



---

January 1991

## Deceptive Trade Practices and Commercial Torts

Michael Curry

Melissa Krakauer

---

### Recommended Citation

Michael Curry & Melissa Krakauer, *Deceptive Trade Practices and Commercial Torts*, 45 Sw L.J. 319 (1991)

<https://scholar.smu.edu/smulr/vol45/iss1/14>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# DECEPTIVE TRADE PRACTICES AND COMMERCIAL TORTS

by

*Michael Curry\* and Melissa Krakauer\*\**

## I. DECEPTIVE TRADE PRACTICES

### A. Consumer Standing

**I**N *Eckman v. Centennial Savings Bank*,<sup>1</sup> the Texas Supreme Court ruled that the defendant in a DTPA suit has the burden to plead and prove the applicability of the \$25,000,000 exception to business consumer status as an affirmative defense.<sup>2</sup> Recognizing that most claimants do not have assets of \$25,000,000 or more, the court reasoned that requiring every DTPA plaintiff to prove that he or she is not a multimillionaire would be an inefficient and uneconomical use of judicial resources.<sup>3</sup> The court stated further that imposing the burden of raising and negating the applicability of the \$25,000,000 exception upon every business consumer would be unduly prejudicial.<sup>4</sup>

Under the Texas Supreme Court's holding, evidence concerning the consumer's financial status is irrelevant unless the defendant raises the issue.<sup>5</sup> Once the issue is raised, such financial information will be discoverable to

---

\* B.A., J.D., The University of Texas. Attorney at Law, Bragg, Chumlea, McQuality, Smithers & Curry, Austin, Texas. Adjunct Professor of Law.

\*\* B.S., J.D., The University of Texas. Attorney at Law, Bragg, Chumlea, McQuality, Smithers & Curry, Austin, Texas.

1. 784 S.W.2d 672 (Tex. 1990).

2. *Id.* at 675-76. The \$25,000,000 exception is found in the DTPA definition of a consumer:

[A]n individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, *except* that the term does not include a business consumer that has assets of \$25 million or more, or that is owned or controlled by a corporation or entity with assets of \$25 million or more.

TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987) (emphasis added by author).

3. 784 S.W.2d at 675. The court quoted DTPA § 17.44 which requires that the Act "be liberally construed and applied to promote its underlying purposes, which are to protect consumers . . . and to provide efficient and economical procedures to secure such protection." TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 1987) (emphasis added).

4. 784 S.W.2d at 675. The court's opinion, issued on rehearing, modified the court's original holding which required the defendant to raise the issue by special exception; once the issue was raised, the plaintiff had the burden of proving the exception's inapplicability. 34 Tex. Sup. Ct. J. 46, 48-49 (Oct. 26, 1988).

5. 784 S.W.2d at 675.

determine whether the exception applies.<sup>6</sup> The court cautioned that to avoid prejudicing the jury with evidence of the claimant's financial status, the parties should attempt to resolve the applicability of the exception before trial.<sup>7</sup>

### B. Liability Under the Act

In *Autohaus, Inc. v. Aguilar*<sup>8</sup> the Dallas court of appeals adopted puffing as a defense in a DTPA misrepresentation suit.<sup>9</sup> Aguilar purchased a new Mercedes Benz from Autohaus and had numerous problems with the vehicle, including an engine hesitation. Over a three year period, Aguilar took the car to Autohaus for repairs nineteen times. At trial Aguilar testified that the Autohaus salesman stated that Mercedes Benz is the best engineered car in the world, that the car probably would not have mechanical difficulties, that it probably would need servicing only for oil changes, and that it would be far superior to what Aguilar had previously driven. Based on this testimony, the trial court found that Autohaus violated DTPA section 17.46(b)(5) and (7).<sup>10</sup> The court of appeals reversed the judgment for Aguilar and held that the salesman's statements were mere puffing because they were "too general to be an actionable misrepresentation."<sup>11</sup> In a dissenting opinion, Justice Stewart demonstrated the error of the majority in implying a puffing defense into the DTPA.<sup>12</sup>

As recognized by both the majority and the dissent, the DTPA does not codify the common law. The purpose of the DTPA is to provide a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in common law fraud and warranty suits.<sup>13</sup> The Texas Supreme Court has consistently rejected all attempts to apply various common law defenses as impediments to recovery under the DTPA.<sup>14</sup>

In justifying its holding, the court of appeals acknowledged that the DTPA does not mention puffing but seized on the reference to puffing in *Pennington v. Singleton*.<sup>15</sup> *Pennington's* reference to puffing, however, was

---

6. *Id.* The court noted that the rules of civil procedure adequately protect against overly intrusive or frivolous discovery requests.

7. 784 S.W. 2d at 675-76.

8. 794 S.W.2d 459 (Tex. App.—Dallas 1990), writ denied per curiam, 34 Tex. Sup. Ct. J. 265 (Jan. 9, 1991).

