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Commercial Torts and Deceptive Trade Practices

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COMMERCIAL TORTS AND DECEPTIVE TRADE PRACTICES

by

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I. DECEPTIVE TRADE PRACTICES

A. Status as the Consumer

THE question of who qualifies as a consumer represents one of the most frequently litigated issues under the Texas Deceptive Trade Practices—Consumer Protection Act (DTPA).[1] Courts have consistently held that only those with standing as a consumer[2] can bring suit under the DTPA.[3] The Texas Supreme Court and courts of appeals considered the issue of standing on several occasions during this Survey period.

In *Sherman Simon Enterprises v. Lorac Service Corp.*[4] an employee of Lorac Service Corporation rented a car from Sherman Simon Enterprises, Inc. (SSE), a car rental franchisee. The employee used a company credit card and billed the charges to the parent company of Lorac. While driving the vehicle, the employee was involved in a collision that killed a passenger in another car. Representatives of the deceased's estate brought suit against Lorac. Ultimately, Lorac made a cash settlement with the estate. Lorac brought suit under the DTPA against SSE seeking reimbursement for the money paid to the estate. Lorac alleged that SSE, through the car rental agreement, had misrepresented to Lorac that Lorac's employee had received liability insurance coverage. The defendant rental car company responded that Lorac, the employer, did not qualify as a consumer because Lorac could not prove that SSE either billed Lorac or received payment from Lorac for the rental car. The Texas Supreme Court rejected SSE's argument.[5]

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1. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1987) [hereinafter DTPA].

2. The DTPA defines consumer as:

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

3. Riverside Nat'l Bank v. Lewis, 603 S.W.2d 169, 173 (Tex. 1980); *accord* Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705 (Tex. 1983); Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535 (Tex. 1981).

4. 724 S.W.2d 13 (Tex. 1987).

5. *Id.* at 15-16.

The court began its analysis by applying the DTPA consumer standing test[6] originally set forth in *Cameron v. Terrell & Garrett, Inc.*[7] The *Cameron* court required the plaintiff to show:

(1) The plaintiff sought or acquired goods or services by purchase or lease; and

(2) The goods or services purchased or leased formed the basis of the complaint.[8]

The *Sherman* court noted that the statutory definition of consumer includes those plaintiffs who merely seek to acquire goods or services.[9] The *Sherman* court, therefore, did not require Lorac to prove payment.[10] The *Sherman* court also noted that the lower court properly held that Lorac, through the agency of its employee, had sought to acquire goods and services.[11] Although not discussed by the court, the facts indicate that the service of providing insurance coverage for the vehicle apparently formed the basis of the plaintiff's complaint, thereby satisfying the second prong of the test.

In *Birchfield v. Texarkana Memorial Hospital*[12] a minor's parents sued on their daughter's behalf to recover damages to her caused by hospital personnel, who improperly administered supplemental oxygen to her shortly after her birth. The parents sued on theories of negligence and deceptive trade practices.[13] The hospital contended, on appeal, that the infant did not qualify as a consumer. The Texas Supreme Court rejected this argument and reaffirmed that the court defines a consumer in terms of his or her relationship to a transaction, rather than by his or her relationship to the defendant.[14] The infant acquired goods and services furnished by the hospital and thereby established her standing for purposes of the DTPA.[15]

The supreme court's opinions in *Sherman* and *Birchfield*, paralleled its 1985 decision in *Kennedy v. Sale*.[16] The *Kennedy* court held that the consumer himself does not have to pay or intend to pay for the goods and services in question.[17] The consumer, instead, must only acquire or seek to acquire the goods or services in a transaction undertaken for his benefit.[18] The fact that Lorac and the infant did not actually pay for the services they received did not disqualify them as consumers.[19]

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6. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon Supp. 1987).
7. 618 S.W.2d 535, 539 (Tex. 1981).
8. *Id.* at 539.
9. *Sherman*, 724 S.W.2d at 15.
10. *Id.*
11. *Id.*
12. 31 Tex. Sup. Ct. J. 36 (Oct. 28, 1987).
13. *Id.* at 39.
14. *Id.* at 40 (*citing* Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705, 707 (Tex. 1983) (relationship to transaction relevant to consumer standing)).
15. *Id.*
16. 689 S.W.2d 890 (Tex. 1985).
17. *Id.* at 892.
18. *Id.* at 892-93. *Kennedy* involved a suit by an employee complaining that an insurance agent misrepresented the terms of a group health insurance policy for which the employer paid.
19. *Id.* at 892. In Berquist v. Onisiforou, 731 S.W.2d 577 (Tex. App.—Houston [14th Dist.] 1987, no writ), the seller of a mineral interest brought suit against her real estate agent

Challenge Transportation, Inc. v. J-Gem Transportation, Inc.[20] involved a DTPA claim by the lessee of three tractor trailers. The defendant contended that the plaintiff lacked the required consumer status necessary to bring a claim under the DTPA. Specifically, the defendant contended that the plaintiff had the burden of proving that the plaintiff *did not* fall within the class of businesses specifically excluded from the definition of consumers in section 17.45(4).[21] The court of appeals disagreed, holding that the plaintiff carried its burden of proof by proving that it was a corporation that had acquired services by lease.[22] The court determined that the defendant should plead the exceptions as an affirmative defense and, therefore, bear the burden of proof on that issue.[23]

The Fifth Circuit considered the issue of consumer standing twice during the Survey period. *Federal Deposit Insurance Corp. v. Munn*[24] involved a suit by Munn, the guarantor of a loan, against Southwest Bank, the lender. Munn alleged that the lender's deceptive trade practices and unconscionable conduct induced him to sign the guarantee agreement. The bank argued on appeal that the trial court erred in refusing to give a jury instruction asking whether the bank agreed to render services to Munn, in addition to extending credit to him. The Fifth Circuit held that although the plaintiff's status as a consumer is ordinarily a question of law for the court, if the parties dispute one of the elements necessary to establish standing as a consumer, that element should be submitted to the jury.[25] The court concluded that the transaction primarily involved the extension of credit and that this fact alone would not bring the transaction within the ambit of the DTPA.[26] The appellate court, however, also found a fact issue as to whether the defendant's misconduct was based on the rendition of a service other than the extension of credit.[27] The court remanded the cause to the trial court because conflicting evidence on this issue required the trial court to submit this issue to the jury.[28] The Fifth Circuit followed its decision in *Munn* in the case of *Nottingham v. General American Communications Corp.*[29] In *Not-*

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and the buyer alleging that the agent's misrepresentations concerning the value of her mineral interests caused her to sell the interests for less than their true worth. The seller further alleged that the buyer and her agent engaged in a civil conspiracy against her. The court held that the plaintiff/seller was not a consumer because she sold rather than purchased the goods that formed the basis of her complaint. *Id.* at 580. One could argue that the plaintiff was complaining about the services of the agent, for which she had paid a commission. She could, therefore, be considered a purchaser and a consumer. The opinion, however, did not state whether the plaintiff framed her case in this manner.

20. 717 S.W.2d 115 (Tex. App.—Houston [14th Dist.] 1986, no writ).

21. See *supra* note 2 and accompanying text. *Challenge Transp.*, 717 S.W.2d at 117.

22. *Id.*

23. *Id.*

24. 804 F.2d 860 (5th Cir. 1986).

25. *Id.* at 865-66.

26. *Id.* In Riverside Nat'l Bank v. Lewis, 603 S.W.2d 169 (Tex. 1980), the supreme court held that the "mere" extension of credit did not qualify as a service covered by the DTPA.

27. *Munn*, 804 F.2d at 865-66. The court recognized that a service other than the extension of credit constituted an objective of the transaction. *Id.*

28. *Id.*

29. 811 F.2d 873 (5th Cir. 1987).

tingham the Fifth Circuit held that the DTPA covered services rendered in connection with the sale of a security when an objective of the transaction consisted of the receipt of those services.[30]

B. Liability Under the Act: General Considerations

In *Home Savings Association v. Guerra*[31] a home owner sued to recover damages for defects in home siding that Modern Builders had installed. The homeowner had executed a promissory note that Modern Builders had assigned to Home Savings. The homeowner brought suit against both Modern Builders and Home Savings and recovered a judgment against both defendants, jointly and severally, for the sum of $25,000 plus attorneys' fees. At the time of trial, Guerra had made retail installment payments totalling $1,256.90. On appeal Homes Savings denied liability, pursuant to a Federal Trade Commission rule,[32] for any amount in excess of the amount paid on the note. A unanimous Texas Supreme Court agreed with Home Savings and reversed the court of appeals.[33]

First, the court explained that the FTC rule preserves the consumer's claims and defenses against the assignee-creditor and thereby makes the buyer's duty to pay dependant upon the seller's duty to perform properly.[34] The court emphasized that the FTC-required notice explicitly limits the amount that the note holder must pay to the amount that the consumer paid under the contract.[35] Second, the court held that any construction of the FTC rule that would impose derivative liability on the creditor in an amount greater than the amount the consumer paid would transform the creditor into an "absolute insurer or guarantor of the seller's performance."[36] Significantly, the court acknowledged that the FTC rule merely limits a creditor's derivative liability for the seller's conduct and does not limit a consumer's right to recover against a creditor on independent grounds under state law.[37] In *Guerra*, however, the consumer did not obtain a jury finding that Home

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30. *Id.* at 878.
31. 30 Tex. Sup. Ct. J. 534 (July 1, 1987).
32. 16 C.F.R. § 433.2 (1976). The FTC rule provides in part:

> In connection with any sale or lease of goods or services to consumers, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of Section 5 of that Act for a seller, directly or indirectly to:
> (a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold type:
>
> NOTICE
>
> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

Id..
33. *Guerra*, 30 Tex. Sup. Ct. J. at 534-35.
34. *Id.*
35. *Id.* at 535.
36. *Id.* at 534-35.
37. *Id.* at 535.

