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DECEPTIVE TRADE PRACTICES AND COMMERCIAL TORTS

by
Michael Curry*

I. DECEPTIVE TRADE PRACTICES

A. Status as a Consumer

THE emergence of a judicially created rule that extends liability under the Texas Deceptive Trade Practices - Consumer Protection Act (DTPA)¹ to a party who is "inextricably intertwined" in a transaction is one of the more interesting developments in the DTPA caselaw. The Texas Supreme Court's decision in *Knight v. International Harvester Credit Corp.*² originated this concept.

In *Knight* the plaintiff signed a retail installment contract for the purchase of a truck. The contract contained a misrepresentation of the plaintiff's rights under the law. The retailer assigned the contract to International Harvester Credit Corporation (IHCC), which extended credit for the purchase of the truck. The purchaser sued the retailer and IHCC alleging that the misrepresentation was a deceptive trade practice. The defendants prevailed in the trial court. The court of civil appeals affirmed and held that the plaintiff was not a consumer as to IHCC because IHCC had merely extended credit and had not sold a good or service.³ The Texas Supreme Court disagreed, holding that the asserted misconduct involved more than a mere extension of credit.⁴ The court recognized that the installment contract was connected with the sale of a truck, which was clearly a "good."⁵ Justice Pope, writing for the court, rejected the argument that the plaintiff

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

2. 627 S.W.2d 382 (Tex. 1982).

3. 613 S.W.2d 531, 532 (Tex. Civ. App.—Beaumont 1981), *aff'd in part & rev'd in part*. The DTPA defines a 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. *Id.* See also *Riverside Nat'l. Bank v. Lewis*, 603 S.W.2d 169, 174 (Tex. 1980) (mere extension of credit is not service).

4. 627 S.W.2d at 389.

5. *Id.* The DTPA defines goods as "tangible chattels or real property purchased or leased for use". TEX. BUS. & COM. CODE ANN. § 17.45(1) (Vernon 1987).

was only a consumer as to the retailer who sold the truck and not to IHCC, the assignee.⁶ IHCC prepared the contract like most of the contracts that the retailer used. The contract, in addition, bore IHCC's insignia, and even contained a pre-printed clause assigning the contract to IHCC. The court concluded that this contract evidenced a sufficiently close relationship between the retailer and IHCC to charge both parties with equal responsibility for the sale's conduct.⁷ When stating this conclusion the court used the phrase "inextricably intertwined" to describe the degree of involvement in the transaction by the nonseller sufficient to create equal responsibility for the conduct of the sale.⁸ As a result the court held that the plaintiff was a consumer as to IHCC who benefited from the sale.⁹

One year later, in *Flenniken v. Longview Bank and Trust Co.*¹⁰ the Texas Supreme Court relying on *Knight* held that a purchaser of home construction services had standing as a consumer to sue the lender who committed an unconscionable act in its foreclosure on the property after the builder abandoned the job.¹¹ The court dismissed the contention that the builder's assignment of the purchaser's notes in exchange for construction financing was a separate transaction from the original purchase of construction services.¹² The court held that the plaintiffs were consumers as to the bank which sought to enjoy the benefits of the plaintiffs' transaction with the builder.¹³

One can read *Knight* and *Flenniken* narrowly to limit the inextricably intertwined doctrine as simply validating a plaintiff's standing as a consumer by redefining as a single transaction what a traditional contractual privity analysis would consider two separate transactions. According to this interpretation, if in the course of this single transaction any party engages in conduct prohibited by the DTPA, that party is amenable to an action under the statute. At least one court of appeals adopted this limited approach and held that the inextricably intertwined doctrine establishes only standing under the DTPA and not liability of the intertwined party for the conduct of another.¹⁴ One can also read *Knight* broadly enough to support the view that an inextricably close relationship between two defendants warrants holding one defendant responsible for the other's misconduct.¹⁵ Under this

6. 627 S.W.2d at 389.

7. *Id.* Accordingly the court considered that the involvement between the plaintiff and IHCC pertained to more than simply the extension of credit. *Id.*

8. *Id.*

9. *Id.*

10. 661 S.W.2d 705 (Tex. 1983).

11. *Id.* at 707.

12. *Id.*

13. *Id.*

14. *Colonial Leasing Co. v. Kinerd*, 733 S.W.2d 671, 673-674 (Tex. App.—Eastland 1987, writ granted) (inextricably intertwined relationship establishes only standing under DTPA; not vicarious liability).

15. See *Potere, Inc. v. National Realty Serv., Inc.*, 667 S.W.2d 252, 256-257 (Tex. App.—Houston [14th Dist.] 1984, no writ) (when two entities develop sufficiently extensive relationships courts will find them inextricably intertwined and may hold one entity responsible for the other's acts).

approach, when two defendants are interconnected in a transaction from which they both benefit, a court would consider the actions of one defendant as the actions of both.

The Texas Supreme Court's decision in *Home Savings Association v. Guerra*,¹⁶ provided support for *both* views. In *Guerra* the lender was an assignee of a home improvement contract and note. The court refused to hold the lender liable for the misconduct of the contractor, noting that a plaintiff must show that the defendant committed a deceptive act; a party's innocent involvement in a transaction was not grounds for liability.¹⁷ This language is ammunition for the proponents of the "standing" theory.¹⁸ The court went on to hold, however, that a creditor's liability is dependent on a showing of either direct creditor involvement in the sales transaction or some deceptive act relating to the financing.¹⁹ Therefore, the plaintiff could not recover against the lender because no evidence existed to show that the lender was inextricably intertwined with the contractor and the plaintiff had not advanced such a theory of recovery.²⁰ This portion of the court's opinion implies that if the lender had had a close connection with the sales transaction, the court would have imposed liability on the lender for misconduct of the seller without a further showing of wrongdoing on the lender's part.

In *Brown v. Galleria Area Ford, Inc.*²¹ the plaintiffs took their vehicle to a car dealership for repairs. While the car was still in the shop, the dealership was sold. The plaintiffs sought to hold the successor dealership liable for the previous dealership's faulty repairs on the theory that the two dealerships were inextricably intertwined. The plaintiffs' standing as a consumer was not an issue before the court. The court detailed the evidence that the consumers advanced in support of its inextricably intertwined argument but concluded that it was unnecessary to address the alternative theory of recovery because the successor dealer had itself engaged in unconscionable conduct.²²

In *Qantel Business Systems, Inc. v. Custom Controls Co.*²³ the Texas Supreme Court laid the issue to rest. Custom Controls, the purchaser of a computer system, brought suit against the retailer and Qantel Business Systems, Inc. (Qantel), the manufacturer. The trial court directed a verdict for Qantel on the grounds that Custom Controls presented no evidence that Qantel engaged, directly or vicariously, in any wrongful or misleading act. The court of appeals reversed and remanded the case to the trial court on the grounds that Custom Controls presented some evidence of a relationship

16. 733 S.W.2d 134 (Tex. 1987) (discussed at 42 Sw. L.J. 174 (1988)).