9. *Id.* at 462.

10. *Id.* at 461.

11. *Id.* at 464-65.

12. *Id.* at 465-67. The Texas Supreme Court stated that in denying the application for writ of error it was not approving or disapproving of the court of appeals' analysis of the puffing issue. *Aguilar v. Autohaus, Inc.*, 34 Tex. Sup. Ct. J. 265 (Jan. 9, 1991).

13. *Id.* at 462, 465 (citing *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980)).

14. *E.g.*, *Chastain v. Koonce*, 700 S.W.2d 579, 583 (Tex. 1985) (refusing to imply requirement of intent, knowledge, or conscious indifference); *Weitzel v. Barnes*, 691 S.W.2d 598, 600 (Tex. 1985) (refusing to imply reliance element or intent to deceive); *Kennedy v. Sale*, 689 S.W.2d 890, 892-93 (Tex. 1985) (refusing to imply privity requirement).

15. 606 S.W. 2d 682, 687 (Tex. 1980). The court also noted judicial references to puffing in *RRTM Restaurant Corp. v. Keeping*, 766 S.W. 2d 804, 807 (Tex. App.—Dallas 1988, writ denied); *Parks v. U.S. Home Corp.*, 652 S.W. 2d 479, 484 (Tex. App.—Houston [1st Dist.] 1983, writ dismissed w.o.j.). The court also cited *Presidio Enters., Inc. v. Warner Bros. Distrib. Corp.*, 784 F. 2d 674, 686-87 (5th Cir. 1986), which held puffing to be a defense to the DTPA.

only dicta. In fact, the court emphasized that statements like "excellent," "perfect," and "just like new" were actionable under the DTPA.<sup>16</sup> Attempting to distinguish the holding in *Pennington*, the court of appeals noted that the representations in *Autohaus* concerned future performance of the vehicle as opposed to its present condition.<sup>17</sup> As pointed out by the dissent, however, this distinction is meaningless because representations of future quality are actionable under the DTPA.<sup>18</sup>

The dissent articulated that the language of the statute does not support a puffing or opinion defense because it neither grants a blanket exemption for opinions nor expressly limits liability to representations of fact.<sup>19</sup> DTPA section 17.46(b)(5) and (7) forbid misrepresentations relating to quality, characteristics, and benefits of goods and services.<sup>20</sup> These prohibitions do not specify whether they relate to misrepresentations of fact or of opinion. In contrast, DTPA section 17.46(b)(8), (11), and (13) are limited to representations of fact.<sup>21</sup> When the legislature has employed certain terms in some sections of a statute but not in others, the courts should not imply those terms where excluded.<sup>22</sup>

The dissent correctly noted that the common law rationale for a puffery defense, that buyers could not reasonably be expected to rely on broad statements of opinion, has no application to the DTPA since reliance is not an element of recovery under the DTPA.<sup>23</sup> Moreover, a representation is false, misleading, or deceptive under the DTPA if it has the capacity or tendency to deceive even an ignorant, unthinking, credulous person.<sup>24</sup> Therefore, the proper inquiry is not whether the statement is too general, but rather the subjective effect on the listener.<sup>25</sup> Aguilar testified that he had been misled. While the majority concluded that the salesman's statements did not "convey any definite implications,"<sup>26</sup> the fact finder could reasonably have found that the salesman's statements, general or not, assured Aguilar that the car would perform dependably.<sup>27</sup> The court's holding is plainly contrary to the position held by many commentators who discredit the puffing defense.<sup>28</sup>

---

16. 606 S.W. 2d at 685.

17. 794 S.W. 2d at 464.

18. 794 S.W. 2d at 466-67; *Smith v. Baldwin*, 611 S.W.2d 611, 614 (Tex. 1980); see *Teague v. Bandy*, 793 S.W. 2d 50, (Tex. App.—Austin 1990, writ denied).

19. 794 S.W. 2d at 466.

20. TEX. BUS. & COM. CODE ANN. § 17.46(b)(5), (7) (Vernon 1987).

21. TEX. BUS. & COM. CODE ANN. § 17.46(b)(8), (11), (13) (Vernon 1987).

22. *Smith*, 611 S.W.2d at 616.

23. 794 S.W. 2d at 466; *Weitzel v. Barnes*, 691 S.W.2d 598, 600 (Tex. 1985) (reliance not an element).

24. *Spradling v. Williams*, 566 S.W.2d 561, 562-63 (Tex. 1978).

25. In *Pennington* the Texas Supreme Court stated that general representations are actionable. 606 S.W. 2d at 687. The majority in *Autohaus* construed this to mean that general representations are sometimes actionable. 794 S.W. 2d at 464.

26. 794 S.W. 2d at 464.

27. *Id.* at 466.