Savings had committed a deceptive or unconscionable act.[38] No independent basis existed, therefore, to impose liability on the creditor.[39] The court distinguished its prior opinion in *Knight v. International Harvester Credit Corp.*[40] on the grounds that the creditor-assignee's involvement in *Knight* exceeded the creditor's involvement in the present case.[41] In addition, the creditor in *Guerra* had not pleaded or submitted the inextricably intertwined theory of recovery discussed in *Knight*.[42] The plaintiff's failure to establish an independent ground of recovery limited Home Savings' liability to the amounts the homeowner paid.[43]

In *Birchfield v. Texarkana Memorial Hospital*[44] the plaintiff accused the defendant hospital of committing deceptive trade practices in connection with medical services rendered to the plaintiff in 1974. The hospital argued that article 4590i, section 12.01,[45] although not effective until 1977, evidenced a legislative intent to exclude health care providers from the DTPA's coverage. The Texas Supreme Court ruled that nothing in the pre-1977 DTPA illustrated a legislative intent to exempt health care providers from liability under the DTPA.[46]

In a decision of potentially major consequence, the Texas Supreme Court ruled in *E.F. Hutton & Co. v. Youngblood*[47] that the DTPA did not apply to securities transactions. The court followed a three-step analysis in reaching this conclusion.[48] First, the court observed that the DTPA provides strict liability for misrepresentations, regardless of whether the speaker knows or should know that the representation is false.[49] The Texas Security Act[50] (TSA) protects a party who misrepresents facts provided that the party exercises due diligence in ascertaining the material's truth.[51] The court therefore concluded that the two statutes were fundamentally inconsistent.[52] Second, the court reasoned that because the legislature added the due diligence de-

38. *Id.*

39. *Id.*

40. 627 S.W.2d 382 (Tex. 1982). The court held that the seller and the note holder were "so inextricably intertwined in the transaction as to be equally responsible for the conduct of the sale." *Id.* at 389.

41. *Guerra*, 30 Tex. Sup. Ct. J. at 536.

42. *Id.*

43. *Id. But see* Colonial Leasing Co. v. Kinerd, 733 S.W.2d 671, 674 (Tex. App.—Eastland 1987, writ ref'd n.r.e.) (court held that (1) jury finding that two defendants acted together insufficient to show that defendants "inextricably intertwined" and (2) concept of inextricably intertwined pertains only to question of standing and does not provide basis for imposition of derivative liability).

44. 31 Tex. Sup. Ct. J. 36 (Oct. 28, 1987).

45. TEX. REV. CIV. STAT. ANN. art. 4590i, § 12.01 (Vernon Supp. 1988).

46. *Birchfield*, 31 Tex. Sup. Ct. J. at 39-40.

47. 30 Tex. Sup. Ct. J. 508 (June 24, 1987), *withdrawn*, 31 Tex. Sup. Ct. J. 65 (Nov. 10, 1987).

48. *E.F. Hutton*, 30 Tex. Sup. Ct. J. at 509-510.

49. *Id.* at 509; *see* Pennington v. Singleton, 606 S.W.2d 682, 687 (Tex. 1980) (liability imposed for intentional and unintentional misrepresentations).

50. TEX. REV. CIV. STAT. ANN. art. 581 (Vernon 1986).

51. Due diligence requires that a party not know and not reasonably be able to know of the inaccuracy of the information.

52. *E.F. Hutton*, 30 Tex. Sup. Ct. J. at 510.

fense to the TSA four years after enacting the DTPA, the DTPA should not apply to securities transactions.[53] Third, the court ruled that when faced with two inconsistent statutes that deal with the same subject matter, the court would apply the more specific statute.[54] Finding that the Securities Act dealt more directly with securities than did the DTPA, the court concluded that the DTPA should not apply to securities transactions.[55] The court, however, withdrew its opinion on a motion for rehearing.[56] The substitute opinion did not reach the question of the DTPA's applicability to securities transactions because the parties did not properly preserve this point for review.[57]

The court's reasoning in the original *Hutton* opinion is difficult to follow. First, just because the two statutes provide different thresholds for recovery and different remedies does not render them fundamentally inconsistent;[58] compliance with the more stringent standard in one statute will constitute compliance with the less exacting standards in the other statute.[59] Furthermore, both statutes provide that their remedies are cumulative, not exclusive.[60] Therefore, the availability of different or greater remedies under one statute does not thereby impliedly restrict the remedies available under the other statute. Further, the rule invoked by the court that a later enacted statute restricts a prior inconsistent statute[61] actually supports the conclusion that the DTPA, not the TSA, controls. The legislature reenacted DTPA section 17.43 in 1979,[62] two years after the legislature enacted the

53. *Id.*

54. *Id.*

55. *Id.*

56. *E.F. Hutton*, 31 Tex. Sup. Ct. J. 65 (Nov. 10, 1987).

57. *Id.*

58. TEX. BUS. & COM. CODE ANN. § 27.01 (Vernon Supp. 1988) deals specifically with fraud in the sale of stock, provides different remedies from those available under the Texas Security Act, TEX. REV. CIV. STAT. ANN. art. 581 (Vernon 1986). Under the court's analysis, this provision would be fundamentally inconsistent.

59. A party who meets the strict liability standard by avoiding misrepresentations will obviously meet the due diligence standard as well.

60. *See* TEX. BUS. & COM. CODE ANN. § 17.43 (Vernon Supp. 1988) (permits cumulative remedies); TEX. REV. CIV. STAT. ANN. art. 581-33M (Vernon Supp. 1988) (allows all common law and statutory actions outside Texas Securities Act to remain intact).

61. *See* TEX. GOV'T CODE ANN. § 311.025(a) (Vernon 1988): "Except as provided by section 311.031(d), if statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails."

62. TEX. BUS. & COM. CODE ANN. § 17.43 (Vernon Supp. 1988). Section 17.43 provides:

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

Id.

TSA's due diligence defense. The DTPA, therefore, should control. Finally, although the predecessor statute to the DTPA contained an exemption that included securities transactions, the legislature repealed this exemption with passage of the DTPA.[63] Section 17.49 contains the only exemptions to the Act and includes no exemption for persons dealing in securities.[64] Clearly, services rendered in connection with the sale of securities are not exempt from the DTPA.[65]

C. *Warranty*

In *Coulson v. Lake LBJ Utility District*[66] the court addressed the issue of which party in a contract action bears the burden of proving the breach of an implied standard of care and conduct.[67] The question arose when an engineer sued the utility district seeking payment for engineering services. The utility district defended by asserting that the engineer's preparation of the plans and specifications failed to meet the standard of reasonable engineering practice and that the engineer did not complete the plans in a good and workmanlike manner. The court of appeals held that the engineer had the burden of proving that he had met the accepted professional standards in order to recover under the contract.[68] The Texas Supreme Court reversed.[69] The supreme court stated that the engineer's proof that he had complied with the express terms of the contract created a rebuttable presumption that he had performed the work in a good, workmanlike, and non-negligent manner.[70] Accordingly, the court held that a party who relies upon the defense that the plaintiff failed to render services in a skillful manner carries the

63. TEX. REV. CIV. STAT. ANN. § 17.49 (Vernon Supp. 1988). Section 17.49 provides:

> (a) Nothing in this subchapter shall apply to the owner or employees of a regularly published newspaper, magazine, or telephone directory, or broadcast station, or billboard, wherein any advertisement in violation of this subchapter is published or disseminated, unless it is established that the owner or employees of the advertising medium have knowledge of the false, deceptive, or misleading acts or practices declared to be unlawful by this subchapter, or had a direct or substantial financial interest in the sale or distribution of the unlawfully advertised good or service. Financial interest as used in this section relates to an expectation which would be the direct result of such advertisement.
>
> (b) Nothing is this subchapter shall apply to acts or practices authorized under specific rules or regulations promulgated by the Federal Trade Commission under Section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C.A. 45(a)(1)]. The provisions of this subchapter do apply to any act or practice prohibited or not specifically authorized by a rule or regulation of the Federal Trade Commission. An act or practice is not specifically authorized if no rule or regulation has been issued on the act or practice.

Id.

64. *Id.*

65. Nottingham v. General Am. Communications Corp., 811 F.2d 873, 878 (5th Cir. 1987); *see* Melody Home Mfg. Co. v. Barnes, 31 Sup. Ct. J. 47, 49 (Nov. 4, 1987) ("The legislative history of the DTPA indicates that the Act was intended to apply to all service providers.").

66. 30 Tex. Sup. Ct. J. 524 (July 1, 1987).

67. *Id.* at 524-25.

68. *Id.* at 526.