17. 733 S.W.2d at 136.

18. See *Colonial Leasing*, 733 S.W.2d at 675.

19. 733 S.W.2d at 136-37.

20. *Id.* at 137.

21. 752 S.W.2d 114 (Tex. 1988).

22. 752 S.W.2d at 115. The dissent disagreed with the court's conclusion as to the unconscionable conduct and found it unnecessary to address the plaintiff's "alternative theory of recovery" because the plaintiffs had waived the issue. 752 S.W.2d at 117 (Phillips, C.J., dissenting).

23. 761 S.W.2d 302 (Tex. 1988).

that could provide a basis for liability.²⁴ The Texas Supreme Court reversed the court of appeals decision because the lower court applied an improper standard of review.²⁵ In the course of its opinion the court also rejected the implication that the inextricably intertwined doctrine was a theory of vicarious liability.²⁶ The court reaffirmed that the doctrine provided only a basis for establishing a party's status as a consumer.²⁷ The court concluded that the consumer may invoke the common law theories of vicarious liability under the DPTA²⁸ and therefore, the court had no need to expand derivative liability to parties who are inextricably intertwined.²⁹

In summary, the inextricably intertwined doctrine is a basis for disregarding artificial barriers to standing which, in Justice Pope's words, "ignore the realities of the transaction."³⁰ The Texas Supreme Court's recent writings in *Guerra* and *Brown* suggested that this doctrine was also be a basis for imposing liability on a defendant, who benefits from the conduct of another party with whom he has significant involvement in the transaction or over whom he has a measure of control, for the misconduct of that party.³¹ In *Qantel*, however, the Texas Supreme Court rejected this expansive reading of the doctrine and reaffirmed that the doctrine provides only a basis for establishing standing and not vicarious liability.³²

Texas courts have considered the status of a consumer in a variety of other contexts during the Survey period. In *Holland Mortgage and Investment Corp. v. Bone*³³ the question before the court was whether the purchasers of a new home were consumers as to the lender that financed the purchase. The court followed established law and looked to the purchasers' objective in the transaction.³⁴ The court concluded that the purchasers' objective in borrowing the money was to purchase goods and services involving home construction.³⁵ The court also looked at evidence of a relationship between the builder and lender.³⁶ The builder's agents had recommended the lender to the buyers and had arranged the appointment. In addition the contract provided that the builder would have fulfilled his obligations upon the lender's final inspection. Based upon the relationship between the lender and the

24. Custom Controls Co. v. MDS Qantel, Inc., 746 S.W.2d 261, 264 (Tex. App.—Houston [1st Dist. 1987], *rev'd sub nom.* Qantel Business Sys., Inc. v. Custom Controls Co., 761 S.W.2d 302 (Tex. 1988).

25. 761 S.W.2d at 303-05.

26. *Id.* at 305.

27. *Id.* The court ratified its statement in *Guerra* that liability does not attach to a defendant based on his innocent involvement in a transaction. *Id.* See *Home Sav. Ass'n. v. Guerra*, 733 S.W.2d 134, 136 (Tex. 1987); see also *supra* notes 16-20 and accompanying text.

28. 761 S.W.2d at 305.

29. *Id.*

30. *Knight v. International Harvester Credit Corp.*, 627 S.W.2d 382, 389 (Tex. 1982).

31. See *supra* notes 16-22 and accompanying text.

32. See *supra* notes 23-29 and accompanying text.

33. 751 S.W.2d 515 (Tex. App.—Houston [1st Dist.] 1987, no writ).

34. *Id.* at 517-18 (citing *Knight v. International Harvester Credit Corp.*, 627 S.W.2d 382, 389 (Tex. 1982); *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 707 (Tex. 1983); *La Sara Grain v. First Nat'l Bank*, 673 S.W.2d 558, 566 (Tex. 1984)).

35. 751 S.W.2d at 518.

36. *Id.*

builder and upon the plaintiffs' objective in borrowing the money the court held that the trial court correctly determined that the plaintiffs were consumers.³⁷

In *Texas Cookie Co. v. Hendricks & Peralta*³⁸ the purchaser of a franchise brought suit under the DTPA. The seller contended that a franchise was intangible property and not a good or service and consequently, the purchaser was not a consumer under the DTPA. The court of appeals rejected this contention explaining that even the purchase of intangible property confers standing if it is accompanied by the transfer of collateral services that are also an objective of the transaction.³⁹ The court had no difficulty in holding that the sale of the franchise included a host of qualifying collateral goods and services.⁴⁰

In 1983 the Texas Legislature amended the DTPA to exclude from the definition of consumer those business consumers⁴¹ with assets of \$25,000,000 or more and those business consumers that are owned or controlled by an entity with \$25,000,000 or more in assets.⁴² In *Eckman v. Centennial Savings Bank*⁴³ the Texas Supreme Court established the rule for challenging a plaintiff's standing as a consumer on the grounds that he falls within the \$25,000,000 exception.⁴⁴ The defendant has the burden of objecting to the plaintiff's standing and should specially except and obtain a hearing. Once the issue is raised, the plaintiff has the burden of presenting evidence and securing a determination that he does not fall within the exception.⁴⁵ Unless the defendant raises the issue, the plaintiff has no duty to establish the inapplicability of the exception.⁴⁶

B. Liability Under the Act: Knowledge of the Defendant

In the DTPA the Texas Legislature declared twenty-three types of conduct as false, misleading or deceptive.⁴⁷ This laundry list of proscribed conduct includes the non-disclosure of pertinent information by the seller for the purpose of inducing the consumer into the transaction.⁴⁸ Liability is

37. 751 S.W.2d at 518. The court correctly held that whether or not a plaintiff is a consumer is a question of law for the court. *Id.* at 517.

38. 747 S.W.2d 873 (Tex. App.—Corpus Christi 1988, writ denied).

39. 747 S.W.2d at 876-877. The court noted that an intangible such as a franchise would be worthless without the attendant collateral services. *Id.* Thus, the conveyance of one necessarily entails the conveyance of the other. *Id.* As a result, a franchise is classified as a service for the purposes of the DTPA. *Id.*

40. *Id.* at 877.

41. TEX. BUS. & COM. CODE ANN. § 17.45(10) (Vernon 1987). Business consumers include individuals, partnerships or corporations, "who seek or acquire by purchase or lease, any goods or services for commercial or business use." *Id.*

42. *Id.* § 17.45(4).

43. 32 Tex. Sup. Ct. J. 46 (Oct. 26, 1988).

44. *Id.* at 48-49.

45. *Id.*

46. *Id.* The Court noted that groundless special exceptions by the defendant are grounds for sanctions. *Id.* at 49 n.1.; see TEX. R. CIV. P. 13.

