> (Tex. 2015); <i>City of Dallas v. TCI West End</i> (Tex. 2015)</li> </ul>
<input type="checkbox"/>	<b>Last-antecedent rule.</b> Qualifier usually modifies only nearest item. <i>Sullivan v. Abraham</i> (Tex. 2016)
<input type="checkbox"/>	<b>Series-qualifier rule.</b> Qualifier modifies all items in parallel construction. <i>Sullivan v. Abraham</i> (Tex. 2016)
<input type="checkbox"/>	<b>Changes in draft forms.</b> Given great weight. <i>Houston Explor. Co. v. Wellington Underwr.</i> (Tex. 2011)
<input type="checkbox"/>	<b>Changes in draft statutes.</b> Usually disregarded. <i>Tex. Mut. Ins. Co. v. Ruttiger</i> (Tex. 2012)
<input type="checkbox"/>	<b>Punctuation.</b> Punctuation aids construction. <i>Criswell v. European Crossroads Shopping Ctr., Ltd</i> (Tex. 1990) <ul style="list-style-type: none"> <li>• absence of comma was drafting error. <i>In re Deepwater Horizon</i> (Tex. 2015)</li> </ul>
<input type="checkbox"/>	<b>Repeal.</b> May not indicate prior constructions were wrong. <i>AHF Arbors v. Walker County</i> (Tex. 2011)

## Agency Interpretation

<input type="checkbox"/>	<b>Deference to agency.</b> <ul style="list-style-type: none"> <li>• only if statute ambiguous. <i>Boeing Co. v. Paxton</i>, 466 S.W.3d 831, 838 (Tex. 2015)</li> <li>• only if from formal proceedings. <i>Fiess v. State Farm Lloyds</i> (Tex. 2006)</li> <li>• only if within statutory authority. <i>Texas Lottery Comm'n v. First State Bank of DeQueen</i> (Tex. 2010)</li> <li>• only if reasonable and consistent with plain language. <i>Thompson v. Tex. Dept. of Licensing &amp; Regulation</i> (Tex. 2014)</li> </ul>
<input type="checkbox"/>	<b>More deference.</b> Interpretation accepted by Legislature. <i>RRC v. Tex. Citizens for a Safe Future</i> (Tex. 2011)
<input type="checkbox"/>	<b>Less deference.</b> Legislative intent rather than technical/regulatory issues. <i>In re Smith</i> (Tex. 2011)
<input type="checkbox"/>	<b>Executive officials.</b> May be entitled to deference too. <i>In re Smith</i> (Tex. 2011)

## Presumptions

<input type="checkbox"/>	<b>Knowledge of law.</b> Parties presumed to know law. <i>Greater Houston Transp. Co. v. Phillips</i> (Tex. 1990)
<input type="checkbox"/>	<b>Knowledge of contract.</b> Parties presumed to know terms. <i>Nat'l Prop. Hldgs. v. Westergren</i> (Tex. 2015)
<input type="checkbox"/>	<b>Parties contract only for themselves.</b> <i>Basic Cap. Mgmt., Inc. v. Dynex Commercial</i> (Tex. 2011)
<input type="checkbox"/>	<b>Legislature knows caselaw.</b> <i>Abutahoun v. Dow Chem Co.</i> (Tex. 2015); <i>Dugger v. Arredondo</i> (Tex. 2013)
<input type="checkbox"/>	<b>Constitutionality intended.</b> <i>Govt. C § 311.021(1); In re Allcat Claims Serv., L.P.</i> (Tex. 2011) <ul style="list-style-type: none"> <li>• construe to avoid constitutional problems. <i>Holder v. Humanitarian Law Project</i> (US 2011); <i>ERS v. Duenez</i> (Tex. 2009)</li> </ul>

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<input type="checkbox"/>	<b>Retroactivity.</b> Laws presumed prospective only. <i>Govt. C § 311.022; City of Austin v. Whittington (Tex. 2012)</i>
<input type="checkbox"/>	<b>Extraterritoriality.</b> None presumed unless intent clear. <i>Coca-Cola Co. v. Harmar Bottling Co. (Tex. 2006)</i>
<input type="checkbox"/>	<b>Governmental immunity.</b> Not waived unless clearly stated. Gov't Code § 311.034

