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Tim Gavin

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# COMMERCIAL TORTS AND DECEPTIVE TRADE PRACTICES

by  
Tim Gavin\*

## I. ANTITRUST

THE only cases decided during the Survey period that dealt with antitrust issues considered the substantive law in effect prior to the enactment of the Texas Free Enterprise and Antitrust Act of 1983 (TFEAA).<sup>1</sup> In *Cooper v. Fortney*<sup>2</sup> the court held that a contract that obligated a seller to deliver a fixed quantity of lignite over a sixty-month period was not an output contract.<sup>3</sup> Consequently, the provisions of the agreement prohibiting the seller from delivering lignite to any competitor of the purchaser unduly restrained competition in violation of the antitrust laws in effect when the parties drafted the contract.<sup>4</sup>

Due to the unusual manner in which the plaintiff raised the antitrust issue in *Cooper*, the court was not required to address the issue of whether the remedies of the TFEAA should apply to violations that occurred prior to its enactment.<sup>5</sup> This issue of retroactive application of TFEAA remedies arose in *Savin Corp. v. Copy Distributing Co.*<sup>6</sup> In *Savin* a manufacturer of copy equipment brought a collection suit against a distributor. The distributor defended on the grounds that the terms of the contract prohibiting the distributor from selling to anyone other than retail end users violated the antitrust laws in effect in 1979, the time that the parties entered into the contract. Although the parties apparently agreed that the provision in question violated the antitrust laws previously in effect,<sup>7</sup> they debated the appropriate remedy. The antitrust laws previously provided that an agreement

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\* B.A., St. Edward's University; J.D., Southern Methodist University. Attorney at Law, Carrington, Coleman, Sloman & Blumenthal, Dallas, Texas.

1. TEX. BUS. & COM. CODE ANN. §§ 15.01-.26 (Vernon Supp. 1987).

2. 703 S.W.2d 217 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

3. *Id.* at 219. The Texas Supreme Court has generally held output contracts, which require a seller to deliver all of the products it is able to produce during a given period, not to be in violation of the Texas antitrust laws. See *Portland Gasoline Co. v. Superior Mktg. Co.*, 150 Tex. 533, 540-41, 243 S.W.2d 823, 827-28 (1951).

4. 703 S.W.2d at 222.

5. The plaintiff in *Cooper* brought a legal malpractice action, seeking damages occasioned by the fact that the federal district court ruled the contract in question to be unenforceable. As a result, the court did not apply the antitrust remedies in the *Cooper* case. *Id.* at 222-23.

6. 716 S.W.2d 690 (Tex. App.—Corpus Christi 1986, no writ).

7. *Id.* at 691. The court's holding is consistent with the court's opinion in *Llewellyn v. Borin*, 569 S.W.2d 946, 949-50 (Tex. Civ. App.—Texarkana 1978, no writ).

that contained any term that violated those laws was unenforceable.<sup>8</sup> Consequently, this remedy would have prohibited the manufacturer in *Savin* from collecting any sums due and owing under the agreement.<sup>9</sup> The TFEAA does not include this draconian remedy. Section 311.031(b) of the Code Construction Act provides that in cases in which a reenactment or amendment of a statute has reduced a penalty, the reduced penalty shall apply.<sup>10</sup> Based on this statute, the manufacturer argued that courts should not enforce the forfeiture provision. The court rejected this contention on grounds that are unclear.<sup>11</sup>

The court noted that the TFEAA continues to provide that every contract in restraint of trade or commerce is unlawful.<sup>12</sup> The court then stated, "Whether the contract is an unlawful restraint of trade is a matter of substantive law. The general rule is that the laws which are in existence at the time of the making of the contract are impliedly incorporated into the contract."<sup>13</sup> This reasoning seems to confirm that the legality of the provisions in the contract should be judged under the law in effect at the time the parties entered into the contract, but fails to address the issue of the appropriate remedy. Future cases hopefully will clarify the issue of whether Texas courts should refuse to enforce contracts that predate the enactment of the TFEAA and contain provisions that violate the preexisting antitrust laws.

## II. DECEPTIVE TRADE PRACTICES

### A. Definition of Consumer

The Texas Deceptive Trade Practices—Consumer Protection Act (DTPA)<sup>14</sup> provides relief for a consumer defined, with certain exceptions, as an individual, partnership, corporation, the State of Texas, or a subdivision or agency of the State of Texas who seeks or acquires by purchase or lease, any goods or services.<sup>15</sup> The DTPA specifically applies to consumer purchases of goods defined as "tangible chattels or real property purchased or leased for use."<sup>16</sup> Texas courts have consistently held that a security is not a good within the meaning of the DTPA<sup>17</sup> and thus have prevented claims for securities fraud from being brought as DTPA actions. The plaintiff in *E.F. Hutton & Co. v. Youngblood*<sup>18</sup> successfully overcame this hurdle

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8. Act of Sept. 1, 1967, ch. 785, § 15.04, 1967 Tex. Gen. Laws 2343, 2556, amended by Act of Aug. 29, 1983, ch. 519, 1983 Tex. Gen. Laws 3010, 3014.

9. See *W.T. Rawleigh Co. v. Gober*, 3 S.W.2d 845 (Tex. Civ. App.—Waco 1928, no writ).

10. TEX. GOV'T CODE ANN. § 311.031(b) (Vernon Special Pam. 1987).

11. *Savin*, 716 S.W.2d at 692.

12. *Id.*; see TEX. BUS. & COM. CODE ANN. § 15.05(a) (Vernon Supp. 1987).

13. 716 S.W.2d at 692.

14. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1987).

15. *Id.* § 17.45(4).

16. *Id.* § 17.45(1).

17. See *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 174-75 (Tex. 1980); *Portland Sav. & Loan Ass'n v. Beville, Bresler & Shulman Gov't Sec., Inc.*, 619 S.W.2d 241, 245 (Tex. Civ. App.—Corpus Christi 1981, no writ).

18. 708 S.W.2d 865 (Tex. App.—Corpus Christi 1986, writ granted).

by alleging that his purchase of securities included the purchase of a service in the form of brokerage advice. Acting on advice from the defendant broker that the transaction would be tax free, the plaintiff withdrew all of the funds from his retirement account and invested in other securities in order to obtain a higher return. After the Internal Revenue Service treated the transaction as a taxable event, the plaintiff initiated a DTPA action against the broker, claiming that he had purchased investment advice as the result of misrepresentations made to him. The broker first maintained that he gave the investment advice without consideration, and that the plaintiff thus neither purchased nor leased the advice within the meaning of the DTPA.<sup>19</sup> The court noted that as a full service brokerage house the defendant received higher commissions than would a discount brokerage house because of the services rendered to its customers.<sup>20</sup> As a result, the court concluded that the services of tax investment counseling and assisting in the purchase of securities were inextricably intertwined. The court could then characterize the plaintiff as a consumer of a service within the meaning of the DTPA.<sup>21</sup> Consequently, the court affirmed a judgment in favor of the plaintiff.<sup>22</sup>

Although the definition of goods under the DTPA does not cover securities in the form of stocks and bonds, some overlap between the definition of securities under the federal and state securities laws and the definition of goods under the DTPA does exist. In *MBank Fort Worth, N.A. v. Trans Meridian, Inc.*<sup>23</sup> the court held that a purchase of a working interest in an oil and gas lease constituted a purchase of goods within the meaning of the DTPA.<sup>24</sup> The court reached this conclusion despite the fact that the purchase of the working interest was a securities transaction for purposes of both the federal and state securities laws.<sup>25</sup>

Courts have consistently held that an attempt to acquire money is not an attempt to purchase goods or services as defined in the DTPA.<sup>26</sup> In keeping

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19. See TEX. BUS. & COM. CODE ANN. § 17.45(1) (Vernon Supp. 1987).

20. 708 S.W.2d at 868.

21. *Id.*

22. *Id.* at 871. The court's ultimate conclusion does not appear well founded. The court found that the statement regarding the tax benefits of the investment constituted a misrepresentation of the benefits, characteristics, or qualities of the broker's service, which is a violation of TEX. BUS. & COM. CODE ANN. § 17.46(b)(5) (Vernon Supp. 1987). *Youngblood*, 708 S.W.2d at 869. The misrepresentation, however, did not concern the nature of the investment advice. The opinion fails to reflect any statements made by the broker regarding the quality of the advice that he would render. Instead, the statement in question concerned the benefits of the security itself, *i.e.*, whether one could purchase the security without adverse tax consequences. Since the applicable provision of the DTPA only prohibits misrepresentations regarding the benefits or characteristics of *goods* or *services*, TEX. BUS. & COM. CODE ANN. § 17.46(b)(5) (Vernon Supp. 1987), and since the security in question does not fall within the definition of either of these terms, this section does not make the statements actionable under the DTPA.

23. 625 F. Supp. 1274 (N.D. Tex. 1985).

24. *Id.* at 1279.

25. *Id.* at 1277 n.7.