47. TEX. BUS. & COM. CODE ANN. § 17.46(b) (Vernon 1987).

48. *Id.* § 17.46(b)(23). Subdivision 23 proscribes: "the failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to

predicated upon non-disclosure of known information; a seller has no duty to disclose information he does not know.⁴⁹

In *Liptak v. Pensabene*⁵⁰ the court held that direct evidence of the seller's knowledge is not necessary.⁵¹ Instead circumstantial evidence and reasonable inferences drawn therefrom are sufficient to justify a finding that the seller knew but failed to disclose that the home sold to the plaintiffs was infested with termites.⁵² In *Pfeiffer v. Ebby Halliday Real Estate*,⁵³ however, the court held that this knowledge must be actual.⁵⁴ In *Pfeiffer* the court held that common knowledge among realtors in the community that a particular house had foundation problems is no substitute for actual knowledge on the part of the defendant real estate agent.⁵⁵ The court also held that knowledge of prior foundation repairs does not imply knowledge of existing foundation defects.⁵⁶

In *Preston II Chrysler-Dodge v. Donworth*⁵⁷ the plaintiffs claimed that the defendant misrepresented the mileage on a used car they had purchased, thereby representing that the vehicle was of a particular standard, quality, or grade when it was of another. Prior to purchase, the defendant stated to the buyers that the odometer reflected the vehicle's actual mileage.⁵⁸ In fact, the party who sold the vehicle to the defendant had rolled back the odometer. The court of appeals rejected the plaintiffs' claim that the defendant had misrepresented the standard, quality or grade of the vehicle in violation of DPTA.⁵⁹ The court held that the defendant's representation made to the best of its knowledge was only false if made with knowledge of the inaccurate mileage, and the plaintiffs presented no evidence of such knowledge.⁶⁰

disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed." *Id.*

49. *Robinson v. Preston Chrysler-Plymouth, Inc.*, 633 S.W.2d 500, 502 (Tex. 1982); *Wyatt v. Petrila*, 752 S.W.2d 683, 687 (Tex. App.—Corpus Christi 1988, no writ).

50. 736 S.W.2d 953 (Tex. App.—Tyler 1987, no writ).

51. *Id.* at 956-57.

52. *Id.* The court relied upon evidence that within two weeks of the sale termites were swarming through the home and had created a mud tunnel on the ceiling, paneling had popped loose, the ceiling in one room began sinking, the plaintiff's hands went through the wall when she scrubbed it, the defendants who had been living in the home had painted the interior two years earlier and the extent of the damage indicated the presence of termites from four to ten years.

53. 747 S.W.2d 887 (Tex. App.—Dallas 1988, no writ).

54. *Id.* at 890.

55. *Id.*

56. *Id.* While the fact that a repaired foundation may not indicate the existence of a current foundation defect, prior foundation repair is itself a material fact that the seller or his agent should disclose since it will generally adversely impact the value of the home. *See Brigh-ton Homes, Inc. v. McAdams*, 737 S.W.2d 340, 342 (Tex. App.—Houston [14th Dist.] 1987, no writ).

57. 744 S.W.2d 142 (Tex. App.—Dallas 1987, writ granted).

58. *Id.* at 144. The court recited the defendant's representation as to the "best of its knowledge" the odometer reading stated on the vehicle was its actual mileage." *Id.* (emphasis original).

59. *Id.* at 145; *see* TEX. BUS. & COM. CODE ANN. § 17.46(b)(7) (Vernon 1987).

60. 744 S.W.2d at 145.

C. Liability Under the Act: Warranty

In 1978, the Texas Supreme Court in *Kamareth v. Bennett*⁶¹ recognized an implied warranty of habitability by the landlord in the lease of residential property.⁶² Ten years later, in *Davidow v. Inwood North Professional Group*⁶³ a similar implied warranty was extended to the lease of commercial property.⁶⁴ In *Davidow* one tenant had a number of problems with the space he leased including inadequate air conditioning, water leaks, and electrical failures. When the problems remained unresolved, the tenant moved out of the building and ceased making lease payments. The landlord sued for the unpaid rent. The tenant asserted the defense of breach of an implied warranty that the premises were fit for medical offices. The tenant prevailed in the trial court but the court of appeals reversed.⁶⁵ The Texas Supreme Court reversed that portion of the court of appeals decision that refused to sustain the tenant's defense and held that (1) there is an implied warranty that leased commercial premises are suitable for the intended purpose⁶⁶ and (2) the tenant's obligation to pay rent and the landlord's obligation under the implied warranty were mutually dependent, making the landlord's breach of warranty justification for non-performance by the tenant.⁶⁷ The court stated that courts should consider a number of factors in determining whether the landlord breached the warranty.⁶⁸ Significantly, the court further held that if the landlord and tenant expressly agree that the tenant will be responsible for certain defects, that agreement will control.⁶⁹

In *Archibald v. Act III Arabians*⁷⁰ the question before the court was whether the implied warranty of good and workmanlike performance articulated in *Melody Home Manufacturing Co. v. Barnes*⁷¹ applied to horse training services.⁷² In *Melody Home* the court held that there is a warranty implied in law that the services of repairing or modifying existing goods or

61. 568 S.W.2d 658 (Tex. 1978).

62. *Id.* at 661.

63. 747 S.W.2d 373 (Tex. 1988).

64. *Id.* at 376-77.

65. *Inwood N. Professional Group v. Davidow*, 731 S.W.2d 600, 605 (Tex. App.—Houston [14th Dist.] 1987, *rev'd in part & aff'd in part*, 747 S.W.2d 373 (Tex. 1988).

66. 747 S.W.2d at 377. The court explained: "This warranty means that at the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that these essential facilities will remain in a suitable condition." *Id.*

67. 747 S.W.2d at 377.

68. *Id.*

The court stated that among the factors a court should consider are the nature of the defect; its effect on the tenant's use of the premises; the length of time the defect persisted; the age of the structure; the amount of the rent; the area in which the premises are located; whether the tenant waived the defects; and whether the defect resulted from any unusual or abnormal use by the tenant.

Id.

69. *Id.*

70. 755 S.W.2d 84 (Tex. 1988).

71. 741 S.W.2d 349 (Tex. 1987); see Curry, *Commercial Torts and Deceptive Trade Practices*, 42 Sw. L.J. 171, 178 (1988).

72. 755 S.W.2d. at 85.

property will be performed in a good and workmanlike manner.⁷³ In a narrowly written opinion, the majority in *Archibald* held that horse training services fell within the *Melody Homes* warranty because the training resulted in a modification of the abilities, traits, and value of a horse, an existing tangible good.⁷⁴ Failure to render those services in a good and workmanlike manner exposed the trainer to liability for damages, in this case, for the death of a horse.⁷⁵

Two justices wrote separate dissenting opinions.⁷⁶ In his dissenting opinion Justice Wallace, argued that since horse training services did not fall within the ambit of the *Melody Homes* warranty and given the remedies available to the plaintiff for breach of contract and negligence, he saw no need to create a new implied warranty.⁷⁷ Justice Gonzales, in a separate dissenting opinion, argued that the real issue before the court was whether the court should extend an implied warranty of good and workmanlike performance to professional services.⁷⁸ Although reiterating the view, as expressed in *Coulson v. Lake LBJ Municipal Utility District*,⁷⁹ that no difference exists between the standards of care in a claim for breach of the implied warranty and in a claim for negligence, Justice Gonzalez nevertheless considered it inappropriate to recognize an implied warranty in the rendition of professional services.⁸⁰ Instead, Justice Gonzales urged adherence to the principle the court set forth in *Dennis v. Allison*⁸¹ that no implied warranty arose in the performance of professional services.⁸²

In *Forestpark Enterprises v. Culpepper*⁸³ a tenant of a shopping center brought suit against the property manager. The tenant alleged that the property manager breached an implied warranty that it would conduct the management services in a good and workmanlike manner. Specifically, the tenant complained that the manager breached the implied warranty by failing to evict a co-tenant whose business attracted undesirables whom the court termed "ne'er-do-wells and ruffians" and drove off the plaintiff's patrons. The court held that the management services in question qualified as professional services, and therefore the court looked not to *Melody Home*

73. 741 S.W.2d at 353-54.

