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DECEPTIVE TRADE PRACTICES AND COMMERCIAL TORTS

Robert M. Hoffman *
Aaron L. Mitchell **

I. DECEPTIVE TRADE PRACTICES

WHILE the legislature did not amend the Texas Deceptive Trade Practices - Consumer Protection Act (DTPA or Act)[1] during the October 1, 1990 through October 31, 1991 Survey period, courts throughout Texas remained busy modifying their perception of the Act. If a trend could be pinpointed, it would appear that a number of Texas courts are endeavoring to limit the application of the Act wherever possible. While Texas courts in the mid-to late 1980s could be characterized as applying a liberal gloss to the Act, the first year of this decade may be distinguished by a more conservative approach. This apparent conservatism is best illustrated in the cases involving loan transactions and in those cases involving the implied warranty to perform services in a good and workmanlike manner. Another good illustration of a more conservative judicial approach comes from the Corpus Christi court of appeals and its development of a distinction between breach of contract and DTPA violations.

A. Breach Of Contract Distinguished

In *Quitta v. Fossati*,[2] a well reasoned opinion, the Corpus Christi court of appeals discussed the appropriate distinction between breach of contract and DTPA causes of action. The *Quitta* case dealt with a dispute between landlord and tenant, and more specifically, whether one of the representatives of the landlord orally modified the lease agreement before his death. The appellate court considered whether the tenant's counterclaim was a proper DTPA cause of action. The court noted that a mere breach of contract claim is not actionable under the DTPA.[3] Therefore, the court concluded, it is necessary "to distinguish a mere breach of contract claim from a breach involving something more in the way of fraud or misrepresentation sufficient to invoke the DTPA."[4] After surveying Texas case law on the subject, the

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1. TEX. BUS. & COM. CODE ANN. § 17.41-.63 (Vernon Supp. 1991).
2. 808 S.W.2d 636 (Tex. App. - Corpus Christi 1991, writ denied).
3. *Id.* at 644.
4. *Id.*

appellate court concluded that a distinction between DTPA and breach of contract claims should be made whenever an alternative interpretation of a contract is asserted and the dispute arises out of the performance of the contract according to one party's contract interpretation.[5] In such a case, the legal rights of the parties are governed by traditional contract principles rather than the DTPA.[6] In *Quitta* the landlord and tenant presented alternative interpretations of the lease agreement, one based on an oral modification of the lease, the other based on the written lease agreement itself. Both parties performed according to their interpretation of the lease agreement. The court emphasized that there was no evidence of overreaching, victimization, unconscionable acts, or false, misleading or deceptive acts. Thus, the case involved traditional contract notions only, thereby precluding a claim by the tenant under the DTPA.

Closely related to the issue of contract breach versus DTPA violation is the question of whether a party qualifies as a consumer under the Act. Both issues require analysis of the exact nature of the claimant's complaint. In order to have standing to bring a DTPA action, the claimant must prove consumer status.[7]

B. Consumer Status

In *Fireman's Fund Insurance Co. v. Clint W. Murchison, III*[8] a surety sought to recover from a number of trusts under an indemnity agreement, for claims paid and to be incurred on construction contract bonds and supersedeas bonds. One of the defenses raised by the defendants dealt with whether the surety acted unconscionably in issuing the surety bonds. The defendants alleged that the bonds were unconscionable because they created considerable financial exposure for the trusts but provided no benefit since the trusts did not have an ownership interest in the entities for which the bonds were issued. The Fifth Circuit noted that before the defendants could raise the defense of unconscionability under DTPA section 17.45(5)(B),[9] they must satisfy the burden of proof on all elements of their DTPA affirmative defense, including proof that they were consumers.[10] The question raised was whether the DTPA claimants were excluded from attaining consumer status because of the business consumer exception, which provides that entities with assets of $25 million or more (or owned or controlled by a corporation or entity with assets of $25 million or more) cannot qualify as consumers under the DTPA.[11] According to the Fifth Circuit, the party

5. *Id.*
6. *Id.*
7. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987). The exception to this general rule arises when a claimant is eligible to sue under article 21.21 of the Texas Insurance Code. Under such circumstances, the claimant's standing under the Texas Insurance Code provides standing to seek damages under the DTPA, even though the claimant does not qualify as a DTPA consumer. TEX. BUS. & COM. CODE ANN. § 17.50(a)(4) (Vernon 1987).
8. 937 F.2d 204 (5th Cir. 1991) (applying Texas law).
9. TEX. BUS. & COM. CODE § 17.45(5)(B) (Vernon 1987).
10. 937 F.2d at 209.
11. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987).

claiming to be a consumer has the burden of proving that it does not have assets of $25 million or more and is not owned or controlled by a corporation or entity with assets of $25 million or more.[12]

In contrast to the Fifth Circuit's ruling, the Corpus Christi court of appeals held that it is the party opposing the DTPA claim which must affirmatively plead and *prove* that the DTPA claimant has $25 million or more in assets or is controlled by a corporation or entity with assets of $25 million or more. In *Compusolve, Inc. v. Urban Engineering, Inc.*[13] the court held that the defendant, and not the party claiming to be a DTPA consumer, has the burden to plead and prove that the party claiming consumer status under the DTPA was a business consumer with assets of $25 million or more.[14] By pleading a general denial, and therefore not raising the affirmative defense at the trial level, the defendant waived any defense regarding the plaintiff's consumer status.[15]

Thus, there appears to be a conflict between the Fifth Circuit and Corpus Christi court of appeals as to who has the burden of proving that the $25 million business consumer exception applies. This issue, however, was resolved by the Texas supreme court (shortly before the survey period commenced) in *Eckman v. Centennial Savings Bank.*[16] In *Eckman* the supreme court made it perfectly clear that the party opposing the DTPA claimant has the burden both to plead affirmatively and to prove that the $25 million exception applies to bar the DTPA claimant from consumer status.[17]

In *Schmueser v. Burkburnett Bank*[18] which addressed the issue of whether a borrower qualifies as a consumer, the plaintiffs agreed to sell their home to buyers, who executed a monthly installment note payable to the plaintiffs and furnished a one year $20,000 irrevocable letter of credit as security. The letter of credit was issued by the defendant Burkburnett Bank. Upon the buyers' failure to pay, the plaintiff made demand upon the defendant bank for payment under the letter of credit. When the bank refused the demand, the plaintiffs brought a declaratory judgment action in state court, which resulted in judgment in their favor and payment by the bank of all amounts due on the letter of credit. The plaintiffs then sued the bank in federal court, asserting claims under the DTPA. The lower federal court concluded that the plaintiffs did not qualify as "consumers" within the meaning of the DTPA and declined to enter judgment on the jury's award of damages under the DTPA claim. The Fifth Circuit agreed and repeated the well-settled rule that "the DTPA's use of the word 'services'[19] does not include the extension of credit or the borrowing of money."[20] Instead, services

12. 937 F.2d at 209.
13. 799 S.W.2d 374 (Tex. App. — Corpus Christi 1990, no writ).
14. *Id.* at 377.
15. *Id.*
16. 784 S.W.2d 672, 674-75 (Tex. 1990).
17. 784 S.W.2d at 675.
18. 937 F.2d 1025 (5th Cir. 1991) (applying Texas law).
19. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987).
20. 937 F.2d at 1028-29.

are defined in the DTPA as "work, labor, or service purchased or leased for use."[21] The Fifth Circuit noted that, while a purchase of banking services such as financial counseling in connection with a loan may provide a basis for DTPA liability, a gratuitous act is not a purchase of services within the meaning of the DTPA.[22] When the bank urged the home buyer to pay on the note and lent money to the buyer so that she could pay the note, the bank's actions were, at best, gratuitous or merely self-serving, and undertaken only in an attempt to avoid its own liability on the letter of credit. Such actions did not constitute services as contemplated by the DTPA because they did not include an activity by the bank on behalf of or for the benefit of the plaintiff seller. Therefore, the plaintiffs were not deemed to be consumers as defined by the DTPA.[23] The Fifth Circuit could have added that, when viewing the entire transaction as a whole, the plaintiff's role was that of seller, not purchaser. Since the plaintiff was a seller, the plaintiff could not qualify as a consumer seeking to acquire goods or services by purchase or lease.

In *Central Texas Hardware, Inc. v. First City, Texas - Bryan, N.A.* the defendant bank was awarded a directed verdict on the ground that the plaintiffs were not consumers within the meaning of the DTPA.[24] The plaintiffs alleged that the bank orally committed to lend $100,000 to plaintiffs for the purchase of seasonal inventory goods. They alleged that the bank repeatedly delayed the loan process and misled the plaintiffs until it was too late to obtain alternate financing, thereby causing the plaintiff hardware store to close its doors. When faced with the well-settled rule that money is neither a good nor a service, and consequently, a pure loan transaction is not actionable under the DTPA, the plaintiffs alleged that the arrangement was more than a pure loan transaction. They argued that their claim fell within the ambit of other bank customer cases in which borrowers have qualified as consumers by showing that the loan proceeds were sought in order to acquire a good or service.[25] The Houston Court of Appeals distinguished the Supreme Court cases cited by the plaintiffs, noting that in those cases the good or service which was the consumer's ultimate objective formed the basis of the DTPA complaint.[26] By contrast, the plaintiffs in *Central Texas Hardware* did not allege any complaint regarding the inventory items which they would have purchased with the loan proceeds. To the contrary, the plaintiff's complaint related to the processing of the loan application itself, and thus, not services under the DTPA.[27] The *Central Texas Hardware* court also held that the mere fact that a directed verdict was awarded in favor of the defendant did not require the automatic imposition of attor-

21. TEX. BUS. & COM. CODE ANN. § 17.45(2) (Vernon 1987).
22. 937 F.2d at 1029.
23. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987).
24. 810 S.W.2d 234 (Tex. App. — Houston [14th Dist.] 1991, writ requested).
25. Knight v. Int'l Harvester Credit Corp., 627 S.W.2d 382 (Tex. 1982); Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705 (Tex. 1983).
26. 810 S.W.2d at 236-37.
27. *Accord* First Interstate Bank of Bedford v. Bland, 810 S.W.2d 277, 289 (Tex. App. — Fort Worth 1991, no writ).

neys' fees against the DTPA plaintiff under DTPA section 17.50(c).[28] The court was concerned that to hold otherwise could discourage a legitimately wronged consumer from seeking relief under the DTPA for fear of failing in court.[29] The court also referred to the fact that " '[g]roundless' under the DTPA means no basis in law or fact and not warranted by good faith argument for the extension, modification or reversal of existing law."[30] Proof of "bad faith" under the DTPA requires a showing that the DTPA claim was "motivated by a malicious or discriminatory purpose."[31] The court was unable to conclude as a matter of law that the plaintiffs lacked the belief that their rights as would-be DTPA consumers had been violated or that existing law, as modified, extended or reversed might remedy their loss. Also, no evidence existed which indicated that the plaintiffs' DTPA claim was motivated by a malicious or discriminatory purpose. Thus, the Houston court held that the trial court abused its discretion in ordering the plaintiffs to pay the defendant bank's attorneys' fees.[32]

In *Griffith v. Porter*[33] Porter purchased a commercial building from the Griffiths and executed a promissory note as payment. When Porter defaulted in making his installment payments, the parties secured a new purchaser for the property. In preparing for closing, Porter contacted the Griffiths to ascertain the promissory note "pay-off" due the Griffiths to obtain the release of their lien on the building. After closing, Porter determined that the pay-off sum resulted in an overpayment to the Griffiths, but subsequent attempts to recover the overpayment were unsuccessful. Porter brought suit under the DTPA to recover the overpayment. The Griffiths maintained that Porter was not a consumer, because his complaint dealt with a pure loan transaction and the purchase of the building was not the basis of his claim. While this argument was persuasive in *Central Texas Hardware, Inc. v. First City, Texas - Bryan, N.A.*[34] it did not persuade the Tyler Court of Appeals. To the contrary, the Tyler court held that "a borrower can qualify as a consumer as long as his objective in the loan transaction is to acquire goods or services."[35] The fact that Porter sought to purchase a building made him a consumer.[36] The objective of purchasing the building was held to be inextricably intertwined with the financing arrangements such that the court considered Porter a consumer as to all aspects of the transaction, including the financing.[37] This conclusion, however, appears flawed in light of the critical test set forth in *Cameron v.*

28. 810 S.W.2d at 237.
29. *Id.*
30. *Id., citing* Donwerth v. Preston II Chrysler-Dodge, Inc., 775 S.W.2d 634, 637 (Tex. 1989), and TEX. R. CIV. P. 13.
31. 810 S.W.2d at 237, citing Knebel v. Port Enterprises, Inc., 760 S.W.2d 829, 831 (Tex. App. — Corpus Christi 1988, writ denied).
32. 810 S.W.2d at 238.
33. 817 S.W.2d 131 (Tex. App. — Tyler 1991, no writ).
34. 810 S.W.2d 234, 236-37 (Tex. App. — Houston [14th Dist.] 1991, writ requested).
35. 817 S.W.2d at 135.
36. *Id.*
37. *Id.*

Terrell & Garrett, Inc.[38] The Texas supreme court made it clear in *Cameron* that the plaintiff's complaint must involve the item sought to be purchased or leased; otherwise, the plaintiff cannot claim to be a consumer.[39] In *Griffith* the item complained of was the loan transaction, not the property purchased. Therefore, under the supreme court's test in *Cameron*, Porter should not have qualified as a consumer. Nevertheless, the Tyler court of appeals held that Porter was a DTPA consumer. In considering whether Porter was treated unconscionably, the court relied on the fact that the Griffiths retained the proceeds of the overpayment unreasonably long after demand had been made for its return.[40]

The issue of whether loan transactions are actionable under the DTPA was also considered in *Herndon v. First Nat'l Bank of Tulia*.[41] There the borrower alleged that he purchased financial services from the bank in connection with the financing of the borrower's farming operations. The financial services included lending money, as well as financial advice on where and when to obtain financing and how to structure various financial arrangements with regard to farming operations. The bank maintained that the borrower was not a consumer because bank activities such as lending money and incidental financial counseling do not qualify as goods or services under DTPA section 17.45(4).[42] In holding in favor of the borrower, the Amarillo court of appeals explained that the Texas supreme court in *Riverside National Bank v. Lewis*[43] did not hold that bank services such as financial counseling fail to qualify a claimant as a consumer under the DTPA.[44] Instead, the borrower's sole complaint in *Riverside* concerned the bank's failure to make the loan.[45] The borrower did not complain concerning the quality of those activities which were collateral to the loan transaction.[46] Absent a complaint concerning the collateral activities, the supreme court in *Riverside* held that the borrower "did not seek either 'goods' or 'services' as defined under the DTPA."[47] The court in *Herndon* analyzed the borrower's pleadings pursuant to the two-part test set forth in *Cameron v. Terrell & Garrett, Inc.*[48] In *Cameron* the Texas supreme court held that in order for a person to qualify as a consumer under the DTPA, (i) "the person must have sought or acquired goods or services by purchase or lease"[49] and (ii) "the goods or services purchased or leased must form the basis of the complaint."[50] In reliance on this rule, the *Herndon* court held that collateral services such as obtaining financial advice on financing and how to structure

38. 618 S.W.2d 535 (Tex. 1981).
39. *Id.* at 539.
40. 817 S.W.2d at 137.
41. 802 S.W.2d 396 (Tex. App. — Amarillo 1991, writ denied).
42. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987).
43. 603 S.W.2d 169 (Tex. 1980).
44. 802 S.W.2d at 398.
45. *Id.*, quoting Riverside National Bank v. Lewis, 603 S.W.2d at 175.
46. *Id.*
47. *Id.*
48. 618 S.W.2d 535 (Tex. 1981).
49. *Id.* at 539.
50. *Id.*

financial arrangements would suffice for consumer status, if such collateral services formed the basis of the borrower's claim.[51]

In *Security Bank v. Dalton*[52] the plaintiffs were long-time customers of the bank. They both borrowed money from the bank and maintained various checking accounts there. The loans were obtained over time in order to construct a funeral home, purchase a hearse, purchase equipment in connection with a crematory and acquire flower shop fixtures, improvements and inventory. The record, however, did not indicate that these purchases formed the basis of the plaintiffs' complaint. To the contrary, the plaintiffs complained only of the manner in which their banking transactions were handled. This point, however, was apparently lost on the Fort Worth court of appeals, which held that the fact that loans were taken in connection with the purchase of goods automatically qualified the plaintiffs as consumers.[53] This holding by the court is inconsistent with the test set forth by the Texas supreme court in *Cameron v. Terrell & Garrett, Inc.*[54] The Fort Worth court of appeals also noted, but clearly as a secondary position, that the various checking accounts maintained by the bank constituted the providing of DTPA services to bank customers.[55] This fall back proposition does have authoritative support,[56] but should have been the sole basis for the court to find consumer status under the DTPA.