28. See P. Kens & S. Cochran, *Consumer Rights & Remedies* §§ 8, 32 (Texas Practice 1983); D. Bragg, P. Maxwell & J. Longley, *Texas Consumer Litigation* § 5.02, p. 136-37 n. 17 (2d ed. 1983); Comment, 9 *Texas Consumer Law Reporter* 30, 33 (Feb. 1990); Comment, 9 *Texas Consumer Law Reporter* 178, 179 (Aug. 1990). As Professors Prosser and Keeton have said:

In the significant decision of *Frizzel v. Cook*,<sup>29</sup> the San Antonio court of appeals ruled that the Texas Securities Act (TSA)<sup>30</sup> does not preempt a consumer's DTPA claim for misrepresentations relating to investment and counseling services.<sup>31</sup> In reaching its holding, the court first encountered the Texas Supreme Court's opinion in *E. F. Hutton & Co. v. Youngblood*<sup>32</sup> which was withdrawn on rehearing.<sup>33</sup> The first opinion in *Youngblood* held that the DTPA was inconsistent with the TSA and did not apply to securities transactions;<sup>34</sup> however, this holding was dropped from the later opinion.<sup>35</sup> The court of appeals in *Frizzel* correctly held that the withdrawn opinion in *Youngblood* was not controlling because unpublished opinions have no precedential value.<sup>36</sup> The court noted that both the DTPA and the TSA expressly provide for cumulative remedies<sup>37</sup> and that the express exemption for securities transactions in the predecessor statute<sup>38</sup> to the DTPA was repealed when the legislature enacted the DTPA.<sup>39</sup> The court found no

---

The "puffing" rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific, on the theory that no reasonable man would believe him, or that no reasonable man would be influenced by such talk. It is not surprising, therefore, that the rule has not been a favored one; and that whenever it can be found under the circumstances that the buyer reasonably understood that he was receiving something in the way of assurance as to specific facts, the question of actionable misrepresentation has been left to the jury.

W. Keeton, *Prosser & Keeton on the Law of Torts*, 757 (5th ed. 1984).

29. 790 S.W.2d 41 (Tex. App.—San Antonio 1990, writ denied).

30. TEX. REV. CIV. STAT. ANN. art. 581-1 (Vernon 1986).

31. 790 S.W.2d at 47.

32. 30 Tex. Sup. Ct. J. 508 (June 24, 1987); see Curry, *Commercial Torts and Deceptive Trade Practices*, 42 SW. L. J. 171, 175-77 (1988).

33. 741 S.W.2d 363 (Tex. 1987).

34. 30 Tex. Sup. Ct. J. at 510.

35. 741 S.W.2d at 364.

36. 790 S.W.2d at 43; see *Berry v. Berry*, 647 S.W. 2d 945, 947 (Tex. 1983).

37. See TEX. BUS. & COM. CODE ANN. § 17.43 (Vernon 1987) (permits cumulative remedies); TEX. REV. CIV. STAT. ANN. art. 581-33M (Vernon Supp. 1991) (allows all common law and statutory actions outside Texas Securities Act to remain intact).

38. Article 5069 - 10.03, Interest - Consumer Credit - Consumer Protection Act, Ch. 274, § 2, 1967 Tex. Gen. Law 608, 658. "Nothing in this Chapter shall apply to actions or transactions permitted under laws administered by a public official acting under statutory authority of this State or the United States."

39. Section 17.49 of the DTPA contains the only exemptions to the Act and contains no securities exemption. It provides:

(a) Nothing in this subchapter shall apply to the owner or employees of a regularly published newspaper, magazine, or telephone directory, or broadcast station, or billboard, wherein any advertisement in violation of this subchapter is published or disseminated, unless it is established that the owner or employees of the advertising medium have knowledge of the false, deceptive, or misleading acts or practices declared to be unlawful by this subchapter, or had a direct or substantial financial interest in the sale or distribution of the unlawfully advertised good or service. Financial interest as used in this section relates to an expectation which would be the direct result of such advertisement.

(b) Nothing in this subchapter shall apply to acts or practices authorized under specific rules or regulations promulgated by the Federal Trade Commission under § 5(a)(1) of the Federal Trade Commission Act [15 U.S.C.A. 45(a)(1)]. The provisions of this subchapter do apply to any act or practice prohibited or not specifically authorized by a rule or regulation of the Federal Trade Commission. An act or practice is not specifically authorized if no rule or regulation has been issued on the act or practice.

inconsistency between the TSA with its due diligence defense and the DTPA.<sup>40</sup> If a conflict between the two statutes existed however, the DTPA would control because it is the later enacted statute.<sup>41</sup> The court concluded that any implied exemption for securities from the DTPA would be improper inasmuch as the Texas Supreme Court had refused to imply exemptions or exceptions not mandated by the legislature.<sup>42</sup>

### C. Damages

Although the issue has not yet been addressed by the Texas Supreme Court, most of the courts of appeals that have considered the issue of whether prejudgment interest is subject to trebling under the DTPA have held that it is not.<sup>43</sup> The rationale of these cases is that although the con-

TEX. BUS. & COM. CODE ANN. § 17.49 (Vernon 1987).