69. *Id.*

70. *Id.* at 525-26.

burden of proof on this issue.[71]

The justices disagreed on the nature of the standard of care implied in the contract.[72] The majority found no distinction between the claims of failure to perform in a good and workmanlike manner and negligent performance.[73] In a concurring opinion, Justice Spears argued that negligence and the failure to render services in a good and workmanlike manner were not necessarily the same and that the former does not necessarily encompass the latter.[74]

Melody Home Manufacturing Co. v. Barnes[75] represents one of the most important decisions handed down during the Survey period. The plaintiff, Barnes, purchased a modular home from the defendant, Melody Home Manufacturing Company. A faulty connection between the sink and drain caused the home to have a continuous problem with dampness. The defendant's employees attempted to repair the home on two occasions. Instead of correcting the problem, however, the repairs caused additional damages. The jury found that the defendants had failed to construct the home in a good and workmanlike manner and, in addition, that the defendant had breached an implied warranty to repair the home in a good and workmanlike manner. Furthermore, the jury found that Melody Home knowingly breached the implied warranty and awarded discretionary damages under the DTPA. On appeal Melody Home contended that a contractor's mere provision of repair services does not give rise to an implied warranty that the contractor will perform the services in a good and workmanlike manner. The court of appeals held that the sale of a service created an implied warranty.[76] The Texas supreme court, in a more limited holding, held that when one repairs existing tangible goods or property he creates an implied warranty of good and workmanlike performance.[77] In reaching this holding, the court concluded that the same policies that support the imposition of strict products liability justified the protection of an implied warranty in service transactions.[78] The court reserved the question of whether a war-

71. *Id.* at 526.

72. *Id.* at 526-27.

73. *Id.* at 526.

74. *Id.* at 527. "An engineer could exercise due care, ordinary prudence, and perform reasonably but, through mistake or ignorance, still render unskilled or shoddy services." *Id.*

75. 31 Tex. Sup. Ct. J. 47 (Nov. 4, 1987).

76. *Id.* at 48-49.

77. *Id.* The court's original opinion was reported at 30 Tex. Sup. Ct. J. 489 (June 17, 1987). The court withdrew the opinion and replaced it with the rehearing opinion. 31 Tex. Sup. Ct. J. at 47. The court used more expansive language in the original opinion. In that opinion the court recognized an "implied warranty that services will be performed in a good and workmanlike manner". 30 Tex. Sup. Ct. J. at 490-91. The court emphasized in the second opinion that "[we] do not require repairmen to guarantee the results of their work; we only require that those who repair or modify existing tangible goods or property to perform those services in a good and workmanlike manner. 31 Tex. Sup. Ct. J. at 50. *But see* Bennett Coulson & CAE, Inc. v. Lake Utility Dist., 30 Tex. Sup. Ct. J. 524, 526-27 (July 1, 1987) (draws distinction between implied warranty of good and workmanlike manner and implied duty of care: "[a]n engineer could exercise due care . . . but through mistake or ignorance, still render unskilled or shoddy services").

78. 31 Tex. Sup. Ct. J. at 49. The court concluded that (1) the public interest in protecting consumers exceeded the impact of the imposition of damages upon the provider of service, (2) between the service provider and the consumer, the provider occupies a better position to

ranty would be implied in transactions involving the rendition of professional services.[79]

Notably, the *Melody Home* majority held that a party could not waive or disclaim the implied warranty in question.[80] The court reasoned that the allowance of waivers or disclaimers would violate the very public policy that supported the warranty's creation.[81] To permit service providers to defeat the consumer's expectation that work will be performed in a proper manner would encourage shoddy workmanship.[82] Justice Campbell concurred in the judgment, but proposed that the court limit the warranty to manufacturers who claim to correct a defect that existed when the consumer purchased the product.[83] Justice Gonzales filed a concurring opinion arguing that the warranty should be nothing more than an extension of the implied warranty that a builder will construct a home in a good and workmanlike manner.[84]

In *March v. Thiery*[85] the court considered whether the sale of an unfinished home creates implied warranties of good workmanlike construction and habitability.[86] The court of appeals answered in the affirmative, holding that the builder/vendor who constructs a residential building impliedly warrants that he performed the portion of work completed in a good and workmanlike manner.[87] The court further held that the fact that the builder first occupied or owned the home did not vitiate the implied warranty because courts consider the warranty to be automatically assigned to subsequent parties.[88]

In *Mercedes-Benz of North America v. Dickinson*[89] the court of appeals addressed the effectiveness of using a disclaimer to exclude express warranties. The automobile sales contract contained a statement indicating that neither the manufacturer nor the dealer made any express or implied war-

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prevent the loss, (3) a consumer can rely upon the service provider's expertise, and (4) the provider of services can better absorb the cost of damages resulting from substandard services. *Id.*

79. *Id.* at 50. In its original opinion the majority held that the same policies supporting imposition of an implied warranty for services such as repair also justified a warranty in the rendition of professional services. 30 Tex. Sup. Ct. J. at 491. The original opinion overruled Dennis v. Allison, 698 S.W.2d 94, 96 (Tex. 1985), which held to the contrary. Notably, the Texas Supreme Court has granted writ in Archibald v. Act III Arabians, 31 Tex. Sup. Ct. J. 206 (Feb. 10, 1988). In an unreported opinion, the *Archibald* court of appeals held that no implied warranty of performance exists with respect to the rendition of professional services. The Texas Supreme Court granted the writ on the following point of error: "The Court of Appeals erred in holding that there is no implied warranty of good and workmanlike performance to the horse training services provided by Act III Arabians." *Id.*; *cf.* Bennet Coulson & CAE, Inc. v. Lake Utility Dist., 30 Tex. Sup. Ct. J. 524, 526 (Spears, J., concurring).

80. 30 Tex. Sup. Ct. J. at 492.

81. *Id.*; see *supra* note 78 and accompanying text.

82. 31 Tex. Sup. Ct. J. at 50. The *Melody Home* decision also overruled part of GWL, Inc. v. Robichaux, 643 S.W.2d 392, 394 (Tex. 1982), which limited the implied warranty for services.

83. 31 Tex. Sup. Ct. J. at 51 (Campbell, J., concurring).

84. *Id.* (Gonzales, J., concurring); see Humber v. Morton, 426 S.W.2d 554 (Tex. 1968).

85. 729 S.W.2d 889 (Tex. App.—Corpus Christi 1987, no writ).

86. *Id.* at 892-93.

87. *Id.*

88. *Id.* at 892; *see* Gupta v. Ritter Homes, Inc., 646 S.W.2d 168, 169 (Tex. 1983).

89. 720 S.W.2d 844 (Tex. App.—Fort Worth 1986, no writ).

ranties, except as set forth in the printed Mercedes-Benz warranty, a copy of which the dealer was to furnish to the purchaser upon delivery of the vehicle. The warranty book indicated that the dealer made no warranty whatsoever. This statement contradicted the evidence and the jury's finding that the dealer made express warranties to the purchaser. The court held the manufacturer's and dealer's disclaimers ineffective,[90] pursuant to section 2.316 of the Texas Business & Commerce Code.[91] The court termed the disclaimers inoperative because they contradicted the dealer's express verbal warranties.[92] The buyer's inability to read the manufacturer's warranty until after signing the sales contract barred the disclaimer under section 2.316.[93]

In *Muss v. Mercedes-Benz of North America*[94] the court of appeals considered whether subpart b of section 2.725 of the Texas Business & Commerce Code[95] applied to a written manufacturer's warranty. Subpart b of section 2.725 provides that for purposes of the statute of limitations, a breach of warranty occurs when the seller tenders delivery, unless the warranty extends to future performance of the goods.[96] In *Muss* the manufacturer's warning stated:

> Any authorized Mercedes-Benz dealer of the owner's choice will, without charge to the owner, perform warranty repairs made necessary because of defects in material or workmanship . . . This warranty shall remain in effect until the vehicle has accumulated 24 months or 24,000 miles of use, whichever first occurs . . . .[97]

The plaintiff argued that the warranty extended to future performance of the goods as provided in section 2.725(b). The court disagreed, holding that the warranty assured the seller's future compliance to make repairs and did not constitute a warranty regarding the goods' quality.[98] Accordingly, the court found the warranty in question did not qualify as a future performance exception.[99]

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90. *Id.* at 851.

91. TEX. BUS. & COM. CODE ANN. § 2.316(a) (Vernon 1968). Section 2.316(a) provides:
> Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limiting warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this chapter on parol or extrinsic evidence (Section 2.202) negation or limitation is inoperative to the extent that such construction is unreasonable.

92. 720 S.W.2d at 852.

93. *Id.*

94. 734 S.W.2d 155 (Tex. App.—Dallas 1987, no writ).

95. TEX. BUS. & COM. CODE ANN. § 2.725 (Vernon 1968). Section 2.725(b) provides:
> (b) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Id.

96. *Id.*

97. 734 S.W.2d at 157-58.

98. *Id.* at 158.