26. See *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 174-75 (Tex. 1980); *Portland Sav. & Loan Ass'n v. Beville, Bresler & Schulman Gov't Sec., Inc.*, 619 S.W.2d 241, 245 (Tex. Civ. App.—Corpus Christi 1981, no writ).

with this principle, the court in *Grass v. Credito Mexicano, S.A.*<sup>27</sup> held that the purchase of a certificate of deposit is not a purchase of goods or services within the meaning of the DTPA.<sup>28</sup> The court in *First Federal Savings & Loan Association v. Ritenour*<sup>29</sup> reached a contrary conclusion on the ground that the plaintiff in that case had also purchased a service in the form of advice and counseling. Specifically, an employee of the defendant bank had advised the plaintiff that the bank could place a hold on the certificate to prevent his wife from withdrawing the funds even though the spouses jointly owned the certificate. The plaintiff recovered judgment against the bank after his wife withdrew the funds.<sup>30</sup>

The court in *Hennessey v. Skinner*<sup>31</sup> considered the question of whether the transaction at issue included the purchase of a partnership interest, which the DTPA would not cover, or the purchase of an interest in cattle, which the DTPA would cover. The plaintiff paid \$2000 for a ten percent interest in the defendant's herd of sixty-three cows. He paid an additional \$120 for a ten percent interest in a specified bull. The parties entered into a partnership for the raising and selling of cattle. The court held that the plaintiff did not purchase an intangible partnership interest, but instead purchased an undivided interest in the cows in question, after which the parties became partners.<sup>32</sup> The court further noted that even if the plaintiff had purchased a combination of tangible goods and an intangible partnership interest, the legislature clearly intended that the DTPA cover such mixed purchases.<sup>33</sup>

### B. Notice

At least thirty days before filing suit under the DTPA a consumer must give the potential defendant written notice of his specific complaint and the amount of actual damages and expenses, including attorney's fees, that the consumer incurred in asserting the claim.<sup>34</sup> The court in *Village Mobile Homes, Inc. v. Porter*<sup>35</sup> held that a claimant does not have to disclose the specific theory of the claim, nor does a claimant have to advise a potential defendant of the particular sections of the DTPA that the defendant has violated.<sup>36</sup> Three cases decided during the Survey period confirmed that the defendant must raise a plaintiff's failure to give the required notice. In *West*

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27. 797 F.2d 220 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1575, 94 L. Ed. 2d 766 (1987).

28. *Id.* at 222.

29. 704 S.W.2d 895 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

30. *Id.* at 900-01. The dissent argued that the plaintiff was not a consumer because he and his wife purchased the certificate of deposit some eight months before the bank employee gave the advice. Consequently, at the time the bank issued the certificate of deposit, all the plaintiff acquired was the certificate itself, which is not a "good." Furthermore, at the time the employee gave the advice, no funds changed hands, and thus the plaintiff did not acquire this "service" by purchase or lease. *Id.* at 902 (Seerden, J., dissenting).

31. 698 S.W.2d 382 (Tex. App.—Houston [14th Dist.] 1985, no writ).

32. *Id.* at 385.

33. *Id.*

34. TEX. BUS. & COM. CODE ANN. § 17.50A(a) (Vernon Supp. 1987).

35. 716 S.W.2d 543 (Tex. App.—Austin 1986, no writ).

36. *Id.* at 547.

*v. Carter*,<sup>37</sup> *Brown Foundation Repair & Consulting v. McGuire*,<sup>38</sup> and *Metro Ford Truck Sales, Inc. v. Davis*,<sup>39</sup> the courts held that the defendant bore the burden of raising noncompliance with the notice statute through special exception, plea in abatement, objection to testimony, or some equivalent means of calling the matter to the court's attention.<sup>40</sup>

### C. Producing Cause

Although the Texas Supreme Court has held that a plaintiff need not show reliance upon a misrepresentation in order to prevail in a DTPA claim, a plaintiff still must show that the defendant's misrepresentation was a producing cause of his loss.<sup>41</sup> The plaintiff in *MacDonald v. Texaco, Inc.*<sup>42</sup> failed to meet this burden. The plaintiff, Ronald MacDonald, brought suit against Texaco after a fire at a Texaco station destroyed his van. The plaintiff claimed that Texaco represented to him that he could "Trust . . . [His] Car to the Man Who Wears the Star," that he had done so, and that Texaco had rewarded his trust with a burned out shell.<sup>43</sup> The plaintiff admitted, however, that he chose the particular station to which he took his van based on the fact that a third party informed him that the station would have a mechanic on duty. Since the Texaco slogan did not induce him to deliver his car to the station in question, it was not a producing cause of his damages.<sup>44</sup>

### D. Damages

A plaintiff who prevails in a DTPA action may recover the amount of actual damages that the defendant's conduct has caused.<sup>45</sup> Since the DTPA does not delineate the types of injuries that are compensable under the Act, a court must look to the common law for guidance as to the damages that are recoverable.<sup>46</sup> The plaintiff in *Farrell v. Hunt*<sup>47</sup> suffered an adverse judgment as a consequence of his failure to prove actual damages in accordance with common law principles. The plaintiff mortgagor brought suit against the defendant mortgagee for wrongful foreclosure and for violation of the DTPA. The jury found that at the time of foreclosure the plaintiff had not defaulted on his note and that the defendant knowingly entered into an un-

37. 712 S.W.2d 569 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

38. 711 S.W.2d 349 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

39. 709 S.W.2d 785 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.).

40. *West*, 712 S.W.2d at 574-75; *McGuire*, 711 S.W.2d at 353; *Davis*, 709 S.W.2d at 788.

41. *Weitzel v. Barnes*, 691 S.W.2d 598, 600 (Tex. 1985); see *Hughes & Gavin, Commercial Torts and Deceptive Trade Practices, Annual Survey of Texas Law*, 40 Sw. L.J. 133, 144 (1986) [hereinafter *Hughes & Gavin, 1986 Annual Survey*].

42. 713 S.W.2d 203 (Tex. App.—Corpus Christi 1986, no writ).

43. *Id.* at 204.

44. *Id.* at 205. The court did not address the question of whether an advertising slogan can be an actionable misrepresentation under the DTPA. It is hoped that the court would have found this statement to be akin to the puffery that occurs when a seller touts his wares, which is not actionable. See *infra* notes 81-87 and accompanying text.

45. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1987).

46. See *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 939 (Tex.), *cert. denied*, 449 U.S. 1015 (1980).

47. 714 S.W.2d 298 (Tex. 1986).

conscionable course of action in foreclosing on the property. The proper measure of damages in a wrongful foreclosure suit is the "difference between the value of the property in question at the date of foreclosure and the remaining balance due on the indebtedness."<sup>48</sup> Although the plaintiff obtained a finding on the market value of the property on the date of foreclosure, he failed to offer proof or request an issue on the amount of the indebtedness due at that time. This fatal shortcoming in his wrongful foreclosure action also barred any claim under the DTPA, since it amounted to a failure to prove actual damages recoverable under the Act. Consequently, the supreme court affirmed the granting of a judgment notwithstanding the verdict.<sup>49</sup>

The plaintiff in *Metro Ford Truck Sales, Inc. v. Davis*<sup>50</sup> met with considerably better luck in establishing damages under the DTPA. The plaintiff recovered actual damages in the amount of \$534,016 and attorney's fees in the amount of \$20,000 based on his purchase of a diesel truck that had a purchase price of \$48,500. The truck was a genuine lemon requiring the plaintiff to incur costs for repairs and lost running time, eventually leading to the repossession of the truck. The court affirmed the recovery of damages for loss of use of the truck from the date of repossession through the date of trial, a period of approximately twenty-five months.<sup>51</sup> Based on testimony regarding reasonable rental rates, the jury awarded \$74,016 for lost use. This award was more than the value of the truck itself. The jury also awarded damages for the difference in value of the truck as sold and as represented, lost earnings, mental anguish, and additional damages for a knowing DTPA violation. Finally, the court awarded actual damages for loss of credit, apparently the first such award under the DTPA.<sup>52</sup>

In a decision that has the potential to expand dramatically the definition of actual damages, the court in *Village Mobile Homes, Inc. v. Porter*<sup>53</sup> allowed the plaintiff to recover compensation for the time spent in attempting to solve problems that the defendant's deceptive acts had created.<sup>54</sup> The defendant in that case sold a mobile home that was subject to an undisclosed lien. The court affirmed an award of damages for the time the plaintiff spent in conducting a title search.<sup>55</sup> This decision opens the door for plaintiffs to seek recovery for personal time spent on the matter that is the subject of the litigation. Although the damages in *Porter* were not substantial, a highly paid professional, whose time could be worth upwards of \$200 per hour, could accrue substantial DTPA damages.<sup>56</sup>

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48. *League City State Bank v. Mares*, 427 S.W.2d 336, 340 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.).

49. 714 S.W.2d at 300.

50. 709 S.W.2d 785 (Tex. App.—Fort Worth 1986, ref'd writ n.r.e.).

51. *Id.* at 790.

52. *Id.* at 791.

53. 716 S.W.2d 543 (Tex. App.—Austin 1986, no writ).

54. *Id.* at 550.

55. *Id.*

56. The court's opinion does not give much guidance concerning the circumstances under which a court may award damages to compensate a plaintiff for the loss of his time. Can a

A plaintiff in a DTPA case has a duty to mitigate the damages that he suffers. In *Great State Petroleum, Inc. v. Arrow Rig Service, Inc.*<sup>57</sup> the court held that a plaintiff is allowed to recover as damages the amount reasonably expended in his efforts to mitigate his damages.<sup>58</sup> The plaintiff in that case purchased a new drilling rig in order to avoid losses of approximately \$5000 for each day that a defective rig was not in operation. The court held that upon retrial the jury must determine whether replacement or repair of the rig was more reasonably necessary under the circumstances, but that the plaintiff could recover the cost of whichever of these two courses the jury found appropriate.<sup>59</sup>

In addition to actual damages, the DTPA allows a plaintiff to recover automatically two times that portion of the actual damages that does not exceed \$1000.<sup>60</sup> In *Blue Island, Inc. v. Taylor*<sup>61</sup> the court held that the trial court did not err in refusing to instruct the jury on this automatic award of an additional \$2000 in damages.<sup>62</sup> A plaintiff who can establish that the defendant acted knowingly can recover even greater rewards. If the trier of fact finds a knowing violation of the DTPA, the court may award additional damages of not more than three times the amount of actual damages in excess of \$1000.<sup>63</sup> The court in *Melody Homes Manufacturing Co. v. Barnes*<sup>64</sup> held that a jury may award additional damages upon finding that a defendant has engaged in a knowing breach of warranty regardless of whether the jury finds that the defendant engaged in any of the false, misleading, or deceptive acts listed under the DTPA.<sup>65</sup> In *Jim Walters Homes, Inc. v. Reed*<sup>66</sup> the court of appeals modified the trial court's judgment by awarding additional damages under the DTPA as well as exemplary damages, both of which the jury found.<sup>67</sup> Although the general rule is that recovery under the DTPA is cumulative of other remedies,<sup>68</sup> the court of appeals' decision in *Reed* is inconsistent with previous cases that denied the recovery of both exemplary and additional damages under the DTPA.<sup>69</sup> The supreme court reversed the award of exemplary damages in *Reed* on the ground that the

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senior partner in a law firm who has to return a defective five-dollar product recover \$200 for the hour spent tending to the matter? Future decisions should keep this Pandora's box closed.