40. 790 S.W.2d at 45. The due diligence defense in the TSA provides in part: "[A] person is not liable if he sustains the burden of proof that either (a) the buyer knew of the untruth or omission or (b) he (the offeror or seller) did not know, and in the exercise of reasonable care could not have known, of the untruth or omission." TEX. REV. CIV. STAT. ANN. art. 581-33A(2) (Vernon Supp. 1991). The court found that part (a) of the due diligence defense is subsumed within the TSA requirement that a deceptive practice constitutes a producing cause of actual damages. See TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon 1987). The court concluded that part (b) of the due diligence defense was very similar to the DTPA third party information defense in § 17.506 (a)(2). That section provides a defense to a defendant who gave the consumer written notice of his reliance upon "written information . . . obtained from another source if the information was false or inaccurate and the defendant did not know and could not reasonably have known of the falsity or inaccuracy of the information." TEX. BUS. & COM. CODE ANN. § 17.506 (a)(2) (Vernon 1987).

The court might have added that even if the DTPA requires compliance with a more stringent standard than does the TSA, the statutes are not irreconcilable. A party who meets the DTPA standard also will comply with the TSA.

41. The Government Code provides that "[e]xcept as provided by § 311.031(d), if statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails." TEX. GOV'T CODE ANN. § 311.025(a) (Vernon 1988).

The legislature amended and reenacted DTPA § 17.43 in 1979, two years after the legislature enacted TSA's due diligence defense. The court held, therefore, that DTPA § 17.43 controls. 790 S.W. 2d at 45. DTPA § 17.43 states:

The provisions of this subchapter are not exclusive. The remedies provided in this subchapter are in addition to any other procedures or remedies provided for in any other law; provided, however, that no recovery shall be permitted under both this subchapter and another law of both actual damages and penalties for the same act or practice. A violation of a provision of law other than this subchapter is not in and of itself a violation of this subchapter. *An act or practice that is a violation of a provision of law other than this subchapter may be made the basis of an action under this subchapter if the act or practice is proscribed by a provision of this subchapter or is declared by such other law to be actionable under this subchapter.* The provisions of this subchapter do not in any way preclude other political subdivisions of this state from dealing with deceptive trade practices.

TEX. BUS. & COM. CODE ANN. § 17.43 (Vernon 1987) (italicized language added by author represents the 1979 amendment). The court concluded that this amendment demonstrated legislative intent that the DTPA not be displaced by other statutes pertaining to the same conduct.

42. 790 S.W.2d at 46; see *Melody Home Mfg. Co. v. Barnes*, 741 S.W. 2d 349, 354 (Tex. 1987) ("The legislative history of the DTPA indicates that the Act was intended to apply to all service providers.").

43. *Group Medical & Surgical Serv., Inc. v. Leong*, 750 S.W.2d 791, 798 (Tex. App.—El Paso 1988, writ denied) (disallowing trebling); *Hope v. Allstate Ins. Co.*, 719 S.W.2d 634, 638

sumer's damages may have been caused by the defendant's statutory violation, the lost use of those damage funds was not.<sup>44</sup> This view, however, cannot be reconciled with the fact that but for the statutory violation, the consumer would not have been deprived of the use of the funds representing the damages. Thus, judicial reticence to the trebling of prejudgment interest is not supported by the policies underlying the DTPA.

In a tightly-written opinion which bucks the trend, the Austin court of appeals held that prejudgment interest recoverable pursuant to common law, rather than by statute or contract, constitutes actual damages subject to trebling.<sup>45</sup> Recognizing that actual damages recoverable under the DTPA are those damages recoverable at common law,<sup>46</sup> the court relied on the long standing rule that interest as "compensation for detention of that which is due on account of injury inflicted"<sup>47</sup> constitutes common law damages.<sup>48</sup> Such interest thus constitutes actual damages under the DTPA, which may be trebled in appropriate cases.<sup>49</sup> As a cautionary word, it is important to remember that the court will award prejudgment interest as actual damages only if it is specifically pleaded.<sup>50</sup>

## II. COMMERCIAL TORTS

### A. Fraud

Eleven years after a statutory amendment should have settled the issue,<sup>51</sup> the Texas Supreme Court confirmed in *Williams v. Khalaf*<sup>52</sup> that the limitations period in fraud actions is four years.<sup>53</sup> Although no limitations statute expressly applies to fraud,<sup>54</sup> the court has long treated fraud as an action on

(Tex. App.—Fort Worth 1986, writ ref'd n.r.e.) (disallowing trebling); *Precision Homes, Inc. v. Cooper*, 671 S.W.2d 924, 931 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (disallowing trebling); *Rotello v. Ring Around Products, Inc.*, 614 S.W.2d 455, 463 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (disallowing trebling). *But see* *Indus-Ri-Chem Laboratory, Inc. v. Par-Pak Co.*, 602 S.W.2d 282, 296 (Tex. Civ. App.—Dallas 1980, no writ) (allowing trebling).