In *Kerrville HRH, Inc. v. City of Kerrville*[57] the San Antonio court of appeals struggled with the issue of whether a city is an appropriate defendant to a DTPA action. The court noted that under DTPA section 17.50(a)(1)[58] a DTPA action can only be brought against a person for the laundry list of deceptive acts or practices specifically enumerated in DTPA section 17.46(b).[59] A person is defined as "an individual, partnership, corporation, association, *or other group*, however organized."[60] The plaintiff urged that the term other group includes cities, arguing that if the legislature had intended to exclude cities, it could have easily and specifically done so. For example, the DTPA definition of business consumer specifically excludes "this state or a subdivision or agency of this state."[61]

The San Antonio court of appeals indicated that the issue was not easy to resolve. On the one hand, the DTPA is to be liberally construed to promote its underlying purposes, which are to protect consumers against false, misleading and deceptive practices.[62] Further, the Texas supreme court has de-

51. 802 S.W.2d at 399.
52. 803 S.W.2d 443 (Tex. App. — Ft. Worth 1991, writ denied).
53. *Id.* at 453.
54. 618 S.W.2d 535, 539 (Tex. 1981).
55. 803 S.W.2d at 453.
56. La Sara Grain v. First Nat'l Bank of Mercedes, 673 S.W.2d 558 (Tex. 1984), appeal after remand, 676 S.W.2d 183 (Tex. App. — Corpus Christi 1984, no writ).
57. 803 S.W.2d 377 (Tex. App. — San Antonio 1990, writ denied).
58. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (Vernon 1987).
59. 803 S.W.2d at 381.
60. TEX. BUS. & COM. CODE ANN. § 17.45(3) (Vernon 1987).
61. TEX. BUS. & COM. CODE ANN. § 17.45(10) (Vernon 1987) (emphasis added).
62. TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 1987).

clared that the realm of possible defendants under the DTPA is limited only by the exemptions provided in DTPA section 17.49.[63] On the other hand, "for the legislature to waive a city's sovereign immunity it must do so by clear and unambiguous language."[64]

The court then turned its attention to the express language of the DTPA to determine whether there was any clear and unambiguous waiver of sovereign immunity. The phrase "this state, or a subdivision or agency of this state" is included in the definition of consumer[65] but does not appear in the definition of person.[66] By including the state and a subdivision or agency of the state (which obviously includes cities) within the definition of consumer the architects of the DTPA obviously intended for cities to be able to bring actions as consumers under the DTPA. However, the use of the phrase other group in the definition of the term person does not evidence a clear and unambiguous legislative intent to include cities within the range of possible DTPA defendants, especially given the plain inclusion of cities within the definition of consumer.[67] Accordingly, the San Antonio court of appeals concluded that the legislature intended to include cities within the range of possible plaintiffs under the Act, but not as possible defendants.[68]

While the court raised the point that the DTPA cause of action for breach of warranty is not limited to persons[69] as is an action for laundry list violations under DTPA section 17.50(a)(1),[70] the court was unwilling to view this anomaly as "a clear and unambiguous waiver of governmental immunity."[71] The court concluded that it would be incongruous for the legislature to retain sovereign immunity for all DTPA causes of action except breach of warranty in such an equivocal manner.[72] Thus, the court held that a DTPA cause of action cannot be brought against a city.

In *Watson v. Allstate Insurance Co.*[73] an action by a third party claimant to recover insurance proceeds, the Fort Worth court of appeals concluded that a third-party claimant has not sought or purchased goods or services, and therefore, cannot be considered to be a consumer under the DTPA.[74] There the plaintiff was involved in an automobile collision with an insured under a liability policy issued by Allstate Insurance Company. The plaintiff sued Allstate without having acquired a judgment against the insured or otherwise establishing that the insured was legally responsible for the collision. The plaintiff argued on appeal that the statutory mandatory automo-

63. Flenniken v. Longview Bank and Trust Co., 661 S.W.2d 705, 706 (Tex. 1983).
64. 803 S.W.2d at 382, citing Duhart v. State, 610 S.W.2d 740, 742 (Tex. 1980); City of Corpus Christi v. Acme Mechanical Contractors, Inc., 736 S.W.2d 894, 906 (Tex. App. — Corpus Christi 1987, writ denied).
65. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987).
66. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (Vernon 1987).
67. 803 S.W.2d at 382.
68. *Id.*
69. TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon 1987).
70. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (Vernon 1987).
71. 803 S.W.2d at 382.
72. *Id.*
73. No. 02-90-170-CV, 1991 WL 213138 (Tex. App. — Ft. Worth, Oct. 23, 1991, n.w.h.).
74. *Id.* at *1.

bile liability insurance scheme set forth in the Texas Motor Vehicle Safety Responsibility Act placed the plaintiff in the position of attempting to acquire the insurance policy furnished by Allstate to its insured. The court of appeals disagreed, firmly holding that an unknown intended beneficiary has not sought or acquired goods or services sufficient to become a consumer under the DTPA.[75]

As a result the court concluded that the claimant could not bring a cause of action under article 21.21 of the Texas Insurance Code[76] in the capacity of a consumer under the DTPA.[77] The Fort Worth court of appeals, however, held that the claimant did have standing to bring an action under article 21.21(16) of the Texas Insurance Code,[78] because the Insurance Code does not require that the claimant be a consumer.[79] What the court failed to add is that the plaintiff's standing as a claimant under article 21.21 of the Texas Insurance Code provides standing to seek damages under DTPA section 17.50(a)(4),[80] even though the plaintiff could not be considered a consumer. While the court of appeals reversed the summary judgment against the plaintiff as it related to article 21.21 of the Texas Insurance Code, the court should have also reversed the summary judgment entered against the plaintiff under the DTPA.

Of course, attaining consumer status is merely the first step. The consumer must also properly plead and prove damages.

C. Damages

In *Odom v. Meraz*[81] the El Paso court of appeals considered whether pleading rules applicable to common law damages also apply to damages sought pursuant to the DTPA. The court noted that a DTPA consumer may recover damages for direct economic loss and consequential economic loss. Consequential damages, however, are special damages that must be pled and proven separately, and which necessitate submission of separate jury questions.[82] The El Paso court held that failure to separately submit consequential damage questions to the jury, in favor of a global question as to actual damages, is fatal to recovery of consequential damages under the DTPA.[83] The plaintiffs were also barred from recovering direct actual damages because they failed to offer any evidence as to the benefit of the bargain or out-of-pocket damages sustained by them. Thus, the court of appeals reversed the judgment of the trial court and rendered judgment that the DTPA consumers take nothing against the defendant.

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75. *Id.* at *3.
76. TEX. INS. CODE ANN. art. 21.21 (Vernon Supp. 1991).
77. *Id.*
78. TEX. INS. CODE ANN. art. 21.21(16) (Vernon Supp. 1991).
79. *Id.*
80. TEX. BUS. & COM. CODE ANN. § 17.50(a)(4).
81. 810 S.W.2d 241 (Tex. App. — El Paso 1991, writ requested).
82. *Id.* at 244.
83. *Id.*

In *Integrated Title Data Systems v. Dulaney*[84] the consumer purchased a package of goods and services for the establishment of a computerized title abstract plant. The jury found that the seller of the computer hardware and software breached its warranty and made misrepresentations, which were actionable under the DTPA. The El Paso court of appeals noted that typically in a DTPA action predicated upon breach of warranty, the measure of damages is the difference between the market value as promised and the market value of what is actually received.[85] Proof of the agreed contract price was held to be sufficient evidence of the market value as promised by the seller.[86] Even though the computer system was approximately 93% accurate, the El Paso court affirmed the jury finding that the system had no market value because the unpredictability and hidden nature of the malfunctions undermined the system so as to render the resulting product unmarketable to the public. Therefore, the actual damages were found to be the total cost of the system to the consumer, together with consequential actual damages including the amount paid on an incidental contract, lost personnel time and contract labor expense incurred in attempting to utilize the seller's system.

In *Henry S. Miller Co. v. Hamilton* the purchasers of a home obtained a default judgment against the broker for failing to advise the purchasers that the home sustained flooding on more than one occasion.[87] The purchasers were awarded $50,000 as actual damages, together with $100,000 additional damages because of the broker's knowing conduct. The broker admitted on appeal that, by failing to respond to the lawsuit, it could not contest whether its conduct was knowing. However, in disputing the additional damage award of $100,000, the broker argued that there was no evidence in the record to prove the *extent* of its knowledge. Therefore, the broker asserted that the evidence did not warrant the imposition of additional damages. The Houston court of appeals (1st District) agreed, noting that the amount of additional damages awarded after finding a violation of the DTPA is within the discretion of the trier of fact.[88] As such, additional damages are unliquidated.[89] If damages are unliquidated, "the plaintiff is required to prove the connection between the liability and the injury, despite the defendant's default."[90] As a consequence, even though the broker admitted, by default, to have knowingly engaged in conduct violative of the DTPA, the consumers were still required to show the extent of the broker's knowledge of flooding sufficient to warrant imposition of additional damages under DTPA section

84. 800 S.W.2d 336 (Tex. App. —El Paso 1990, no writ).

85. 800 S.W.2d at 339, citing Mercedes-Benz of North America, Inc. v. Dickenson, 720 S.W.2d 844, 848 (Tex. App. —Fort Worth 1986, no writ); Valley Datsun v. Martinez, 578 S.W.2d 485, 490 (Tex. Civ. App. —Corpus Christi 1979, no writ).

86. 800 S.W.2d at 340, citing Chrysler Corp. v. Schuenemann, 618 S.W.2d 799, 805 (Tex. Civ. App. —Houston [1st Dist.] 1981, writ ref'd n.r.e.).

87. 813 S.W.2d 631 (Tex. App. —Houston [1st Dist.] 1991, no writ).

88. *Id.* at 634.

89. *Id.*

90. *Id.*

17.50(b)(1).[91]

The Houston court observed that there was no evidence that the house had flooded on any occasion other than the one instance described by the broker and there was no evidence that the broker had knowledge of any other flooding.[92] Therefore, the award of unliquidated additional damages could not be affirmed, and the question of additional damages was remanded to the trial court.[93]

D. Defendant's Attorneys' Fees

In *Maronge v. Cityfed Mortgage Co.* the jury found that the defendant committed a DTPA violation, but that such violation was not a producing cause of the plaintiff's damages.[94] The jury also found that the plaintiff's DTPA cause of action was barred by the statute of limitations and that the plaintiff brought the action in bad faith. On appeal, the DTPA consumer argued that a jury finding that the defendant engaged in a false, misleading or deceptive act or practice precludes a finding of bad faith as a matter of law. The Houston court of appeals (14th District) noted that in order to recover attorneys' fees pursuant to DTPA section 17.50(c),[95] the defendant must prove that the plaintiff's suit was brought in bad faith or for purpose of harassment, and the court must conclude that the suit was groundless.[96] Given that the jury found that the DTPA action was brought in bad faith, the lower court upheld the finding, and there was no statement of facts to review, the appellate court saw nothing to disturb the lower court's findings and overruled the point of error.[97]

The DTPA consumer also argued that since her DTPA claim survived a motion for instructed verdict, the DTPA action could not be groundless as a matter of law. The Houston court rejected this argument, noting that the trial court had discretion to deny a motion for instructed verdict, submit the issues to the jury and subsequently find the suit legally groundless.[98] The court also pointed out that unless the trial judge denied the motion for instructed verdict, the defendant could not recover attorneys' fees because such fees can only be awarded if the DTPA claim goes to the jury.[99]

In *Elbaor v. Sanderson* the Fort Worth court of appeals affirmed a judgment awarding attorneys' fees to the defendant under the DTPA.[100] The Fort Worth court analyzed the evidence to determine whether there was sufficient proof of bad faith, that is, proof that the plaintiff was motivated by malicious or discriminatory purpose. The court noted many discrepancies

91. *Id.*
92. *Id.* at 635.
93. *Id.* at 636.
94. 803 S.W.2d 393 (Tex. App. —Houston [14th Dist.] 1991, no writ).
95. TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon 1987).
96. 803 S.W.2d at 395.
97. *Id.*
98. *Id.*
99. *Id.*, citing Howell v. Homecraft Land Development, 749 S.W.2d 103, 111 (Tex. App. —Dallas 1987, writ denied).
100. No. 02-90-059-CV, 1991 WL 206817 (Tex. App. —Ft. Worth, Oct. 16, 1991, n.w.h.).

between the plaintiff's pleadings and his testimony at trial. For instance, the pleadings alleged that the defendant made oral and written warranties that the well in question was already producing, yet the plaintiff admitted during cross-examination that the defendant did not make such representations. The plaintiff, however, failed to amend his pleadings prior to trial, and in fact, went to trial with an inaccurate petition. The court examined several other material discrepancies between the plaintiff's pleadings and the plaintiff's testimony, as well as discrepancies within the plaintiff's testimony itself. Based on its examination, the Fort Worth court of appeals concluded that these discrepancies, and the failure of the plaintiff to amend his pleadings before trial, were sufficient to reasonably conclude that the plaintiff's suit was filed in bad faith.[101]

E. ERISA Preemption

In *Cathey v. Metropolitan Life Insurance Co.*,[102] *Gorman v. Life Insurance Co. of North America*,[103] and *Southland Life Insurance Co. v. Estate of Small*,[104] the Texas supreme court put to rest the issue of whether the DTPA and other state law claims are preempted by virtue of the Employee Retirement Income Security Act of 1974 (ERISA).[105] In *Cathey* an employee and his wife were covered by Dow Chemical Company's group insurance plan. Mrs. Cathey was diagnosed with multiple sclerosis, necessitating home nursing care. While the nursing expenses were initially paid for under the Plan, the third-party administrator ultimately declined to continue paying for nursing care because of lack of medical necessity. The Catheys filed suit in state court, alleging misrepresentations in violation of the DTPA, as well as other state law causes of action. No ERISA causes of action were pled. The trial court rendered summary judgment in favor of the defendants, holding that the DTPA was preempted by ERISA. The Texas supreme court agreed with the lower court, holding that ERISA preempts the DTPA and other state causes of action.[106] The court concluded that Congress intended for ERISA's civil enforcement scheme to be exclusive.[107] Because the DTPA provides remedies that were not included among, and were inconsistent with, ERISA's civil enforcement provisions, the DTPA was considered to be preempted.[108]

Gorman v. Life Insurance Co. of North America and *Southland Life Insurance Co. v. Estate of Small*, decided by the Texas supreme court on the same day, also involved claims by beneficiaries against employer sponsored health insurance plans. Both cases stand for the proposition that DTPA claims are preempted by ERISA. The *Gorman* decision added that state courts and

101. 1991 WL 206817 at *3.
102. 805 S.W.2d 387 (Tex. 1991).
103. 811 S.W.2d 542 (Tex. 1991).
104. 806 S.W.2d 800 (Tex. 1991).
105. 29 U.S.C. § 1001-1461 (1988).
106. 805 S.W.2d at 390.
107. *Id.*
108. *Id.*

federal courts have concurrent jurisdiction of actions by beneficiaries (i) to recover benefits under the terms of the plan, (ii) to enforce rights under the plan or (iii) to clarify rights to future benefits.[109] Any other civil ERISA action, such as a claim for breach of fiduciary duty, is subject to the exclusive jurisdiction of federal courts.[110] The *Gorman* court concluded that if the state law cause of action falls within the scope of one of these three classes of actions which are not exclusively subject to federal court jurisdiction, preemption would be considered a choice of law defense rather than a jurisdictional defense.[111] If the state law claim asserted is not jurisdictional, the preemption defense will be considered waived unless timely asserted as an affirmative defense at the trial level.[112] As to the state law claims in *Gorman* which did not relate to matters exclusively within the jurisdiction of the federal courts, the preemption defense was regarded as having been waived for failure to assert it at the trial level.[113]

Although the *Small* opinion states on its face that it relies on *Gorman*, the court in *Small* declared that the preemption defense cannot be waived, since the defense is jurisdictional and can be raised for the first time on appeal.[114] While *Small* and *Gorman* cannot be reconciled on their face, the solution to the riddle may lie in the assumption that the ERISA claim asserted in *Small* was for breach of fiduciary duty or some other cause of action where the federal courts maintain that exclusive jurisdiction (although this is not reflected in the opinion). As noted in *Gorman*, claims which are subject to exclusive federal court jurisdiction are jurisdictional and not susceptible to being waived at trial.[115] While the opinion in *Small* does not specifically state that breach of fiduciary duty was asserted, there is no other way to reconcile *Small* and *Gorman*. The *Gorman* decision provides careful analysis of the preemption waiver issue, whereas the *Small* opinion merely offers conclusionary statements and purports to adopt *Gorman*. This provides additional support for the conclusion that the result reached in *Gorman* was the outcome the supreme court intended. Regardless, both decisions are consistent in holding that DTPA claims and other state law causes of action brought by a plan beneficiary against an employee health insurance plan are preempted.

But, in *Hermann Hosp. v. Aetna Life Insurance Co.*[116] the Houston court of appeals (14th District) concluded that ERISA does not preempt state law claims where an insurance carrier informed a third-party health care provider that insurance coverage provided by an employee health care plan was available to the patient.[117] The basis of this conclusion was that ERISA provides for preemption only when the claims "relate to any employee bene-

109. 811 S.W.2d at 545.
110. *Id.*, citing 29 U.S.C. § 1132(e)(1) (1988).
111. *Id.* at 546.
112. *Id.*
113. *Id.*
114. 806 S.W.2d at 801.
115. 811 S.W.2d at 547.
116. 803 S.W.2d 351 (Tex. App. —Houston [14th Dist.] 1990, writ denied).
117. *Id.* at 354.

fit plan."[118] Where the third-party health care provider brings claims independently of the health care plan, such claims are not preempted.[119] While a claim for policy benefits relates to an employee benefit plan and is therefore preempted, a state law action brought by the health care provider seeking damages from an insurance carrier for misrepresentation does not relate to the plan for preemption purposes.[120]

Because the health care provider neither sought to benefit from the plan nor claimed that the plan acted improperly in processing and denying the health care provider's claim, the health care provider was not considered to be claiming policy benefits relating to an employee benefit plan. The court made it clear, however, that if the health care provider sought damages as an assignee of the plan beneficiary, then such state law causes of action would be preempted under ERISA.[121]

F. Implied Warranty

The breadth of the DTPA action for breach of implied warranty, as recognized in *Melody Home Manufacturing Co. v. Barnes*,[122] is perhaps the single most important unresolved DTPA issue facing the courts today. In *Melody Home* the Texas supreme court held that an implied warranty exists that a workman will repair or modify existing tangible goods or property in a good and workmanlike manner, and breach of such warranty constitutes a violation of DTPA section 17.50(a)(2).[123] The extent of this implied warranty was the subject of careful consideration in *Sears, Roebuck & Co. v. Nichols*.[124] In *Nichols* the plaintiffs took their mower into a Sears Service Center to have the motor mounts replaced. Sears offered to perform the work for a set price, and on that basis the plaintiffs authorized the repairs. Previously, the plaintiffs had replaced the engine on the mower. They had also purchased a belt from an auto parts store and placed it on the mower after a second trip to the auto parts store to find the correct belt. Once the mower was left with Sears to be repaired, the service technician determined that the transmission belt on the mower, the one previously replaced by the plaintiffs, would no longer fit the mower after the authorized repairs were completed. Knowing that the price estimate given to the plaintiffs for the repairs did not include a new belt and corresponding labor costs for replacing the belt, the repair technician attempted to obtain authorization from the plaintiffs to replace the transmission belt. After the technician had twice explained that the old belt would not fit the mower once it was repaired, the plaintiffs insisted that Sears leave the belt alone. Accordingly, the technician completed

118. 29 U.S.C. § 1144(a).
119. 803 S.W.2d at 354.
120. *Id.*
121. *Id.*
122. 741 S.W.2d 349 (Tex. 1987).
123. *Id.* at 354.
124. No. B14-90-00965-CV, 1991 WL 213790 (Tex. App. —Houston [14th Dist.], Oct. 24, 1991, no writ).

the authorized repairs and wrote on the service order that the transmission belt would not disengage.