57. 706 S.W.2d 803 (Tex. App.—Fort Worth), *reheard on other grounds*, 714 S.W.2d 429 (1986).

58. *Id.* at 807.

59. *Id.* at 809.

60. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1987).

61. 706 S.W.2d 668 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

62. *Id.* at 670.

63. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1987).

64. 708 S.W.2d 600 (Tex. App.—Fort Worth 1986), *aff'd*, 30 Tex. Sup. Ct. J. 489, 492 (June 17, 1987).

65. *Id.* at 602.

66. 703 S.W.2d 701 (Tex. App.—Corpus Christi 1985), *modified*, 711 S.W.2d 617 (Tex. 1986).

67. *Id.* at 708.

68. TEX. BUS. & COM. CODE ANN. § 17.43 (Vernon Supp. 1987).

69. *See, e.g.,* Charlie Thomas Courtesy Ford v. Avalos, 619 S.W.2d 9, 11 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).



plaintiff had failed to prove a tortious injury.<sup>70</sup> As a result, the court failed to reach the issue regarding the award of both exemplary and additional damages under the DTPA.

### E. Defenses

Texas courts have consistently held that a simple breach of contract cannot constitute a deceptive trade practice under the DTPA.<sup>71</sup> The courts have applied this principle most frequently by denying a plaintiff standing to pursue a DTPA action against an insurance company that failed to pay a claim.<sup>72</sup> The United States district court in *Lexington Insurance Co. v. Bennett Evans Grain Co.*<sup>73</sup> and in *South Texas National Bank v. United States Fire Insurance Co.*<sup>74</sup> relied upon this principle in granting summary judgments denying the plaintiffs any recovery on their DTPA claims based upon the defendants' failure to pay insurance claims.<sup>75</sup> The court in *Helms v. Southwestern Bell Telephone Co.*<sup>76</sup> applied this principle outside the insurance arena. Specifically, the court affirmed a dismissal of a DTPA claim in which the plaintiff alleged that the defendant failed to list properly the plaintiff's number in the yellow pages. The court viewed this allegation as no more than a simple breach of contract, which cannot constitute a violation of the DTPA.<sup>77</sup> To like effect is the court's opinion in *Atrium Boutique v. Dallas Market Center Co.*,<sup>78</sup> in which the court held that the breach of an oral contract to renew a lease could not be actionable as a deceptive trade practice.<sup>79</sup> The court indicated that it might have reached a different result had the evidence indicated that at the time the parties entered into the oral contract the defendant never intended to perform.<sup>80</sup>

In its opinion in *Presidio Enterprises, Inc. v. Warner Bros. Distributing*

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70. 711 S.W.2d at 617.

71. See *Ashford Dev., Inc. v. USLife Real Estate Serv. Corp.*, 661 S.W.2d 933, 935 (Tex. 1983); *Coleman v. Hughes Blanton, Inc.*, 599 S.W.2d 643, 646 (Tex. Civ. App.—Texarkana 1980, no writ); Hughes & Gavin, *Commercial Torts and Deceptive Trade Practices, Annual Survey of Texas Law*, 39 Sw. L.J. 123, 136-37 (1985) [hereinafter Hughes & Gavin, 1985 *Annual Survey*].

72. See *American Ins. Cos. v. Reed*, 626 S.W.2d 898, 905 (Tex. App.—Eastland 1981, no writ); *General Accident, Fire & Life Assurance Corp. v. Legate*, 578 S.W.2d 505, 506-07 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.).

73. 642 F. Supp. 78 (S.D. Tex. 1986).

74. 640 F. Supp. 278 (S.D. Tex. 1985).

75. *Lexington Ins.*, 642 F. Supp. at 83; *South Tex. Nat'l Bank*, 640 F. Supp. at 280-81.

76. 794 F.2d 188 (5th Cir. 1986).

77. *Id.* at 190-91. The court distinguished several cases allowing recovery under the DTPA for an improper placing of a yellow page advertisement. The court noted that in these other cases something more was shown than just a failure to comply with the contractual terms. *Id.* at 191. See *Martin v. Lou Poliquin Enters., Inc.*, 696 S.W.2d 180, 182-83 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.); *Reuben H. Donnelley Corp. v. McKinnon*, 688 S.W.2d 612, 614 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

78. 696 S.W.2d 197 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

79. *Id.* at 200.

80. *Id.*; see also *Group Hosp. v. One & Two Brookriver Center*, 704 S.W.2d 886, 888-89 (Tex. App.—Dallas 1986, no writ) (suit involving contract interpretation is for mere breach of contract, which is not violation of DTPA).

*Corp.*<sup>81</sup> the Fifth Circuit discussed a second defense that is available to defendants in a DTPA action. The plaintiffs in that case were film exhibitors who brought suit against a film distributor alleging misrepresentations concerning the movie *The Swarm*. The plaintiffs paid \$65,000 for the right to show the film, which turned out to be a flop. The plaintiffs alleged that statements made in promotional materials regarding the film were actionable misrepresentations under the DTPA. The Fifth Circuit first noted that to be actionable as a misrepresentation a statement must be one of fact, meaning "one that (1) admits of being adjudged true or false in a way that (2) admits of empirical verification."<sup>82</sup> The court then held that the statements cited by the plaintiffs, including claims that the film would be the "blockbuster for the summer of 1978"<sup>83</sup> and "the most 'want-to-see' movie of the year,"<sup>84</sup> were not actionable statements of fact, as they turned on vague, indefinable terms. The court characterized these statements as predictions.<sup>85</sup> In language that would sharply limit potential claims under the DTPA, the Fifth Circuit held that a prediction or statement about the future is essentially an expression of opinion, which is not ordinarily actionable.<sup>86</sup> An exception to this rule exists for statements of opinion made by a person who has special knowledge regarding the matter on which the person expresses the opinion.<sup>87</sup> The court noted that this exception applies typically to the opinions of specialized experts, such as jewelers, lawyers, and physicians, who base their opinion on objective, verifiable facts.<sup>88</sup> The exception is not applicable in cases in which a plaintiff accuses a salesman of puffery in the sale of his wares. Since the court believed that the facts before it constituted mere puffing, the court reversed the judgment in favor of the plaintiff and directed the district court to dismiss the complaint.<sup>89</sup>

The DTPA, in section 17.56A, contains a limitations provision requiring that plaintiffs bring all actions within two years after the date on which the conduct occurred or after which the consumer should have discovered the occurrence of the act.<sup>90</sup> The court's opinion in *MBank Fort Worth, N.A. v. Trans Meridian, Inc.*<sup>91</sup> expanded the defense provided in section 17.56A in holding that the limitations provisions under the DTPA impliedly exclude any savings provisions provided in other statutes.<sup>92</sup> Specifically, the court held that article 5539c,<sup>93</sup> which allows a party to assert a time-barred coun-

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81. 784 F.2d 674 (5th Cir. 1986).

82. *Id.* at 679.

83. *Id.* at 676.

84. *Id.*

85. *Id.* at 679.

86. *Id.* at 680.

87. *Id.* at 682. For a discussion of the "special knowledge" exception see RESTATEMENT (SECOND) OF TORTS §§ 539, 542 (1977).

88. 784 F.2d at 682.

89. *Id.* at 687.

90. TEX. BUS. & COM. CODE ANN. § 17.56A (Vernon Supp. 1987).

91. 625 F. Supp. 1274 (N.D. Tex. 1985).

92. *Id.* at 1281-82.

93. TEX. REV. CIV. STAT. ANN. art. 5539c (Vernon 1969) (now codified at TEX. CIV. PRAC. & REM. CODE ANN. § 16.069 (Vernon 1986)).

terclaim that arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim, did not apply to DTPA counterclaims.<sup>94</sup> In reasoning that is not altogether clear, the court held that the only limitations provision applicable to a DTPA claim is provided in section 17.56A, and that if the legislature intended to give DTPA claimants the benefit of savings provisions, it could have done so.<sup>95</sup>

In *Jernigan v. Page*,<sup>96</sup> a decision discussed in a previous Survey article,<sup>97</sup> the Corpus Christi court of appeals held that a plaintiff has constructive notice of real property documents that are filed of record.<sup>98</sup> Such notice estopped the plaintiff in *Jernigan* from claiming that the defendant had engaged in an unconscionable act in foreclosing a recorded lien of which the plaintiff had no actual knowledge.<sup>99</sup> The court in *Medallion Homes, Inc. v. Thermar Investments, Inc.*<sup>100</sup> created a seemingly unwarranted extension of this doctrine. The defendant in that case had contracted to convey to the plaintiff property that the defendant intended to acquire from a third party. The defendant could not acquire the property, however, and thus was unable to convey in accordance with its agreement. The plaintiff claimed that the defendant breached an implied warranty of title. The court held the claim not tenable due to the fact that the real property records reflected the true state of the ownership of the property.<sup>101</sup> The court concluded that "[t]he constructive notice provided by a recording statute is a defense to an action under the DTPA."<sup>102</sup>

In *Jenkins v. Steakley Bros. Chevrolet Co.*<sup>103</sup> the court held that a defendant could use the common law defense of accord and satisfaction to defeat a plaintiff's DTPA claim.<sup>104</sup> The court in *Bolton v. Alvarado*<sup>105</sup> held that the merger doctrine prohibited a plaintiff from relying upon the terms of a contract for the sale of realty as the basis for his DTPA claim.<sup>106</sup> Under the terms of the contract in question the seller agreed to convey the property free and clear of all encumbrances except those specified in the contract. Although the exceptions in the contract did not include some outstanding

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94. 625 F. Supp. at 1282.

95. *Id.* The court appears to have reached the wrong conclusion. Nothing contained within the DTPA would preclude the application of general tolling and savings provisions that the Texas Legislature enacts.