44. *Precision Homes*, 671 S.W. 2d at 930-31; *Rotello*, 614 S.W. 2d at 463; *Hope*, 719 S.W. 2d at 638; *Group Medical*, 750 S.W. 2d at 798.

45. *Paramore v. Nehring*, 792 S.W.2d 210, 212 (Tex. App.—Austin 1990, no writ).

46. *Id.* at 212 (citing *Brown v. American Transfer & Storage*, 601 S.W.2d 931, 939 (Tex. 1980)).

47. 792 S.W.2d at 212 (citing *Watkins v. Junker*, 90 Tex. 584, 40 S.W. 11 (1897)).

48. In *Cavnar v. Quality Control Parking, Inc.* the Texas Supreme Court examined the two types of interest recognized by the law:

The term "interest" encompasses two distinct forms of compensation: interest as interest (*eo nomine*) and interest as damages. Interest as interest is compensation allowed by law or fixed by the parties for the use or detention of money. (citation omitted) Interest as damages is compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment.

696 S.W.2d 549, 551-52 (Tex. 1985).

49. 792 S.W.2d at 212. At the time *Paramore* was tried, treble damages were mandatory.

See TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 1977).

50. *Benavidez v. Isles Constr. Co.*, 726 S.W. 2d 23, 25 (Tex. 1987).

51. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (Vernon 1986).

52. 34 Tex. Sup. Ct. J. 133 (Dec. 1, 1990).

53. *Id.* at 137.

54. *Id.* at 134.

a debt for limitations purposes.<sup>55</sup> Before 1979, two statutes of limitation specifically applied to debts: a four-year period applied to debts evidenced in writing and a two-year period applied to debts not evidenced in writing.<sup>56</sup> In 1979 the legislature amended the two statutes to eliminate this distinction and to list all actions for debt under the four-year statute.<sup>57</sup> Accordingly, the Texas Supreme Court reversed the court of appeal's judgment, determining that the court erroneously applied a two-year limitations period to Mr. Williams's fraud counterclaim.<sup>58</sup>

The *Williams* opinion goes into considerable detail in explaining the historical basis for treating fraud claims as actions on a debt as opposed to trespass actions, which would fall under the two-year statute.<sup>59</sup> Briefly, the court explains that, unlike most torts, the cause of action for fraud or deceit did not develop from the common law action for trespass.<sup>60</sup> Rather, the fraud action evolved from the action for assumpsit which was contractual or quasi-contractual in nature and involved a claim of debt.<sup>61</sup> The fraud action seeking to rescind a contract for fraudulent inducement is an exception since no damages are sought and it is thus not an action on a debt.<sup>62</sup> Nevertheless, the court found that this action is governed by the four-year "residual" limitations provision.<sup>63</sup>

---

55. See *Gordon v. Rhodes & Daniel*, 102 Tex. 300, 116 S.W. 40, 42 (1909); *Blondeau v. Summer*, 139 S.W. 2d 223, 225 (Tex. Civ. App.—Galveston 1940, writ ref'd).

56. TEX. REV. CIV. STAT. art. 5527 (1925) (four-year statute); TEX. REV. CIV. STAT. art. 5526 (1925) (two-year statute).

57. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (Vernon 1986). Section 16.004 provides in part:

Four-Year Limitations Period

(a) A person must bring suit on the following actions not later than four years after the day the cause of action accrues:

- (1) specific performance of a contract for the conveyance of real property;
- (2) penalty or damages on the penal clause of a bond to convey real property; or
- (3) debt.

TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a) (Vernon 1986).

58. 34 Tex. Sup. Ct. J. at 133.

59. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1986) provides:

Two-Year Limitations Period

(a) A person must bring suit for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues.

(b) A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person

TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a), (b) (Vernon 1986).

60. 34 Tex. Sup. Ct. J. at 134-36.

61. *Id.* at 135-36.

62. *Id.* at 137.

63. *Id.* The general limitations or residual provision states that for all actions for which there is no express limitations period, the statute of limitations is four years. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 1986).