The plaintiffs picked up the mower, took it home and attempted to operate the mower. Because the transmission belt was too small, once in motion the mower would not stop and it struck one of the plaintiffs, who required medical treatment including arthroscopic knee surgery. The question put before the Houston court of appeals was whether the *Melody Home* implied warranty to perform services in a good and workmanlike manner was breached when a repairman, after explaining to a knowledgeable consumer the need for repairs and the consequences of failing to make the repairs, followed the customers' instructions not to make the suggested repairs.

In a skillful and workmanlike opinion the Houston court refused to extend *Melody Home* so far. The court noted that the rationale behind *Melody Home*, that is, protecting the helpless consumer and shifting the risk of loss to the skilled and experienced service provider, did not apply.[125] While, the service purchasers in *Melody Home* were unknowledgeable and relied completely on the experience and skill of the *Melody Home* repairman, the plaintiffs in *Nichols* had considerable experience in servicing and repairing the mower.[126] Accordingly, they were held to have assumed the risk of loss when they instructed the Sears technician to refrain from doing what he thought was best.[127] In sum, the Houston court of appeals declined to extend the *Melody Home* implied warranty to a case where the service provider attempted to obtain authorization for necessary repairs and fully explained the consequences of failing to make those repairs.

The court noted that Sears acted prudently in calling the customer to seek permission for further repairs and in performing the repairs that were permitted in a professional manner.[128] The court was reluctant to blame Sears when the customer refused to rely upon the expertise and skill of the service provider. The court concluded that the customers' refusal to rely on such advice led to the plaintiffs' damages.[129] Further, DTPA cases typically involve some type of deception, overreaching or taking unfair advantage of a customer. Because there was no deception, overreaching or taking unfair advantage, or repeated failed repair attempts that caused additional damage to the customer, the court concluded that the *Melody Home* implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner could not apply where reasonable services were offered and declined.[130]

Similarly, in *Slentz v. American Airlines, Inc.*[131] the Austin court of appeals declined to permit an action under the DTPA for breach of an implied

125. *Id.* at *4.
126. *Id.* at *5.
127. *Id.*
128. *Id.* at *6.
129. *Id.* at *5.
130. *Id.*
131. No. 03-89-245-CV, 1991 WL 213137 (Tex. App. —Austin, Nov. 19, 1991, writ requested).

warranty. There the plaintiff was injured when he was struck in the Dallas/Fort Worth Airport by an electric passenger cart owned by American Airlines. The plaintiffs argued that compelling public policy reasons exist for extending the theory of implied warranty, as recognized in *Melody Home Manufacturing Co. v. Barnes*,[132] to a provider of air transportation services. The Austin court disagreed, noting that the law has long held that a common carrier is not an insurer of the safety of its passengers, but merely owes them that high degree of care that a cautious, prudent and competent person would use under the same or similar circumstances.[133] The court declined to extend the DTPA cause of action for breach of an implied warranty to the common carrier/passenger relationship, based on the state of existing law.

G. Jurisdiction

In *Sears, Roebuck & Co. v. Big Bend Motor Inn, Inc.*[134] the Fort Worth court of appeals considered whether the amount in controversy requirement of the Tarrant County Court at Law Jurisdictional Statute[135] could be satisfied by alleging discretionary treble damages under the DTPA. The court construed the Tarrant County Court at Law Jurisdictional Statute to exclude penalties in calculating the amount in controversy.[136] Because trebling under the DTPA is discretionary and must be based on a finding of culpability,[137] treble damages are clearly punitive in nature. As a result, such damages are properly excluded as a penalty from the amount in controversy limits provided by the Tarrant County Court at Law Jurisdictional Statute.[138]

H. Limitations

In *Dick Poe Motors, Inc. v. Dickey*[139] the essential issue was which party, the DTPA consumer or the seller, had the burden of proof as to when the consumer discovered a DTPA violation. The defendant affirmatively pled the two-year statute of limitations, in reply to which the consumer pled enough to invoke the DTPA's discovery rule.[140] The case went to the jury on various questions, none of which made inquiry into the commencement date of limitations or the date of discovery of the DTPA violation. Apparently it was undisputed that the consumer did not commence the lawsuit within two years from the date of the allegedly deceptive acts. Thus, the consumer was forced to rely upon the discovery rule embedded in DTPA

132. 741 S.W.2d 349, 352-54 (Tex. 1987).
133. 1991 WL 213137 at *2, citing City of Dallas v. Jackson, 450 S.W.2d 62, 63 (Tex. 1970); Delta Airlines, Inc. v. Gibson, 550 S.W.2d 310, 312 (Tex. Civ. App. —El Paso 1977, writ ref'd n.r.e.).
134. No. 02-90-244-CV, 1991 WL 218788 (Tex. App. —Ft. Worth, Oct. 30, 1991, n.w.h.).
135. TEX. GOV'T CODE ANN. § 25.2222(b)(1) (Vernon Supp. 1991).
136. *Id.* at *2.
137. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 1987).
138. TEX. GOV'T CODE ANN. § 25.2222 (Vernon Supp. 1991).
139. 802 S.W.2d 739 (Tex. App. —El Paso 1990, writ denied).
140. TEX. BUS. & COM. CODE ANN. § 17.565 (Vernon 1987).

section 17.565.[141]

The DTPA's discovery rule allows the consumer to bring suit within two years after the deceptive act or practice was discovered, or in the exercise of reasonable diligence should have been discovered.[142] The court in *Dick Poe Motors* held that since the consumer failed to show that the lawsuit was brought within two years from the date of the deceptive act, the burden was on the consumer to plead and prove sufficient facts to benefit from the DTPA discovery rule.[143] The court noted that the evidence did not conclusively establish any particular date when the consumer discovered, or in the exercise of reasonable diligence should have discovered, that the purchased goods were not as warranted or represented.[144] Further, the evidence was such as to preclude the appellate court from finding timely discovery as a matter of law.[145] Therefore, the court held that limitations was not tolled under the DTPA's discovery rule, thereby barring the consumer's DTPA action.[146]

In *McAdams v. Capitol Products Corp.*[147] a case involving breach of warranty under the DTPA, the Fort Worth court of appeals held that the two-year limitations period set forth in DTPA section 17.44[148] was applicable rather than the four-year limitations period commonly applied in breach of warranty actions.[149]

I. Mitigation Of Damages

Although the Texas supreme court has repeatedly noted that common law defenses are generally not applicable to DTPA claims,[150] an exception has been carved out for mitigation of damages.[151] In *Pinson v. Red Arrow Freight Lines, Inc.*[152] the Austin court of appeals referred to the well-accepted rule that actual damages under the DTPA are defined as those recoverable at common law.[153] Because the common law of damages recognizes a duty on the part of an injured party to mitigate its damages, the court concluded that a DTPA consumer likewise has a duty to minimize its losses.[154]

In *Pinson* the plaintiff and defendant entered into an agreement by which the plaintiff would serve as the defendant's terminal manager for the defendant's shipping business in two Texas counties. The defendant promised the plaintiff the exclusive business of several customers and guaranteed a mini-

141. TEX. BUS. & COM. CODE ANN. § 17.565 (Vernon 1987).
142. 802 S.W.2d at 744.
143. Id.
144. *Id.*
145. *Id.* at 745.
146. *Id.*
147. 810 S.W.2d 290 (Tex. App. —Fort Worth 1991, writ denied).
148. TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 1987).
149. 810 S.W.2d at 292.
150. Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980).
151. Great State Petroleum, Inc. v. Arrow Rig Service, Inc., 706 S.W.2d 803, 807 (Tex. App. —Fort Worth 1986, no writ).
152. 801 S.W.2d 14 (Tex. App. —Austin 1990, no writ).
153. *Id.* at 15.
154. *Id.*

mum level of income from the operations. The plaintiff alleged, and the jury found, that the defendant's failure to carry out these promises violated the DTPA and was a producing cause of his losses. The jury, however, also found that the plaintiff could have avoided all losses had he exercised reasonable care and diligence. Despite this answer, the lower court entered judgment in favor of the plaintiff. The court of appeals reversed and rendered judgment for the defendant, based solely on the jury's finding with regard to mitigation of damages.[155] The appellate decision, however, is silent as to the threshold issue of whether the plaintiff ever sought to acquire goods or services from the defendant by lease or purchase. While there is no indication in the opinion that the plaintiff rose to the level of a consumer as defined by the DTPA,[156] the court of appeals did not address this issue.

J. Notice

In *Automobile Insurance Co. of Hartford Connecticut v. Davila*[157] the plaintiff insureds obtained a jury verdict and trial court judgment awarding damages under alternative DTPA and duty of good faith and fair dealing theories. On appeal, the insurer asserted that the insureds failed to plead and prove proper notice under the DTPA. The Corpus Christi court of appeals stated that it is the responsibility of the DTPA plaintiff to initially plead notice.[158] Once the DTPA defendant specifically denies notice, the plaintiff has the burden to prove that notice was actually given.[159] The court noted, however, that if the DTPA plaintiff fails to plead notice, but some evidence regarding notice is admitted at trial without objection and no question regarding notice is submitted to the jury, notice will be deemed in support of the judgment by virtue of Texas Rule of Civil Procedure 279.[160]

The insureds in *Davila* did not allege notice in their pleadings after the insurer specifically denied that it received notice. The Corpus Christi court held that there was insufficient evidence to support a deemed finding of notice as required under the DTPA.[161] The court concluded that, as a result of the insureds' failure to plead and prove DTPA notice, the trial court erred in submitting DTPA issues to the jury.[162] The court also explained that, normally, the appropriate remedy would be to remand the case for a new trial on the DTPA cause of action with instructions to the trial court to abate the lawsuit to allow the insureds to comply with the notice requirement. This normal practice was not followed, however, because the insureds' cause of

155. *Id.* at 16.
156. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987).
157. 805 S.W.2d 897 (Tex. App. —Corpus Christi 1991, writ denied).
158. *Id.* at 902, citing Investors, Inc. v. Hadley, 738 S.W.2d 737, 741 (Tex. App. —Austin 1987, writ denied).
159. *Id.*, citing as additional authority HOW Ins. v. Patriot Fin. Serv. of Tx., Inc., 786 S.W.2d 533, 538 (Tex. App. —Austin 1990, no writ). Accord Keith v. Stoelting, 915 F.2d 996, 998 (5th Cir. 1990).
160. 805 S.W.2d at 902, citing Cielo Dorado Dev., Inc. v. Certainteed Corp., 744 S.W.2d 10, 11 (Tex. 1988).
161. *Id.*
162. *Id.*

action asserting breach of the duty of good faith and fair dealing provided the insureds with the identical recovery they would have received under the DTPA. Because the judgment could be upheld on the jury findings regarding breach of the duty of good faith and fair dealing, and the measure of damages was the same under either cause of action, remand of the DTPA cause of action was not warranted.[163]

K. Producing Cause

In *Charles E. Beard, Inc. v. McDonnell Douglas Corp.*[164] the plaintiff purchased a $50,000 specialized micrographics camera from an Australian company under a distributorship agreement. The Australian company filed for receivership in Australia, leaving McDonnell Douglas as the only solvent defendant. McDonnell Douglas had an informal trade agreement with the Australian government, under which the government would buy defense products from McDonnell Douglas in exchange for the company's promise to provide unspecified marketing assistance to Australian companies such as the one which sold the camera to the plaintiff. It was McDonnell Douglas that introduced the plaintiff to the Australian company. Further, McDonnell Douglas offered to provide leads to the plaintiff and to help solve any problems that arose with regard to the camera.

The plaintiff alleged that he relied on McDonnell Douglas' representations in buying the $50,000 camera, in converting his business and in retaining his staff. On appeal, the Fifth Circuit considered whether it was appropriate for the lower court to render a directed verdict in favor of McDonnell Douglas. While the plaintiff did testify that he would not have bought the camera except for the representations of McDonnell Douglas, the Fifth Circuit considered this broad self-serving declaration as a mere scintilla of evidence, compared to the plaintiff's sweeping admissions that McDonnell Douglas did not participate in the negotiations to purchase the camera, did not guarantee the performance of the Australian company and did not guarantee any sales.[165] The Fifth Circuit concluded that, at most, McDonnell Douglas provided the plaintiff with vague assurances that if anything went wrong, the company would help.[166] The Fifth Circuit held that if the plaintiff relied on these statements to protect himself from loss in the transaction with the Australian company, his reliance was, as a matter of law, unreasonable.[167] Without a written contract, promise or guarantee, McDonnell Douglas could not be held liable for damages caused by the Australian company.[168] In sum, the Fifth Circuit concluded that McDonnell Douglas was not the producing cause of the plaintiff's damages, and affirmed the directed verdict on the DTPA claim.[169]

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163. *Id.* at 903.
164. 939 F.2d 280 (5th Cir. 1991).
165. *Id.* at 282.
166. *Id.*
167. *Id.* at 282-83.
168. *Id.* at 283.
169. *Id.*

In *American Commercial Colleges, Inc. v. Davis*[170] the Eastland court of appeals grappled with the issue of whether post-contract misrepresentations are actionable under the DTPA. The plaintiff executed a contract to attend American Commercial College and tendered a deposit of $500, in exchange for a copy of the college's catalogue. The contract had a 72-hour cancellation provision, permitting the plaintiff to obtain a full refund if she chose to cancel the contract. The lofty representations set forth in the catalogue induced the plaintiff to attend the college, rather than cancelling within the 72-hour period. Shortly after classes commenced the plaintiff realized that the representations set forth in the brochure were inaccurate. On appeal, the College raised the defense that post-contract misrepresentations cannot be a producing cause of DTPA damages. The Eastland court of appeals disagreed, however, noting that the plaintiff relied on the College's representations to her detriment when she allowed the 72-hour cancellation provision to expire.[171] Thus, there was sufficient evidence that the College's post-contract representations were a producing cause of the plaintiff's loss.[172] Another issue presented in the case involved the plaintiff's attorney's fees. While there was evidence put forth at trial of the amount of attorney's fees incurred by the plaintiff, there was no evidence as to the necessity or reasonableness of those fees. Nevertheless, the jury awarded the plaintiff the sum of $19,656 in attorney's fees. In deciding to reverse and render a take-nothing award on attorney's fees, the court of appeals recognized that the attorney's fee provision in the DTPA is mandatory.[173] However, the court essentially held that there can be no attorney's fee award, even a mandatory award, where there is no evidence to support the award. In other words, the plaintiff waived the DTPA's mandatory attorney's fee provision[174] when she failed to put forth evidence of the reasonableness and necessity of her attorney's fees.[175]

L. Professional Malpractice

The San Antonio court of appeals has recently held that the implied warranty of good and workmanlike performance under the DTPA did not extend to the rendition of personal medical care services. In *Eoff v. Hal and Charlie Peterson Foundation*[176] the patient and her husband brought a DTPA and negligence action against a hospital and emergency room physician for malpractice. The plaintiffs alleged a breach of an implied warranty to provide emergency room services in a good and workmanlike fashion and to provide medical services in a professional manner. The court noted that, while courts have recognized an implied warranty to perform services relating to existing tangible goods or property in a good and workmanlike man-

170. No. 11-90-166-CV, 1991 WL 215332 (Tex. App. —Eastland, Oct. 24, 1991, no writ).
171. *Id.* at *3.
172. *Id.*
173. TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon 1987).
174. *Id.*
175. 1991 WL 215332 at *5.
176. 811 S.W.2d 187 (Tex. App. —San Antonio 1991, no writ).

ner, the DTPA's implied warranty has never been extended to the rendition of the personal service of medical care.[177] The court followed the reasoning set forth by the Texas supreme court in *Dennis v. Allison*,[178] wherein the supreme court held that the policies which support strict liability are not present in medical treatment.[179] The patient can determine who is responsible for his injury and is provided with adequate remedies to address wrongs which may occur during treatment.[180] Thus, the reason for imposing an implied warranty does not apply to medical treatment. Based on this reasoning, the San Antonio court of appeals concluded that breach of an implied warranty to render professional medical services was not actionable under the DTPA. [181]

In *Roberts v. Burkett*[182] a legal malpractice case, the attorneys actively participated in the real estate transaction they were documenting, and by agreement, they were not paid for their services. On appeal the defendants argued that the plaintiffs were not consumers under the DTPA. DTPA section 17.45(4) provides that a consumer is "an individual, [or] partnership . . . who seeks or acquires by purchase or lease, any goods or services."[183] The Corpus Christi court of appeals held that legal services are considered "services" within the meaning of the DTPA.[184] The Corpus Christi court also stated that consideration need not change hands for consumer status to arise.[185] The court found, however, that there was no actual purchase or lease of legal services, and questioned whether the plaintiff intended or contemplated that legal services would be acquired by purchase or lease.[186] The court noted that the legal work performed was gratuitous and incidental to the loan transaction.[187] Because the loan transaction did not involve goods or services, consumer status could not arise from that aspect of the transaction. Because no agreement to purchase legal services existed, the court of appeals held that the plaintiffs were not consumers and therefore could not recover under the DTPA.[188]

In *Johnson v. DeLay*[189] the plaintiff-seller sued her attorney for negligence and violations of the DTPA in preparing legal documents and misrepresenting facts in connection with the sale of her business. The seller had hired the attorney to prepare purchase agreements, notes, security agreements and other required documents in connection with the sale of her laundry business. The attorney's fee was split between the seller and the buyer at closing.