96. 662 S.W.2d 760 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

97. See Hughes & Gavin, 1985 *Annual Survey*, *supra* note 71, at 143.

98. 662 S.W.2d at 762.

99. *Id.*

100. 698 S.W.2d 400 (Tex. App.—Houston [14th Dist.] 1985, no writ).

101. *Id.* at 402.

102. *Id.* It would seem that a purchaser should be able to rely upon representations of ownership made by a seller without having to conduct a title search.

103. 712 S.W.2d 587 (Tex. App.—Waco 1986, no writ).

104. *Id.* at 590; see also *Miranda v. Joe Myers Ford, Inc.*, 638 S.W.2d 36, 39 (Tex. App.—Houston [1st Dist.] 1982, writ dismissed).

105. 714 S.W.2d 119 (Tex. App.—Houston [1st Dist.] 1986, no writ).

106. *Id.* at 122-23. Under the merger doctrine, when the seller delivers, and the buyer accepts the deed, the rights and duties created by a land sales contract merge into the deed unless fraud, accident, or mutual mistake exists. As a result, a party is estopped to bring suit on the contract once the seller delivers the deed. *Commercial Bank, Uninc. v. Satterwhite*, 413 S.W.2d 905, 909 (Tex. 1967).

mineral interests, the delivered deed did exclude the interests. The court held that since the plaintiff failed to obtain any findings of fraud or mutual mistake that would warrant avoiding the application of the merger doctrine, the plaintiff could not bring a DTPA claim based upon the defendant's failure to convey a deed that was consistent with the contract.<sup>107</sup>

Two cases decided during the Survey period dealt with statutorily created defenses. The court in *Giles v. TI Employees Pension Plan*<sup>108</sup> held that the provisions of the Employee Retirement Income Security Act of 1974<sup>109</sup> preempted DTPA and common law claims for misrepresentation brought against a pension plan.<sup>110</sup> The court in *Holder v. Wood*<sup>111</sup> held that the Manufactured Housing Standards Act (MHSA)<sup>112</sup> required a purchaser of a mobile home to pursue administrative remedies for breach of an express warranty prior to initiating a DTPA claim.<sup>113</sup> The MSHA, however, did not preclude the plaintiffs from proceeding with their claims for breaches of implied warranties and misrepresentations under the DTPA.<sup>114</sup>

Three cases decided during the Survey period discussed the circumstances under which a court would enforce a waiver or limitation of liability to defeat a DTPA claim.<sup>115</sup> In *Singleton v. LaCoure*<sup>116</sup> the court held that language sufficient to exclude an implied warranty under the Uniform Commercial Code (UCC)<sup>117</sup> would also serve to defeat a claim for breach of implied warranty under the DTPA.<sup>118</sup> The court reasoned that the DTPA itself does not create any warranties, but instead only provides relief for the breach of independently established warranties. Since no warranty arose under the UCC due to the effective waiver, the plaintiff could not point to any warranty the defendant had breached.<sup>119</sup> The court in *Metro Ford Truck Sales, Inc. v. Davis*<sup>120</sup> held that although a party sometimes may

107. 714 S.W.2d at 123. The court noted that previous opinions, such as *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980), indicated that not all of the defenses that plagued common law fraud and breach of warranty suits should apply in a DTPA action. 714 S.W.2d at 123. The court held, however, that this principle would not preclude the application of the doctrine of merger, which the court characterized as a rule of evidence rather than a defense. *Id.*

108. 715 S.W.2d 58 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

109. 29 U.S.C. § 1144(a)-(b) (1982).

110. 715 S.W.2d at 59.

111. 714 S.W.2d 318 (Tex. 1986).

112. TEX. REV. CIV. STAT. ANN. art. 5221f, § 17(d) (Vernon Pam. Supp. 1987).

113. 714 S.W.2d at 319.

114. *Id.*

115. See TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon Supp. 1987). Section 17.42 provides that, with certain exceptions, any waiver by a consumer of the protections afforded in the DTPA is unenforceable and void. *Id.* For a discussion of the conflict between this section and common law principles of waiver see Hughes & Gavin, 1986 *Annual Survey*, *supra* note 41 at 148-50.

116. 712 S.W.2d 757 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

117. TEX. BUS. & COM. CODE ANN. § 2.316 (Tex. UCC) (Vernon 1968 & Supp. 1987).

118. 712 S.W.2d at 760.

119. *Id.* The court's opinion appears consistent with the reasoning of previous cases. See *McCrea v. Cubilla Condominium Corp.*, 685 S.W.2d 755, 758 (Tex. App.—Houston [1st Dist.] 1985, no writ); *Ellmer v. Delaware Mini-Computer Sys., Inc.*, 665 S.W.2d 158, 160-61 (Tex. App.—Dallas 1983, no writ). For a discussion of *McCrea* see Hughes & Gavin, 1986 *Annual Survey*, *supra* note 41, at 148-49.

120. 709 S.W.2d 785 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.).

waive implied warranties under the UCC, the waiver would not preclude that party from bringing a claim based upon misrepresentations made in connection with the sale.<sup>121</sup> Consequently, plaintiffs may avoid the effect of limited warranties or other waivers that they execute by citing specific misrepresentations made in connection with the sale. Finally the court in *Epler, Guerin & Turner v. Purolator Armored, Inc.*<sup>122</sup> held that a contractual provision absolving Purolator from any liability for loss caused by nonperformance or delay of delivery prohibited the plaintiff from pursuing a DTPA claim based on Purolator's failure to comply with its delivery schedule.<sup>123</sup>

#### F. Prospective Application of DTPA Amendments

The 1979 amendments to the DTPA provide: "This Act shall be applied prospectively only. Nothing in this Act affects either procedurally or substantively a cause of action that arose in whole or in part prior to the effective date of this Act."<sup>124</sup> The court in *Cocke v. White*<sup>125</sup> held that a claim alleging a breach of an implied warranty in the sale of real property arose, at least in part, at the time that the parties entered into the contract, in this case, August 22, 1979.<sup>126</sup> Since the contract predated the effective date of the 1979 amendments, the court held that the plaintiff could automatically recover treble damages for the breach.<sup>127</sup> The court reached this conclusion even though the cause of action in *Cocke* did not accrue, for limitations purposes, until the plaintiff discovered that the house was not built in a good and workmanlike manner, which was after the effective date of the 1979 amendments.<sup>128</sup> As a result, in cases that use a discovery rule for limitations purposes, the ability to recover automatic treble damages continues.

The 1983 amendments contain language that is considerably less clear regarding the circumstances under which those amendments apply. Specifically, those amendments provide: "This Act applies only to the contract executed on or after the effective date of this Act. A contract executed before the effective date of this Act is governed by the law in effect when the contract was executed."<sup>129</sup> Whether this language will apply in the same fashion as the language in the 1979 amendments is unclear because many

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121. *Id.* at 790.

122. 701 S.W.2d 293 (Tex. App.—Dallas 1985, no writ).

123. *Id.* at 296. The court noted, however, that the delivery in question had been merely one in a series of deliveries made pursuant to the agreement in question. The court might have reached a different result if the plaintiff in *Purolator* had entered into a special contractual arrangement regarding the delivery in question by paying a higher rate for a timely delivery or if Purolator had guaranteed to make this specific delivery in accordance with its schedule. *Id.* at 297 n.1.

124. Act of June 13, 1979, ch. 603, § 9, 1979 Tex. Gen. Laws 1327, 1332. The effective date of the Act was Aug. 27, 1979. *Id.*

125. 697 S.W.2d 739 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

126. *Id.* at 743-44.

127. *Id.* at 744. In 1979 the legislature amended the DTPA to allow an award of additional damages only if the trier of fact finds that the defendant knowingly committed the DTPA violation. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1987).

128. 697 S.W.2d at 745.

129. Act of Aug. 29, 1983, ch. 883, § 4, 1983 Tex. Gen. Laws 4943, 4944.

DTPA claims will not involve contracts. The San Antonio court of appeals construed this language in a case involving a contract in *Government Employees Credit Union v. Fuji Photo Film U.S.A., Inc.*<sup>130</sup> That court held that the provisions of the 1983 amendments that exclude from the definition of consumer a business consumer with assets of twenty-five million dollars<sup>131</sup> and the provisions that allow waivers to be effective in the case of a business consumer with assets of five million dollars or more<sup>132</sup> both apply prospectively only.<sup>133</sup> Since the parties executed the contracts in question in 1981, the court held that the plaintiff could pursue its DTPA claim despite the fact that it would not qualify as a consumer under the 1983 amendments.<sup>134</sup>

### G. Counterclaim for Bad Faith and Harassing DTPA Actions

A number of cases decided during the Survey period considered the circumstances under which a defendant may recover attorney's fees incurred in defending against a DTPA claim. Prior to the 1979 amendments the DTPA provided: "On a finding by the court that an action under this section was groundless and brought in bad faith, or for the purpose of harassment, the court may award to the defendant reasonable attorneys' fees in relation to the amount of work expended, and court costs."<sup>135</sup> In a jury trial the initial question is whether the trial court or the jury is to make the findings necessary to support an award of attorney's fees under this provision. The court in *Fichtner v. Richardson*<sup>136</sup> held that the established rule is that the trial court must decide whether the suit is groundless and the jury must decide whether the plaintiffs brought the suit in bad faith or for purposes of harassment.<sup>137</sup> The court in *Fichtner* further noted that in ruling on the bad faith and harassment issues the jury may properly consider evidence concerning events that occurred between the time the plaintiffs filed suit and the time of trial.<sup>138</sup>

The court in *Group Hospital Services, Inc. v. One & Two Brookriver Center*<sup>139</sup> established the standard against which a court may test a finding of bad faith. The court stated that bad faith is present when a person acts with "knowledge of such facts and circumstances to know that his or her actions are wrong and, with such knowledge, acts with intentional disregard of the rights of others."<sup>140</sup> In *Heller v. Armstrong World Industries, Inc.*<sup>141</sup>

130. 712 S.W.2d 208 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.).

131. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon Supp. 1987).

132. *Id.* § 17.42.

133. 712 S.W.2d at 211.