### B. *Duty of Good Faith and Fair Dealing*

In *Viles v. Security National Insurance Co.*<sup>64</sup> the Viles claimed under their homeowners insurance policy for damages to their home's foundation caused by a shower pan leak. Although they gave their insurance agent prompt notice of their loss, they failed to file a sworn proof of loss within the 91-day period provided by the insurance policy. Within the 91-day period, however, the insurance company denied the Viles' claim on the ground that the foundation damage was due to a leak which predated the inception of the policy.<sup>65</sup> The Viles then sued the insurance company for breach of contract and breach of the duty of good faith and fair dealing and secured a favorable judgment based upon the latter theory. The court of appeals reversed the district court's judgment holding that the Viles' failure to obtain a jury finding that their proof of loss had been timely filed, or its filing waived, disallowed any recovery for breach of the duty of good faith and fair dealing.<sup>66</sup> The appellate court reasoned that, absent a finding of compliance with the policy, the insurance company had a reasonable basis for denial of the claim.<sup>67</sup>

The Texas Supreme Court reversed the judgment of the court of appeals.<sup>68</sup> The court held that an insured's failure to file a proof of loss within the time period prescribed by the insurance policy did not automatically bar an action for breach of the duty of good faith and fair dealing.<sup>69</sup> The court reasoned that an insurer's breach of its duty to act in good faith and to deal fairly with its insured gives rise to a cause of action in tort which is separate from the contract action for breach of the insurance policy.<sup>70</sup> Accordingly, compliance with the insurance contract is not an element of the tort cause of action for breach of the duty of good faith and fair dealing.<sup>71</sup> The court noted, however, that compliance with the contract conditions may have evidentiary relevance to the tort action since the basis of an action for breach of the duty of good faith and fair dealing is the absence of a reasonable basis for the denial of a claim; in some cases failure to comply with the policy may establish a reasonable basis for claim denial.<sup>72</sup>

The Texas Supreme Court also held that whether a reasonable basis for denial of a claim exists is to be judged from the facts available to the insurer at the time of claim denial.<sup>73</sup> This holding is significant. Under this analysis, if an insurance company denies a claim without a reasonable basis for

---

64. 788 S.W. 2d 566 (Tex. 1990).

65. There were actually several policies issued by three insurance companies involved in the case. For convenience, all of the companies will be collectively referred to in the singular.

66. 788 S.W.2d at 566.

67. *Id.* at 567.

68. *Id.* at 568.

69. *Id.* at 567.

70. *Id.*

71. *Id.*

72. *Id.*

73. 788 S.W.2d at 567. The court held that since the insurance company denied the Viles' claim prior to the expiration of the 91-day period, the failure to file the proof of loss could not have been a reasonable basis for the denial. *Id.* at 568.

doing so, then it has breached its duty of good faith even though it later recognizes or discovers a bona fide basis for denying the claim.<sup>74</sup> The court reasoned that this policy would promote the thorough investigation of claims prior to any denial.<sup>75</sup>

In a concurring opinion, four justices agreed that the insurance company's denial within the 91-day period established waiver of the proof of loss requirement as a matter of law; accordingly, the failure to obtain a jury finding on this issue was not fatal to the tort cause of action.<sup>76</sup> The concurring justices disagreed, however, with the majority's holding that the tort claim for breach of the duty of good faith and fair dealing was always separate from the contract claim for breach of the policy of insurance.<sup>77</sup> The concurring opinion stated that it was unnecessary to decide that issue but gave implicit support for the view that a breach of contract was an element of the tort action for breach of the duty of good faith and fair dealing.<sup>78</sup> The concurring justices also disagreed with the majority's view that the reasonableness of the claim denial must always be judged by the facts before the insurer at the time of the denial.<sup>79</sup> In the concurring justices' view, a reasonable basis may exist for the denial of a claim even though the grounds actually relied upon by the company were invalid.<sup>80</sup>

*Murray v. San Jacinto Agency, Inc.*<sup>81</sup> involved a claim by Debra Murray on a medical insurance policy provided by her husband's employer. Murray had been covered as a dependent, but after she initiated divorce proceedings her husband requested the administrator, San Jacinto Agency (SJA), to drop her from the policy. Due to that request, on September 5, 1984 the administrator refused to verify coverage for medical treatment sought by Murray. SJA reversed its position on March 15, 1985, admitting that its denial of coverage had been unwarranted. Murray filed suit against SJA on March 27, 1986, but service of citation was not effected until January 4, 1987. The trial court granted summary judgment in favor of SJA on the ground that limitations had run.<sup>82</sup> The court of appeals affirmed, holding that the two-year limitations period applied and that Murray's suit did not toll limita-

---

74. See *Viles*, 788 S.W. 2d at 569 (Hecht, J., concurring).

75. *Id.* at 568. The court's opinion rejected "permitting the insurer to justify on any basis, no matter how technical and as late as trial, its failure to make a thorough investigation prior to denial of a claim." *Id.*

76. *Id.*

77. *Id.* at 569.

78. *Id.* The concurring justices cited Justice Gonzalez's concurring opinion in *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W. 2d 165, 168 (Tex. 1987), wherein it was suggested that breach of contract was an element of the good faith tort action.