177. *Id.* at 196.
178. 698 S.W.2d 94 (Tex. 1985).
179. *Id.* at 96.
180. *Id.*
181. *Id.*
182. 802 S.W.2d 42 (Tex. App. —Corpus Christi 1990, no writ).
183. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987).
184. 802 S.W.2d at 47, citing DeBakey v. Staggs, 612 S.W.2d 924, 925 (Tex. 1981).
185. *Id.*, citing McCrann v. Klaneckey, 667 S.W.2d 924, 926 (Tex. App. —Corpus Christi 1984, no writ).
186. *Id.*
187. *Id.*
188. *Id.* at 48.
189. 809 S.W.2d 552 (Tex. App. —Corpus Christi 1991, writ denied).

The attorney did not perform up to the seller's expectations, made certain misstatements of fact and defended the buyer's estate in a lawsuit brought by the seller to recover on various promissory notes.

The Corpus Christi court of appeals noted that the extent to which professional services are subject to the DTPA remains an open question.[190] While the supreme court had previously held that a lawyer's unconscionable conduct was actionable under the DTPA, the supreme court declined to extend implied warranties, which are likewise actionable under the DTPA, to include professional conduct.[191]

The Corpus Christi court, however, never reached the implied warranty issue. Instead, the issue before the court was whether a DTPA action against an attorney must be supported by expert testimony. The court concluded that, with regard to DTPA violations involving the quality of legal advice or other professional services, expert testimony was required to allow the jury to determine if the attorney conducted himself professionally in his dealings with his client.[192] However, with regard to whether the attorney misrepresented material facts concerning the specifics of a transaction, no expert testimony was necessary.[193] Because the fact-related representations at issue did not concern the rendition of legal services, expert testimony was not required.[194] The court declared that a jury could rightfully decide, without the benefit of expert testimony, whether the attorney misrepresented facts to his client and whether such misrepresentations, if any, were the producing cause of damages to the client.[195]

Whereas *DeLay* did not reach the issue of whether a professional is subject to a DTPA action for breach of implied warranty, the Fort Worth court of appeals did reach the issue during the survey period. In *Kubinsky v. Van Zandt Realtors*[196] the case involved a claim by purchasers of a home against the listing agent and her broker, alleging a defective foundation. The purchasers asserted that the real estate agents were bound to inspect the property for defects, and also urged breach of an implied warranty under the DTPA to the effect that the agents' services would be performed in a good and workmanlike manner. The Fort Worth court of appeals analyzed the Real Estate License Act[197] regarding the responsibilities of agents and the licensing provision for inspectors. The court held that the Act specifically bars an agent from also acting as an inspector.[198] As a result, the court held that the agents were under no duty to inspect the property.[199]

As to the assertion that an implied warranty existed and was actionable

190. *Id.* at 554.
191. *Id.*, citing Debakey v. Staggs, 612 S.W.2d 924, 925 (Tex. 1981); Dennis v. Allison, 698 S.W.2d 94, 96 (Tex. 1985).
192. *Id.* at 555.
193. *Id.*
194. *Id.*
195. *Id.*
196. 811 S.W.2d 711 (Tex. App. —Fort Worth 1991, writ denied).
197. TEX. REV. CIV. STAT. ANN. art. 6573(a), § 18C(a)(1) (Vernon Supp. 1991).
198. 811 S.W.2d at 714.
199. *Id.* at 715.

under the DTPA, the Fort Worth court recognized that the Texas supreme court had held in *Melody Home Manufacturing Co. v. Barnes*[200] that an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner exists under the DTPA.[201] But the supreme court there expressly declined the question of whether the warranty applies to professional services, in which the essence of the transaction is the exercise of professional judgment by the service provider.[202] Thus, under the current state of the law, the supreme court's prior opinion in *Dennis v. Allison*,[203] indicating that no such implied warranty exists with respect to professional services, would continue as controlling authority.[204] The *Kubinsky* court noted that the brokers were not seeking to repair or modify existing tangible goods or property, but instead, provided services involving the exercise of professional judgment.[205] Thus, under the controlling authority of *Dennis v. Allison*,[206] no implied warranty of good and workmanlike performance could exist as a matter of law.[207]

M. Rescission

In *Schenck v. Ebby Halliday Real Estate*[208] the plaintiffs purchased residential property from the sellers for the sum of $195,000, paying the sum of $50,000 in cash and a real estate lien note in the amount of $145,000. The jury determined that the property was located within the boundaries of a 100-year flood plain, making it subject to substantial flooding. The real estate contract provided that if the buyers ascertained that the property was located within a 100-year flood plain and notified the sellers within fifteen days of the date of the contract, the buyers could terminate the contract. The buyers, however, waited over one year, until they were ready to sell the property, before they examined the property and discovered its location within the flood plain. The buyers sued the sellers and the brokers. The jury found that the buyers were entitled to recover the sum of $45,305 from the sellers and the brokers, together with prejudgment interest and attorneys' fees. The sellers were awarded the sum of $122,917.20, representing the remaining note balance, along with prejudgment interest and attorneys' fees.

On appeal the buyers complained of the lower court's decision denying the buyers the right to rescind the transaction. The Fort Worth court of appeals found that the decision to grant rescission lies within the sound discretion of the trial court, despite the fact that the DTPA expressly provides for rescis-

200. 741 S.W.2d 349 (Tex. 1987).

201. TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon 1987).

202. 811 S.W.2d at 715, citing Melody Homes Mfg. Co. v. Barnes, 741 S.W.2d at 354 (Tex. 1987).

203. 698 S.W.2d 94 (Tex. 1985).

204. 811 S.W.2d at 715, citing Forestpark Enter. v. Culpepper, 754 S.W.2d 775, 779 (Tex. App. —Fort Worth 1988, writ denied).

205. *Id.* at 715-16.

206. 698 S.W.2d at 95-96.

207. 811 S.W.2d at 716.

208. 803 S.W.2d 361 (Tex. App. —Fort Worth 1990, no writ).

sion as an available remedy.[209] The court held that the remedy of rescission under the DTPA is a statutory recognition of the equitable remedy of rescission, as opposed to a purely statutory remedy.[210] Therefore, the general rule that common law defenses do not apply in a DTPA action was held not to apply where rescission is the objective.

This conclusion opened the door for the court of appeals to agree with the trial court to the effect that the buyer's comparative negligence - constituting unclean hands - was sufficient to bar the plaintiffs from having the equitable remedy of rescission.[211] The negligent act by the buyers was their failure to ascertain that the property was located within a flood plain within fifteen days from the date the real estate contract was executed.

The sellers, who also urged points of error, asserted that the buyers' own conduct was the producing cause of their damages and that the sellers were entitled to contribution and indemnity by virtue of DTPA section 17.555.[212] The sellers argued that since the jury found the buyers to be 33% responsible for their damages by reason of their own negligence, the trial court erred in failing to submit an issue to the jury as to whether the sellers were entitled to DTPA contribution and indemnity by reason of the buyers' wrongful conduct. The Fort Worth court disagreed with this reasoning, concluding that the law relating to comparative responsibility does not apply to limit recovery under a DTPA cause of action.[213] The court recognized that section 33.002 of the Texas Civil Practice and Remedies Code,[214] regarding comparative responsibility, does not apply to actions brought under the DTPA.[215] In addition, the court referred to DTPA section 17.50, providing that the law of comparative responsibility, as contained in section 33 of the Texas Civil Practice & Remedies Code, only governs actions seeking damages for death, personal injury and damage to property other than the goods acquired by the purchase or lease, if such damage arises out of death or bodily injury.[216] Inasmuch as the damages awarded to the buyers related to property which was acquired by the purchase that was involved in the consumer's complaint, and did not involve death or bodily injury, the comparative responsibility statute was held not to be applicable.[217]

N. Venue

In *Steger & Bizzell, Inc. v. Vandewater Construction, Inc.*[218] the plaintiff filed suit in Travis County, urging violations of the DTPA. The defendants filed a motion to transfer venue to Williamson County, alleging that it was

209. *Id.* at 366.
210. *Id.*
211. *Id.* at 367.
212. TEX. BUS. & COM. CODE ANN. § 17.555 (Vernon 1987).
213. 803 S.W.2d at 370.
214. TEX. CIV. PRAC. & REM. CODE ANN. § 33.002(a) and (b) (Vernon Supp. 1991).
215. 803 S.W.2d at 370.
216. *Id.* at 371.
217. *Id.*
218. 811 S.W.2d 687 (Tex. App. —Austin 1991, writ denied).

the only county where venue was appropriate. The case involved DTPA section 17.56, providing that venue is allowed, *inter alia*, in any county in which the defendant or its authorized agent "solicited the transaction made the subject of the action at bar."[219] On appeal the plaintiff maintained that venue was proper in any county in which the seller solicited any potential purchaser, regardless of whether such solicitations resulted in the transaction made the subject of the action at bar.

The court disagreed with the concept of viewing the matter solely from the perspective of the seller, and interpreted the venue provision to refer to the particular transaction that is the basis, or at least part of the basis, of the lawsuit.[220] Because the lots which were the subject of the lawsuit were all purchased in Williamson County, and the advertisement in question was read in Williamson County, the court concluded that the transaction was solicited in Williamson County only.[221] The fact that the defendants solicited business in Travis County generally, and even advertised the lots in question in Travis County, was not considered controlling.[222] The trial court's judgment was reversed and remanded with instructions that the action be transferred to Williamson County.[223]

O. Waiver

The Texas supreme court has held that the nonwaiver provision of the DTPA[224] does not restrict the effect of a disclaimer limiting the damages recoverable for breach of warranty. In *Southwestern Bell Telephone Co. v. FDP Corporation*[225] a customer brought a DTPA action against the telephone company for breach of warranty when the customer's Yellow Pages advertisement was not published as expressly agreed. The two basic issues involved were (i) whether violation of a promise by the telephone company to correctly publish the customer's advertisement constituted a breach of warranty, and (ii) whether the telephone company's written disclaimer limiting damages to the amount of consideration paid violated the nonwaiver provision of the DTPA.

While the court conceded that the Uniform Commercial Code did not specifically apply because the sale of goods was not involved, the court nevertheless regarded the Uniform Commercial Code as instructive in interpreting the common law of warranties.[226] In considering whether the telephone company's failure to properly publish the customer's advertisement constituted a breach of warranty, the court adopted the Uniform Commercial Code's distinction between breach of contract and breach of warranty.[227]

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219. *Id.* at 693.
220. *Id.*
221. *Id.* at 694.
222. *Id.*
223. *Id.*
224. TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon 1987).
225. 811 S.W.2d 572 (Tex. 1991).
226. *Id.* at 577.
227. *Id.* at 576.

According to the Uniform Commercial Code, remedies for breach of contract are available to a buyer "where the seller fails to make delivery."[228] Remedies for breach of warranty, however, are available to a buyer who has finally accepted the goods, but discovers that they are in some way defective.[229]

Thus, the Texas supreme court found that a breach of warranty existed where the advertisement was published omitting an agreed upon item. The court then considered whether the DTPA's nonwaiver provision would overcome the telephone company's attempt to contractually limit damages. The court noted that while the nonwaiver provision would prevail over a disclaimer of liability for an act defined as deceptive under DTPA section 17.46(b), the same is not true for a claim of breach of warranty.[230] Unlike a laundry list claim under DTPA section 17.46(b), an action for breach of warranty is not a creation of the DTPA.[231] The court was apparently persuaded by the fact that the very language which provided the warranty contained a limitation thereof. Although the warranty to accurately publish the advertisement was a part of the basis of the bargain, so too was the limit of the telephone company's liability. Thus the court held that a warranty actionable under the DTPA may be limited by a disclaimer, in spite of the nonwaiver provision set forth in DTPA section 17.42.[232]

II. COMMERCIAL TORTS

The commercial torts area encompasses many diverse causes of action and concerns the application of a variety of legal principles and relationships. Not all commercial torts are limited to the business world or even involve an economic injury. Among the torts and general areas of law designated for inclusion in the commercial torts portion of this Survey are: defamation, tortious interference, fraud, conversion, trademark and copyright, breach of fiduciary duty, negligent misrepresentation, and master and servant.

A. Defamation

1. False Light

An important issue in all types of defamation cases is the mental state with which a defendant must act in order to be subjected to liability. In *Diamond Shamrock Refining and Marketing Co. v. Mendez*[233] the San Antonio court of appeals held that in defamation cases involving publications which place a private plaintiff in a false light, the plaintiff may recover

228. *Id.* at 576, quoting TEX. BUS. & COM. CODE ANN. § 2.711(a) (Vernon 1968).

229. *Id.*, citing TEX. BUS. & COM. CODE ANN. § 2.714 and 2.711 (Comment 1). Accord Roy v. Harvard-Glendale Funeral Home, No. 01-90-00321-CV, 1991 WL 195858 (Tex. App. —Houston [1st Dist.] Oct. 3, 1991, no writ).

230. 811 S.W.2d at 576.

231. *Id.*, citing La Sara Grain v. First National Bank of Mercedes, 673 S.W.2d 558, 565 (Tex. 1984).

232. *Id.* at 577. Accord Mooney v. Southwestern Bell Media, Inc., No. 05-90-00786-CV, 1991 WL 200214 (Tex. App. —Dallas 1991, n.w.h.).

233. 809 S.W.2d 514 (Tex. App.—San Antonio 1991, writ granted).

if he can show that the defendant knew or should have known that the statement was false.[234] The private plaintiff need not show that the defendant acted with actual malice, *i.e.*, that the defendant made the publication with knowledge or with reckless disregard of its falsity.[235]

Mendez was terminated from a Diamond Shamrock refinery in Three Rivers, Texas, for allegedly stealing a handful of nails. News of the termination spread quickly throughout the refinery as well as the small town where the refinery was located. Mendez subsequently brought suit against Diamond Shamrock alleging, among other things, that Diamond Shamrock invaded his privacy by placing him before the public in a false light.[236] The jury found in favor of Mendez and judgment was entered accordingly. Diamond Shamrock complained on appeal that the instructions submitted to the jury were erroneous because no element of malice was included.

The court was called upon to decide for the first time in Texas the standard of care that applies to false light cases. The standard of care set out in clause (b) of section 652E of the Restatement, upon which the Texas false light tort is based, is the actual malice standard of the U.S. Supreme Court case *New York Times Co. v. Sullivan*,[237] a defamation case.

Further, comment d to section 652E states that, in light of the substantial change in defamation law effected by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974),[238] it is possible that private plaintiffs could establish liability based upon a showing of the defendant's mere negligence as to truth or falsity rather than the stricter knowledge/reckless disregard standard set out in clause (b) of section 652E and in *New York Times*. Significantly, Texas adopted the negligence standard for defamation cases in *Foster v. Laredo Newspapers, Inc.*[239] and the Fifth Circuit has considered the question in false

234. *Id.* at 520.

235. *Id.* at 520.

236. In Texas, the tort of "false light" publicity is taken from the RESTATEMENT (SECOND) OF TORTS § 652E (1977):

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

E.g., Covington v. Houston Post, 743 S.W.2d 345 (Tex. App.—Houston [14th Dist.] 1987, no writ); Gill v. Snow, 644 S.W.2d 222 (Tex. App.—Fort Worth 1982, no writ); Moore v. Big Picture Co., 828 F.2d 270 (5th Cir. 1987).

237. 376 U.S. 254 (1964). This defamation standard was later applied to a false light privacy action by the Court in *Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed.2d 456 (1967).

238. *Gertz* retained the requirement of actual malice for public figures, but held that private individuals could recover in defamation cases upon a showing of mere negligence as to truth or falsity.

239. 541 S.W.2d 809, 819 (Tex. 1976). Foster held that:

> A private individual may recover damages from a publisher or broadcaster of a defamatory falsehood as compensation for actual injury upon a showing that the publisher or broadcaster knew or should have known that the defamatory statement was false.

light cases under Texas law and has not required a showing of actual malice.[240] The *Mendez* Court therefore adopted for false light cases the negligence standard applied to defamation cases in *Foster*.

2. *Official Immunity*

The Speech and Debate Clause of the U.S. Constitution grants federal legislators immunity from suits based upon their legislative activities. In *Williams v. Brooks*[241] the Fifth Circuit held that the protection afforded by the judicially-created doctrine of official immunity is coextensive with that furnished by the Speech and Debate Clause, and that official immunity does not immunize a member of Congress from a claim for defamation brought by a private citizen in connection with the Congressman's comments in a television interview.[242] Plaintiff Williams filed suit against Congressman Brooks, alleging defamation based upon his statements in the offending television interview. Brooks appealed following the trial court's refusal to grant his motion to dismiss.[243]

The trial court ruled that the official immunity enjoyed by federal legislators is coextensive with the immunity afforded under the Speech or Debate Clause of the U.S. Constitution. Congressman Brooks argued that federal legislators are entitled to official immunity even where protection would not be available under the Speech or Debate Clause.[244] Brooks conceded that he was not afforded immunity under the Speech or Debate Clause. Thus, the issue faced by the court was whether Brooks' actions were protected by the judicially created doctrine of official immunity, which protects federal officials from civil suits arising out of actions taken in performance of their official duties.[245]

The appellate court agreed with the trial court that "absolute official immunity merely fulfills the mandate of the Speech or Debate Clause," and "[i]n practice, the scope of protection of legislative official immunity is equivalent to that of the Speech or Debate Clause."[246] The appellate court relied upon *Doe v. McMillan*[247] and *Minton v. St. Bernard Parish School Board*.[248] The Supreme Court in *McMillan* stated that the Speech and De-

240. *See* Wood v. Hustler Magazine, Inc., 736 F.2d 1084 (5th Cir. 1984); Braun v. Flynt, 726 F.2d 245 (5th Cir. 1984).

241. 945 F.2d 1322 (5th Cir. 1991).

242. *Id.* at 1327.

243. A motion to dismiss is not a final judgment that is appealable under 28 U.S.C. § 1291, however, Brooks' motion raised a colorable claim of immunity and was appealable under the collateral order of exception to the finality requirement of § 1291. *See* Helstoski v. Meanor, 442 U.S. 500 (1979); Nixon v. Fitzgerald, 457 U.S. 731 (1982).