74. 755 S.W.2d at 86.

75. *Id.*

76. *Id.* at 86 (Wallace, J., dissenting); *Id.* at 87 (Gonzalez, J., dissenting). Since Chief Justice Phillips did not sit and Justice Culver joined Wallace's dissenting opinion the majority opinion garnered only five votes.

77. *Id.* at 86-87.

78. *Id.* at 87.

79. 734 S.W.2d 649 (Tex. 1987); *Id.* at 87. See Curry, *supra* note 71, at 177-78.

80. 755 S.W.2d at 88 (Gonzalez, J., dissenting). Justice Gonzalez chastised the majority for extending a warranty imposing "strict liability" and "guaranteeing an error-free performance" yet later in the same opinion equated the standard of care required under the implied warranty with that required "under the common law negligence doctrines." *Id.* at 86-87. Justice Gonzalez correctly noted, however, that a warranty action under the DTPA is governed by "producing cause" while a negligence action is governed by "proximate cause". *Id.* at 88. This fact, in his view, increased the potential liability of service providers.

81. 698 S.W.2d 94, 95-96 (Tex. 1985).

82. 755 S.W.2d at 88 (Gonzalez, J., dissenting).

83. 754 S.W.2d 775 (Tex. App.—Fort Worth 1988, no writ).

but to *Dennis v. Allison* for the governing principle.⁸⁴ Following the latter case, the court held that no implied warranty existed.⁸⁵

D. Liability Under the Act: Unconscionability

In *Brown v. Galleria Area Ford, Inc.*⁸⁶ the Browns took their damaged truck to LaMarque Ford of Texas (LaMarque) for repair. While the vehicle was in the repair shop, three individuals contracted to purchase the dealership. The purchasers assumed full managerial authority for the day-to-day operations, but they remitted receipts from repair work already in progress to LaMarque. Shortly thereafter they formed a corporation, Galleria Ford (Galleria), and conducted all operations under that name. Upon return of their vehicle the Browns found the repairs unsatisfactory and brought suit against Galleria under the DTPA for the faulty repairs. The Browns prevailed in the trial court. On appeal, the court of appeals reversed on the basis of no evidence that Galleria had engaged in any misconduct that would subject it to liability under the DTPA.⁸⁷ The Texas Supreme Court reversed and held that evidence presented at trial supported the jury findings that Galleria had engaged in an unconscionable act or course of action.⁸⁸ The court examined the evidence in relation to both definitions of unconscionability in the DTPA.⁸⁹ Unrebutted evidence established that the truck was too dangerous to drive and that additional damage occurred during the repair work. The court held such evidence established a gross disparity between the value received and the consideration paid, which violated DTPA under the second half of the statutory definition.⁹⁰ The court also held that Galleria by representing itself to the parties as the company in charge of the dealership, took advantage of the Brown's lack of knowledge of the true responsibility of the parties involved in the dealership to a grossly unfair degree.⁹¹ As a result, the court held that Galleria also violated DTPA under the first half of the statutory definition.⁹² Finally, the court rejected Galleria's contention that an agreement between LaMarque and itself that LaMarque would be responsible for deceptive trade practices committed in

84. *Id.* at 779.

85. *Id.*

86. 752 S.W.2d 114 (Tex. 1988). This case also presents the issue of status. See *supra* notes 16-17 and accompanying text.

87. *Galleria Area Ford v. Brown*, 748 S.W.2d 239, 243 (Tex. App.—Houston [14th Dist.], *rev'd*, 752 S.W.2d 114 (Tex. 1988).

88. 752 S.W.2d at 116.

89. *Id.* The statute defines unconscionability as:

"Unconscionable action or course of action" means an act or practice which, to a person's detriment: A. takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or B. results in a gross disparity between the value received and the consideration paid in a transaction involving the transfer of consideration.

TEX. BUS. & COM. CODE ANN. § 17.45(5) (Vernon 1987).

90. 752 S.W.2d at 116. "Gross disparity" is determined from the consumer's perspective. The fact that Galleria had agreed with LaMarque that the latter would receive the proceeds of repairs already in progress did not prevent a gross disparity from existing.

91. *Id.*

92. *Id.*

Galleria's name relieved Galleria of liability.⁹³ Chief Justice Phillips, in his dissenting opinion, argued that the record showed no evidence that any violation of the DTPA by Galleria was a producing cause of damages to the consumers.⁹⁴ Chief Justice Phillips found no nexus between the confusion as to control of the dealership and the poor repair work as well as no evidence that Galleria performed the repairs.⁹⁵

In *Kennemore v. Bennett*⁹⁶ Bennett agreed to build the Kennemores a home. The Kennemores moved in upon completion, but refused to pay certain amounts that Bennett submitted on his bill because of alleged defects and plan deviations. Bennett instituted an action on the contract and for foreclosure. The Kennemores counterclaimed alleging that Bennett did not build the home in a good and workmanlike manner and that Bennett engaged in deceptive trade practices. The Kennemores ultimately paid the amounts that Bennett demanded but nevertheless proceeded with their counterclaim under the DTPA. The trial court directed a verdict against the Kennemores and they appealed. The court of appeals affirmed the trial court's judgment on the ground that the Kennemores' payment to Bennett and possession of the home waived their claims and estopped them from asserting them.⁹⁷ The Texas Supreme Court reversed and held that in the absence of an express waiver or settlement, the consumers' payment for and acceptance of allegedly defective performance did not constitute a waiver of the DTPA claim.⁹⁸ The court further held that Bennett's false assurances that he would personally supervise the work coupled with his continued failure to do so or to correct the defects resulting from his subcontractor's work constituted some evidence of a violation under the statutory definition.⁹⁹

In *Wyatt v. Petrila*¹⁰⁰ a court of appeals held that the sale of a home on an "as is" basis does not preclude a determination that the sale was unconscionable due to a gross disparity between the value received and the consideration paid.¹⁰¹ The court reasoned that to permit this disclaimer to defeat a claim of unconscionability would contravene the provision against waiver in

93. *Id.* at 116-17.