134. *Id.* at 214.

135. Act of May 21, 1973, ch. 143, § 1, 1973 Tex. Gen. Laws 322, 327.

136. 708 S.W.2d 479 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

137. *Id.* at 482; see Hughes & Gavin, 1985 *Annual Survey*, *supra* note 71, at 147.

138. 708 S.W.2d at 482. Specifically, the court felt it proper for the jury to consider the plaintiff's response to efforts that had been made by the defendant to appease the plaintiff after the suit was filed. *Id.* at 483.

139. 704 S.W.2d 886 (Tex. App.—Dallas 1986, no writ).

140. *Id.* at 891 (quoting *Glasgow v. Hall*, 668 S.W.2d 863, 865 (Tex. App.—Austin 1984, writ ref'd n.r.e.)).

141. 708 S.W.2d 18 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

the court considered the type of evidence that would support a finding of bad faith. The court held that the contradictions between the plaintiff's testimony regarding the symptoms he allegedly suffered as a result of exposure to a particular type of ceiling tile and the plaintiff's responses to a questionnaire filled out for a doctor, which indicated that he was not suffering any such symptoms, were sufficient to support the jury's finding that the plaintiff brought the claim in bad faith.<sup>142</sup> The court in *Xarin Real Estate, Inc. v. Gamboa*<sup>143</sup> also set forth standards to determine whether a claim is groundless within the meaning of the DTPA. The court held that a finding that no arguable basis for the cause of action exists must occur before a court can find a claim to be groundless.<sup>144</sup> Finally, the court in *Wickersham Ford, Inc. v. Orange County*<sup>145</sup> held that under the 1979 amendments to the DTPA an award of attorney's fees is mandatory upon a finding by the jury that the plaintiff brought a DTPA claim for the purpose of harassment.<sup>146</sup>

### III. FRAUD

The typical fraud case involves a speaker who makes a false material representation with knowledge that the statement is false when made or who makes it recklessly with the intent that a third party will act upon it.<sup>147</sup> A promise to do an act in the future, however, may also constitute actionable fraud if the speaker makes the promise with the intent to deceive the promisee and with no intent to perform the promised act.<sup>148</sup> This latter variety of fraud was the subject of the Texas Supreme Court's opinion in *Spoljaric v. Percival Tours, Inc.*<sup>149</sup> The plaintiff employee in that case claimed that the defendant employer had fraudulently induced him to continue his employment by promising a bonus the employer never intended to pay. The court noted that failure to perform, standing alone, is no evidence to support a claim that the promisor never intended to perform.<sup>150</sup> Nevertheless, the court held that only slight circumstantial evidence of intent not to perform, when considered in conjunction with a breach of the promise to perform, is sufficient to support a fraud claim.<sup>151</sup> The court held that the evidence in the record was sufficient to comply with this reduced standard.<sup>152</sup>

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142. *Id.* at 20.

143. 715 S.W.2d 80 (Tex. App.—Corpus Christi 1986, no writ).

144. *Id.* at 86. Chief Justice Nye strongly disagreed with this conclusion, noting that under the majority's standard a court would never grant an award for attorney's fees, as an arguable basis for bringing a lawsuit always exists. *Id.* at 87 (Nye, C.J., dissenting).

145. 701 S.W.2d 344 (Tex. App.—Beaumont 1985, no writ).

146. *Id.* at 350. In so holding, the court did not directly address whether, after the 1979 amendments, a court may properly submit the issues of bad faith and harassment to the jury or whether the court must resolve these issues. This issue remains open. See Schott v. Leissner, 659 S.W.2d 752 (Tex. App.—Corpus Christi 1983), writ *ref'd n.r.e. per curiam*, 668 S.W.2d 686, 686-87 (Tex. 1984).

147. See *Stone v. Lawyers Title Ins. Corp.*, 554 S.W.2d 183, 185 (Tex. 1977).

148. *Stanfield v. O'Boyle*, 462 S.W.2d 270, 272 (Tex. 1971).

149. 708 S.W.2d 432 (Tex. 1986).

150. *Id.* at 435.

151. *Id.*

152. *Id.*

The court's opinion in *Spoljaric* also considered the circumstances under which a plaintiff in a fraud case may recover punitive damages. The court found that the proof that supported the jury's finding that the defendant employer had intended to induce action on the part of the employee, which was one of the elements of the fraud claim, constituted proof of conscious indifference. This sufficiently supported an award of punitive damages.<sup>153</sup> Consequently, in any case in which a plaintiff establishes the elements of fraud in the form of an intentionally made false statement or promise, the plaintiff may recover exemplary damages. The court will not require a finding of malice.

Consistent with the supreme court's opinion in *Spoljaric*, the court in *First City Bank v. Global Auctioneers, Inc.*<sup>154</sup> held that if the plaintiff establishes that the defendant made a false representation with the intent of inducing the plaintiff to act, the plaintiff may recover exemplary damages.<sup>155</sup> Exemplary damages are not available, however, in the case of a defendant who recklessly makes a statement without any knowledge of whether the statement is true or not. Although reckless misrepresentations may give rise to a claim for actual damages, the court in *Group Hospital Services, Inc. v. Daniel*<sup>156</sup> reversed the jury's award of exemplary damages because of the plaintiff's failure to obtain a jury finding that the defendant knew that the representation in question was false at the time that defendant made the representation.<sup>157</sup>

In *New Process Steel Corp. v. Steel Corp.*<sup>158</sup> the court considered the actual damages that a party may recover in a successful fraud claim. The court held that if the fraud results in the breach of a contract, a party may recover damages in compensation for the loss of the benefit of the bargain and for collateral losses caused by reliance upon the fraudulent representations.<sup>159</sup> The court in *Abilene National Bank v. Fina Supply, Inc.*<sup>160</sup> held that a plaintiff in a fraud case must elect between damages or the equitable remedies of reformation or rescission.<sup>161</sup> Although a plaintiff may plead, present evidence, and submit special issues on the theories of reformation, rescission, and damages, the plaintiff must elect between legal or equitable relief at the time the court enters judgment.<sup>162</sup> The *Abilene National Bank* court further held that an alleged misrepresentation regarding the legal effect or interpretation of a document is not actionable unless the person making the misrepresentation possesses superior knowledge regarding the law or is in a

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153. *Id.* at 436.

154. 708 S.W.2d 12 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.).

155. *Id.* at 17.

156. 704 S.W.2d 870 (Tex. App.—Corpus Christi 1985, no writ).

157. *Id.* at 875.

158. 703 S.W.2d 209 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

159. *Id.* at 215. The court's opinion apparently is limited to cases in which a plaintiff prevails in both a breach of contract claim and in a fraud claim. In a strictly fraud case a plaintiff can recover only reliance damages; benefit of the bargain damages are not recoverable. *Sobel v. Jenkins*, 477 S.W.2d 863, 868 (Tex. 1972).

160. 706 S.W.2d 737 (Tex. App.—Eastland 1986), *aff'd*, 726 S.W.2d 537 (Tex. 1987).

161. *Id.* at 739.

162. *Id.*



confidential or fiduciary relationship with the recipient of the information.<sup>163</sup> The plaintiff in that case claimed that a representative of the defendant bank made misrepresentations regarding the effect of an extension of a letter of credit that secured a debt owing to the plaintiff. The court held that since the evidence failed to establish that the bank representative had any special knowledge in letter of credit transactions, any misrepresentations made by her regarding the effect of the extension were not actionable.<sup>164</sup>

The defendant in *West v. Carter*<sup>165</sup> thought that the jury's findings that the plaintiff knew, or by the exercise of reasonable diligence should have known, that the statements made to him were false precluded the plaintiff from prevailing on his fraud claim. The court held that no evidence existed to support a finding that the plaintiff knew that the representations were false; the jury, therefore, could have found only that the plaintiff should have discovered that they were false.<sup>166</sup> The court held that this finding did not present any defense to a fraud claim.<sup>167</sup>

Parties frequently allege fraud as a means of avoiding the terms of a contractual agreement. Under the parol evidence rule, however, a party cannot introduce evidence of a defendant's mere misrepresentation that he will not enforce a negotiable instrument in accordance with its terms.<sup>168</sup> In order to avoid the obligations of a negotiable instrument, the plaintiff must also show that the defendant employed some sort of trick, artifice, or device.<sup>169</sup> The court in *Friday v. Grant Plaza Huntsville Associates*<sup>170</sup> relied on this basis to affirm a summary judgment imposing liability upon a guarantor of a shopping center lease. The guarantor's affidavit filed in response to the summary judgment motion showed no more than that the plaintiff stated that he would not enforce the guarantee and that he intended to use the guarantee solely to assist the shopping center in obtaining permanent financing. The absence of any further evidence of deceit or artifice was fatal to the fraud defense.<sup>171</sup>

The court in *Coronado Transmission Co. v. O'Shea*<sup>172</sup> held that a plaintiff who seeks to avoid the terms of a contract that is not a promissory note or a guarantee need not show any trick or artifice in addition to the standard elements of fraud.<sup>173</sup> The court affirmed an award of actual and exemplary damages for fraud in a case in which the defendant allegedly misrepresented the percentage of revenues due the plaintiff under a net revenue interest agreement.<sup>174</sup> The defendant orally represented to the plaintiff that he

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163. *Id.* at 744.

164. *Id.* at 745.

165. 712 S.W.2d 569 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

166. *Id.* at 575.

167. *Id.*

168. *See* Town N. Nat'l Bank v. Broadus, 569 S.W.2d 489, 493 (Tex. 1978).

169. *Id.*

170. 713 S.W.2d 755 (Tex. App.—Houston [1st Dist.] 1986, no writ).

171. *Id.* at 756-57.

172. 703 S.W.2d 731 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

173. *Id.* at 734.