244. U.S. CONST. art. I, § 6, cl. 1, states that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." The clause protects "purely legislative activities." *See* United States v. Brewster, 408 U.S. 501 (1972).

245. The doctrine of official immunity provides absolute immunity from common law tort suits. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982); Claus v. Gyorkey, 674 F.2d 427, 431 (5th Cir. 1982).

246. Williams, 945 F.2d at 1327.

247. 412 U.S. 306 (1973).

248. 803 F.2d 129, 134-35 (5th Cir. 1986).

bate Clause "has not been extended beyond the legislative sphere," and that "[l]egislative acts are not all-encompassing."[249] Because the television interview given by Congressman Brooks was apparently not an essential part of the legislative process, the court concluded that *McMillan* foreclosed Brooks' claim of official immunity.

3. *Publication of Newsworthy Events*

a. *Intentional Infliction of Emotional Distress*

Leland Wavell sued the Corpus Christi Caller-Times, alleging that he was injured by the newspaper's publishing several articles about him. In *Wavell v. Caller-Times Publishing Co.*,[250] the court was called upon to decide whether the Caller-Times was entitled to protection for its publication of news stories covering open judicial proceedings.

Wavell was beaten and shot on November 2, 1981, by his former lover while working at his law office. The former lover was indicted, and the assault resulted in a number of judicial proceedings.[251] Wavell's suit was based upon a series of newspaper articles published by the Caller-Times relating to the various judicial proceedings. Wavell argued that the articles were intentionally or negligently published to cause him mental anguish and to ruin his reputation.

The publication that allegedly injured Lavell concerned information made public during his former lover's trial. This circumstance was dispositive because "[t]he First Amendment forbids the imposition of civil liability in a privacy action based upon the truthful publication of matters contained in open judicial proceedings."[252] Further, the happenstance that Wavell also pled his case as invasion of privacy in addition to defamation did not alter the extent of protection afforded by the First Amendment. "The protections given the press to publish do not depend upon the legal theory asserted by an inventive plaintiff."[253] Because the First Amendment furnishes protection for the reporting of private facts when made in connection with the publication of newsworthy matters,[254] such a publication, if accurate, is not tortious even though it may be offensive.[255] Judicial proceedings are events of legitimate public concern.[256]

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249. 93 S. Ct. at 2025; Gravel v. United States, 408 U.S. 606 (1972).

250. 809 S.W.2d 633 (Tex. App.—Corpus Christi 1991, writ requested).

251. These proceedings included (1) a paternity action by the lover against Wavell, (2) the lover's criminal indictment, trial, and acquittal, (3) a civil suit against the former lover and its eventual settlement, and (4) the lover's indictment in federal court on unspecified charges and subsequent plea of guilty.

252. *Id.* at 635; Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). Cox Broadcasting's rationale is that there should be no liability for publishing information that is already public record.

253. *Id.* at 635. *See Cox Broadcasting*, 420 U.S. at 492; Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974).

254. Gilbert v. Medical Economics Co., 665 F.2d 305, 307 (10th Cir. 1981).

255. Neff v. Time, Inc. 406 F. Supp. 858, 861 (W. D. Pa. 1976).

256. *Wavell*, 809 S.W.2d at 636. *See Cox Broadcasting*, 420 U.S. at 492, 95 S. Ct. at 1044.

b. Public Disclosure of Private Facts

In *McNamara v. Freedom Newspapers, Inc.*[257] the Corpus Christi court of appeals affirmed a summary judgment in favor of Freedom Newspapers d/b/a Brownsville Herald in a lawsuit brought because the newspaper published an embarrassing photograph of a student taken during a high school soccer game. The photograph was described as:

> accurately depict[ing] McNamara and a student from the opposing school running full stride and chasing a soccer ball. The picture further shows McNamara's genitalia, which happened to be exposed at the exact moment that the photograph was taken.[258]

The court was called upon to decide whether publication of the photograph was protected under the First Amendment to the United States Constitution and under article I, section 8 of the Texas Constitution so as to preclude McNamara's suit for invasion of privacy and for negligent and intentional infliction of emotional distress.[259]

The court held that a publication that would otherwise be actionable as an invasion of privacy is sometimes protected by the First Amendment when publication by the media is involved.[260] This protection likewise applies to the public disclosure of private facts, thus, a disclosure of private facts made in connection with a newsworthy matter is privileged under the First Amendment.[261] An accurate public disclosure of private facts, even though offensive to ordinary sensibilities, is not tortious when connected with a newsworthy event.[262] The privilege for truthful publication disappears only when "an editor abuses his broad discretion to publish matters that are of legitimate public interest."[263] A publication does not lose protection simply because it may cause embarrassment. Accordingly, "[w]hen an individual is photographed at a public place for a newsworthy article and that photograph is published, the entity publishing the photograph is entitled to the protection of the First Amendment."[264]

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257. 802 S.W.2d 901 (Tex. App.—Corpus Christi 1991, writ denied).

258. *Id.* at 903.

259. *Id.* The court concluded that article 1, section 8 of the Texas Constitution guarantees rights of free speech and press more extensive than those guaranteed by the United States Constitution and proceeded to base its analysis on whether the newspaper was entitled to protection under the First Amendment. TEX. CONST. art. I, § 8 states that:

> Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.

U.S. CONST. amend. I reads as follows:

> Congress shall make no law . . . abridging the freedom of speech or of the press . . . ."

260. *Id.* at 904. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974).

261. Gilbert v. Medical Economic Co., 665 F.2d 305, 307 (10th Cir. 1981).

262. Neff v. Time, Inc., 406 F. Supp. 858, 861 (W.D. Pa. 1976).

263. 802 S.W.2d at 904, quoting Gilbert, 665 F.2d at 308.

264. *Id.*; *see* Time, Inc. v. Hill, 385 U.S. 374, 397 (1967).

4. Defamatory Meaning

In *Johnson v. Houston Post Co.*[265] the Houston court of appeals held that a newspaper's characterization of an individual representing striking sanitation workers as "among the most militant speakers . . . outside City Hall" was not defamatory as a matter of law and was therefore not actionable. During the course of a 1986 strike of sanitation workers in Houston, Johnson, a delegate for the striking sanitation workers, gave speeches to some of the striking workers outside of City Hall. The Houston Post reported on the strike and on Johnson's activities. In the course of this report the Post printed the allegedly defamatory statement. Johnson filed a libel suit against the Post contending, among other things, that the language it used was ambiguous and that a jury should be allowed to determine whether its meaning was defamatory to an ordinary reader. The trial court granted a summary judgment in favor of the Post.

In a libel action, the initial question to be answered is whether the words used were reasonably capable of a defamatory meaning.[266] This question is one of law to be determined by the court, which construes the statement as a whole in light of the surrounding circumstances based on how a person of ordinary intelligence would perceive the statement.[267] When the court determines that language is ambiguous or of doubtful import, a fact issue is raised.

The appellate court held that simply placing the word militant in front of the word speaker did not make the statement defamatory, and actually commended the Post for being correct in its use of militant in the context of the story.[268] Because the language used by the Post was not defamatory as a matter of law, the summary judgment in favor of the Post was affirmed.[269]

B. Tortious Interference

1. Failure to Act as Basis of Liability

The Fourteenth District court of appeals may have expanded the potential bases of liability for tortious interference and increased the uncertainty as to whether intent to cause injury is a required element where a plaintiff seeks compensatory damages. *Southwestern Bell Telephone Co. v. John Carlo Texas, Inc.*,[270] held that an omission or failure to act, as opposed to an affirmative action taken by a defendant, can form the basis of a claim for contractual interference.[271] John Carlo Texas, Inc. (John Carlo) sued the City

265. 807 S.W.2d 613 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

266. *Id.* at 614; *see* Musser v. Smith Protective Services, Inc., 723 S.W.2d 653, 654 (Tex. 1987); Beaumont Enter. and Journal v. Smith, 687 S.W.2d 729, 730 (Tex. 1985).

267. *Id.*; *see* Fitzjarrald v. Panhandle Publishing Co., 228 S.W.2d 449, 504 (Tex. 1950).

268. *Id.* at 615. The Court cited Webster's New Collegiate Dictionary, which lists as one of the definitions of "militant": "aggressively active (as in a cause)." The evidence showed that Johnson was aggressively active in the sanitation workers' cause as a speaker.

269. *Id.*

270. 813 S.W.2d 613 (Tex. App.—Houston [14th Dist.] 1991, writ requested).

271. *Id.* at 618. The elements of a claim of contractual interference are: (1) a contract subject to interference, (2) willful and intentional interference, (3) the intentional interference

of Houston (City) and Southwestern Bell Telephone Co. (SWB) to recover damages resulting from a delay in John Carlo's completion of a construction project to widen a city street. John Carlo alleged, among other things, that SWB tortiously interfered with his contract with the City by failing to relocate SWB's telephone poles and cables in a timely manner. SWB was obligated under a Gross Receipts ordinance to relocate cables to accommodate street widening projects.[272] A take nothing judgment was entered in favor of the City, but John Carlo was awarded actual and punitive damages against SWB. On appeal, one of SWB's points of error was that only an affirmative act, and not an omission or failure to act, could support a claim for tortious interference.[273]

In making its contention, SWB relied upon cases that involved findings that the defendant had not performed an intentional or willful act wrongfully interfering with a contract. In rather summary fashion, the court responded to SWB's argument as follows:

> Because no case law holds that an omission or as in the instant case, a failure to act in a timely manner, cannot constitute contractual interference, we find no error here.[274]

The court then went on to hold that intent to cause harm to the plaintiff is not a required element of tortious interference with contract when only compensatory damages are sought.[275] Rather, the court reasoned that while intent to injure indicates actual malice and is the state of mind necessary to recover exemplary damages,[276] a showing of intent to harm is not required to obtain compensatory damages for tortious interference.[277] Apparently, the court believed that the evidence at a minimum supported a conclusion

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was the proximate case of plaintiff's damages, and (4) the plaintiff suffered actual damages. *Id.* at 616.

272. Ordinance No. 69-639 section 14 stated that:

> The Telephone Company shall, upon the written request of the City, relocate its facilities situated within any street at no expense to the City where reasonable and necessary to accommodate street widening or improvement projects of the City.

273. *Id.* at 617.

274. *Id.* at 618. The court distinguished Aramco Serv. Co. v. Redland Fabricating and Welding, Inc., 752 S.W.2d 184 (Tex. App.—Houston [14th Dist.] 1988), *modified*, No. C-7785, 1989 WL 62253 (Tex. 1989) (not designated for publication) and similar cases as holding simply that the defendant had not committed a willful or intentional act as required for tortious interference. According to the court, the cases did not stand for the proposition that an omission or failure to act cannot be a basis of liability.

275. *Id.* at 619. In reaching this holding, the court seemed to disagree with Marathon Oil Co. v. Sterner, 745 S.W.2d 420, 423 (Tex. App.—Houston [14th Dist.] 1988, *aff'd in part, rev'd in part on other grounds*, 767 S.W.2d 686 (Tex. 1989)), and CF&I Steel Corp. v. Pete Sublett & Co., 623 S.W.2d 709, 713 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.), which "state that wrongful interference with contract is shown 'by findings that a defendant willfully and intentionally committed acts calculated to cause damage to the plaintiffs' lawful business when the acts were done with the unlawful purpose of causing damage and loss. . . .'" Id. at 619, quoting *CF&I Steel Corp.*, 623 S.W.2d at 713. The court disagreed with the definition of the required mental state given in those cases "to the extent that it means intent to cause harm is a required element of tortious interference with contract." *Id.*

276. *See* Clements v. Withers, 437 S.W.2d 818, 822 (Tex. 1969); Transfer Prod., Inc. v. Texpar Energy, Inc., 788 S.W.2d 713, 715 (Tex. App.—Corpus Christi 1990, no writ).

277. *Clements*, 437 S.W.2d at 822. The court based its analysis upon comment j to § 766 of

that SWB failed to move its telephone poles and cables in a timely manner with the knowledge that interference with John Carlo's contract with the City was substantially certain to result. In keeping with its comments made earlier in the opinion, the court reversed the award of punitive damages against SWB because there was no evidence of actual malice, *i.e.*, intent to injure, warranting an award of punitive damages.[278]

2. *Legal Justification*

In *Ryan v. Laurel*[279] the San Antonio court of appeals held that the filing of a lawsuit to determine rights under a settlement agreement constitutes, as a matter of law, a legal justification which exonerates the party filing suit from liability for tortious interference with a contractual relationship.[280] Several years prior to the subject suit, Ryan sued Laurel over a mineral deed. This suit resulted in a settlement agreement pursuant to which Ryan deeded back the disputed mineral interests and received a royalty deed. The settlement agreement contained restrictive pooling provisions.[281] When Ryan learned that Dynamic Production, Inc. (Dynamic) and Laurel had entered into a lease and that Dynamic had drilled producing oil and gas wells on the property, he filed suit alleging that Laurel breached the settlement agreement by violating its restrictive pooling provisions. Laurel counterclaimed for tortious interference with its relationship with Dynamic. The jury found that the absence of certain pooling restrictions in Laurel's lease with Dynamic did not breach the settlement agreement Laurel had previously entered into with Ryan.[282] The jury also found that Ryan had tortiously interfered with Laurel's business relationship with Dynamic and had thereby caused damage.[283]

The court of appeals held that Ryan had a right under Texas law to bring suit to determine whether his settlement agreement with Laurel had been

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the Restatement (Second) of Torts, which deals with intentional interference with performance of a contract. RESTATEMENT (SECOND) OF TORTS, § 766c comment j (1965) reads as follows:

> j. The rule stated in this Section is applicable if the actor acts for the primary purpose of interfering with the performance of the contract, and also if he desires to interfere, even though he acts for some other purpose in addition. The rule is broader, however, in its application than to cases in which the defendant has acted with this purpose or desire. It applies also to intentional interference, as that term is defined in § 8A, in which the actor does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a result of his action. The rule applies, in other words, to an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action.

278. 813 S.W.2d at 621; *See* Clements v. Withers, 437 S.W.2d 818, 822 (Tex. 1969); Top Value Enter., Inc. v. Carlson Mktg. Group, Inc., 703 S.W.2d 806, 813 (Tex. App.—El Paso 1986, writ ref'd n.r.e.). "Actual malice" means "ill-will, spite, evil motive, or purposing the injuring of another." Id. at 622, quoting *Clements*, 437 S.W.2d at 822.

279. 809 S.W.2d 258 (Tex. App.—San Antonio 1991, no writ).

280. *Id.* at 260.

281. *Id.* at 259.

282. *Id.* at 259-60.

283. *Id.*

breached when Laurel entered into its lease with Dynamic.[284] This proper exercise of a legal right could not constitute the basis of a claim for tortious interference of the contract between Laurel and Dynamic.[285] Finding legal justification as a matter of law, the court reversed and rendered judgment in favor or Ryan.[286]

3. *Unenforceability as a Defense/Negligence Insufficient for Liability*

Exxon Corp. v. Allsup[287] held both (1) that unenforceability of a contract is not a defense to a cause of action for tortious interference with that contract,[288] and (2) that interference with a prospective contract or business relationship is not actionable if the interference is done with mere negligence.[289]

Allsup was hired as a gate security guard by King Ranch, Inc. (King Ranch) in May 1961. The gate guarded by Allsup allowed access to Exxon Oil operations on the Alazan oil field. In exchange for Allsup's performance of services as a gate guard, King Ranch provided him with a house at his assigned post and paid his utilities plus a minimum hourly wage. The King Ranch also promised Allsup that he could live on the Ranch for life after he retired. When the supervision of the gate guards was transferred to an independent contractor, Allsup was told that he would not be rehired. Allsup eventually filed suit against Exxon for tortious interference with his employment contract with King Ranch and for negligent and malicious "handling" of his employment relationship. The jury found in favor of Allsup and awarded damages.

Exxon complained on appeal that Allsup failed to establish that a contract existed between himself and King Ranch.[290] The court stated that "[a] contract may be the subject of an interference action even though it is unenforceable between the contracting parties. Unless the contract is illegal or otherwise against public policy, the defendant may not raise unenforceability of the contract as a defense."[291] The evidence supported the existence of a separate contract between Allsup and King Ranch.

Next, Allsup's "negligent handling" claim and the jury issues submitted in connection therewith were construed as a claim for interference with a pro-

284. *Id.* at 261; Legal justification is an affirmative defense to a claim of tortious interference. Sterner v. Marathon Oil Co., 767 S.W.2d 686 (Tex. 1989). The party is privileged to interfere with another's contract if the interference is done in a bona fide exercise of his own rights or if he has a superior or equal right or a well founded belief of his rights in the subject matter to that of the other party. *Id.* at 260.

285. *Id.* at 261.

286. *Id.* at 262.

287. 808 S.W.2d 648 (Tex. App.—Corpus Christi 1991, writ denied).

288. *Id.* at 654-55.

289. *Id.* at 659.

290. *Id.* at 654. A plaintiff suing for interference with contractual relations must produce evidence of a contract subject to interference. Guynn v. Corpus Christi Bank & Trust, 589 S.W.2d 764, 770 (Tex. Civ. App.—Corpus Christi 1979, writ dism'd).

291. *Id.* at 654-55; *See* Clements v. Withers, 437 S.W.2d 818, 821 (Tex. 1969); Armendariz v. Mora, 553 S.W.2d 400, 404 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.).

spective business relationship between himself and King Ranch.[292] Exxon objected to one of the jury issues on the basis that it erroneously stated that negligence could be a basis for a tortious interference claim. Because an interference with a prospective contractual or business relationship must involve an intentional or malicious act by the defendant, the court sustained this objection.[293] The issue submitted by Allsup asking the jury whether Exxon had negligently handled his business relationship was therefore improper.