99. *Id.*

D. Damages

In *Birchfield v. Texarkana Memorial Hospital*[100] patients sued a doctor and a hospital for both negligence and deceptive trade practices. The jury verdict contained findings supporting both theories of recovery. On appeal the court considered whether to allow the plaintiffs to recover both exemplary damages for gross negligence and treble damages under the DTPA. The Texas Supreme Court held that because the jury found that the deceptive conduct and the negligent conduct resulted in the same damages, an award of both exemplary damages and statutory treble damages would constitute an impermissible double recovery of punitive damages.[101] Accordingly, the court permitted the plaintiffs to elect between the exemplary damages and treble damages under the DTPA.[102] Further, the court held that the plaintiffs did not waive their entitlement to treble damages by failing to make an election in the trial court.[103] The court explained that when the prevailing party does not elect a remedy, the trial court should render judgment for those damages affording the greatest recovery.[104]

In *Kold-Serve Corp v. Ward*[105] the purchaser of an ice-making machine sued the manufacturer because the machine did not perform as represented.[106] The court of appeals affirmed an award that included the sums of money paid by the purchaser to the manufacturer and/or financing bank, including interest on this indebtedness, the installation and startup expenses, lost profits, and mental anguish.[107] The court prohibited the manufacturer from submitting damage issues to the jury for the value of the machines because he failed to produce evidence of their value.[108] Additionally, the manufacturer failed to request a jury issue, which would have determined this matter. In dicta the court held that, in a DTPA case, the plaintiff no longer must prove the existence of a physical injury in order to recover for mental anguish.[109]

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100. 31 Tex. Sup. Ct. J. 36 (Oct. 28, 1987).

101. *Id.* at 40.

102. *Id.*

103. *Id.* at 39-40.

104. *Id.* The court relied upon TEX. R. CIV. P. 301, which requires a judgment to be "so framed as to give the party all the relief to which he may be entitled." 31 Tex. Sup. Ct. J. at 39. *See also* Town East Ford Sales, Inc. v. Gray, 730 S.W.2d 796, 811 (Tex. App.—Dallas 1987, no writ) (plaintiff entitled to greatest relief that verdict allows).

105. 736 S.W.2d 750 (Tex. App.—Corpus Christi 1987, writ granted).

106. *Id.* at 754-55.

107. *Id.* at 755-56; *cf.* Nottingham v. General Am. Communication Corp., 811 F.2d 873, 879 (5th Cir. 1987) (plaintiff entitled to recover both damages and rescission of future obligation when necessary for full compensation).

108. 736 S.W.2d at 755.

109. *Id.* at 756. The Court relied upon St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649 (Tex. 1987), which held that plaintiff need not show a physical manifestation of mental anguish in order to recover damages for mental anguish in a suit alleging a negligent infliction of emotional distress. Apparently, the court determined that it need not restrict the rationale of *Garrard* to negligence cases and that the rule should apply to DTPA suits as well. *See*, Curry, *Recovery of Damages and Restitution Under the DTPA*, in STATE BAR OF TEXAS, DECEPTIVE TRADE PRACTICES ACT 1987, at A-12 to A-14.

E. Attorney's Fees

DTPA section 17.50(d)[110] provides that a court shall award a prevailing consumer reasonable and necessary attorney's fees.[111] In *March v. Thiery*[112] the court of appeals held that the consumer's attorney's testimony that he had taken the case on a one-third contingent fee basis and that such a fee arrangement was reasonable constituted sufficient evidence to support an award of attorney's fees.[113]

A DTPA claim often arises in connection with other common law claims or when a consumer defends a counterclaim asserted by the defendant. In these situations, a court confronts the question whether the consumer must segregate those attorney's fees attributable to a DTPA action and those attorney's fees expended in prosecuting the common law action or defending against a counterclaim. In *Wood v. Component Construction Corp.*[114] the court of appeals held that a consumer cannot recover attorney's fees under the DTPA that are incurred in defending a counterclaim, unless the facts necessary for the consumer to recover under the DTPA also serve to defeat the counterclaim.[115] The *Wood* court found that the facts supporting the consumer's claim did not defeat the counterclaim asserted by the defendant.[116] Accordingly, because the evidence did not distinguish between attorney's fees incurred in the defense of the counterclaim and those incurred in the prosecution of the DTPA claim, the award of attorney's fees could not stand.[117] In contrast, in *Nottingham v. General American Communications Corp.*[118] the Fifth Circuit did not require the trial court to allocate attorney's fees between the various claims because essentially the same facts formed the basis of the various causes of action and defenses.[119] In *Homes Savings Association v. Guerra*[120] the court held that the defendant must object at the trial court level when the trial court submits a special issue to the jury regarding attorney's fees for the entire case without requiring a separate allocation of attorney's fees between claims or parties.[121] If the defendant fails to object timely, he waives his objection.[122]

The defendant can recover attorney's fees incurred in the defense of groundless DTPA claims that the plaintiff brought in bad faith or for the purpose of harassment.[123] In *Intertex, Inc. v. Cowden*[124] the jury found that

110. TEX. BUS. & COMM. CODE ANN. § 17.50(d) (Vernon Supp. 1988).
111. *Id.*
112. 729 S.W.2d 889 (Tex. App.—Corpus Christi 1987, no writ).
113. *Id.* at 897.
114. 722 S.W.2d 439 (Tex. App.—Fort Worth 1986, no writ).
115. *Id.* at 445-46.
116. *Id.* at 444.
117. *Id.* at 444-45.
118. 811 F.2d 873 (5th Cir. 1987).
119. *Id.* at 880. Attorney's fees were properly awarded because the attorney's services were required to successfully prosecute the DTPA claim. *Id.*
120. 30 Tex. Sup. Ct. J. 534, 536 (July 1, 1987).
121. *Id.* at 536.
122. *Id.*
123. TEX. BUS. & COMM. CODE ANN. § 17.50(c) (Vernon Supp. 1988).
124. 728 S.W.2d 813 (Tex. App.—Houston [1st Dist.] 1986, no writ).

the plaintiff brought the claim in bad faith and for the purpose of harassment. The trial court also found the claim groundless, but refused to award attorney's fees to the defendant.[125] The court of appeals held that the statute required the court to award the defendant attorney's fees when the court found bad faith.[126] The plaintiff's decision to nonsuit its DTPA claim during trial did not alter the defendant's right to recover attorney's fees.[127] *Hill v. Pierce*[128] presented the converse situation. The *Hill* trial court found that the plaintiff's claim was not groundless and that the plaintiff did not bring the action in bad faith or for the purpose of harassment.[129] The court of appeals held that the evidence supported these findings.[130] The court of appeals stated that the term "groundless," as used in section 17.50(c),[131] means more than that the consumer failed to prevail; the term means that the plaintiff lacked an "arguable basis for his cause of action."[132] The terms "bad faith" and "for the purpose of harassment" require a showing that the consumer had a malicious or discriminatory purpose.[133] In this connection, a reckless disregard for the rights of the defendant or the absence of a good faith belief in the basis of his claim constitutes a showing of malice.[134]

F. Notice/Defenses

A consumer must give thirty days written notice to the defendant of his specific complaints and the actual damages, expenses, and attorney's fees claimed, before filing suit seeking the recovery of damages under the DTPA.[135] Several cases during the Survey period dealt with the application of that provision. In *McCann v. Brown*[136] the court considered the sufficiency of a demand letter. The applicable portion of the letter sent by counsel for the plaintiff read as follows:

> Your actions unquestionably constitute a violation of the Texas Deceptive Trade Practice Act. They also constitute common law fraud. We hereby give notice pursuant to those statutes and failure to deliver the trailer which was purchased will result in us seeking our full legal dam-

125. *Id.* at 819-20.
126. *Id.*; *see* TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon Supp. 1987).
127. 728 S.W.2d at 820.
128. 729 S.W.2d 340 (Tex. App.—El Paso 1987, no writ).
129. *Id.* at 341.
130. *Id.* at 341-42.
131. TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon Supp. 1988).
132. 729 S.W.2d at 341.
133. *Id.*; *see* TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon Supp. 1988).
134. 729 S.W.2d at 341. In Zak v. Parks, 729 S.W.2d 875 (Tex. App.—Houston [14th Dist.] 1987, no writ) the court stated in dicta, that the defendant need not prove malice, personal ill will, or reckless disregard in order to prove that the plaintiff brought the claim for the purpose of harassment or in bad faith.
135. TEX. BUS. & COMM. CODE ANN. § 17.50A(a) (Vernon Supp. 1988) states:
> (a) As a prerequisite to filing a suit seeking damages under Subdivision (1) of Subsection (b) of Section 17.50 of this subchapter against any person, a consumer shall give written notice to the person at least 30 days before filing the suit advising the person of the consumer's specific complaint and the amount of actual damages and expenses, including attorney's fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant.

136. 725 S.W.2d 822 (Tex. App.—Forth Worth 1987, no writ).

ages including penalties, interest and attorney's fees.[137]

The court determined that the letter satisfied the DTPA's notice requirement.[138] The court noted that the letter clearly alerted the defendant to the consumer's complaint and gave the defendant an opportunity to settle.[139] In contrast, the Fifth Circuit held in *International Nickel Co. v. Trammel Crow Distributor*[140] that the plaintiff had the burden of notifying the seller about additional damages he discovered during the interim period between the time when he sent the first notice letter and the time of the filing of the lawsuit.[141] The court noted, that as a procedural matter, the proper remedy for a plaintiff's failure to give the statutory notice is an abatement rather than a dismissal.[142] If the defendant, however, fails to specially except or otherwise object to the plaintiff's failure to plead or prove the required notice, the defendant waives the error and may not raise it for the first time on appeal.[143]

In *MBank Fort Worth, N.A. v. Trans Meridian, Inc.*[144] the court held that when the parties maintain equal bargaining positions, the consumer, through his conduct, may waive his assertion of rights under the DTPA.[145] The consumer's waiver, however, must be knowing and intelligent, and his conduct must be inconsistent with the assertion of his DTPA rights.[146] In *MBank* the consumer possessed knowledge of the material facts concerning the defendant's fraud at the time of the original transaction, but still entered into a new contract based on the original transaction and otherwise took action inconsistent with a repudiation of the original transaction.[147]

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137. *Id.* at 825.