94. 752 S.W.2d at 117 (Phillips, C.J., dissenting). Incidentally, three other justices joined in Phillips' dissent resulting in a 5-4 majority. *Id.* at 118 (Phillips, C.J., dissenting).

95. *Id.* at 117-18 (Phillips, C.J., dissenting).

96. 755 S.W.2d 89 (Tex. 1988).

97. *Kennemore v. Bennett*, 740 S.W.2d 39 (Tex. App.—Dallas 1987), *rev'd*, 755 S.W.2d 89 (Tex. 1988).

98. 755 S.W.2d at 91. The court reasoned that the waiver and estoppel theories that the lower courts advanced were applicable to contract actions, but were not controlling in this statutory action under the DTPA. *Id.* See *Weitzel v. Barnes*, 691 S.W.2d 598, 600 (Tex. 1985); see also *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980) (contractual defense of substantial performance inapplicable to DTPA claims).

99. 755 S.W.2d at 92. This constituted, in the court's words, "some evidence that Bennett took advantage of the Kennemores' lack of knowledge of the construction business and lack of ability to correct the problems themselves". *Id.*; cf. *Pfeiffer v. Ebby Halliday Real Estate*, 747 S.W.2d 887 (Tex. App.—Dallas 1988, no writ) (when defendant has no knowledge of foundation defects in home and buyer receives same information as defendant, no evidence exists that defendant took advantage of buyer's lack of knowledge to grossly unfair degree).

100. 752 S.W.2d 683, 685 (Tex. App.—Corpus Christi 1988, no writ).

101. *Id.* at 685-86.

the DTPA.¹⁰² The court nevertheless concluded that the \$50,000.00 differential between the value received (\$575,000.00) and the consideration paid (\$625,000.00) did not constitute a gross disparity.¹⁰³ Accordingly, the court reversed the jury's finding of unconscionability.¹⁰⁴

E. Damages

In *Ludt v. McCollum*¹⁰⁵ the Texas Supreme Court confirmed that any residual loss of value in property after repairs is compensable under the DTPA.¹⁰⁶ The court, however, refused to allow the plaintiff to recover both repair costs and loss in value because the trial court submitted a question to the jury that did not inquire as to the loss in value after repairs.¹⁰⁷ The court held that under these circumstances to have permitted recovery of both the cost of repair and reduction in value would result in a double recovery.¹⁰⁸

In *W.O. Bankston Nissan, Inc. v. Walters*¹⁰⁹ the plaintiff purchased a pickup truck from W. O. Bankston Nissan, Inc. (Nissan). As part of the purchase price, Walters traded in his 280-ZX automobile at an agreed upon value of \$7,700.00. After experiencing mechanical problems with the truck and upon learning that the truck was an older model than the year that Nissan represented, Walters demanded rescission of the sale and the return of his automobile. However, Nissan had already sold the 280-ZX. Walters

102. *Id.* at 685; see TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon 1987). The statute provides in part that "[a]ny waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void . . ." The court also relied upon *Weitzel v. Barnes*, 691 S.W.2d 598 (Tex. 1985) in which the Texas Supreme Court held that an "as is" clause was not a defense to a DTPA action based upon misrepresentation. 752 S.W.2d at 685.

103. 752 S.W.2d at 686. Cf. *Holland Mortgage and Inv. Corp. v. Bone*, 751 S.W.2d 515, 521 (Tex. App.—Houston [1st Dist.] 1987, no writ) (disparity of less than seven percent did not constitute "gross disparity" as a matter of law).

104. 752 S.W.2d at 686.

105. 32 Tex. Sup. Ct. J. 50 (Oct. 26, 1988).

106. *Id.* at 51. In so holding, the court followed the decisions in *Terminex International, Inc. v. Lucci*, 670 S.W.2d 657 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.), and *Brighton Homes, Inc. v. McAdams*, 737 S.W.2d 340 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.), both of which approved recovery of reduction in value after repairs. 32 Tex. Sup. Ct. J. at 51. In *Brighton Homes* the court further considered the question of the date upon which the court should measure the amount of damages. 737 S.W.2d at 342-42. *Brighton Homes, Inc.* (*Brighton Home*), the defendant, argued that the date the foundation failed determined the date of repairs and reduction in value. The court rejected that contention because *Brighton Homes* had warranted that they would repair latent defects and held that *Brighton Homes'* failure to repair constituted a continuing cause of damage justifying an award of damages measured at the time of trial. *Id.* Actually, regardless of the existence of a warranty of repair, damages such as foundation and termite damages, can be progressive. Unlike a fire or collision, consumers usually cannot pinpoint a moment when the damage occurs. Given the continuing nature of the damages, courts properly measure the cost of repair at the time of trial. If the consumer does elect to measure the damages from the date of sale or the date he discovered the defect as opposed to the date of trial, courts should permit him to recover pre-judgment interest on that amount. Until the Texas Supreme Court settles this issue, the best course of action is to offer proof of the cost of repairs at all relevant times. In most cases, the difference is minimal.

107. 32 Tex. Sup. Ct. J. at 51. The jury question permitted recovery of the "[p]ermanent reduction in the market value at the present time of the home because of foundation problems . . ." *Id.*

108. *Id.*

109. 754 S.W.2d 127 (Tex. 1988).

then brought suit seeking recovery of the fair market value of his automobile on the date of the transaction. In the trial court the jury found for Walters, but the court rendered judgment notwithstanding the verdict. On appeal the court of appeals reversed.¹¹⁰ The Texas Supreme Court reversed and sustained Nissan's contention that Walters failed to prove a compensable measure of damages.¹¹¹ The court stated that Walters may recover his damages with respect to the truck under either the out of pocket measure¹¹² or the benefit of the bargain measure,¹¹³ whichever afforded the greater recovery.¹¹⁴ The court also held that the value of the 280-ZX, which was the only damage issue submitted, was not the proper measure of damages.¹¹⁵ Justice Mauzy, in his concurring opinion, noted that while one could appropriately apply either the out of pocket or benefit of the bargain measures in this case, they were not the exclusive measure of damages available in DTPA cases.¹¹⁶

In *Jacobs v. Danny Darby Real Estate, Inc.*¹¹⁷ Jacobs purchased a tract of land from the defendant and made improvements upon it on the basis of the representation of the defendant that Jacobs was eligible for financing through the Texas Veterans Land Board. Jacobs did not obtain the financing and he brought suit seeking to recover his out of pocket expenses incurred in improving the land. He prevailed in the trial court but the court of appeals reversed and held that he had not offered evidence of the reasonableness and necessity of his expenses.¹¹⁸ The Texas Supreme Court reversed the court of appeals.¹¹⁹ Despite the absence of specific testimony that the expenses were reasonable and necessary, the court held that the evidence of the materials and services purchased for the improvements, most of which Jacobs did himself, supported the deemed finding that the expenses were reasonable and necessary.¹²⁰ Finally, the court noted that the defendant did not preserve the issue of whether a consumer must establish the reasonableness and necessity of expenses in a DTPA action and the court did not need

110. *Id.*

111. *Id.* at 128.