174. *Id.*

would receive five percent of the net revenues derived from the sale of natural gas to a designated corporation. The written agreement provided that the plaintiff would receive five percent of the net revenues that the defendant derived from such sales. As it turned out, the seller of the gas was a partnership in which the defendant owned a forty-five percent interest. Consequently, under the contract the plaintiff received only five percent of the defendant's forty-five percent share, whereas the defendant had represented that the plaintiff would receive five percent of the total net sales. The court held that these representations were actionable despite the terms of the parol evidence rule.<sup>175</sup>

The court's opinion in *Johnson v. Smith*<sup>176</sup> has the potential to expand broadly the cause of action for fraud. In *Johnson* the court held that the plaintiff must establish the traditional elements of a fraud claim only in instances where the alleged fraud is in the form of a specific misrepresentation.<sup>177</sup> The plaintiff need not show these elements, however, if he alleges fraud in the form of some cunning, deception, or artifice used to cheat or defraud him.<sup>178</sup> The plaintiff in *Johnson* was the executor of the estate of a party whom the defendant had allegedly defrauded in the sale of a home. In payment of the purchase price of the house, the defendant had given a promissory note that included a provision inserted by the defendant providing that the note would terminate in the event of the payee's death. At the time the payee signed the note, the payee was seventy-five years old, senile, extremely forgetful, and unable to understand his business affairs. The court held that under the circumstances, a jury finding that the insertion of the death clause was the result of fraud, which the instructions defined as the successful employment of cunning, deception, or artifice to circumvent, cheat, or defraud another, was sufficient to support an award of actual and exemplary damages.<sup>179</sup>

#### IV. NEGLIGENT MISREPRESENTATION

Section 552 of the Restatement (Second) of Torts<sup>180</sup> recognizes a cause of action for negligent misrepresentation. This theory imposes liability upon a party who, in the course of his business, supplies false information for the guidance of others in their business transactions. To succeed, a plaintiff must show that he justifiably relied upon the supplied information and that the defendant failed to exercise reasonable care in obtaining or communicat-

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175. *Id.*

176. 697 S.W.2d 625 (Tex. App.—Houston [14th Dist.] 1985, no writ).

177. *Id.* at 632.

178. *Id.*

179. *Id.* at 632-36. Although the court considered the defendant's conduct reprehensible, the court's opinion in *Johnson* appears to be an unwarranted expansion of the fraud cause of action. Furthermore, the opinion flies in the face of the well-established principle that the terms of a document signed by a party bind that party and prohibit the party from claiming that he did not read or understand the document's terms. See *First City Mortgage Co. v. Gillis*, 694 S.W.2d 144, 147 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

180. RESTATEMENT (SECOND) OF TORTS § 552 (1977).

ing that information.<sup>181</sup> During the Survey period the Dallas court of appeals addressed this tort in two cases. In *Cook Consultants, Inc. v. Larson*<sup>182</sup> the court affirmed a judgment finding a surveyor liable for damages suffered by the purchaser of a home that encroached upon an adjoining lot, an encroachment not shown on the survey.<sup>183</sup> The survey contained a representation that it accurately represented the property and the location of the buildings located thereon. Although the defendant prepared the survey for the builder of the home, the court held that the purchaser could pursue the negligent misrepresentation claim as a member of a class of persons whom the surveyor foreseeably may have expected to rely upon the information.<sup>184</sup> In a radical departure from the Restatement principles<sup>185</sup> the court allowed the plaintiff to recover even though she had not relied upon the survey in purchasing the home.<sup>186</sup> The plaintiff had not even seen the survey until some nine years after her purchase. Nevertheless, the court held that the plaintiff's loan would never have closed and thus she would not have consummated her purchase but for the fact that the survey had misrepresented the location of the house.<sup>187</sup> The court held that this evidence of causation sufficiently satisfied the reliance requirement.<sup>188</sup>

The court also departed from the Restatement principles in its decision in *Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co.*<sup>189</sup> In *Blue Bell* the court reversed a summary judgment in favor of an accounting firm due to a finding that factual issues existed as to the plaintiff's claim of negligent misrepresentation.<sup>190</sup> The plaintiff alleged that it extended credit based on the financial statements the defendant had prepared for the debtor. Although the Restatement limits the class of parties who may pursue a negligent misrepresentation claim to persons whom the defendant actually and specifically knows will receive the information,<sup>191</sup> the court held that the class of potential plaintiffs should be expanded to include all those parties of whom the defendant should have known.<sup>192</sup> Since the plaintiff in *Blue Bell* had been a trade creditor of the debtor at the time the defendant prepared the debtor's financial statements, and since the debtor requested seventy copies of those statements, the court held that the defendant should have known that the plaintiff would receive the statements and act in reliance thereon.<sup>193</sup> Consequently, the plaintiff could pursue its negligent misrepresentation claim despite the fact that the defendant had no actual knowledge that the plaintiff intended to extend additional credit in reliance upon the financial statements

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181. *Id.*

182. 700 S.W.2d 231 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

183. *Id.* at 239.

184. *Id.* at 234-36.

185. RESTATEMENT (SECOND) OF TORTS § 552(2)(b) (1977).

186. 700 S.W.2d at 236-37.

187. *Id.* at 237.

188. *Id.*

189. 715 S.W.2d 408 (Tex. App.—Dallas 1986, no writ).

190. *Id.* at 412-15.

191. RESTATEMENT (SECOND) OF TORTS § 552 comment n (1977).

192. 715 S.W.2d at 412-13.

193. *Id.* at 413.

the defendant had prepared.<sup>194</sup> The court noted that its decision cast doubt upon the continuing validity of its decision in *First Municipal Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart*,<sup>195</sup> in which the court failed to allow a plaintiff to pursue a negligent misrepresentation claim against an attorney who issued an opinion letter to a client knowing that the plaintiff third party would rely upon the letter.<sup>196</sup>

## V. CONSPIRACY

The court in *Likover v. Sunflower Terrace II, Ltd.*<sup>197</sup> held an attorney liable as a co-conspirator for advice given to a client.<sup>198</sup> The plaintiff in that case purchased an apartment complex from joint owners. The title company that closed the purchase became concerned about a gap in the chain of title due to the fact that a deed of trust named an additional joint owner who had not signed the deed to the plaintiff. To cure this problem the plaintiff and joint owners agreed that the plaintiff would convey the property to the joint owners, including the previously unnamed owner, and the joint owners would immediately reconvey it to the plaintiff. Although plaintiff instructed the title company not to record the deed from the plaintiff until after the execution of the deed from the joint owners, the title company violated these instructions at the request of one of the joint owners. Thus, the plaintiff no longer held record title. In the course of attempting to resolve numerous disputes that developed between the plaintiff and the previous owners, the plaintiff's general partner discovered that no one had recorded the deed back to the plaintiff. The general partner then scheduled a meeting with the joint owner who refused to sign the deed and the joint owner's attorney. The joint owner persisted in his refusal to sign the deed, at which point the plaintiff asked whether an acceptable settlement figure existed. The defendant lawyer responded with a request for \$400,000. The court affirmed the judgment against the attorney based on a jury finding of civil conspiracy. The court noted that although an attorney generally owes no duty to an opposing party, he is liable "if he knowingly enters into a conspiracy to defraud a third person."<sup>199</sup> The court extended this doctrine to include a conspiracy

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194. *Id.* Although the court limited its holding to a finding that the plaintiff had standing because it was a trade creditor known to the defendant at the time the defendant prepared the financial statements, the court characterized as persuasive the reasoning of cases and commentators who have urged adoption of a foreseeability test. *Id.* at 412. Under this test a court could hold an accountant liable to all those whom he should reasonably expect to rely upon his certification of financial statements. This would include all trade creditors, regardless of whether they were known trade creditors at the time the accountant prepared the reports. See Comment, *The Citadel Falls?—Liability for Accountants in Negligence to Third Parties Absent Privity*: Credit Alliance Corp. v. Arthur Anderson & Co., 59 ST. JOHN'S L. REV. 348, 356-61 (1985). The court stated that allowing recovery by all foreseeable plaintiffs is consistent with its opinion in *Cook Consultants, Inc. v. Larson*, 700 S.W.2d 231, 234 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). 715 S.W.2d at 412 n.3.

195. 648 S.W.2d 410 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

196. *Blue Bell*, 715 S.W.2d at 413, see *First Mun. Leasing Corp.*, 648 S.W.2d at 413-14.

197. 696 S.W.2d 468 (Tex. App.—Houston [1st Dist.] 1985, no writ).

198. *Id.* at 474.

199. *Id.* at 472.

to subject a third person to duress, which in that case took the form of economic coercion.<sup>200</sup> The attorney and his client knew that the plaintiff would suffer serious financial loss if it had to delay making repairs to the apartment project. In fact, the attorney had advised the joint owner not to sign the deed back to the plaintiff in order to obtain a bit of leverage that would help settle a contractual dispute between the parties. The case failed to fit the usual duress mold, however, in that the plaintiff had never actually paid the money that the defendant demanded. The court noted that it was unaware of any case in which a plaintiff had sued for damages proximately caused by an unsuccessful attempt to exact money under duress.<sup>201</sup> Nevertheless, the court held that the attorney could be liable for a conspiracy to exert duress regardless of whether the tort had actually been committed.<sup>202</sup>

The court in *Gulf Atlantic Life Insurance Co. v. Hurlbut*<sup>203</sup> reached a conclusion directly contrary to that reached by the court in *Likover*. The *Hurlbut* court reversed a judgment the lower court had rendered in favor of the plaintiff on numerous theories, including civil conspiracy.<sup>204</sup> The court first engaged in a lengthy consideration of whether it could sustain the judgment on the jury's findings that the defendant committed various other torts.<sup>205</sup> After concluding that it could not sustain the judgment on this basis, the court made short shrift of the conspiracy claim. The court noted that the essence of civil conspiracy is the damage resulting from the commission of an independent tort and not the civil conspiracy itself.<sup>206</sup> Consequently, the court concluded that "if an act by one person cannot give rise to a cause of action, then the same act cannot give rise to a cause of action if done pursuant to an agreement between several persons."<sup>207</sup> The *Hurlbut* court thus viewed a conspiracy claim merely as a means of extending liability for the commission of a tort rather than as a tort in and of itself.<sup>208</sup>

Finally, the court's opinion in *Futeras v. Park Towers*<sup>209</sup> points out the difficulty a defendant faces in seeking a summary judgment in a conspiracy case.<sup>210</sup> The plaintiff in that case alleged that the defendants had furthered their conspiracy through the use of unlawful acts in the form of harassing telephone calls. The defendants filed affidavits denying that they conspired

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200. *Id.* at 472-73.