138. *Id.*

139. *Id.* at 824-25.

140. 803 F.2d 150 (5th Cir. 1986).

141. *Id.* at 156.

142. *Id.*; *accord* The Moving Co. v. Whitten, 717 S.W.2d 117, 123 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

143. Challenge Transp., Inc. v. J-Gem Transp., Inc., 717 S.W.2d 115, 117 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

144. 820 F.2d 716 (5th Cir. 1987).

145. *Id.* at 721-22.

146. *Id.* TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon Supp. 1988) provides: "Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void . . . ."

147. 820 F.2d at 722. While the facts of the case may have supported common law waiver, if the Fifth Circuit meant to allow waiver of DTPA rights, provided the conduct constituting the waiver is both knowing and intelligent and not the result of unequal bargaining power, the court appears to have argued in a circle. By definition, waiver requires a voluntary relinquishment of known rights. Section 17.42 does not contain an exception for knowing, intelligent and voluntary waivers. *See* TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon Supp. 1988). Perhaps the court meant that a consumer may waive his rights under the DTPA by certain post-transaction conduct, undertaken after acquisition of knowledge of all of the facts, such as in a settlement of a claim, or an in-court abandonment of certain rights. *See* Rocha v. U.S. Homecraft Corp., 653 S.W.2d 53, 56-57 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). Although the Fifth Circuit stated the facts sketchily, apparently the consumer, acting with knowledge of the fraud, entered into a new contract with the defendant based upon the original transaction. One could argue that the better analysis would focus on causation, rather than waiver, and conclude that the defendant's conduct did not cause the consumer any damages because the consumer willingly entered into the transaction with knowledge of the fraudulent conduct.

II. INSURANCE

The Survey period contained several important cases dealing with causes of action against an insurance company. The question of standing to bring suit under Texas Insurance Code article 21.21[148] arose in *Aetna Casualty & Surety Co. v. Marshall*.[149] The plaintiff recovered a settlement in a worker's compensation claim, which included, among other things, a provision requiring Aetna to pay the plaintiff's future medical costs. The court's judgment incorporated the settlement agreement. After the settlement, the plaintiff encountered difficulties obtaining payments from Aetna for his medical expenses and ultimately brought suit against the company. The plaintiff alleged that Aetna violated DTPA section 17.46[150] by representing to the plaintiff that the agreed judgment contained medical benefits that it, in fact, did not contain. Such a misrepresentation is actionable under article 21.21.[151] The insurance company argued that Marshall did not have standing to bring the suit because he did not qualify as a consumer and because the court's judgment did not constitute an insurance policy. The Texas Supreme Court held that article 21.21 does not require Marshall to qualify as a consumer.[152] Marshall established a cause of action under article 21.21 by showing that the insurance carrier's actions violating DTPA section 17.46 injured him.[153]

In a landmark case, *Arnold v. National County Mutual Fire Insurance Co.*,[154] the Texas Supreme Court considered the question whether an insurer has a duty to deal fairly and in good faith with its insured. Arnold, the insured, filed a claim on his uninsured motorist policy against National County Mutual Fire Insurance Company (NCM). NCM denied Arnold's timely demand for payment. After Arnold sued both the uninsured motorist and NCM and obtained a judgment in the amount of approximately $18,000, NCM paid the $10,000 policy limit. Arnold then filed suit against NCM alleging that the company failed to act reasonably when it delayed settlement of the claim and forced Arnold to file suit. The trial court granted a summary judgment in favor of NCM, which the court of appeals affirmed.

The Texas Supreme Court reversed the trial court's judgment, holding

148. TEX. INS. CODE ANN. art. 21.21 (Vernon 1981).
149. 724 S.W.2d 770 (Tex. 1987).
150. TEX. BUS. & COMM. CODE ANN. § 17.46 (Vernon Supp. 1988).
151. *See* TEX. INS. CODE ANN. art. 21.21, § 16 (Vernon 1981).
152. 724 S.W.2d at 772.
153. *Id.* The court stated:

> Article 21.21 does not incorporate the entire [DTPA] which would require proof that Marshall was a consumer of goods or services. Instead, article 21.21 provides a cause of action to a person who has been injured by an insurance carrier who engages in an act proscribed by Section 17.46.
>
> Aetna's contention that a judgment is not an insurance policy is likewise irrelevant. The question is simply whether Aetna engaged in conduct prohibited by section 17.46.

Id.
154. 725 S.W.2d 165 (Tex. 1987).

that due to the special relationship[155] between the insurance company and the insured, the law imposes on the insurance company a duty of good faith and fair dealing.[156] The court held that Arnold stated a cause of action for breach of this duty by alleging that the insurance company denied his claim and delayed paying his claim without a reasonable basis.[157] Additionally, the insurance company breached this duty by failing to determine whether any reasonable basis for denial or delay existed.[158] The court pointed out that a plaintiff may recover mental anguish damages and exemplary damages arising from breach of this duty on the same grounds that permit their recovery in other tort actions.[159] Finally, the court held that the statute of limitations on the cause of action for breach of the duty of good faith and fair dealing does not begin to run until the parties finally resolve the underlying insurance contract claims.[160]

Chitsey v. National Lloyds Insurance Co.[161] involved a claim that the insured, Chitsey, had filed under his fire insurance policy. Chitsey alleged that the insurance company had failed to properly evaluate and investigate his claim and had therefore violated article 21.21 and breached the insurance company's duty of good faith and fair dealing. First, the Texas Supreme Court addressed Chitsey's claim under the Insurance Code.[162] Chitsey alleged that the jury's finding that the insurance company had failed to use due diligence in determining the amount of the plaintiff's loss established that the insurance company violated a State Board of Insurance order.[163] The board order prohibits practices that constitute unfair methods of competition or unfair or deceptive acts or practices in the insurance business, as determined by law.[164] The court rejected Chitsey's claim, holding that the phrase determined by law in the board order refers to an agency or a legislative determination and that a jury finding, alone, does not constitute such a

155. The court found the special relationship due to "the parties' unequal bargaining power and the nature of insurance contracts which would allow unscrupulous insurers to take advantage of their insured's misfortunes in bargaining for settlement or resolution of claims." *Id.* at 167. The court noted that an insurance company has exclusive control over the claims process, thereby permitting a company to deny coverage arbitrarily and delay payment with the only penalty being interest in the money owed. *Id.*

156. *Id.* The court thus extended the duty first recognized in G.A. Stowers Furniture Co. v. American Indemnity Co., 155 S.W.2d 544, 548 (Tex. Comm'n App. 1929, holding approved). The court distinguished the *duty* of good faith that arises from the parties' special relationship from a *covenant* of good faith, which the court had previously refused to imply into every contract. *Id. See* English v. Fisher, 660 S.W.2d 521, 522 (Tex. 1983).

157. 725 S.W.2d at 167.

158. *Id.*

159. *Id.* at 168.

160. *Id.* In a footnote, however, the court stated that this holding did not mean that the court may not try contract claims and claims for breach of the duty of good faith and fair dealing together whenever possible. *Id.* at 168 n.1.

161. 738 S.W.2d 641 (Tex. 1987).

162. *Id.* at 642-43; *see* TEX. INS. CODE ANN. art. 21.21 (Vernon 1981).

163. Docket No. 41060, State Board of Insurance, Amendment of Unfair Competition and Unfair Practices of Insurers Rules (June 4, 1982).