79. 788 S.W. 2d at 569.

80. The concurring opinion considered the majority's holding to be in conflict with *Aranda v. Insurance Co. of N. Am.*, 748 S.W. 2d 210 (Tex. 1988), wherein the Texas Supreme Court opined that the existence of a reasonable basis for claim denial required "an objective determination of whether a reasonable insurer under similar circumstances would have delayed or denied the claimant's benefits." *Id.* at 213. The majority's opinion, however, is not inconsistent with *Aranda* but merely requires that the hypothetical actions of the reasonable insurer be judged in light of the facts known at the time of denial.

81. 33 Tex. Sup. Ct. J. 404 (April 18, 1990).

82. *Id.* at 405.

tions, because she had not exercised due diligence in effecting service.<sup>83</sup>

The Texas Supreme Court reversed the judgment of the court of appeals and, in the course of its opinion modified the limitations rules announced in *Arnold v. National County Mutual Fire Insurance Co.*<sup>84</sup> for actions involving good faith and fair dealing claims.<sup>85</sup> In *Arnold*, the Texas Supreme Court held that the two-year limitations period did not begin to run "until the underlying insurance contract claims are finally resolved."<sup>86</sup> Murray argued that, under *Arnold*, limitations on her good faith and fair dealing claim did not start until SJA resolved the claim by acknowledging its mistake on March 15, 1985 which occurred within two years of the date citation was served. This argument failed when the court replaced the *Arnold* limitations rule with a new rule: limitations for a good faith and fair dealing claim commences on the date that the claim is denied.<sup>87</sup> The court reasoned that this new formulation brought *Arnold* claims in line with the general rule that limitations commences when facts exist which authorize a claimant to seek judicial relief.<sup>88</sup>

Although Murray filed suit within two years of the date SJA denied coverage, she did not complete service of citation for another ten months. The court remanded the case to the trial court to give Murray an opportunity to prove diligence in attempting service.<sup>89</sup> Four justices dissented, arguing that the majority had not offered sufficient justification for overturning such recent precedent as *Arnold*.<sup>90</sup> In the dissenters' view, the new limitations rule would force plaintiffs to prematurely file good faith and fair dealing claims to toll limitations.<sup>91</sup>

Perhaps more intriguing than the debate over the commencement of the limitations period in good faith and fair dealing claims is the question of whether the court's choice of limitations statutes was correct. In *Murray* the Texas Supreme Court held, without discussion, that the two-year limitations period found in section 16.003 (a) of the Texas Civil Practices & Remedies Code controlled.<sup>92</sup> This conclusion must be reexamined in light of the

---

83. *Id.* at 407.

84. 725 S.W. 2d 165 (Tex. 1987).

85. 33 Tex. Sup. Ct. J. at 405-06.

86. 725 S.W. 2d at 168.

87. 33 Tex. Sup. Ct. J. at 406. The court noted, however, that when there is no outright denial of the claim, the date limitations commences becomes a question of fact. The court stated, "clearly, though, if an insurance company strings an insured along without denying or paying a claim, limitations will be tolled." *Id.*

88. *Id.*; see *Robinson v. Weaver*, 550 S.W. 2d 18, 19 (Tex. 1977).

89. 33 Tex. Sup. Ct. J. at 407.

90. *Id.* at 407-08. The dissent also pointed out that the court had previously recognized exceptions to the general limitations rule embraced by the majority; in the dissent's view, an exception was warranted in good faith and fair dealing cases as well.

91. *Id.* at 408. This problem may be mitigated somewhat by § 16.068 of the Texas Civil Practices and Remedies Code which tolls limitations as of the filing of the suit for any new cause of action later added to the suit, provided it arises out of the same transaction or occurrence. TEX. CIV. PRAC. & REM. CODE ANN. § 16.068 (Vernon 1986).

92. 33 Tex. Sup. Ct. J. at 406. Section 16.003 (a) provides:

A person must bring suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal

court's holding in *Williams v. Khalaf*<sup>93</sup> that an action for fraud is considered, for limitations purposes, as an action for debt governed by the four-year limitations period.<sup>94</sup> It would certainly seem that a claim for damages resulting from a failure to pay insurance proceeds, when there is no reasonable basis for denial, has the characteristics of an action for debt.<sup>95</sup> Moreover, since nothing in the two-year limitations provision relates to an action for good faith and fair dealing,<sup>96</sup> the court apparently selected the wrong limitations provision. The court's analysis in *Williams* suggests that a good faith and fair dealing action should be governed by the four-year limitations period.<sup>97</sup> This approach would have the added benefit of providing a uniform limitations time frame for actions on the insurance contract and tort actions under *Arnold*.