201. *Id.* at 473.

202. *Id.* at 474. The court stated:

We are not here concerned with whether Likover and the Ritters actually exerted duress on Sunflower Terrace, Ltd., or actually defrauded them. The findings are that there was conspiracy to do these things and that the conspiracy resulted in injury. The jury's affirmative findings on these issues are fully supported by the evidence.

*Id.*

203. 696 S.W.2d 83 (Tex. App.—Dallas 1985, writ granted).

204. *Id.* at 102-03.

205. *Id.* at 90-101.

206. *Id.* at 102.

207. *Id.*

208. *Id.*; see *Steinmetz & Assocs., Inc. v. Crow*, 700 S.W.2d 276, 280 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

209. 707 S.W.2d 149 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

210. *Id.* at 156.

to injure the plaintiff or that they placed the telephone calls in question. The court noted that statements denying involvement in a conspiracy are not readily controvertible and thus do not satisfy the requirements for summary judgment affidavits submitted by a party.<sup>211</sup> The court's opinion renders it virtually impossible for a defendant in a conspiracy case to obtain a summary judgment on the ground that he did not agree to engage in the conduct in question with the intent to injure the plaintiff.

## VI. TORTIOUS INTERFERENCE WITH CONTRACT

For a plaintiff to have a valid cause of action for tortious interference with a contract a defendant must interfere with the contract without legal justification or excuse. Consistent with the Texas Supreme Court's opinion in *Sakowitz, Inc. v. Steck*<sup>212</sup> the court in *Rural Development, Inc. v. Stone*<sup>213</sup> held that in a tortious interference case the plaintiff has the burden of establishing that the defendant acted without legal justification or excuse.<sup>214</sup> Since the record in that case contained no evidence on this issue, the court reversed a judgment in favor of the plaintiff and rendered judgment in favor of the defendant.<sup>215</sup> The court considered the issue of what constitutes legal justification or excuse for interfering with a contract in *Top Value Enterprises, Inc. v. Carlson Marketing Group, Inc.*<sup>216</sup> In that case a trading stamp company brought suit against a competitor who convinced eight large grocery stores to break their contracts with the plaintiff and to begin carrying trading stamps offered by the defendant. The defendant argued that business competition allows a party the privilege to persuade customers to change their business relations without incurring liability even if the party knows that a broken contract will result. The court rejected this view, holding that "the right of competition does not justify a person to knowingly and deliberately, for his own benefit or advantage, induce the breach of a contract by offering lower prices."<sup>217</sup> The court also held that in a tortious interference case it will award exemplary damages only upon an express finding of actual malice in the form of "ill-will, spite, evil motive, or purposing the injuring of another."<sup>218</sup>

In *Griffin v. Rowden*<sup>219</sup> the court held that the filing of a *lis pendens*<sup>220</sup> is an absolutely privileged act that cannot give rise to a claim for tortious inter-

211. *Id.* at 157-58; see TEX. R. CIV. P. 166-A(c).

212. 669 S.W.2d 105 (Tex. 1984); see Hughes & Gavin, 1985 *Annual Survey*, *supra* note 71, at 128-30 (discussion critical of the *Steck* holding).

213. 700 S.W.2d 661 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

214. *Id.* at 666; see *Steck*, 669 S.W.2d at 107.

215. *Stone*, 700 S.W.2d at 666-68.

216. 703 S.W.2d 806 (Tex. App.—El Paso 1986, writ ref'd n.r.e.).

217. *Id.* at 809-10. The court's opinion is consistent with the position taken in the RESTATEMENT (SECOND) OF TORTS § 768(2) (1979). 703 S.W.2d at 809-10.

218. 703 S.W.2d at 813 (quoting *Clements v. Withers*, 437 S.W.2d 818, 822 (Tex. 1969)). In *Clements* the court noted that the actual malice requirement would not apply upon a showing of defendant's fraudulent conduct or other aggravating circumstances. 437 S.W.2d at 822.

219. 702 S.W.2d 692 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

220. See TEX. PROP. CODE ANN. § 12.007 (Vernon 1984).

ference with contract.<sup>221</sup> The court did note that the basis of its decision was its belief that good faith litigants should be assured access to the judicial system.<sup>222</sup> This reasoning would seem to imply that the filing of a lis pendens as an incident to litigation that the plaintiff initiates in bad faith should not enjoy the same protection. Due to the fact that the filing of a lis pendens may cause a cloud on title and associated severe injuries, the courts should allow a plaintiff to pursue a tortious interference claim if litigation initiated in bad faith has clouded his title.

The Fifth Circuit considered the actual damages that a litigant may properly recover in a tortious interference case in its opinion in *Marcus Stowell & Beye Government Securities, Inc. v. Jefferson Investment Corp.*<sup>223</sup> The plaintiff in that case was a mortgage broker who had an exclusive brokerage agreement with a savings and loan. During the period of the plaintiff's exclusive agreement, the defendant, who had full knowledge of the plaintiff's agreement, brought two potential mortgage purchasers to the savings and loan's attention. The savings and loan eventually completed mortgage sale transactions with both of those purchasers. As a result, the savings and loan refused to consummate a sale to a party that the plaintiff had solicited. In the plaintiff's suit against the competing broker for tortious interference, the court considered the issue of whether the plaintiff should recover as damages the commission that it would have received if it had consummated the sale to its prospect or whether it should recover the amount of the commission that the defendant had received, which was larger. Although courts outside of Texas have awarded damages based on the defendant's profits,<sup>224</sup> the court held that Texas courts would limit the plaintiff's recovery to his actual loss.<sup>225</sup> This reasoning is consistent with the theory that the award of damages for tortious interference should be the same as the award of damages for breach of contract, which is designed to place the injured party in the same economic position it would have been in had the parties performed the contract. In keeping with this theory, the court also held that the defendant in *Marcus* was entitled to a credit in the amount that the plaintiff had received in settlement of its breach of contract claim against the savings and loan.<sup>226</sup>

## VII. DEFAMATION AND INVASION OF PRIVACY

A statement that unambiguously and falsely imputes criminal conduct to a party is slander per se, for which a court will presume damages.<sup>227</sup> The

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221. 702 S.W.2d at 694-95.

222. *Id.* at 695.

223. 797 F.2d 227 (5th Cir. 1986).

224. See *Certified Laboratories v. Rubinson*, 303 F. Supp. 1014, 1025-26 (E.D. Pa. 1969) (refusal to allow plaintiff to recover defendant's profit would allow the defendant to profit from his wrongdoing); *National Merchandising Corp. v. Leyden*, 348 N.E.2d 771, 774-75 (Mass. 1976) (recovery of lost profits may represent defendant's unjust enrichment).

225. 797 F.2d at 231.

226. *Id.* at 232-33. For the court to have held otherwise would have allowed the plaintiff a double recovery. *Id.* at 233.

227. *Glenn v. Gidel*, 496 S.W.2d 692, 697 (Tex. Civ. App.—Amarillo 1973, no writ).

court in *Ramos v. Henry C. Beck Co.*<sup>228</sup> expanded this doctrine to include statements referring to a third party's report of criminal conduct on the part of the plaintiff.<sup>229</sup> The defendant in *Ramos* terminated the plaintiff's employment after receiving a telephone call from a third party who reported that the plaintiff had stolen something out of a parking garage. In so doing the defendant stated that a rumor existed that a third party had seen him take a power tool from the parking garage. Although this statement did not directly accuse the plaintiff of having stolen the tool, the court held that a factual question existed as to whether the hearer of the statement could reasonably understand that the statement imputed criminal conduct to the plaintiff. Consequently, the court reversed a summary judgment in favor of the defendant.<sup>230</sup> The *Ramos* court also noted that although a plaintiff may not recover for a publication to which he has consented or which he has invited, this doctrine did not preclude the plaintiff's claim. The plaintiff had merely asked why the defendant had terminated him. This would bar a defamation claim only if the plaintiff knew that the response of defendant's employee would defame him.<sup>231</sup>

The San Antonio court of appeals considered a set of circumstances similar to those in *Ramos* in *Chasewood Construction Co. v. Rico*.<sup>232</sup> The plaintiff subcontractor in that case claimed that the defendant defamed him at the time the defendant fired him at the construction site. He testified that at the time of his termination the general contractor's representative accused him of having taken some \$12,000 in materials, and gave him an ultimatum either to return the materials or leave the job. The plaintiff left the job and informed approximately 100 men who were working under him that the defendant terminated him because of the accusation that he had been stealing. This publication of the defamatory material by the plaintiff himself gave rise to the plaintiff's damages. Nevertheless, the court held that since a reasonably prudent person under the circumstances would have known that the plaintiff would have communicated these accusations to others, this republication was actionable.<sup>233</sup> The dissent argued that the majority applied the wrong standard.<sup>234</sup> Although one who utters a defamatory statement may be liable for a republication if a reasonable person would have recognized that there was an unreasonable risk that someone would republish the defamatory matter, this rule only applies in the case of republication by someone other than the defamed party.<sup>235</sup> As noted in the discussion of the

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228. 711 S.W.2d 331 (Tex. App.—Dallas 1986, no writ).

229. *Id.* at 334-35.

230. *Id.* It would appear that the defendant could better have refuted the plaintiff's claim by relying upon the truth of the statement. The court's opinion does not indicate any dispute about the issue of whether the third party had in fact reported the theft. A statement recounting the receipt of the third party's report would be true regardless of whether the theft actually occurred.

231. *Id.* at 336.

232. 696 S.W.2d 439 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

233. *Id.* at 445.

234. *Id.* at 449 (Reeves, J., dissenting).