164. *Id.* State Board of Insurance Order No. 41060 provides, in part, that "no person shall engage in this State in any trade practice which is determined pursuant by [sic] law to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance." *Id.*; *cited in* 738 S.W.2d at 643.

determination.[165] The court, however, did hold that based upon an affirmative jury finding, Chitsey could recover for the insurance company's breach of its duty of good faith and fair dealing in handling the claim.[166]

In *Ranger County Mutual Insurance Co. v. Guin*[167] the Texas Supreme Court considered application of the *Stowers* doctrine.[168] In *Stowers* the court held that an insurer owes its insured the duty of reasonable care.[169] Accordingly, a court will hold an insurer liable for refusing to accept a claimant's settlement offer if an ordinary, prudent person standing in the insured's situation would have accepted the offer.[170] The jury in *Ranger County* found that the insurance company negligently handled both the claim and the lawsuit asserted against its insured.[171] The insurance company contended that the special issue was overly broad and that *Stowers* obligated the company only to accept an unconditional settlement within the policy limits. The Texas Supreme Court refused to adopt this limited approach.[172] The court held that the insurer's duty extends to the same breadth as the agency relationship and includes not only settlement matters, but the investigation, preparation, and trial of a lawsuit.[173] The court explained that the insurer's failure to offer to settle within policy limits (in the face of probable liability in excess of the policy) and the insurer's failure to advise the insured of a settlement offer supported a finding of negligence in the company's handling of the lawsuit.[174] The court approved the trial court's lengthy jury instructions concerning an insurer's duty.[175] Finally, the court held that the evidence supported a finding of gross negligence, which authorized the award of punitive damages.[176] Justice Gonzales dissented, asserting that the court could not properly extend liability under *Stowers* for negligence other than a failure to settle a claim within the policy

165. 738 S.W.2d at 643-44. Chitsey could have avoided this limitation by bringing suit under TEX. BUS. & COM. CODE ANN. § 17.50(a)(4) (Vernon Supp. 1988) for violation of TEX. INS. CODE ANN. art. 21.21, § 3 (Vernon 1981). Section 3 provides: "No person shall engage in this state in any trade practice which is defined in this Act as, or determined pursuant to this Act to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance." *Id.* A jury finding that the insurance company had engaged in an unfair act would constitute a determination pursuant to art. 21.21. *Cf.* Spradling v. Williams, 566 S.W.2d 561, 563 (Tex. 1978) (jury finding necessary in order to find deceptiveness of unlisted conduct prohibited by TEX. BUS. & COM. CODE ANN. § 17.46(a)).

The *Chitsey* court rejected the plaintiff's contention that he established a violation of another board order, incorporated by reference in Board Order 41060. While the court acknowledged that such a cause of action exists, it held that Chitsey's evidence did not establish proof of a violation. 738 S.W.2d at 643-44.

166. 730 S.W.2d at 643-44 (citing Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987)).

167. 723 S.W.2d 656 (Tex. 1987).

168. G.A. Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved).

169. *Id.* at 547.

170. *Id.*

171. 723 S.W.2d at 658.

172. *Id.* at 659.

173. *Id.*

174. *Id.*

175. *Id.* at 660.

176. *Id.*

limits.[177]

In *Block v. Employers Casualty Co.*[178] the court addressed the question of whether an insurance company may attack a judgment, agreed to by its insured in settlement of a claim, after the insurance company failed to defend the insured. In *Block* the plaintiff sued the insured, Coating Specialists, Inc. (CSI), for defects in a roof that CSI installed on his home. After CSI's insurance company refused to defend CSI, contending that the damaging event had not occurred during the policy period, CSI and the plaintiff entered into an agreed judgment. The court of appeals held that if the insurance company wrongfully refused to defend its insured, the insurance company could not collaterally attack the final agreed judgment between its insured and the claimant.[179] The insurance company, therefore, could not challenge either the reasonableness of the damages awarded by the agreed judgment or recitations in the judgment setting the date of the loss within the policy period.[180]

The Texas Supreme Court disagreed and held that while the insurance company could not relitigate the reasonableness of the damages set forth in the judgment,[181] the recitation that the damaging event occurred within the policy period did not bind the insurance company.[182] The court reasoned that the agreed judgment did not establish the policy coverage; therefore, CSI's assertion that no coverage existed did not constitute a collateral attack on the agreed judgment.[183] In addition, CSI was not collaterally estopped from contesting the date of the loss because the date of the loss did not constitute a material issue in the agreed judgment and because CSI's interests were antagonistic to those of the insured's on this issue.[184] The Texas Supreme Court also determined that rule 94 of the Texas Rules of Civil Procedure[185] did not require the insurance company to plead specifically that the policy did not cover the loss.[186] Instead, the insurance company adequately raised this issue, the court held, by a general denial since proof of the date of loss is a prerequisite of coverage.[187] Because the evidence clearly showed that the loss occurred within the policy period, however, the court affirmed the lower court's judgment for the insureds.[188]

Chaffin v. Transamerica Insurance Co.[189] raised a question of first impression: Does an insurance company's wrongful denial of coverage under the

177. *Id.* (Gonzales, J., dissenting).
178. 723 S.W.2d 173 (Tex. App.—San Antonio 1986, no writ).
179. *Id.* at 174.
180. *Id.*
181. 31 Tex. Sup. Ct. J. 245, 246 (Feb. 24, 1988) (citing Ranger Ins. Co. v. Rogers, 530 S.W.2d 162, 166-67 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.); St. Paul Ins. Co. v. Rahn, 641 S.W.2d 276, 278-79 (Tex. App.—Corpus Christi 1982, no writ)).
182. *Id.*
183. *Id.*
184. *Id.*
185. TEX. R. CIV. P. 94.
186. 31 Tex. Sup. Ct. J. at 247.
187. *Id.*
188. *Id.*
189. 731 S.W.2d 728 (Tex. App.—Houston [14th Dist.] 1987, no writ).

tortfeasor's policy give a third party a cause of action against the tortfeasor's insurance company? The plaintiffs sued the subcontractor responsible for waterproofing the roofs on two townhomes. Due to the subcontractor's negligence, both properties sustained damage. The subcontractor admitted liability and informed its insurance carrier, Transamerica, of its liability. Without investigating the merits of the claim, Transamerica denied the claim, asserting that the policy did not cover the subcontractor for these damages. Ultimately, Transamerica admitted that it previously denied coverage without basis and, approximately three years from the date of the loss, paid the plaintiffs the subcontractor's policy's limits. The plaintiffs dismissed their suit against the subcontractor, but continued their suit against Transamerica for tortious handling of the property claim. They contended that Transamerica's actions caused them unnecessary litigation expenses in their suit against the subcontractor. Among their claims, the plaintiffs asserted a cause of action pursuant to section 16(a) of article 21.21 of the Texas Insurance Code.[190] That section gives a cause of action to persons injured by others engaged in proscribed practices.[191] The plaintiffs asserted that the term "person" in section 16 included third parties injured by an insurance company's misconduct. Although acknowledging that the plaintiff's construction of this term lent credence to their position, the court nevertheless refused to recognize a statutory action by a third party against an insurance carrier.[192] In rejecting this cause of action, the court relied upon the common law rule that an insured party may not bring a direct action against his tortfeasor's insurance carrier.[193] The court further held that plaintiffs were not entitled to recover under a common law duty of good faith and fair dealing because the duty extends only from the insurer to its insured and does not provide a remedy for an injured third party.[194]

III. TORTIOUS INTERFERENCE AND BUSINESS DISPARAGEMENT

In *Hurlbut v. Gulf Atlantic Life Insurance Co.*[195] the Texas Supreme Court provided an interesting discussion of the causes of action for business

190. TEX. INS. CODE ANN. art. 21.21, § 16(a) (Vernon 1981).

191. Section 16.(a) provides:

> Any person who has sustained actual damages as a result of another's engaging in an act or practice declared in Section 4 of this Article or in rules or regulations lawfully adopted by the Board under this Article to be unfair methods of competition or unfair or deceptive acts or practices in the business of insurance or in any practice defined by Section 17.46 of the Business & Commerce Code, as amended, as an unlawful deceptive trade practice may maintain an action against the person or persons engaging in such acts or practices.

Id.

192. 731 S.W.2d at 732.

193. *Id.* at 731-32; *see* TEX. R. CIV. P. 51(b). One could argue that the authorities cited by the court do not compel the court's holding. The court failed to state why, as a matter of statutory construction, the claimants did not fit within the definition of persons empowered by section 16 to bring suit for conduct actionable under Art. 21.21. *See* TEX. INS. CODE ANN. art. 21.21, § 16 (Vernon 1981).

194. 731 S.W.2d at 732. This holding appears defensible due to the absence of a special relationship between the insurance company and a third party.

195. 31 Tex. Sup. Ct. J. 144 (Dec. 16, 1987).

disparagement and tortious interference with contract. The case involved a suit by two former insurance agents against their former employer, Gulf Atlantic Insurance Company, to recover damages incurred as a result of the defendant's misrepresentation that the agents were authorized to write group health insurance underwritten by Gulf Atlantic. After the agents sold the insurance, the defendant told state officials investigating the sales that the agents were not in fact authorized to write the insurance. The absence of authorization resulted in the agents' arrests and the loss of their insurance licenses, among other damages.

The court, pursuant to the Restatement (Second) of Torts section 623A,[196] held that the elements of a cause of action for business disparagement consist of the defendant's publication of the disparaging words, falsity, malice, lack of privilege, and special damages.[197] The court recognized that business disparagement resembles defamation, but noted that defamation protects the injured party's personal reputation whereas business disparagement protects the injured party's economic interests.[198] Business disparagement requires proof of special damages in the form of pecuniary losses, such as loss of sales.[199] In the case at bar, plaintiffs were unable to show direct pecuniary loss as a result of the defendant's conduct.[200] Accordingly, the Texas Supreme Court held that the plaintiffs failed to prove a business disparagement claim.[201] The court also held that plaintiffs failed to show tortious interference with the contract because the only contract affected was the contract between the plaintiffs and the defendant.[202] The court held the defendant's failure to honor its agreement with the plaintiffs may have constituted breach of contract and even fraud, but would not support a claim for tortious interference with a contract.[203] In *Tinkle v. McGraw*[204] the federal

196. RESTATEMENT (SECOND) OF TORTS § 623A (1977).

197. 31 Tex. Sup. Ct. J. at 147; *cf.* Donaldson v. Lake Vista Community Imp. Ass'n, 718 S.W.2d 815 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.) (holding that actionable interference with business relationship arises when defendant commits "an intentional harmful act without legal justification").