4. Breach of Direct Contract as Interference

The Texas supreme court in *American National Petroleum Co. v. Transcontinental Gas Pipe Line Corp.*[294] reaffirmed the rule that a party's knowing and intentional breach of his direct contract may also be an act that tortiously interferes with a third party's contract if the act is done with the purpose and effect of preventing the third party from performing its contract with another.[295] Additionally, the Court held that counsel's statement during argument on the jury charge that damages recoverable for breach of one contract were identical to the damages recoverable for tortious interference with another contract entitled the trial court to refrain from submitting a correct damage issue to the jury.[296]

A jury found that Transcontinental Gas Pipe Line Company (Transco) breached a take or pay contract with American National Petroleum Company (ANPC) and Oil Investments, Ltd. (Oil) and had thereby tortiously interfered with certain gas balancing agreements that ANPC and Oil had with third parties. It assessed $16 million of exemplary damages for the tortious interference claim, and the trial court rendered judgment for ANPC and Oil on both the tortious interference and breach of contract theories. The court of appeals reversed the judgment for exemplary damages and held that ANPC's and Oil's failure to obtain a separate finding of tort damages apart from the breach of contract damages precluded recovery of the exemplary damages. The supreme court, however, held that Transco's failure to

292. A petition is construed as favorably as possible to the pleader, and the court will look to the pleader's intent and uphold the pleading even though an element of a cause of action has been omitted. Gulf, Colo. & Santa Fe Ry. Co. v. Bliss, 368 S.W.2d 594, 599 (Tex. 1963). The elements of tortious interference with prospective contract or business relationships are: (1) a reasonable probability that the parties would have entered into a contractual relationship, (2) an intentional and malicious act by the defendant that prevented the relationship from occurring, with the purpose of harming the plaintiff, (3) the defendant lacked privilege or justification to do the act, and (4) actual harm or damage resulted from the defendant's interference. 808 S.W.2d at 659. *See*, 2 J. EDGAR AND J. SALES, TEXAS TORTS AND REMEDIES, § 46.03[1] (1990). It must reasonably appear that, but for the interference, the contract would have been made. Harshberger v. Reliable-Aire, Inc., 619 S.W.2d 478, 481 (Tex. Civ. App.—Corpus Christi 1981, writ dism'd).

293. In this connection, malice is understood not to mean ill will against the plaintiff, but in its legal sense to mean an unlawful act, done intentionally without just cause or excuse. *See*, State Nat'l Bank v. Farah Mfg. Co., 678 S.W.2d 661, 688-89 (Tex. App.—El Paso 1984, writ dism'd by agr.).

294. 798 S.W.2d 274 (Tex. 1990).

295. *Id.* at 279.

296. *Id.* at 278.

object to ANPC's failure to submit a separate tort damages question to the jury was sufficient to waive any error in the failure to submit.

The basic measure of damages for tortious interference with contract is the same as the measure of damages for breach of the contract interfered with, *i.e.*, to "put the plaintiff in the same economic position he would have been in had the contract interfered with been actually performed."[297] As an affirmative defense, one can plead and prove that interference with a contract was privileged.[298] In the court's view, Transco's assertion that it was privileged to interfere with the gas balancing agreements was equivalent to an assertion that its breach of its direct contracts with ANPC and Oil could not constitute tortious interference with their contracts with the operators. The court rejected Transco's argument, concluding that "[t]rying to coerce a party into a favorable settlement by threats under existing or potential future contracts with third parties is not privileged."[299]

The court then addressed the issue of damages. A breach of the gas balancing agreements interfered with would cause a different amount of damages from those caused by Transco's breach of its direct contracts.[300] However, there was evidence to support actual damages for breach of the gas balancing agreements, which would have been an element of actual damages for tortious interference had Transco not waived the requirement of such a finding.[301] The jury assessed damages for Transco's breach of its take or pay direct contracts with ANPC and Oil, but, importantly, it made no separate finding of damages for the tortious interference claim. In objecting to the jury questions relating to the tortious interference theory, counsel for Transco acknowledged that any actual damages sustained by ANPC and Oil as a result of tortious interference with the gas balancing agreements would be the same as damages for the breach of the take or pay contracts.

The supreme court held that the trial court was entitled to rely on this acknowledgment by Transco's counsel and to find that damages for the tortious interference cause of action were the same as those for the contract cause of action that was submitted to the jury.[302] Thus, Transco's failure to object to the omission of a tort damages question waived the requirement of submitting a correct damage issue to the jury.[303] Transco was bound by a

297. *Id.* at 278; Capital Title Co. v. Donaldson, 739 S.W.2d 384, 391 (Tex. App.—Houston [1st Dist.] 1987, no writ); Prowse v. Whitehurst, 313 S.W.2d 126, 130-31 (Tex. Civ. App.—San Antonio 1957, writ ref'd n.r.e.).

298. Sterner v. Marathon Oil Co., 767 S.W.2d 686, 690 (Tex. 1989).

299. 798 S.W.2d at 279; Griffin v. Palatine Ins. Co., 235 S.W. 202, 204, *modified on rehearing other grounds*, 238 S.W. 637 (Tex. Comm'n App. 1922, judgmt. adopted).

300. If Transco had not interfered with the gas balancing agreements, the amount it would have to pay ANPC and Oil would not have been the same amount it should have paid under its direct contracts with them. This is because Transco paid ANPC and Oil a price based on the market price for spot gas. The gas balancing agreements only addressed the allocation of the relative amounts of gas actually taken among the interest owners, not the amount that the pipeline company paid the interest owner for the gas.

301. 798 S.W.2d at 279.

302. *Id.* at 278.

303. *Id.*; TEX. R. CIV. P. 279; Turner, Collie and Braden, Inc. v. Brookhollow, Inc., 642 S.W.2d 160, 164 (Tex. 1982).

deemed finding of actual tort damages by the trial court because there was evidence to support damages from tortious interference.[304]

C. Master and Servant

1. Negligence

a. Duty/Foreseeability

The Texas supreme court held in *Greater Houston Transportation Co. v. Phillips*[305] that Yellow Cab had no duty to take steps to prevent one of its drivers from carrying a concealed weapon and shooting a passenger in another car.[306]

In reversing the court of appeals and rendering in favor of Yellow Cab, the supreme court examined the elements of the common law doctrine of negligence and concluded that the risk of harm to others presented by the situation was unforeseeable.[307] Because the first element of negligence is the existence of a duty, the court had to consider the factors used to determine whether a defendant is under a duty to act or refrain from acting. Applying these factors requires weighing the risk involved, the foreseeability of harm, and the likelihood of injury against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant.[308]

The court emphasized that there was only one prior incident involving the use of a weapon by a Yellow Cab driver. The driver in the prior case was exonerated of wrongdoing. Thus, the risk of harm to others in the case of Yellow Cab was unforeseeable.[309] Because the injury was unforeseeable as a matter of law, Yellow Cab had no duty to warn its cab drivers not to carry guns.[310]

b. Causation

In *Federal Deposit Insurance Corp. v. Ernst & Young*[311] Ernst & Young obtained a summary judgment as to negligence claims raised by the Federal Deposit Insurance Corp. (FDIC) in connection with the insolvency of Western Savings Assoc. (Western). The FDIC asserted that Western relied upon various allegedly defective accounting audits performed by Ernst & Young, with the result that it sustained losses of over $560 million. Ernst & Young responded, among other things, that it was entitled to summary judgment on the FDIC's negligence claim because the FDIC could not establish causa-

304. 798 S.W.2d at 278.
305. 801 S.W.2d 523 (Tex. 1990).
306. *Id.* at 527.
307. *Id.* at 526-27. The common law doctrine of negligence consists of three elements: (1) a legal duty owed by one person to another; (2) a breach of that duty; and (3) damages proximately resulting from the breach. El Chico Corp. v. Poole, 732 S.W.2d 306, 311 (Tex. 1987); Rosas v. Buddies Food Store, 518 S.W.2d 534, 536 (Tex. 1975).
308. *Id.* at 525; Otis Eng'g. Corp. v. Clark, 668 S.W.2d 307, 312 (Tex. 1983).
309. 801 S.W.2d at 526.
310. *Id.*
311. 1991 WL 197111 (N.D. Tex. 1991).

tion.[312] This response was contained in two prongs: (1) the FDIC could not show Western's reliance because Western's sole shareholder, Mr. Jarrett E. Woods, Jr. (Woods) was aware of Western's true financial condition, and (2) Woods' knowledge was imputed to Western and thus to FDIC, which was therefore estopped from urging Western's reliance on information it knew was untrue. The FDIC countered that it was not subject to Ernst & Young's defenses against Western, that detrimental reliance was not an element of its claim, and that Woods' knowledge was not attributable to Western.

Although the Texas courts have not expressly listed reliance as an element of cause in fact, it has been recognized that plaintiff's damages in an accounting malpractice action stem from reliance upon the accuracy of the accountant's work.[313] Thus, the court required FDIC to prove that it relied upon Ernst & Young's allegedly defective audits.

Importantly, the court also held under Texas corporation law that Woods' interests were not adverse to Western's and that his knowledge of Western's true financial condition could therefore be imputed to Western and the FDIC.[314] The resolution to the question of Woods' imputed knowledge turned upon whether Woods' interests were adverse to Western's.[315] Relying upon *Greenstein, Logan & Co. v. Burgess Marketing*,[316] the court reasoned that the question of whether action is taken upon a corporation's behalf depends upon whether the stockholders are the beneficiaries or the victims of the fraudulent activity. Because Woods was Western's sole stockholder, he was the beneficiary of his own fraudulent activity to the detriment of the corporation's outsiders, i.e., its depositors and creditors. Accordingly, Woods' fraud was taken on behalf of Western rather than against Western, and his knowledge was imputable to Western and the FDIC.[317] Because the FDIC could not prove causation, *i.e.*, could not show that Western relied upon Ernst & Young's audits to its detriment, the FDIC could not prove causation. Ernst & Young was entitled to a summary judgment in its favor.[318]

312. The elements of the FDIC's negligence claim were (1) duty, (2) breach, (3) causation, and (4) injury. Causation consists of cause in fact and foreseeability. Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 549 (Tex. 1985).

313. *Id. See* E. F. Hutton Mortgage Corp. v. Pappas, 690 F.Supp. 1465 (D. Md. 1988); Delmar Vineyard v. Timmons, 486 S.W.2d 914, 921 (Tenn. Ct. App. 1972).

314. Knowledge of individuals who exercise control over a corporation's affairs are imputable to the corporation. Goldstein v. Union National Bank, 213 S.W. 584 (Tex. 1919); American Standard Credit, Inc. v. Nat'l Cement Co., 643 F.2d 248, 270-71 & n.16 (5th Cir. 1981).

315. An officer's or director's knowledge acquired within the scope of his duties will be imputed to a bank unless the officer or director dealt fraudulently with the bank in his own interest. In the latter instance, the officer or director has an adverse interest to the bank and his knowledge is not imputed to the institution. Federal Deposit Ins. Corp. v. Lott, 460 F.2d 82, 88 (5th Cir. 1972).

316. 744 S.W.2d 170 (Tex. App.—Waco 1987, writ denied).

317. 1991 WL 197111 at 5.

318. *Id.*

2. *Statute of Limitations*

In *McClure v. Zoecon, Inc.*[319] the Fifth Circuit held that a lawsuit alleging wrongful termination to forestall an employee's receipt of medical and disability benefits in violation of ERISA section 510[320] is governed by the two-year Texas statute of limitation applicable to wrongful discharge and employment discrimination claims.[321] Plaintiff McClure brought suit exactly four years after his employer allegedly terminated him to prevent his receipt of benefits secured by ERISA. The district court summarily dismissed the suit as time barred by the two-year Texas statute of limitation that applies to wrongful discharge and employment discrimination claims.[322] Because ERISA provides no statute of limitation for section 510 actions, the claim was subject under federal law to the Texas limitations statute governing the Texas action most analogous to a section 510 claim.[323]

Finding that a wrongful discharge or employment discrimination claim was most analogous to an ERISA section 510 action, which prohibits specified acts of discharge and discrimination, the Fifth Circuit followed other courts that have construed section 510 claims as wrongful discharge or employment claims for statute of limitations purposes.[324] The dissent would have followed the Eighth and Eleventh Circuits by holding that a section 510 wrongful termination more closely resembles a breach of contract claim and should be governed by a four year statute of limitations.

3. *Workers' Compensation/Exclusive Remedy*

The Dallas court of appeals held in *Harris v. Varo, Inc.*[325] that the exclusive remedy provision of the Worker's Compensation Act does not bar an employee's action against an employer for fraudulent misrepresentations concerning the employer's insurance coverage. Harris was injured in De-

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319. 936 F.2d 777 (5th Cir. 1991).

320. 29 U.S.C. § 1140 (1974). That section reads in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may be entitled under the plan, this subchapter, or the Welfare Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pensions Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

321. 936 F.2d at 778.

322. *Id.* at 777.

323. *Id.* at 778. *See*, Henson-El v. Rodgers, 923 F.2d 51 (5th Cir. 1991); Jensen v. Snellings, 841 F.2d 600, 606 (5th Cir. 1988).

324. *Id.* at 778; *see* Gavalik v. Continental Can Co. 812 F.2d 834, 843-46 (3rd Cir. 1987), *cert. denied*, 484 U.S. 979; Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197 (10th Cir. 1990); Young v. Martin Marietta Corp. 701 F.Supp. 567, 569 (E.D. La. 1988); Gladich v. Navistar Int'l. Transp. Corp., 703 F.Supp. 1331, 1333 (N.D. Ill. 1989).

325. 814 S.W.2d 520 (Tex. App.—Dallas 1991, no writ).

cember 1981 during her employment with Varo. After her worker's compensation claim against Varo's purported insurance carrier, Northern Assurance Company of America (North Assurance), was denied by the Industrial Accident Board (IAB) on April 18, 1983, Harris appealed the IAB ruling to the district court. Eventually, Harris nonsuited her cause of action with prejudice, and her motion to reinstate was denied by the district court.

On December 15, 1983, Harris filed a premises liability suit against Varo that related to the same injury made the basis of her worker's compensation claim. Varo responded with a motion for summary judgment, contending that the exclusivity provision of the Workers Compensation Act barred Harris' claim. Harris then amended her pleading to include an action for fraud. The trial court granted Varo's Motion for Summary Judgment.

The problem centered around the identity of Varo's insurance carrier at the time of Harris' accident. Commercial Union Assurance Company (Commercial Union) was first named as Varo's workers compensation carrier, but Varo subsequently identified Northern Assurance as its carrier before the IAB. Still later, Varo named Employers' Fire Insurance Company (Employers' Fire) as its carrier. Varo's worker's compensation insurance was changed to Employers' Fire from Northern Assurance before Harris' accident, but no one notified the IAB of the change. Harris contended that Varo's actions were deceptive, intentional, and caused or could cause a future denial of recovery for her injuries. Varo contended that because there was no causal link between Harris' physical injuries and its alleged wrongful conduct, the fraud claim was barred by the exclusive remedy provision.

The court, relying upon *Aranda v. Insurance Co. of North America*[326] held that the exclusivity provision barred only claims by employees against employers based on job-related activities, and concluded:

> We do not perceive any meaningful distinction between a suit against an insurance carrier for breach of the duty of good faith and fair dealing and a suit against an employer for fraudulent misrepresentations concerning its insurance coverage. Harris' cause of action for fraud is wholly separate from her claim seeking recovery for her physical injuries.
>
> Consequently, we hold that the exclusivity provision of the Act does not bar Harris' claim against Varo for the intentional tort of fraud.[327]

D. Trademark Infringement

1. Likelihood of Confusion

In *Brandtjen and Kluge, Inc. v. Prudhomme*[328] the district court dealt

326. 748 S.W.2d 210 (Tex. 1988), Aranda involved an employee's cause of action against an insurance carrier for breach of the duty of good faith and fair dealing. Because this cause of action did not relate to the employee's job related activities, the exclusivity provision of the Worker's Compensation Act did not bar recovery.

327. 814 S.W.2d at 526.

328. 765 F. Supp. 1551 (N.D. Tex. 1991).

with a trademark infringement claim in the context of a rebuilder's use of a manufacturer's mark. In a well reasoned opinion, the court adapted and expanded upon the traditional factors used to determine whether a likelihood of confusion is created by a party's use of another's trademark. Because there was little or no dispute as to the existence of the other elements of the claim, the key issue was whether there existed a likelihood that the challenged mark would cause confusion.[329] The "likelihood of confusion" test in the Fifth Circuit turns upon a weighing of various factors, which have been listed as:

> (1) strength of the plaintiff's mark; (2) similarity of design between the marks; (3) similarity of the products; (4) identity of retail outlets and purchasers; (5) similarity of advertising media used; (6) the defendant's intent; (7) actual confusion; and (8) the degree of care exercised by potential purchasers.[330]

These elements, however, are non-exclusive and no single factor is dispositive. The weight accorded the different factors varies from case to case.[331]

The court recognized that despite the broad discretion given to the fact finder in weighing the various factors, the claim before it did fall within "a well-recognized category of trademark infringement, involving goods that originally were made by one party and that later were repaired and reconditioned by another party and resold under the original marks."[332]

After analyzing the repair and reconditioning cases and concluding that the traditional "likelihood of confusion" test factors were an adequate starting point, the court found that the case law supported consideration of additional elements. Accordingly, the court formulated the following three factors to be used in addition to the traditional test:

> (9) the extent and nature of changes made to the product;
> (10) the clarity and distinctiveness of the labelling on the rebuilt products; and
> (11) the degree to which any inferior quality associated with the reconditioned product would likely be identified by the typical purchaser with the manufacturer.[333]

After weighing the traditional likelihood of confusion factors as well as the three it formulated for purposes of the opinion, the court found as a

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329. "A trademark owner 'may not enjoin others from using the mark if the likelihood of confusion between his product and the infringer's product is minimal or non-existent.' " Union Nat'l Bank of Tex., Laredo, Tex. v. Union Nat'l Bank of Tex., Austin, Tex. 909 F.2d 839, 843 (5th Cir. 1990). In determining likelihood of confusion, the inquiry is "whether the defendant's use of the plaintiff's trademark would likely create confusion in the minds of potential buyers as to the source, affiliation, or sponsorship of the parties' products." 765 F.Supp. at 1564-65; Oreck Corp. v. U.S. Floor Sys., Inc., 803 F.2d 166, 170 (5th Cir. 1986). Because the test is likelihood of confusion, evidence of actual confusion is not required. Further, likelihood of confusion is determined with reference to the typical purchaser of the disputed product.