112. *Id.* The court defined this measure as the "difference between the value of that which was parted with and the value of that which was received" *Id.* (citing, among other cases, *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984)).

113. 754 S.W.2d at 128. The court defined the measure as the "difference between the value as represented and the value actually received" *Id.* (citing, among other cases, *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984)).

114. 754 S.W.2d at 128.

115. *Id.*

116. 754 S.W.2d at 128-29 (Mauzy, J., concurring). See *Vogelsang v. Reece Import Autos, Inc.*, 745 S.W.2d 47 (Tex. App.—Dallas 1987, no writ) (when the services sought by consumer are either not rendered or are worthless, consumer may recover amount paid); see also *Kish v. Van Note*, 692 S.W.2d 463 (Tex. 1985) (court permitted recovery of payments made on worthless pool without utilizing market value approach).

117. 750 S.W.2d 174 (Tex. 1988).

118. *Danny Darby Real Estate, Inc. v. Jacobs*, 740 S.W.2d 18 (Tex. App.—Dallas 1987), *rev'd*, 750 S.W.2d 174 (Tex. 1988).

119. 750 S.W.2d at 176.

120. *Id.*; see also *Liptak v. Pensabene*, 736 S.W.2d 953, 958 (Tex. App.—Tyler 1987, no writ), (while "doubtless true" that party must establish repairs were necessary and costs were reasonable, nevertheless, explicit testimony was not necessary).

to express an opinion on the issue.¹²¹ Justice Kilgarlin in his concurring opinion argued the additional point that DPTA did not require proof of reasonableness and necessity because the statute did not specify such proof.¹²²

In *Centroplex Ford, Inc. v. Kirby*¹²³ the court held that under certain circumstances a consumer may recover damages for mental anguish under the DTPA.¹²⁴ Traditionally, courts have permitted the recovery of these damages in DTPA cases upon a showing of either (1) a willful tort, a knowing violation, willful or wanton disregard, gross negligence or (2) a resulting physical injury.¹²⁵ In *Kirby* the court held that the jury finding of unconscionability qualified as a finding of wanton misconduct entitling the plaintiff to recover damages for mental anguish without further proof of physical injury.¹²⁶ The *Kirby* court relied upon the Texas Supreme Court's decision in *St. Elizabeth Hospital v. Garrard*,¹²⁷ which abolished the requirement of proof of physical injury in suits alleging a negligent infliction of emotional distress.¹²⁸

In *Sunrizon Homes, Inc. v. Fuller*¹²⁹ the court dealt with the recovery of additional statutory and exemplary damages under the DTPA.¹³⁰ Because the defendant failed to answer the trial court entered a default judgment. The court held that for a plaintiff to recover additional statutory damages under a default judgment the plaintiff must both plead knowing conduct and

121. 750 S.W.2d at 175 n.2.

122. *Id.* at 176 (Kilgarlin, J., concurring). *But see* *Woo v. Great Southwestern Acceptance Corp.*, 565 S.W.2d 290 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.). Justice Kilgarlin reasoned that the legislature intentionally omitted an explicit requirement of reasonableness and necessity as evidenced by language permitting recovery of "reasonable and necessary" attorneys' fees. 750 S.W.2d at 176 (Kilgarlin, J., concurring). *See* TEX. BUS. & COM. CODE ANN. § 17.15(d) (Vernon 1987). In *Corum Management v. Aguayo Enterprises*, 755 S.W.2d 895, 897, 898 (Tex. App.—San Antonio 1988, no writ), the court quoted at length from Justice Kilgarlin's concurring opinion finding in it both "logic and substance". *Id.* at 897-98. However, the court found it unnecessary to address the issue because the evidence supported a jury finding that expenses were reasonable and necessary. *Id.* As a practical matter, even if a majority of the Texas Supreme Court agreed with Justice Kilgarlin on this issue, the outcome should not necessarily change since the plaintiff must prove the defendant's conduct a producing cause of the plaintiff's damages. A defendant's conduct is not a producing cause of unnecessary expenditures. For example, repairs to a home which exceed those necessary to correct the defect is caused not by the defendant's conduct but by the whim of the homeowner. Similarly, the defendant's conduct will not *cause* the homeowner to pay an unreasonable amount for the repairs.

123. 736 S.W.2d 261 (Tex. App.—Austin 1987, no writ).

124. *Id.* at 264.

125. *Luna v. North Star Dodge Sales, Inc.*, 667 S.W.2d 115, 117 (Tex. 1984); *Farmers & Merchants State Bank v. Ferguson*, 617 S.W.2d 918, 921 (Tex. 1981); *Duncan v. Luke Johnson Ford, Inc.* 603 S.W.2d 777, 779 (Tex. 1980).

126. 736 S.W.2d at 264.

127. 730 S.W.2d 649 (Tex. 1987).

128. 736 S.W.2d at 264. The language rather than the express holding of *St. Elizabeth Hospital*, supports this conclusion of the court of appeals. In that case, the Texas Supreme Court stated that "the physical manifestation requirement is destined for extinction". 730 S.W.2d at 652 n.3. *See also* *Kold-Serve v. Ward*, 736 S.W.2d 750 (Tex. App.—Corpus Christi 1987, writ dism'd) (dicta: proof of physical injury not required to recover mental anguish damages).

129. 747 S.W.2d 530 (Tex. App.—San Antonio 1988, writ denied).

130. *Id.* at 534-35.

establish that the extent of the defendant's knowledge merits additional damages.¹³¹

F. Attorneys' Fees

The DTPA provides that a court shall award a consumer reasonable and necessary attorneys' fees.¹³² In *Satellite Earth Stations East, Inc. v. Davis*¹³³ the court held that an award of attorneys' fees is mandatory if a violation of the DTPA is found.¹³⁴ The only question that remains for the trier of fact is the amount of attorneys' fees.¹³⁵ The court modified the trial court's judgment and properly awarded attorneys' fees to the consumer and not to the consumer's attorney.¹³⁶

When a DTPA cause of action is combined with a nonstatutory claim, the defendant often contends that the consumer's attorney must segregate those attorneys' fees attributable to prosecuting the DTPA claim from those accrued in connection with common law claims. In *Texas Cookie Co. v. Hendricks & Peralta, Inc.*¹³⁷ the court held that when the common law and DTPA claims are more or less inseparable, that is, both involving proof of the same facts, the attorney is not required to allocate the time spent on each.¹³⁸

The defendant may recover attorneys' fees upon a showing that the plaintiff brought a groundless DTPA claim in bad faith or for the purpose of harassment.¹³⁹ Whether a suit is groundless is ordinarily a question for the

131. *Id.* at 534. The court stated that the defendant admitted knowing misconduct by the default but nevertheless required that the plaintiff present evidence to establish the extent of the knowledge. *Id.* While the court's reluctance to permit the award of substantial punitive damages in a default context is understandable, it would seem that to require a showing of the extent of the knowledge negates the effect of the admission of the knowing violation. Perhaps, what the court meant is that it will look to all of the evidence including the evidence showing knowledge when it reviews the amount of additional damages awarded.

132. TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon 1987).

133. 756 S.W.2d 385 (Tex. App.—Eastland 1988, no writ).

134. *Id.* at 387.

135. *Id.*

136. *Id.* Accordingly, if the defendant is entitled to an offset against the consumer, he can offset this amount against the award of attorneys' fees. *Id.*

137. 747 S.W.2d 873 (Tex. App.—Corpus Christi 1988, writ denied).

138. *Id.* at 880. In *Concorde Limousines, Inc. v. Moloney Coachbuilders, Inc.*, 835 F.2d 541 (5th Cir. 1987), the court held that allocation is not necessary when there is a "substantial", even though not complete, overlap in the causes of action. *Id.* at 546-48. The court also held that paralegal time is recoverable as part of the attorneys' fees. *Id.* at 547 n.25.

139. TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon 1987); see *Preston II Chrysler-Dodge, Inc. v. Donwerth*, 744 S.W.2d 142, 145 (Tex. App.—Dallas 1987, writ granted). Courts have interpreted this provision as allowing the recovery of attorneys' fees if the action was brought in bad faith and was groundless or, if the action was simply brought to harass. *Leissner v. Schott*, 668 S.W.2d 686, 686 (Tex. 1984); *Shenandoah Assocs. v. J & K Properties, Inc.*, 741 S.W.2d 470, 484 (Tex. App.—Dallas 1987, writ denied). *But see Myer v. Spletstosser*, 759 S.W. 2d 514, 517 (Tex. App.—Austin 1988, writ pending) (finding of harassment alone not enough). Although § 17.50(c) refers to a "finding by the court", a number of courts have held that the jury decides questions of bad faith and harassment. *Leissner*, 668 S.W.2d at 686, (noting discrepancy between statutory language and court decisions); *but cf. Blizzard v. National Mut. Fire Ins. Co.*, 756 S.W.2d 801, 810 (Tex. App.—Dallas 1988, no writ) (declined to follow *Leissner* and *Shenandoah dicta*). The Texas Supreme Court has not decided the issue. *Id.*

court.¹⁴⁰ At least one court has held that the fact that a claim survives a motion for directed verdict does not preclude a later determination that it was groundless.¹⁴¹

G. Defenses

In *Ojeda de Toca v. Wise*¹⁴² the plaintiff purchased a home from the defendant. The City of Houston had previously issued a demolition order for the home and the city filed the order in the Harris County deed records prior to the sale. The plaintiff was unaware of the demolition order, and the seller who knew of the order neglected to tell her. The plaintiff left town, and the city demolished the home while she was gone. The jury found that the defendant's failure to disclose was a deceptive trade practice and fraud. The court of appeals reversed and rendered judgment for the defendant on the ground that the plaintiff had constructive knowledge of the demolition order, which was a defense to her DTPA and fraud claims.¹⁴³

The Texas Supreme Court reversed the judgment of the court of appeals.¹⁴⁴ The court opined that the purpose of the recording statute was to protect innocent purchasers from secret liens and encumbrances and not to protect those who would perpetuate a fraud.¹⁴⁵ Accordingly, the court held that imputed notice under the recordation statutes was not a bar to liability for fraud or deceptive trade practices.¹⁴⁶ This holding is correct: the recordation statute should not substitute for the disclosure of material facts of which the seller has actual knowledge.¹⁴⁷

In *Alvarado v. Bolton*¹⁴⁸ Bolton agreed to convey certain land to Alvarado. The earnest money contracts contained language constituting an express warranty that Bolton would convey the mineral interests. The warranty deeds, however, reserved the mineral interests and the jury found the reservation in the deed to be a breach of the express warranty. The court of appeals reversed and held that the doctrine of merger barred Alvarado's claim for breach of warranty.¹⁴⁹ The Texas Supreme Court reversed the court of appeals and held that merger is a common law defense that has no

140. *Blizzard*, 756 S.W.2d at 810; *Howell v. Homecraft Land Dev., Inc.*, 749 S.W.2d 103, 111 (Tex. App.—Dallas 1987, writ denied).

141. *Howell*, 749 S.W.2d at 111; *Zak v. Parks*, 729 S.W.2d 875, 878 (Tex. App.—Houston [14th Dist.] 1987, no writ).

142. 748 S.W.2d 449 (Tex. 1988).

143. *Houston Title Co. v. Ojedade Toca*, 733 S.W.2d 325, 328 (Tex. App.—Houston [14th Dist.] 1987), *rev'd*, 748 S.W.2d 449 (Tex. 1988).

144. 748 S.W.2d at 451.

145. *Id.*

146. *Id.*

147. *Curry*, *supra* note 71, at 196-197 (1988).

148. 749 S.W.2d 47 (Tex. 1988).

149. *Bolton v. Alarado*, 714 S.W.2d 118, 123 (Tex. App.—Houston [1st Dist.] 1986), *rev'd*, 749 S.W.2d 47 (1988). The doctrine of merger provides that:

When a deed is delivered and accepted as performance of a contract to convey, the contract is merged in the deed. Though the terms of the deed may vary from those contained in the contract, still the deed must be looked to alone to determine the rights of the parties.

749 S.W.2d at 48.

application to a statutory action under the DTPA.¹⁵⁰

In a strong dissent, four justices argued that, as a matter of law, no breach of warranty existed.¹⁵¹ The dissent reasoned that under the merger doctrine the deed extinguished the contractual warranty.¹⁵² The merger doctrine was, therefore, not asserted as a defense to the breach of warranty action, but rather to negate the existence of a warranty.¹⁵³

In *Willis v. Maverick*¹⁵⁴ the Texas Supreme Court primarily focused on the application of the statute of limitations¹⁵⁵ in a common law cause of action for legal malpractice. The court held that the discovery rule was applicable to legal malpractice actions and that the statute of limitations does not begin to run until the claimant, exercising reasonable care and diligence, discovers or should have discovered the facts that established his cause of action.¹⁵⁶ The court further held that since the discovery rule operates to avoid the statute of limitations, the claimant has the burden of pleading and proving when the operative facts were discovered or reasonably should have been discovered.¹⁵⁷ Since the plaintiff had failed to request a proper issue submitting the discovery rule, she was unable to avoid the defendant's limitations defense.¹⁵⁸

In *Willis* the plaintiff also alleged a cause of action under the DTPA. The court held that the plaintiff's cause of action was barred by the DTPA limitations provision.¹⁵⁹ The court reasoned that DTPA by this provision "incorporates the discovery rule".¹⁶⁰ The plaintiff's failure to request a properly worded discovery issue in connection with her DTPA claim waived her attempt to avoid the effect of limitations.¹⁶¹ The court apparently misconstrued the DTPA limitations provision. The DTPA limitations defense

150. 749 S.W.2d at 48; see *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980).

151. 749 S.W.2d at 48 (Wallace, J., dissenting).

152. *Id.* at 49 (Wallace, J., dissenting).