198. 31 Tex. Sup. Ct. J. at 147. The court cited other differences. First, the law presumes a defamatory statement to be false—truth is a defense; a party bringing a claim for business disparagement must prove the falsity of the statement. Second, a party who defames another is strictly liable, whereas scienter is an element of a cause of action for disparagement. Third, proof of special damages is only required in certain defamation cases; proof of pecuniary loss is required in all disparagement cases. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 143. The court also discussed the defendant's contention that the disparaging statements were privileged because they were made to an assistant attorney general who was investigating the insurance program. The court drew a distinction between an absolute privilege, which functions as a complete immunity regardless of the motivation of the speaker, and a conditional or qualified privilege, which protects the speaker only when it is made for a proper purpose. *Id.* The court held that the communication to the assistant attorney general would give rise to, at most, a conditional privilege. *Id.* Because proof of a business disparagement incorporates proof of scienter on the part of the defendant, a plaintiff who establishes his cause of action, therefore, defeats a qualified privilege. *Cf.* City of Brady v. Bennie, 735 S.W.2d 275 (Tex. App.—Eastland, 1987, no writ) (holding that only qualified privilege available in suits for tortious interference).

district court considered whether the defendant's interference in the contract between two other parties was privileged and, therefore, not a tortious interference.[205] The plaintiff alleged contractual interference against Kip Lamb, an attorney, based on Lamb's recommendation to his mother, Melba Lamb, and her sisters not to sign certain documents pursuant to a contract. The court held that Texas law recognizes that one who stands in a confidential relationship with a party to a contract may induce that party to breach a contract.[206] The court concluded that the defendant's familial and professional relationship with the other parties to the contract bestowed upon him a privilege to advise them concerning the wisdom of signing the documents in question.[207]

Baker v. Welch[208] presented an unusual claim for tortious interference with a business relationship. Plaintiff operated a lounge on property it leased from a corporation, Houston Helicopters, Inc. (HHI). The defendant, Baker, was the founder, sole shareholder, and president of HHI. After a verbal disagreement, Baker notified the plaintiff that HHI had decided to terminate the lease, as the contract permitted. Welch alleged that this termination constituted a tortious interference by Baker with plaintiff's relationship with Baker's corporation. The court of appeals rejected this mind-bending allegation, reasoning that Baker's and HHI's interests were so closely intertwined that one could not interfere with the conduct of the other.[209] The court also held that interference with contractual business relations becomes privileged when it results from the exercise of a party's own rights.[210]

In *First National Bank of Eagle Pass v. Levine*[211] the Texas Supreme Court held that suits for tortious interference with business relations resemble trespass actions,[212] as section 16.003 of the Texas Civil Practice and Remedies Code defines trespass.[213] As such, the two-year statute of limitations applies to such causes of action.[214]

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204. 644 F. Supp. 138 (E.D. Tex. 1986).

205. The court stated that under Texas law the following elements constitute a cause of action for contractual interference: (1) the existence of a contract, (2) willful and intentional interference with that contract, and (3) proximate cause between the interference and actual damage or loss to the plaintiff. *Id.* at 139.

206. *Id.* at 140.

207. *Id.*

208. 735 S.W.2d 548 (Tex. App.—Houston [1st Dist.] 1987, writ dism'd).

209. *Id.* at 549-50.

210. *Id.*

211. 721 S.W.2d 287 (Tex. 1986).

212. *Id.* at 289.

213. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1986). This section provides in pertinent part: "There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description: 1. Actions of trespass for injury done to the estate or property of another." *Id.* § 16.003(1).

214. 721 S.W.2d at 289; *cf.* Atomic Fuel Extraction Corp. v. Estate of Slick, 386 S.W.2d 180 (Tex. Civ. App.—San Antonio 1964.), *writ ref'd n.r.e. per curiam* 403 S.W.2d 784 (Tex. 1965) (two-year statute of limitations applied to suits for tortious interference with contract).

IV. CONVERSION

In *National Mortgage Corp. of America v. Stephens*[215] the court considered whether the failure to pay the proceeds of a check gives rise to a conversion action. The plaintiff purchased a mobile home and executed an installment contract. The mobile home dealer assigned the contract to the defendant, National Mortgage Corporation. A fire caused extensive damage to the mobile home and to the plaintiff's personal possessions. The insurance company issued a check for approximately $27,000. A portion of the check covered the loss of the home and the balance covered the plaintiff's personal property. The plaintiff alleged that National Mortgage agreed to reimburse her for the value of her personal items, if she signed the entire check over to them. Although the plaintiff endorsed the check, National Mortgage applied all but a small portion of the check to the outstanding indebtedness on the home. The plaintiff brought suit for conversion of that portion of the insurance proceeds representing reimbursement for her personal property. The trial court entered a summary judgment for the plaintiff and awarded her the proceeds at issue. The case continued when the plaintiff entered a claim for punitive damages based on National Mortgage's wrongful withholding of the insurance proceeds and a claim for actual damages caused by National Mortgage's delay in transferring title to the home. The plaintiff recovered a final judgment when the jury rendered a favorable verdict.

The court of appeals reversed the lower court's summary judgment decision.[216] The court reasoned that the check's proceeds could not form the subject of a conversion action because a conversion action is not available for the recovery of money, unless the money can be identified specifically as a chattel.[217] The insurance company did not owe the plaintiff a specific sum of money, but rather a portion of the insurance company's bank account after having deposited the endorsed check. The plaintiff's voluntary endorsement and delivery of the check negated any claim that National Mortgage had converted the draft itself.[218] The court held that the plaintiff did not have a cause of action in tort, but merely a cause of action for money had and received.[219] Such a cause of action for the breach of an implied contractual obligation did not support an exemplary damages award.[220] In *International Nickel Co. v. Trammel-Crow Distribution*[221] the Fifth Circuit addressed whether a warehouseman's failure to deliver stored goods to their owner creates a rebuttable presumption that the warehouseman has converted the

215. 723 S.W.2d 759 (Tex. App.—El Paso (1986), *rev'd on other grounds*, 735 S.W.2d 474 (Tex. 1987).

216. *Id.* at 762.

217. *Id.* at 761.

218. *Id.* at 761-62.

219. *Id.* at 762.

220. *Id.* Possibly, Stephens also would have had causes of action for the torts of deceit, generally referred to as "fraud," negligent misrepresentation, and deceptive trade practices arising out of the misrepresentation that induced her to sign the check. *Id.*

221. 803 F.2d 150 (5th Cir. 1986).

goods. Under Texas law, a bailee's failure to return goods to their owner gives rise to a presumption of the bailee's negligence.[222] Noting that other jurisdictions were split on this question and that no Texas court had apparently addressed this question, the court refused to extend the presumption to include conversion, as well as negligence.[223]

V. FRAUD AND NEGLIGENT MISREPRESENTATION

In *Fina Supply, Inc. v. Abilene National Bank*[224] the defendant bank issued a letter of credit to Fina Supply, Inc. (Fina) as part of an oil exchange agreement between Fina and a third party, Brio Petroleum, Inc. The letter of credit assured Fina that it would receive payment for excess shipments of oil made to Brio. The bank extended the expiration date of the letter of credit on several occasions. The question arose as to whether this extension merely gave Fina additional time to make proper presentation in conformity with the letter of credit, or whether it extended the letter of credit's coverage to include transactions that occurred at a later time. Fina alleged that an agent of Abilene National Bank represented that the amendments to the letter of credit covered further exchange and balances. The court, however, held that extension of the expiration date merely extended the time to comply with the terms of the letter of credit and did not cover additional imbalances.[225]

The Texas Supreme Court affirmed the court of appeal's ruling that the bank's agent's misrepresentations did not amount to actionable fraud.[226] The court reasoned that the representations concerned the legal effect of amendments to the document. Because the law considers such representations statements of opinion, not of fact, the representations generally do not support an action for fraud.[227] Relying upon the leading case in the area, *Safety Casualty Co. v. McGee*,[228] the court noted that the exceptions to the general rule include the following fact situations: (1) when one party with superior knowledge deceives another party, who is ignorant of the law, through studied concealment or misrepresentation; (2) when a fiduciary or confidential relationship exists between the parties; and (3) when the misrepresentation of law was intended and understood as a representation of fact.[229] In the present case the court found none of the exceptions to ap-

222. *See* Buchanan v. Byrd, 519 S.W.2d 841, 843 (Tex. 1975).
223. 803 F.2d at 154.
224. 726 S.W.2d 537 (Tex. 1987).
225. *Id.* at 539. The court relied upon Westwind Exploration, Inc. v. Homestate Savings Ass'n, 696 S.W.2d 378 (Tex. 1985).
226. 726 S.W.2d at 540-41.
227. *Id.*
228. 133 Tex. 233, 127 S.W.2d 176, 178 (Tex. Comm. App. 1939, opinion adopted).
229. *Id.* Other exceptions exist to the general rule that opinions are not actionable at common law. Indeed, in *Safety Casualty Co. v. McGee* the court stated that "so harsh a rule . . . ought to be modified in its application by every exception which can be admitted without defeating its policy." *Id.* at 177. In Trenholm v. Ratcliff, 646 S.W.2d 927, 930 (Tex. 1983), the court listed the following exceptions to the general rule: (1) when the speaker has knowledge of its falsity, (2) when the speaker purports to have special knowledge of what will occur in the future, and (3) when the opinion is based upon past or present facts. Of course, the

ply.[230] The court found the parties equally sophisticated, no confidential relationship between the two parties, and no superior knowledge on the part of the defendant concerning the law.[231] The court held it could not apply the third exception, statements of opinion intended and understood as statements of fact, to a situation in which the parties maintained equal bargaining positions and could obtain equal access to legal advice.[232] In such a situation the parties could draw their own conclusions as to the legal effect of their conduct.[233]