330. 803 F.2d at 170.

331. Conan Properties, Inc. v. Conan's Pizza, Inc., 752 F.2d 145, 149 (5th Cir. 1985); Marathon Mfg. Co. v. Enterlite Prods. Corp., 767 F.2d 214, 218 (5th Cir. 1985).

332. Joy Mfg. Co. v. CGM Valve and Gauge Co., 730 F. Supp. 1387, 1394-95 (S.D. Tex. 1989).

333. 765 F.Supp. at 1567.

matter of fact that the typical purchaser would not likely be confused as to the source, affiliation, of the products in question.[334] In essence, the plaintiff failed to prove that there was any likelihood of confusion created by the rebuilder's activities. Accordingly, its request for a preliminary injunction was denied.[335]

2. *Protection of Trade Dress*

Taco Cabana International Inc. v. Two Pesos, Inc.[336] was a suit by Taco Cabana against Two Pesos for trade dress[337] infringement under the Lanham Act[338] and misappropriation of trade secrets under Texas law. The central and most interesting dispute centered around whether Taco Cabana's trade dress[339] was protectable. Two Pesos argued that Taco Cabana was essentially attempting to prohibit a competitor from using a Mexican theme for a Mexican restaurant. Specifically, Two Pesos argued that Taco Cabana's protectable trade image was narrower than its total image, and that the court's instruction to the jury referring to both total image and to concept was misleading.[340] The court disagreed, concluding that "Taco Cabana's distinctive combination of layout and design features" was protectable and that the court's instruction to the jury was proper.

Proceeding to the trade secret misappropriation[341] count, the court held

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334. *Id.* at 1568; The case concerned a manufacturer's attempt to control the rebuilding and resale of its automatic printing presses. Importantly, the purchasers of the rebuilt presses were sophisticated. The court emphasized that high cost items such as the rebuilt presses were unlikely to be bought on impulse, but were more likely to be purchased only after a great deal of examination and care. "Likelihood of confusion can be found to be absent where the typical purchaser is sophisticated." *Id.* at 1571. *See*, Control Components, Inc. v. Valtek, Inc., 609 F.2d 763, 776 (5th Cir. 1980) (Rubin, J. dissenting).

335. *Id.* at 1573.

336. 932 F.2d 1113 (5th Cir. 1991).

337. Infringement of trade dress, which has been characterized as the total image of a business, is established by showing: (1) that the dress qualifies for protection, which requires consideration of functionality, distinctiveness, and secondary meaning; and (2) that the dress has been infringed, which requires consideration of the likelihood of confusion. *Id.* at 1117-18, citing, Sicilia Di R. Biebow & Co. v. Cox, 732 F.2d 417, 425 (5th Cir. 1984).

338. *See* 15 U.S.C. § 1117 (1946).

339. Taco Cabana's trade dress is described as:

> a festive eating atmosphere having interior dining and patio areas decorated with artifacts, bright colors, paintings and murals. The patio includes interior and exterior areas with the interior patio capable of being sealed off from the outside patio by overhead garage doors. The stepped exterior of the building is a festive and vivid color scheme using top border paint and neon stripes. Bright awnings and umbrellas continue the theme.

340. The jury was instructed that:

> "[T]rade dress" is the total image of the business. Taco Cabana's trade dress may include the shape and general appearance of the exterior of the restaurant, the identifying sign, the interior kitchen floor plan, the decor, the menu, the equipment used to serve food, the servers' uniform and other features reflecting the total image of the restaurant. 932 F.2d at 1118.

341. "A trade secret misappropriation in Texas requires: (a) the existence of a trade secret; (b) a breach of a confidential relationship or improper discovery of the trade secret; (c) use of the trade secret; and (d) damages." *Id.* at 1123; Hurst v. Hughes Tool Company, 634 F.2d 895, 896 (5th Cir. 1981). "A trade secret is any formula, pattern, device or compilation of information used in one's business, and which gives an opportunity to obtain an advantage

that architectural plans, kitchen layout and design drawings may be trade secrets,[342] and examined the evidence concerning the remaining elements of the tort. It found that the jury's conclusion that Two Pesos had misappropriated Taco Cabana's trade secrets was supported by the evidence.[343] Additionally, the court found no voluntary disclosure of Taco Cabana's trade secrets sufficient to forfeit protection.[344] Specifically, neither the disclosure of Taco Cabana's plans to contractors nor the filing of Taco Cabana's plans to obtain a building permit eliminated its proprietary rights.[345] The jury was also entitled to conclude that Two Pesos had acted improperly in acquiring the plans.[346] The jury award was doubled to $1,868,600 by the district court for intentional and deliberate infringement. Taco Cabana further recovered $150,000 on its cause of action for trade secret misappropriation and $937,550 in attorneys' fees. Two Pesos was ordered to make design changes in its Texas restaurants and to display therein a sign acknowledging that it had unfairly copied Taco Cabana's restaurant concept.[347]

E. Fraud and Fraudulent Transfer

1. Disclaimer is not a Fraudulent Transfer

In a case of first impression in Texas, the Fourteenth District court of appeals held in *Dyer v. Eckols*[348] that a disclaimer of inheritance is not a transfer within the meaning of the Fraudulent Transfer Act even though the disclaimer may defeat the rights of a judgment creditor.[349] Plaintiff Dyer alleged that Eckols, executor of the estate of Cleveland Croom, and Sarah Croom were involved in a conspiracy to defraud him of his ability to collect on a default judgment rendered against Sarah Croom. Sarah Croom's car was involved in an automobile accident with Dyer's mother that resulted in Mrs. Dyer's death. Croom, who was insolvent at the time, disclaimed a gift of $200,000 which she was about to inherit under the will of her deceased uncle, Cleveland Croom.

The court granted a summary judgment against Dyer and held that (1) his claim was defeated by the execution of the disclaimer under section 37A of the Texas Probate Code, and (2) the disclaimer was not a transfer prohibited

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over competitors who do not know or use it." Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex. 1958, cert. denied, 358 U.S. 898 (1958).

342. *See* American Precision Vibrator Co. v. Nat'l Air Vibrator Co., 764 S.W.2d 274, 278 (Tex. App.—Houston [1st Dist.] 1988, no writ); Weed Eater, Inc. v. Dowling, 562 S.W.2d 898, 901-02 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.).

343. 932 F.2d at 1124-25.

344. "The owner of the secret must do something to protect himself. He will lose his secret by its disclosure unless it is done in some manner by which he creates a duty and places it on the other party not to further disclose or use it in violation of that duty. Furr's, Inc. v. United Specialty Advertising Co., 385 S.W.2d 456, 459 (Tex. Civ. App.—El Paso 1964, writ ref'd n.r.e.).

345. 932 F.2d at 1124-25.

346. *Id.* at 1125. There was no dispute over whether Two Pesos used the plans.

347. *Id.*

348. 808 S.W.2d 531 (Tex. App.—Houston [14th Dist.] 1991 writ dism'd).

349. *Id.* at 535.

by the Uniform Fraudulent Transfer Act.[350] Relying on the "relation back"[351] passage of Tex. Prob. Code Ann. section 37 (Vernon Supp. 1991), the court held that Croom's disclaimer was not a prohibited transfer because, in order to constitute a transfer, the transferring party must actually possess the property.[352] In other words, "a transfer is not made until the debtor has acquired rights in the asset transferred."[353] "Because disclaimed property passes as if the beneficiary predeceased the testator, the beneficiary never possesses the property."[354] The *Dyer* Court's decision places Texas in the majority, which follows the rule that a creditor cannot prevent a debtor from disclaiming an inheritance and that the "relation back" doctrine prevents the disclaimer from being considered a prohibited fraudulent transfer.[355]

2. *Definition of "Insider"*

In *J. Michael Putman, M.D.P.A. Money Purchase Pension Plan v. Stephenson*[356] the Dallas court of appeals held that the language of Texas Business and Commerce Code section 24.002 does not exclusively define an insider for purposes of allowing a creditor to set aside a fraudulent conveyance under the Uniform Fraudulent Transfer Act.[357] J. Michael Putman (Putman) was a close personal friend of both Thomas Stephenson (Husband) and Dorothy Stephenson (Wife), and was Wife's personal physician. Putman was also administrator of the J. Michael Putman M.D.P.A. Money Purchase Pension Plan (Pension Plan). As administrator, Putman, on behalf of the Pension Plan, entered into various transactions with Husband which involved loans of money to Husband in exchange for Husband's promissory note and pledge of his share of certain property owned jointly with the Pension Plan.

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350. TEX. BUS & COMM. CODE ANN. § 24.005(a)(1) (Vernon 1987), prohibits "every mode . . . of disposing of or parting with an asset or an interest in an asset—including a release—made with the actual intent to hinder, delay, or defraud a claimant."

351. The relation back doctrine is based on the rationale that a gift is an offer which can be accepted or rejected.

352. TEX. PROB. CODE ANN. § 37 (Vernon Supp. 1991), states that:

> Any person . . . who may be entitled to receive any property as a beneficiary and who intends to effect a disclaimer irrevocably . . . of the whole or any part of such property shall evidence same as herein provided. A disclaimer . . . shall be effective as of the death of the decedent and the property . . . shall pass as if the person disclaiming . . . had predeceased the decedent . . . .

353. TEX. BUS. & COMM. CODE ANN. § 24.007(4) (Vernon 1987).

354. 808 S.W.2d at 534.

355. *Id.* at 533. *See*, Sara L. Johnson, Annotation, *Creditor's Right to Prevent Debtor's Renunciation of Benefit Under Will or Debtor's Election to Take Under Will*, 39 ALR 4th 633 (1985).

356. 805 S.W.2d 16 (Tex. App.—Dallas 1991, no writ).

357. *Id.* at 18. The text of the section reads as follows:

> (7) "Insider" includes:
>
> (A) if the debtor is an individual,
>
> (i) a relative of the debtor or of a general partner of the debtor;
>
> (ii) a partnership in which the debtor is a general partner;
>
> (iii) a general partner in a partnership described in Subparagraph (ii) of this paragraph; or
>
> (iv) a corporation of which the debtor is a director, officer, or person in control.

Despite his knowledge of Husband's poor financial condition and his dealings on behalf of the Pension Plan with Husband, Putman did not disclose the transactions to Wife when she visited him for a regular appointment or on other occasions when she consulted him concerning Husband's and Wife's financial affairs.

Husband's financial condition deteriorated further, causing him to execute a quitclaim deed to Pension Plan conveying away his interest in the jointly owned land. Wife subsequently filed for a divorce and, after learning of the transactions between the Pension Plan and Husband, sought to have the transfer of Husband's interest in the jointly owned property to the Pension Plan set aside. The trial court set aside the conveyance as fraudulent.

The Pension Plan contended on appeal that it did not fit within the definition of insider contained in Texas Business and Commerce Code section 24.002. The court found, however, that the term includes as used in the statute meant that the express language of the statute did not contain an exclusive listing of those who could be insiders.[358] In light of Putman's knowledge of the business, financial, and personal affairs of Husband and Wife, the Court concluded that he was an insider under the UFTA with respect to the conveyance of the jointly owned property.[359] Because all action taken in the name of the Pension Plan was handled through Putman, its sole administrator, any action taken in the name of the Pension Plan was fraudulent as to a creditor because Putman, as Pension Plan administrator, was an insider.[360]

3. *Statute of Limitations*

In *Williams v. Khalaf*[361] the Texas supreme court held that for statute of limitations purposes, an action for fraud is one for debt not evidenced by a writing and is governed by a four year statute of limitations.[362] Khalaf sued Williams in October 1980 concerning the latter's agreement to construct a country and western club to be owned jointly by the parties. Although Williams initially filed a general denial, in October 1983 he filed a counterclaim asserting a cause of action for breach of contract. In September 1986, Williams filed an amended pleading that raised for the first time a cause of action for fraud based upon the same transaction or occurrence. Khalaf amended his pleading to respond that the cause of action for fraud was barred by limitations. The jury found in favor of Williams, but awarded no damages for the breach of contract claim and over $180,000 in damages on the fraud claim. The trial court rendered judgment in favor of Williams on

358. The court relied upon TEX. GOV'T. CODE ANN. § 311.005 (Vernon Sup. 1991), the Code Construction Act, which states that:

> (13) "Includes" and "including" are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded.

359. 805 S.W.2d at 19.

360. *Id.*

361. 802 S.W.2d 651 (Tex. 1990).

362. *Id.* at 657; TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a) (Vernon 1986).

the jury verdict.[363]

On appeal, the court of appeals reversed and rendered judgment that Williams take nothing because his fraud counterclaim was barred by an unspecified provision of the two year statute of limitations. The court of appeals relied upon a relation back rule to consider whether the savings statute of the Texas Civil Practice and Remedies Code would prevent the fraud claim from being barred.[364] It held that the fraud cause of action was governed by a two year statute of limitations and would therefore have been barred even if raised at the time of Williams' original filing.

In reversing, the Texas supreme court held that the court of appeals erred in assuming that fraud claims were governed by the two-year statute of limitation because the statute had been amended in 1979 to provide for a four year statute of limitation.[365] After tracing the common law development of the tort of fraud, the Court reiterated its prior holdings that fraud is an action for debt for statute of limitations purposes even though it is not debt as a strict common law action.[366]

F. Conversion

1. Bailment/Unconditional Tender

Import Systems International, Inc. v. Houston Central Industries[367] held that a bailee does not convert a bailor's property by selling the bailed goods at a warehouseman's lien sale after the bailee's refusal to turn the goods over to the bailor in response to the bailor's conditional tender of payment.[368] Import Systems International, Inc. (Import Systems) stored shoes at a central warehouse facility belonging to Houston Central Industries (Central). Central, at Import Systems' direction, delivered quantities of the shoes for shipment to Import Systems' customers. In May 1986, 263 cartons of shoes were shipped from Houston to a retail customer in Massachusetts. After a customer refused to accept a shipment of shoes, Central notified Import Systems that delivery had been refused and that the shoes were restored at its warehouse facility in Houston. Import Systems attempted to retrieve its shoes, and Central attempted to obtain payment for its freight, storage and attorneys' fees.

In connection with its attempt to retrieve its shoes, Import Systems tendered an amount apparently covering what Central believed it was owed, minus its attorneys' fees. Without the inclusion of attorneys' fees, the

363. 802 S.W.2d at 653.

364. TEX. CIV. PRAC. & REM. CODE ANN. § 16.068 (Vernon 1986) provides as follows:
> If a filed pleading relates to a cause of action, cross action, counterclaim, or defense that is not subject to a plea of limitation when the pleading is filed, a subsequent amendment or supplement to the pleading that changes the facts or grounds of liability or defense is not subject to a plea of limitation unless the amendment or supplement is wholly based on a new, distinct, or different transaction or occurrence.

365. 802 S.W.2d at 657.

366. *Id.*

367. 752 F. Supp. 745 (S.D. Tex. 1990).

368. *Id.* at 749.

amount tendered was a full tender of the total amount due. In offering this amount, however, Import Systems placed certain conditions upon Central's acceptance of its offer.[369] The parties were unable to reach an agreement, and Central eventually sold Import Systems' shoes at a warehouseman's lien sale.

Import Systems filed suit, alleging that Central had converted the shoes by refusing its tender of the full amount owed and by selling the shoes at the warehouseman's lien sale. In response, Central contended that its attorneys' fees incurred in connection with attempting to collect Import Systems' debt to it, which was secured by its warehouseman's lien, were also secured by that lien. Central asserted its claim for attorneys' fees by relying upon Texas Business and Commerce section 7.209(a)1, which does not authorize the inclusion of attorneys' fees in a warehouseman's lien but does provide that a warehouseman's lien on goods in his possession includes other unspecified charges.[370] The court refused Central's request to construe the statute broadly and liberally to include attorneys' fees.[371] Accordingly, Central was not entitled to insist upon recovery of its attorneys' fees as a prerequisite to surrendering the shoes to Import Systems.

In addition to the above, however, the court cited Texas Business and Commerce section 7.210(c),[372] and held that by placing conditions upon its otherwise sufficient tender to Central, Import Systems had failed to make a proper tender and to discharge Central's warehouseman's lien. Import Systems was therefore not entitled to possession of the goods. From this conclusion, it followed that Central was entitled to sell Import Systems' shoes to pay its debt, and was not guilty of converting Import Systems'

369. The tender included the following four conditions:
(1) The tender was a final settlement of Import Systems' liability to Central;
(2) Central's law firm was to hold the check in escrow until Central (a) tendered all of Import Systems' goods, (b) certified in writing that it had delivered all of Import Systems' goods to its designated carrier in good condition, and (c) the common carrier had removed Import Systems' goods from Texas;
(3) The payment and delivery would not release Import Systems' claims against Central; and
(4) The tender or "offer" would expire in ten (10) days.

370. TEX. BUS. & COMM. CODE ANN. § 27.209(a)(1) (Vernon 1987) states that:
A warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation (including demurrage and terminal charges), insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law.

371. *Id.* at 747.

372. That statute reads in relevant part as follows:
Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt in this chapter.
The "unconditional" tender rule has wide support in Texas law. Collision Center Paint and Body v. Campbell, 773 S.W.2d 354, 357 (Tex. App.—Dallas 1989, no writ); Arguelles v. Kaplan, 736 S.W.2d 782, 784 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.); Veale v. Rose, 657 S.W.2d 834, 839-40 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

property.[373]

G. Negligent Misrepresentation

1. Statute of Limitations

Texas American Corp. v. Woodbridge Joint Venture[374] confirmed that the statute of limitations for negligent misrepresentation is two years rather than four years.[375] A dispute arose between Texas American Corp. (Texas American) and Woodbridge Joint Venture (Woodbridge) regarding contracts for the construction of subdivisions in Hurst, Texas. On May 13, 1987, Woodbridge filed suit to terminate a contract for the purchase of subdivision lots which was executed on December 21, 1984. On October 2, 1989, Woodbridge amended its pleadings to assert that Texas American made negligent misrepresentations in order to induce it to enter into the contracts of sale. In response, Texas American pled that the claims were barred by limitations.