Specific Words	
<input type="checkbox"/>	<b>Any:</b> Can mean every. <i>Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth. (Tex. 2010)</i>
<input type="checkbox"/>	<b>May:</b> Can be mandatory. <i>Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co. (US 2000)</i> <ul style="list-style-type: none"> <li>• can mean permission rather than option. <i>Govt Code § 311.016; Ray Malooly Trust v. Juhl (Tex. 2006)</i></li> </ul>
<input type="checkbox"/>	<b>Includes.</b> Doesn't exclude items not stated. <i>Govt Code § 311.005(13); Sneed v. Webre (Tex. 2015)</i>
<input type="checkbox"/>	<b>Or:</b> Indicates separate and distinct items. <i>City of Lorena v. BMTP Holdings, L.P. (Tex. 2013)</i>
<input type="checkbox"/>	<b>Shall:</b> Mandatory unless legislative intent otherwise. <i>Govt Code § 311.016(2)</i>
<input type="checkbox"/>	<b>The:</b> Can mean more than one. <i>PlainsCapital Bank v. Martin (Tex. 2015)</i>

Latin Class	
<input type="checkbox"/>	<b>Cessante ratione legis cessat et ipsa lex.</b> <ul style="list-style-type: none"> <li>• when reason of the law ceases, the law also ceases. <i>LAN/STV v. Martin K. Eby Constr. Co. (Tex. 2014)</i></li> </ul>
<input type="checkbox"/>	<b>Contra proferentem.</b> Construe against drafter. <i>In re Deepwater Horizon (Tex. 2015)</i> <ul style="list-style-type: none"> <li>• only if &gt; 1 reasonable interpretation. <i>Evanston Ins. Co. v. ATOFINA Petrochemicals (Tex. 2008)</i></li> </ul>
<input type="checkbox"/>	<b>Ejusdem generis.</b> Naming some implies exclusion of others. <i>Brooks v. Northglen Ass'n (Tex. 2004)</i> <ul style="list-style-type: none"> <li>• general terms limited to categories like those expressed. <i>City of Houston v. Bates (Tex. 2013)</i></li> <li>• intended for "catchall" clauses. <i>Paroline v. U.S. (US 2014)</i></li> </ul>
<input type="checkbox"/>	<b>Expressio unius est exclusio alterius.</b> <ul style="list-style-type: none"> <li>• stating one excludes others. <i>Brooks v. Northglen Ass'n, 141 S.W.3d 158, 168 (Tex. 2004)</i></li> </ul> <b>Inclusio unius est exclusio alterius.</b> Including one excludes others. <i>City of Houston v. Williams (Tex. 2011)</i> <ul style="list-style-type: none"> <li>• only if context indicates intent rather than inadvertence. <i>Barnhart v. Peabody Coal Co. (US 2003)</i></li> </ul>
<input type="checkbox"/>	<b>Generalia specialibus non derogant.</b> <ul style="list-style-type: none"> <li>• specific governs general. <i>Govt Code 311.026(b); In re Mem'l Hermann Hosp. Sys. (Tex. 2015)</i></li> <li>• applies only to laws of equal dignity. <i>Nitro-Lift Techs., L.L.C. v. Howard (US 2012)</i></li> </ul>
<input type="checkbox"/>	<b>Noscitur a sociis.</b> Words grouped together given related meaning. <i>Ritchie v. Rupe (Tex. 2014)</i> <ul style="list-style-type: none"> <li>• N/A if list is too short and items too disparate. <i>Graham County v. U.S. (US 2010)</i></li> </ul>

Quotable	
<input type="checkbox"/>	"If it were proved by 20 bishops that a party, when he used words, intended something else than the usual meaning the law imposes, he would still be held." <i>Hotchkiss v. Nat'l City Bank (SDNY 1911)</i>
<input type="checkbox"/>	"If Parliament does not mean what it says, it must say so." <i>In re Jordan (Tex. 2008)</i>

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<input type="checkbox"/>	"The Court risks being viewed as a contest among Pharisees in the Temple of Textualism over who is the most devout." <i>Jaster v. Comet II Constr., Inc.</i> (Tex. 2014) (Hecht dissent)
<input type="checkbox"/>	"Since the Tower of Babel, expression is inexact." <i>Jaster v. Comet II Constr.</i> (Tex. 2014) (Hecht dissent)
<input type="checkbox"/>	"Making life easy for judges is not a rule of contract construction." <i>Intercont'l Group P'ship v. KB Home Lone Star L.P.</i> (Tex. 2009) (Brister dissent)