In *Geosearch, Inc. v. Howell Petroleum Corp.*[234] the Fifth Circuit considered the proper construction of section 552 of the Restatement (Second) of Torts,[235] which imposes liability for negligent misrepresentations. For the past fifteen years, several courts of appeals have followed section 552 when deciding negligent misrepresentation cases.[236] In *Geosearch* Howell Petroleum Corp. (Howell) granted Geosearch, Inc. (Geosearch) a working interest in an oil well. The agreement signed by the parties did not require Howell to insure Geosearch's interest. A Howell employee, however, stated during a telephone conversation following the signing of the agreement that Howell carried insurance that covered Geosearch's interest. The well suf-

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DTPA provides a statutory cause of action for misrepresentation of the legal effect of documents. TEX. BUS. & COM. CODE ANN. § 17.46(b)(12) (Vernon Supp. 1988). Section 17.46(b)(12) prohibits "representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law." *Id.*

230. 726 S.W.2d at 540-41.

231. *Id.*

232. *Id.*

233. *Id.* The court unjustifiably rejected the third exception. If the party giving an opinion intends the statement to be treated as a statement of fact *and* the other party understands it to be one of fact, the court should not insist upon treating it as one of opinion, regardless of the parties' bargaining positions.

234. 819 F.2d 521 (5th Cir. 1987).

235. RESTATEMENT (SECOND) OF TORTS § 552 (1977). Section 552 reads as follows:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Id.

236. *See, e.g.*, Blue Bell v. Peat Marwick, Mitchell & Co., 715 S.W.2d 408, 411 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (court directly referenced section 552); Great American Mortgage Investors v. Louisville Title Ins. Co., 597 S.W.2d 425, 429 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.) (court looked to section 552 for explanation of negligent misrepresentation); Shatterproof Glass Corp. v. James, 466 S.W.2d 873, 878 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.) (court quoted section 552 as the general rule).

fered an underground blowout, which, it turns out, was not covered by insurance. Geosearch brought suit for, among other things, negligent misrepresentation. Geosearch recovered judgment in the lower court based upon a favorable jury verdict. On appeal the court considered whether Howell supplied false information for the guidance of another under subsection (1) of section 552. Howell argued that Geosearch must prove that Howell had a pecuniary interest in Geosearch's purchase of insurance and that an interest in the well did not constitute such a pecuniary interest. In a well-reasoned opinion the Fifth Circuit rejected this argument.[237] The court declined to draw an "artificial line" separating the purchase of insurance covering the well from the rest of the transaction and held that, for purposes of section 552, the drilling venture necessitated the purchase of insurance.[238]

Houston Title Co. v. Ojeda De Toca[239] examined the effect that recording information in the Real Property Records has upon the seller's duty to disclose that information to the buyer. This lawsuit arose out of Mrs. Toca's purchase on November 15, 1979, of a residence in Houston. When the plaintiff purchased the property, she did not know that Harris County had condemned the property. An outstanding order of a Harris County building official authorized the City of Houston to demolish the property. Plaintiff, a resident of Mexico, parked her car in the garage after closing on the property and then returned to Mexico. The city demolished the house on March 10, 1980, but the plaintiff did not find out until she returned in July of 1980. Mrs. Toca brought suit against the title company and the seller and recovered a jury verdict. The jury found that the title company's and the seller's failure to disclose the demolition order constituted both negligence and a deceptive trade practice. Further, the jury found that the seller's failure to disclose the demolition order constituted fraud.

The court of appeals reversed the judgment against the title company, holding that a title company (as opposed to an abstract company) does not owe its insured a duty to disclose outstanding encumbrances.[240] The court held that the title company only owed a duty to the insured to indemnify against the losses resulting from outstanding encumbrances or defects in the title.[241] The court followed Texas law reflected in earlier courts of appeals' opinions.[242] The court next considered the defendant's argument that the recorded condemnation order created a defense to the claims of violations of the DTPA and fraud.[243] The court determined that the recordation consti-

237. 819 F.2d at 526.
238. *Id.*
239. 733 S.W.2d 325 (Tex. App.—Houston [14th Dist.] 1987, writ granted).
240. *Id.* at 327.
241. *Id.*
242. *Id.; see also* Prendergast v. Southern Title Guaranty Co., 454 S.W.2d 803, 807 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.) (guaranty company owed no duty to purchaser to examine title to land); Wolff v. Commercial Standard Ins. Co., 345 S.W.2d 565, 569 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.) (insurance company did not have to point out encumbrances on land to purchaser).
243. *See* TEX. PROP. CODE ANN. § 13.002 (Vernon 1984). Section 13.002 provides: "An instrument that is properly recorded in the proper county is notice to all persons of the existence of the instrument." *Id.*

tuted a defense to the plaintiff's claims that the defendant failed to disclose the order.[244] Recordation, pursuant to section 13.002,[245] constitutes constructive notice of the order.[246]

This holding merits reexamination in light of the recordation statute's purpose. The recordation statute permits a party to stake a claim to a piece of real property, putting the world on notice that he has an interest in that property and thereby preventing one who would otherwise be a bona fide purchaser from obtaining that status.[247] A party therefore cannot defeat another party's property interest by claiming ignorance of that party's interest. Yet, *Houston Title Co.* and the prior cases on point[248] treat section 13.002 as a substitute for full disclosure in a transaction. The court can engage in the fiction that a party has knowledge of those title facts recorded in the deed records when necessary to protect other parties who rightfully claim an interest in the property. A court, however, should not invoke this fiction for the purpose of relieving a seller of the duty of disclosing clearly material information, such as that he does not own that which he purports to convey. The court in *Houston Title Co.* appears to go even further by charging a purchaser with notice of filed documents that do not, at the time of purchase, affect the title to the property.[249] Ironically, one of the cases cited by the court, *NRC, Inc. v. Pickhardt*,[250] although agreeing with the proposition that a purchaser is charged with actual notice of matters affecting its title, held that a seller nevertheless has a duty to disclose facts which do not affect title.[251] Such facts include the suitability of the property for its intended use.[252] The court's decision in *Houston Title* charging the pur-

244. 733 S.W.2d at 327-28.

245. TEX. PROP. CODE ANN. § 13.002 (Vernon 1984).

246. *Id.*

247. *See* Boucher v. Wallis, 236 S.W.2d 519, 526 (Tex. Civ. App.—Eastland 1951, writ ref'd n.r.e.).

248. Medalion Homes, Inc. v. Therman Inv., Inc., 698 S.W.2d 400, 402 (Tex. App.—Houston [14th Dist.] 1985, no writ); Jernigan v. Page, 662 S.W.2d 760 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.). In *Medalion* the court stated, in dicta, that the absence of ownership as evidenced in real property records creates a defense to breach of an implied warranty of good title. 698 S.W.2d at 403. In *Jernigan*, upon which *Medalion* relied, the defendant sold certain real property to the Wendells who sold the property by contract for deed to the plaintiffs. When the Wendells defaulted on their loan, the defendant foreclosed on the property and sought to oust the plaintiffs. The plaintiffs alleged several unconvincing violations of the DTPA on the part of the defendants. The trial court directed a verdict against plaintiffs. 662 S.W.2d at 761. The court of appeals held that the plaintiffs were not deceived by defendant and that they were charged with notice of the defendant's interest in the property by virtue of the recorded deed of trust. *Id.* at 762.

249. Houston Title Co. v. Ojeda De Toca, 733 S.W.2d 325, 326 (Tex. App.—Houston [14th Dist.] 1987, writ granted). The order of the building official posted the house as a dangerous building and set a February 10, 1979, deadline for submission of repair plans. The director of public works authorized the City of Houston to demolish the building after this date and place a lien on the property for demolition costs. Since the city did not demolish the house until after the purchase, the city apparently did not file the lien until after the purchase as well.

250. 667 S.W.2d 292 (Tex. App.—Texarkana 1984, writ ref'd n.r.e.).

251. *Id.* at 294; *see also* Smith v. National Resort Communities, Inc., 585 S.W.2d 655, 657-58 (Tex. 1979) (limiting notice to defects affecting marketable title).

252. 667 S.W.2d at 294.

chaser with notice of a demolition order extends an already questionable rule and turns the recordation statute into an instrument of fraud. The recordation statute does not substitute for the full disclosure necessary to honest transactions. This statute should not relieve a seller from disclosing to the buyer material facts (including facts affecting title) of which the seller has actual acknowledge.[253]

253. *Cf.* Morris v. Brown, 85 S.W. 1015, 1017 (Tex. Civ. App. 1905, writ ref'd) (purchaser entitled to rely upon representation of good title; no legal duty to search records).