The court reaffirmed prior cases holding that a cause of action for negligent misrepresentation is governed by the two year statute of limitations applicable to tort actions,[376] and agreed with the Fifth Circuit's opinion in *Sioux Limited Securities Lit. v. Coopers and Lybrand*.[377] *Sioux Limited* concluded that the Texas supreme court case of *Williams v. Khalaf* only applied to claims of fraud and that the statute of limitations for negligent misrepresentation remained two years.[378] "Negligent misrepresentation is properly identified as being a claim sounding negligence rather than fraud."[379] Thus, Woodbridge's claim for negligent misrepresentation was barred by the two year statute of limitations.

H. Breach of Fiduciary Duty

1. Franchisor/Franchisee Relationship Not Fiduciary

The Texas supreme court in *Crim Truck and Tractor Co. v. Navistar International Transportation Corp.*[380] held that a relationship of mutual trust and confidence between a franchisor and a franchisee does not create a fiduciary relationship between the parties.[381] Navistar terminated Crim's franchise

373. 752 F.Supp. at 749.

374. 809 S.W.2d 299 (Tex. App.—Ft. Worth 1991, writ denied).

375. *Id.* at 302.

376. *Id.* at 302. Coleman v. Rotana, Inc. 778 S.W.2d 867, 873 (Tex. App.—Dallas 1989, writ denied).

377. 901 F.2d 51 (5th Cir. 1990).

378. 809 S.W.2d at 303.

379. *See* Great Am. Mort. Investors v. Louisville Title, 597 S.W.2d 425, 430 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.); Susser Petroleum Co. v. Latina Oil Corp., 574 S.W.2d 830, 832 (Tex. Civ. App.—Texarkana 1978, no writ). The two-year statute of limitations contained in Tex. Civ. Prac. & Rem. Code Ann. § 16.003, the same statute applicable to causes of action for negligence, still applied to claims for negligent misrepresentation.

380. No. D-0092, 1991 WL 99945 (Tex. June 12, 1991). After the submission date for this Survey, the Supreme Court on rehearing issued another opinion virtually identical to its prior opinion. The opinion on rehearing emphasized that, while the existence of a confidential relationship is ordinarily a question of fact, when the issue is one of no evidence it becomes a question of law. *See* 35 Tex. Sup. Ct. J. 342 (Jan. 22, 1992).

381. *Id.* at 3.

when it refused to sign a contract obligating Crim to purchase computer equipment required to implement Navistar's nationwide dealer communications network. Crim brought suit seeking damages for breach of contract, breach of fiduciary duty and fraud. Judgment was rendered at the trial court level in favor of Crim based on the jury verdict. The Court of Appeals found no evidence of a confidential relationship giving rise to a fiduciary duty, and reversed the trial court judgment as to the breach of fiduciary duty claim.

Although some Texas cases have recognized that certain informal relationships can give rise to a fiduciary duty,[382] the Texas supreme court failed to find such a relationship between Crim and Navistar. Crim's belief that its relationship with Navistar was one of mutual trust and confidence was insufficient to change the arm's length transaction between Crim and Navistar into a fiduciary relationship.[383] The court also declined Crim's urging that it impose a common law fiduciary duty upon franchisors in connection with franchise agreements.[384]

2. *Mutual Trust does not Create Fiduciary Duty*

Crim Truck was followed by the Fifth Circuit in *Lee v. Wal-Mart Stores, Inc.*[385] That case also held that a long standing business relationship based upon mutual trust and confidence does not give rise to a fiduciary relationship.[386] Plaintiff Lee was a real estate developer who built shopping centers in small Texas towns. Wal-Mart discount stores were the principal tenants of Lee's developments. Typically, Lee purchased land and built stores at Wal-Mart's direction based upon the oral approval of Wal-Mart personnel or their commitment letters and later entered into formal leases. Wal-Mart entered into break even leases with its developers, basing rental rates on standard calculations. These leases reimbursed Lee for an amount equal to Wal-Mart's break-even cost. Lee's profits came from favorable lease terms from adjacent shopping centers built next to Wal-Mart because these shopping centers were considered desirable leasing space.

The dispute centered around two building projects. Upon Wal-Mart's insistence, Lee bought land in December 1984 in Daingerfield for a shopping center. Wal-Mart indicated in a March 1985 commitment letter that it would enter into a lease on standard terms. Eventually, Wal-Mart proposed lease terms which were much less favorable to Lee, who nonetheless signed the lease in August of 1986. When Lee became unable to carry through on the deal, Wal-Mart canceled the lease and Lee signed a lease termination agreement. Similarly, Lee alleged that Wal-Mart encouraged him to acquire land in Paris, Texas, and later proposed a lease offering much less favorable terms to Lee than its standard break even rate. According to Lee, the lease

382. *See* MacDonald v. Follett, 180 S.W.2d 334 (Tex. 1944).
383. *See* Thigpen v. Locke, 363 S.W.2d 247, 253 (Tex. 1962).
384. In declining to impose a fiduciary duty, the court noted that the franchisor-franchisee relationship is already heavily regulated in some areas. *See* TEX. REV. CIV. STAT. ANN. art. 4413 (36) § 5.02 (Vernon Supp. 1991); 15 U.S.C. §§ 1221-1225 (1988).
385. 943 F.2d 554 (5th Cir. 1991).
386. *Id.* at 557.

was so unfavorable that Lee could not obtain financing, and ultimately agreed to sell the Paris property to Wal-Mart. Following trial of Lee's suit, the jury found that Lee and Wal-Mart had a fiduciary relationship and that Wal-Mart had breached its fiduciary duty to Lee.

Based upon *Crim Truck*, the court found that Lee and Wal-Mart "did not have a confidential relationship which would give rise to a fiduciary duty."[387] Lee argued that the relationship was successful because Lee made commitments of his time and money to potential Wal-Mart projects prior to obtaining a specific return commitment from Wal-Mart in writing. Wal-Mart also had Lee acquire options in his own name on land Wal-Mart needed. Thus, the relationship required a great deal of mutual trust between Lee and Wal-Mart.

Relying on *Crim Truck*, which held that a party may pursue his own interests without tort liability even though his actions may constitute a breach of contract, the court responded as follows: "[B]y analogy, then, a party to a business relationship should be free to pursue its own interests in negotiating leases, even if the negotiations result in a perceived bad deal for the other party, without incurring tort liability."[388]

Lee argued that *Crim Truck* did not control because, unlike the franchisor/franchisee relationship in that case, his relationship with Wal-Mart was not an ordinary contractual relationship. His relationship with Wal-Mart, however, was actually antagonistic because it was in Wal-Mart's best interest to obtain a lease less favorable to Lee and in Lee's best interest to obtain a lease less favorable to Wal-Mart.[389] At least one Texas case has rejected a finding of a fiduciary relationship where the parties' interests were inherently at odds.[390] Thus, the court was persuaded that Lee's course of dealing with Wal-Mart did not fulfill the "broad and rather vague test" employed by Texas courts to determine non-traditional fiduciary or confidential relationships.[391]

I. Miscellaneous

1. Assumption of Third Party's Debt to Another Lender is Not Interest

Victoria Bank and Trust Co. v. Brady[392] was a lender liability case in which the Texas supreme court held that when a lender requires a borrower to assume a third party's debt owed to a different lender as a condition for making a loan, the third party's debt owed to the different lender does not constitute interest.[393]

The court determined that a bank's requirement that one debtor assume

387. *Id.* at 557, quoting Crim Truck, No. D-0092, 1991 WL 99945 (Tex. June 12, 1991).
388. *Id.* at 558.
389. *Id.* at 559.
390. Thigpen v. Locke, 363 S.W.2d 247 (Tex. 1963).
391. *Id.*
392. 811 S.W.2d 931 (Tex. 1991).
393. *Id.* at 935. Interest is defined as "the compensation allowed by law for the use or forbearance or detention of money . . . ." TEX. REV. CIV. STAT. ANN. art. 5069-1.01(a),(d)(Vernon 1987). Usury is "interest in excess of the amount allowed by law."

another debtor's preexisting debt to a third party had the same legal effect as a bona fide charge or fee.[394] The bank had no connection with the third party lender and did not receive payment of the money used to pay the preexisting debt.[395] Rather, the bank simply required the debtor to assume the other debtor's preexisting debt so that it would have a superior lien on the collateral used to secure the bank's loan. Accordingly, the court held that the preexisting debt did not constitute "interest."[396]

2. *Piercing The Corporate Veil*

The Fifth Circuit in *Permian Petroleum Co. v. Petroleos Mexicanos*[397] held that the alter ego doctrine can only be used to disregard the corporate fiction when a party seeks to hold an individual liable for the obligations of a corporation in which the individual or entity owns stock.[398] A dispute arose between Petroleos Mexicanos (Pemex) and International Drilling and Energy Company, d/b/a Permian Petroleum Company (IDEC) concerning whether IDEC had received certain shipments of liquefied petroleum gas (LPG) which Pemex was obligated to make. The parties settled their disputes by entering into an agreement which provided that in return for delivery of an amount of LPG equal to the disputed amount, Pemex would receive a contingent double credit against its future obligations if it could show that IDEC had actually received the disputed LPG. Prior to the date of the agreement, IDEC's president formed a new company called Permian Petroleum Company (Permian) which purchased the assets of IDEC's LPG division. Permian used IDEC's place of business, address, and telex number. Pemex subsequently claimed to have discovered that IDEC had actually received the disputed LPG, and sought to exercise the double credit under its agreement with IDEC by refusing to pay Permian for certain other LPG deliveries.

Pemex claimed that IDEC and Permian were alter egos of each other and that Pemex was therefore entitled to assert against deliveries for which it owed Permian the double credit provided for in its agreement with IDEC. Permian responded that the agreement only entitled Pemex to a double

394. The court quoted the following language from Sapphire Homes, Inc. v. Gilbert, 426 S.W.2d 278 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.):

> Lenders often require borrowers to pay expenses incurred by the lenders in connection with loans, such as title policy premiums, recording fees, costs of supplemental abstracts and attorneys' fees. When such expenses are actually incurred and they are paid in good faith to those furnishing the services, and no part of the payment is received by the lender, they are not properly classified as interest in determining whether the loan is usurious.

Id. at 284.

The supreme court distinguished Alamo Lumber Company v. Gold, 661 S.W.2d (Tex. 1983), and its predecessors, which held that when a lender requires a borrower to pay or assume a debt that a third party owes to the same lender, the amount of the payoff or assumed debt is considered as interest in determining whether the loan is usurious. *Id.* at 927.

395. *Id.* at 937.

396. *Id.* at 937.

397. 934 F.2d 635 (5th Cir. 1991).

398. *Id.* at 643.

credit against IDEC. The district court found that Permian and IDEC were "alter egos of each other," and that "a contract with one was effectively a contract with the other."[399] Accordingly, the district court allowed Pemex to exercise its double credit.

On appeal, the Fifth Circuit held that "Texas courts will not apply the alter ego doctrine to directly or reversely pierce the corporate veil unless one of the alter egos owns stock in the other."[400] Because the record did not show that Permian or IDEC owned stock in each other, the "alter ego" doctrine was inapplicable. Nonetheless, the appellate court affirmed the trial court's holding that Pemex was entitled to the credit based on the Texas sham to perpetrate a fraud doctrine. Under this doctrine, a party need only demonstrate constructive fraud, as distinguished from actual fraud, in order to induce a court to disregard the corporate function.[401]

Because IDEC sold its LPG assets to Permian before entering into the agreement with Pemex without giving any notice to Pemex that Permian might be a separate but identically named company, the sham to perpetrate a fraud doctrine was applicable and the district court's allowance of the double credit to Pemex was affirmed.[402]

3. *Force Majeure Clauses*

In *PPG Industries, Inc. v. Shell Oil Co.*[403] the Fifth Circuit refused to hold that Texas Business and Commerce Code sections 2.615 and 1.102 added a requirement to a force majeure clause that the force majeure event be beyond the parties' reasonable control.[404] The district court granted a summary judgment in favor of Shell for excusable non-performance of an ethylene delivery contract, concluding that the force majeure clause applied to excuse non-performance due to explosion whether or not the explosion was beyond the reasonable control of Shell. PPG responded (1) that Texas Business and Commerce Code section 2.615 imposes a requirement that force majeure

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399. *Id.* at 643.

400. *Id.* at 643 (quoting, Zahra Spiritual Trust v. United States, 910 F.2d 240, 246 (5th Cir. 1990)). Reverse piercing involves an attempt to hold a corporation liable for the obligations of a shareholder.

401. In Castleberry v. Branscum, 721 S.W.2d 270 (Tex. 1986), the Texas supreme court stated that the sham to perpetrate a fraud doctrine is to prevent use of the corporate entity as a cloak for fraud or illegality or to work an injustice . . . ." 721 S.W.2d at 273 (quoting Gentry v. Credit Plan Corp. of Houston, 528 S.W.2d 571, 575 (Tex. 1975)). The doctrine is an equitable one and its application is flexible and fact specific. Actual and constructive fraud are distinguished as follows:

> Actual fraud usually involved dishonesty of purpose or intent to deceive, whereas constructive fraud is the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests.

Archer v. Griffith, 390 S.W.2d 735, 740 (Tex. 1964).

402. 934 F.2d at 644-45.

403. 919 F.2d 17 (5th Cir. 1990).

404. The force majeure clause at issue provided in relevant part:

> Either seller or buyer will be excused from this contract to the extent that the performance is delayed or prevented by any of the circumstances (except financial) reasonably beyond its control or by . . . explosion . . . .

events be beyond the parties' reasonable control, and (2) that Texas Business and Commerce Code section 1.102(c) imposes a non-waivable duty of good faith and diligence that precluded enforcement of the clause.

The court distinguished several cases cited by PPG in which other courts refused to give effect to force majeure clauses because the event in question was found to be within the control of one of the parties.[405] In these cases, said the court, the reasonable control requirements were supplied by the terms of the contract itself rather than by dictates of law.[406] Relying upon Comment 8 to section 2.615 itself, which sets the only codal limitation upon contractual terms at "mercantile sense and reason," the court refused to hold that Texas law would read such a requirement into force majeure clauses, and concluded "[w]e decline to substitute the 'mercantile sense and reason' of . . . this court . . . for that of these two sophisticated corporations."[407]

Additionally, the court refused to hold that section 1.102(c) created a non-waivable duty of good faith and diligence that was contravened by Shell's force majeure clause. In rejecting PPG's argument, the court cited the language of section 1.102(c), which permits parties to "determine the standard by which the performance of [contractual obligations] is to be measured if such standards are not manifestly unreasonable."[408] Because PPG and Shell were sophisticated parties, the standard of performance established by their contract was not manifestly unreasonable and the force majeure clause did not exceed section 1.102(c)'s commercial standards.[409]

4. *Damages/Lost Future Profits*

One of the best ways that a business can prove damages claimed for lost future profits is to present evidence of its past profits. Although evidence of past profits is desirable, it is not an absolute necessity. *Orchid Software, Inc. v. Prentice- Hall, Inc.*[410] held that the absence of evidence of past profits does not preclude a new business from recovering damages for lost future profits.[411] Orchid Software, Inc. (Orchid) sued Prentice-Hall, Inc. (Prentice-Hall) in connection with a contract pursuant to which Orchid was to develop a line of accounting and business management computer programs in return for Prentice-Hall's promise to publish and market the programs. Prentice-Hall also agreed to partially fund the development of the programs by periodically paying Orchid advances against its anticipated royalties from the sales of the programs. Orchid's development of programs went more slowly than expected, and the company experienced cash flow problems.

405. *See* United States v. Brooks-Calloway Co., 318 U.S. 120 (1943); Eastern Air Lines, Inc. v. McDonald Douglas Corp., 532 F.2d 957 (5th Cir. 1976); Rowan Cos. v. Transco Exploration Co., 679 S.W.2d 660 (Tex. App.—Houston [1st Dist.] 1984, cert. denied, 474 U.S. 822).
406. 919 F.2d at 18.
407. *Id.* at 19.
408. *Id.*
409. *Id.*
410. 804 S.W.2d 208 (Tex. App.—Austin 1991, writ requested).
411. *Id.* at 211.

Eventually, Prentice-Hall terminated the entire agreement and Orchid brought suit on breach of contract and various other theories, seeking as damages from Prentice-Hall a significant amount of anticipated future lost profits. The trial court granted Prentice-Hall's Motion for Summary Judgment as to lost profits on the basis that Orchid had not earned a profit from the time it started the business until the time it had ceased doing business.[412]

The court of appeals reversed. An injured party seeking to recover future lost profits must show that the lost profits were a natural and probable result of the defendant's act or omission and that the profits that he would have earned are reasonably certain.[413] Texas cases have held, however, that a new business attempting to show anticipated profits with reasonable certainty is not limited to past profit history.[414] Further, precise calculations of anticipated profits have never been required; a new business need only establish its losses with reasonable certainty in order to recover.

Because Prentice-Hall, as the movant for summary judgment, did not establish that Orchid could not show reasonably certain future lost profits by means other than the use of past profit history, it was not entitled to summary judgment.[415] Accordingly, the case was reversed and remanded for further proceedings.

412. *Id.* at 210.

413. *Id.* This requirement of certainty has often prevented new businesses from recovering lost profits. *See* Atomic Fuel Extraction Corp. v. Slick's Estate, 386 S.W.2d 180, 189 (Tex. Civ. App.—San Antonio 1964), writ ref'd n.r.e. per curiam, 403 S.W.2d 784 (Tex. 1965). If there is no evidence from which profits can be intelligently estimated, this requirement prevents a speculative recovery.

414. *Id.* at 210. *See also*, White v. Southwestern Bell Telephone Co., 651 S.W.2d 260 (Tex. 1983) (business records showing past developments and existing conditions were sufficient); Pace Corp. v. Jackson, 284 S.W.2d 340 (Tex. 1955) (opinion of business owner based on prior similar businesses profit history was sufficient). Provided that reasonable certainty can be achieved, most jurisdictions have rejected the "new business rule" as a per se rule of prohibition against recovery of lost future profits. *See* Annotation, *Recovery of Anticipated Lost Profits of New Business: Post-1965 cases*, 55 A.L.R. 4th 507 (1987).

415. 804 S.W.2d at 211.