235. *Id.*



*Ramos* case,<sup>236</sup> a plaintiff cannot recover for injuries sustained by reason of publication of an alleged defamation if the plaintiff himself procured the publication.<sup>237</sup> Consequently, the circumstances under which this type of republication is actionable are much more limited than is true in the case of a republication by a third party. The dissent argued that republication by the plaintiff is actionable only if the republication was necessary, rather than foreseeable.<sup>238</sup> Due to the absence of any jury finding on the question of necessity, the dissent would have reversed the judgment in favor of the plaintiff and remanded the case for a retrial.<sup>239</sup>

*El Paso Times, Inc. v. Kerr*<sup>240</sup> contains a lengthy discussion of the difference between the publication of an opinion, which is not actionable, and a statement of fact, which is actionable.<sup>241</sup> The plaintiff, an Assistant United States Attorney claimed that an editorial appearing in the defendant's newspaper defamed him. The statement at issue in effect stated that the burden of proof faced by a prosecutor is no excuse for cheating. In determining whether to view this statement as an opinion, the court noted several factors that required consideration: first, the court must look to the common usage or meaning of the specific language used in order to determine whether the statement has a precise meaning or whether the statement is ambiguous; second, the court must consider whether the statement is verifiable, i.e., can the statement be proved or disproved or objectively characterized as true or false; third, the court must look to the immediate context in which the statement appeared; finally, the court must consider the broader context in which the specific statement appeared.<sup>242</sup> Applying this test in *Kerr*, the court noted that the term cheating did not have any unique definition; that an allegation of cheating in the context of a trial of a criminal case could not be objectively established as true or false; that the article that contained the statement set forth the facts on which the author based his allegation of cheating and referred to the article itself as an opinion; and that the article appeared as a Sunday commentary in the editorial section.<sup>243</sup> Based on these facts the court drew the legal conclusion that the publication was a protected expression of opinion, and thus, not actionable.<sup>244</sup>

Statements made in the course of a judicial proceeding are absolutely privileged and cannot form the basis of a defamation action even if the statements are false and published with actual malice.<sup>245</sup> The court in *Gulf Atlantic Life Insurance Co. v. Hurlbut*<sup>246</sup> held that this absolute privilege

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236. See *supra* note 231 and accompanying text.

237. See *Lyle v. Waddle*, 144 Tex. 90, 94, 188 S.W.2d 770, 772 (1945).

238. *Rico*, 696 S.W.2d at 449 (Reeves, J., dissenting).

239. *Id.* at 449-50.

240. 706 S.W.2d 797 (Tex. App.—El Paso 1986, writ ref'd n.r.e.), *cert. denied*, 107 S. Ct. 1570, 94 L. Ed. 2d 761 (1987).

241. *Id.* at 798-800.

242. *Id.* at 798.

243. *Id.* at 798-800.

244. *Id.* at 800-01.

245. See *Russell v. Clark*, 620 S.W.2d 865, 868 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).

246. 696 S.W.2d 83 (Tex. App.—Dallas 1985, writ granted).

also "applies to communications to law-enforcement officers and to agencies exercising quasi-judicial powers."<sup>247</sup> The court held that the statements that defendants made to representatives of the attorney general's office, the Board of Insurance Commissioners, and to a grand jury in Harris County were absolutely privileged.<sup>248</sup>

Three cases decided during the Survey period pointed out the extreme difficulty a defendant faces in attempting to dispose of a defamation claim on summary judgment. Consistent with its earlier opinion in *Beaumont Enterprise & Journal v. Smith*,<sup>249</sup> the Texas Supreme Court in *Bessent v. Times-Herald Printing Co.*<sup>250</sup> reversed a summary judgment that the lower courts had allowed based upon the affidavit of an officer of the defendant that indicated that a United Press International (UPI) release was the basis of the allegedly defamatory article.<sup>251</sup> The affidavit also claimed that the UPI is generally a reliable and accurate source of news. Since knowledge of facts under the control of the defendant's employees formed the basis of these statements, the court held that the affidavit could not be readily controverted and could not form the basis for a summary judgment.<sup>252</sup> Similarly the court in *Associated Telephone Directory Publishers, Inc. v. Better Business Bureau*<sup>253</sup> reversed a summary judgment that had as its basis the affidavit of the defendant rebutting any actual malice in the communication of the allegedly defamatory information.<sup>254</sup> Finally, the court in *Sellards v. Express-News Corp.*<sup>255</sup> held that a summary judgment was not proper in the case of an allegedly defamatory statement that was ambiguous; the jury must determine how the ordinary reader would interpret an ambiguous statement.<sup>256</sup>

The San Antonio court of appeals considered the little known tort of invasion of privacy in *Donnel v. Lara*.<sup>257</sup> The plaintiffs in that case claimed that the defendant had unlawfully intruded into their privacy by placing repeated telephone calls to their residence at unreasonable hours. Relying upon the Restatement of Torts,<sup>258</sup> the court noted that there are four separate and distinct categories that comprise the tort of invasion of privacy.<sup>259</sup> These include any unreasonable intrusion upon the seclusion of another, any appropriation of another's name or likeness, any unreasonable publicity given

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247. *Id.* at 99.

248. *Id.* at 100.

249. 687 S.W.2d 729 (Tex. 1985).

250. 709 S.W.2d 635 (Tex. 1986).

251. *Id.* at 636; see *Beaumont Enter.*, 687 S.W.2d at 730.

252. 709 S.W.2d at 636.

253. 710 S.W.2d 190 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

254. *Id.* at 192-93.

255. 702 S.W.2d 677 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

256. *Id.* at 679-80. The plaintiff in *Sellards* was a passenger injured in an automobile accident that killed the driver and that the defendant newspaper characterized as a "drug-induced suicide." *Id.* at 678. The court believed that this statement was ambiguous in that the ordinary reader could interpret it to mean that the injured plaintiff had in fact been involved with drugs and suicide. Consequently, a fact issue existed as to whether the statement was defamatory. *Id.* at 679.

257. 703 S.W.2d 257 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

258. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

259. 703 S.W.2d at 259.

to another's private life, and any publicity that unreasonably places another person in a false light before the public.<sup>260</sup> The court held that the facts of *Donnel* clearly fell within the first category, and affirmed an award of nominal actual damages and exemplary damages in the amount of \$4500.<sup>261</sup>

### VIII. EMPLOYER-EMPLOYEE RELATIONS

The cases decided during the Survey period did not create any new exceptions to the employment at will doctrine. This doctrine provides that, absent an express agreement to the contrary, either the employer or the employee may terminate their relationship at any time and for any reason.<sup>262</sup> The courts in *Berry v. Doctor's Health Facilities*,<sup>263</sup> *Vallone v. Agip Petroleum Co.*,<sup>264</sup> and *Totman v. Control Data Corp.*<sup>265</sup> relied upon the at will doctrine to affirm summary judgments disposing of wrongful termination claims.<sup>266</sup> Two cases decided during the Survey period discussed statutorily created exceptions to the at will doctrine. In *Vasquez v. Bannworths, Inc.*<sup>267</sup> the Texas Supreme Court considered the appropriate relief to be granted in a case involving the Texas right-to-work law.<sup>268</sup> The jury in that case found that the employer had terminated the plaintiff for belonging to a union. By way of relief, the court awarded back pay and an injunction prohibiting the employer from discriminating against the plaintiff in the event that she was reemployed. The Texas Supreme Court held that the right to work law requires that the remedy awarded by the court effectuate the policy of the act.<sup>269</sup> Under the circumstances of that case the court held that the act mandated an injunction requiring the employer to rehire the plaintiff.<sup>270</sup> The court in *City of Brownsville v. Pena*<sup>271</sup> affirmed a jury verdict in favor of a plaintiff who brought suit under the whistle blower statute.<sup>272</sup>

The court in *Wilson v. Chemco Chemical Co.*<sup>273</sup> considered the enforceability of a covenant not to compete. The court upheld the covenant even

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260. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

261. 703 S.W.2d at 259-61.

262. See *Mitsubishi Aircraft Int'l, Inc. v. Maurer*, 675 S.W.2d 286, 289 (Tex. App.—Dallas 1984, no writ). But see *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985) (public policy exception to the employment at will doctrine exists in a case in which an employer has terminated an employee for refusing to do an illegal act that carried criminal penalties).

263. 715 S.W.2d 60 (Tex. App.—Dallas 1986, no writ).

264. 705 S.W.2d 757 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

265. 707 S.W.2d 739 (Tex. App.—Fort Worth 1986, no writ).

266. See *Berry*, 715 S.W.2d at 62-63; *Totman*, 707 S.W.2d at 744; *Vallone*, 705 S.W.2d at 758-59.

267. 707 S.W.2d 886 (Tex. 1986).

268. See TEX. REV. CIV. STAT. ANN. art. 5154g (Vernon 1971).

269. 707 S.W.2d at 888.

270. *Id.* at 888-89.

271. 716 S.W.2d 677 (Tex. App.—Corpus Christi 1986, no writ).

272. *Id.* at 680-81. The whistle blower statute provides that "A state or local governmental body may not suspend or terminate the employment of, or otherwise discriminate against, a public employee who reports a violation of law to an appropriate law enforcement authority if the employee report is made in good faith." TEX. REV. CIV. STAT. ANN. art. 6252-16a, § 2 (Vernon Supp. 1987).

273. 711 S.W.2d 265 (Tex. App.—Dallas 1986, no writ).

though it covered a geographic area including twenty-one counties in four states.<sup>274</sup> The court held that an evaluation of the reasonableness of the geographic scope of the restraint must involve an analysis of the characteristics of the area affected. Since the region involved was sparsely populated, the twenty-one county area was reasonable.<sup>275</sup> The court in *Williams v. Compressor Engineering Corp.*<sup>276</sup> held that a former employer who obtains an injunction enforcing a covenant not to compete may recover its attorney's fees even though the trial court's injunction reduced the geographic scope of the covenant.<sup>277</sup>

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274. *Id.* at 267-68.

275. *Id.*

276. 704 S.W.2d 469 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

277. *Id.* at 474. The court so concluded despite that a finding that the covenant was overbroad would prohibit the former employer from recovering actual damages for breach of the covenant. *Id.*; see *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 314-15, 340 S.W.2d 950, 952-53 (1960).