### C. Tortious Interference

In *Juliette Fowler Homes, Inc. v. Welch Associates, Inc.*<sup>98</sup> the Texas Supreme Court reviewed a number of tortious interference claims stemming from a covenant not to compete.<sup>99</sup> Fowler and Welch entered into a contract by which Welch agreed to conduct a fund-raising campaign for the benefit of Fowler. Welch then contracted John W. Butler Companies, Inc. ("Butler") to help execute the campaign. The contract between Fowler and Welch contained a notice provision for termination in the event either party became dissatisfied with the other's performance.

Additionally, the contract between Welch and Butler contained a covenant not to compete which prohibited Butler from entering into any form of contract for services with any of Welch's clients for two years following the conclusion of the Welch-Butler contract. Fowler eventually became dissatisfied with Welch's performance and terminated its contract. Similarly, Butler and Welch became dissatisfied with one another, and Butler terminated its contract. Subsequently, the president<sup>100</sup> of Butler Companies, John Butler, was hired by an affiliate of Fowler's and took over supervising the Fowler fund-raising campaign. Welch sued Fowler for interfering with the Welch-Butler contract and sued Butler for interfering with the Fowler-Welch contract.

Addressing the Welch-Butler contract, the court first determined that the

---

property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues.

TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon 1986).

93. 34 Tex. Sup. Ct. J. 133 (November 28, 1990).

94. *Id.* at 134; see *supra* notes 51-63.

95. See *Williams*, 34 Tex. Sup. Ct. J. at 136. In *Williams* the court explained that the cause of action for fraud developed as a quasi-contractual cause of action—a hybrid of the original actions for debt and account. *Id.* at 135-36.

96. *Autohaus, Inc. v. Aguilar*, 794 S.W.2d 459, 464-65 (Tex. App.—Dallas 1990, no writ).

97. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (Vernon 1986).

98. 793 S.W. 2d 660 (Tex. 1990).

99. *Id.*

100. John Butler was the president, and apparently also the sole employee of Butler Companies.

noncompetition prohibition was absolute, unequivocal and unreasonable<sup>101</sup> and held that the clause as written constituted an unreasonable restraint on trade and was unenforceable on grounds of public policy.<sup>102</sup> The court noted that mere unenforceability of a contract is not a defense to an action for tortious interference.<sup>103</sup> Covenants not to compete, however, which are unreasonable restraints on trade and unenforceable on grounds of public policy cannot form the basis of an action for tortious interference.<sup>104</sup> Accordingly, the court held that Fowler had a valid defense against Welch's tortious interference claim.<sup>105</sup>

The Texas Supreme Court also ruled upon Welch's claim that Butler tortiously interfered with the Fowler-Welch contract. The court held that the mere fact that the contract was terminable upon notice would not provide a defense to the action.<sup>106</sup> The court agreed with Welch that since Texas law protects both existing and prospective contracts from interference,<sup>107</sup> an existing contract which is terminable upon notice should be given similar protection.<sup>108</sup> The court reasoned that it would be inconsistent to leave contracts that are terminable upon notice unprotected while protecting relations that are more or less complete or definitive.<sup>109</sup> Ultimately, however, the court concluded that there was no evidence to support the jury's finding that Butler had interfered with the Fowler-Welch contract.<sup>110</sup> The court noted that merely inducing a party to exercise a right to terminate contractual relations after giving the required notice does not necessarily constitute tortious interference under Texas law.<sup>111</sup>

---

101. *Id.* at 663; see *De Santis v. Wackenhut Corp.*, 793 S.W. 2d 670, 681-83 (Tex. 1990) (criteria for enforceable covenants not to compete).

102. 793 S.W. 2d at 663.

103. *Id.* at 664 (citing *Clements v. Withers*, 437 S.W. 2d 818, 821 (Tex. 1969)). In *Clements* the contract at issue was unenforceable under the statute of frauds, but it was not void or illegal or against public policy. Even though the contract was unenforceable, it could serve as the basis for a tortious interference claim. *Id.*

104. 793 S.W. 2d at 665.

105. *Id.* at 663.

106. *Id.* at 666.

107. See *Sterner v. Marathon Oil Co.*, 767 S.W. 2d 686, 689 (Tex. 1989).

108. 793 S.W. 2d at 665.

109. *Id.* at 666; see *Champion v. Wright*, 740 S.W. 2d 848, 854 (Tex. App.—San Antonio 1987, writ denied). Complete or definitive relations include contracts with fixed terms, terminable-at-will contracts, and prospective business relations.

110. 793 S.W. 2d at 666. The court stated, "The decision to hire John Butler . . . was not dependent upon the termination of the Fowler-Welch contract and the termination of the Fowler-Welch contract was not dependent upon John Butler's hiring." *Id.*

111. *Id.* at 667; see *Kingsbery v. Phillips Petroleum Co.*, 315 S.W. 2d 561, 576 (Tex. Civ. App.—Austin 1958, writ ref'd n.r.e.).