153. *Id.* Since the DTPA does not create warranties but merely provides statutory remedies for their breach, a warranty must arise independent of the act. *La Sara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558, 565 (Tex. 1984). The dissent observed that had Alvarado alleged that Bolton had misrepresented a fact, the doctrine of merger would not have prevented proof of the misrepresentation. 749 S.W.2d 49 (Wallace, J., dissenting). Apparently, Alvarado's cause of action would have received the support of the full court had he alleged that Bolton misrepresented the character of the real property interests being conveyed.

154. 31 Tex. Sup. Ct. J. 569 (July 6, 1988).

155. The two-year statute of limitations applies to legal malpractice actions. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1986). Under § 16.003, one must bring suit "not later than two years after the day the cause of action accrues."

156. 31 Tex. Sup. Ct. J. at 569.

157. *Id.* at 572.

158. *Id.*

159. *Id.* at 573. TEX. BUS. & COM. CODE ANN. § 17.565 (Vernon 1987). Section 17.565 reads in part:

All actions brought under this subchapter must be commenced within two years after the date on which the false, misleading or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading or deceptive act or practice.

Id.

160. 31 Tex. Sup. Ct. J. at 573.

161. *Id.*

is keyed to the occurrence of the misconduct in question or discovery of such occurrence. Thus, unlike the two year limitations statute governing common law malpractice actions, discovery of the occurrence, not the accrual of the cause of action, is the benchmark for the beginning of the limitations' timeline. A proper construction of this provision would require that the defendant plead and prove that the consumer discovered the misconduct more than two years prior to the initiation of the lawsuit just as he must plead and prove in a negligence action that the cause of action occurred outside the limitations period. To hold otherwise incorrectly shifts the burden of proof with respect to the limitations defense to the consumer.¹⁶² This is not the liberal construction required by section 17.44 of the DTPA.¹⁶³

In *McClure v. Duggan*¹⁶⁴ a federal district court considered the applicability of a statute of frauds defense to a claim for misrepresentation under the DTPA. In this summary judgment case the plaintiff, McClure, alleged that Duggan agreed to sell him a race horse with the understanding that if the horse did not pass a veterinarian's examination, McClure was under no obligation to buy the animal. McClure alleged that Duggan subsequently misrepresented that the horse would not pass the test, thereby deceiving McClure into not purchasing the horse, which later won the Hollywood Derby. The court rejected Duggan's defense of statute of frauds on the ground that the statute of frauds did not apply to misrepresentations that were factual rather than merely promissory.¹⁶⁵ Since McClure alleged that Duggan did more than just fail to perform a promise, his lawsuit was not simply a breach of contract claim recast as a DTPA claim to avoid the statute of frauds.¹⁶⁶

In several cases decided during the Survey period the courts refused to find that the consumer had waived his rights under the DTPA as urged by the defendants. In *Wyatt v. Petrila*¹⁶⁷ the Corpus Christi Court of Appeals held that an "as is" clause in a contract for the sale of a home did not waive the consumer's right to claim that the sale was unconscionable due to a gross disparity between the consideration paid and the value received.¹⁶⁸ In *Kenmore v. Bennett*¹⁶⁹ the Texas Supreme Court held that in the absence of an express settlement or express waiver, payment for and acceptance of allegedly defective goods or services of the defendant does not, in and of itself, waive the consumer's right to sue the defendant for damages resulting from

162. An assertion that limitations has not run because one discovered the misconduct less than two years prior to filing suit is not an attempt to "suspend" or "void" the operation of section 17.565. Rather it attempts to invoke that section and place the burden on the defendant to show that the misconduct was discovered outside the limitations period, that is, to prove a limitations defense.

163. TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 1987).

164. 674 F. Supp. 211 (N.D. Tex. 1987).

165. *Id.* at 223-24. In so holding the court followed *Lawson v. Commercial Credit Business Loans, Inc.*, 690 S.W.2d 679 (Tex. App.—Eastland 1985, writ ref'd n.r.e.).

166. 674 F. Supp. at 224.

167. 752 S.W.2d 683 (Tex. App.—Corpus Christi 1988, no writ).

168. *Id.* at 685. The court relied upon the no-waiver provision in § 17.42 of the DTPA.

169. 755 S.W.2d 89 (Tex. 1988).

the defective performance.¹⁷⁰ Similarly, in *Poe v. Hutchins*¹⁷¹ the court held that the DTPA prohibited the defendant from asserting that the plaintiff's post contract conduct waived his claim under the DTPA.¹⁷² The court rejected the argument that the DTPA provision applied only to contractual waivers.¹⁷³ Finally, in *FDP Corp. v. Southwestern Bell Telephone Co.*¹⁷⁴ the court held that a contractual limitation in a yellow page advertising contract that purported to limit Southwestern Bell's liability to the amount paid for the advertisement was ineffective under the DTPA.¹⁷⁵

In *Dubow v. Dragon*¹⁷⁶ the Dragons sold a home to the Dubows. After the purchasers signed the contract they discovered problems with the home including structural problems. They obtained expert reports that confirmed the problems. The purchasers alleged that they confronted the sellers with the problems and the sellers assured them that it was a good house with no problems. Based upon the inspection and reports the parties modified the contract to include language acknowledging the need for continuous maintenance due to the site positioning, foundation, and drainage and to reduce the sales price. In view of this evidence the court of appeals affirmed a summary judgment for the defendants on the grounds that the alleged representations that there were "no problems" did not produce damages to the buyers.¹⁷⁷ Obviously the buyers knew of the problems based upon their own inspection and expert reports, had obtained a reduced price, and did not rely upon any misrepresentations or failure to disclose on the part of the defendants.¹⁷⁸

H. Notice

A consumer must give thirty days written notice to the defendant of his specific complaints and the actual damages, expenses, and attorneys' fees claimed before filing suit seeking the recovery of damages under the DTPA.¹⁷⁹ In *Cielo Dorado Development, Inc. v. Certainteed Corp.*¹⁸⁰ the Texas Supreme Court considered the question of whether the consumer properly showed notice. The defendant in *Cielo* pleaded that the plaintiff failed to give the requisite notice. The plaintiff's attorney testified at trial

170. *Id.* at 91. The court reasoned that to hold otherwise would discourage the resolution of disputes; further, such a defense has no basis in the language of the DTPA. *Id.*

171. 737 S.W.2d 574 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

172. *Id.* at 580; see TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon 1987).

173. 737 S.W.2d at 580.

174. 749 S.W.2d 569 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

175. *Id.* at 571.

176. 746 S.W.2d 857 (Tex. App.—Dallas 1988, no writ).

177. *Id.* at 860.

178. *Id.*

179. TEX. BUS. & COM. CODE ANN. § 17.505(a) (Vernon 1987). Section 17.505 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 attorneys' fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant.

Id.

180. 744 S.W.2d 10 (Tex. 1988).

that the plaintiff had mailed a demand letter as required by the DTPA. The letter was not offered into evidence. No jury question concerning notice was requested or submitted and no objection to its nonsubmission was lodged. The trial court rendered judgment for the plaintiff on the verdict. A majority of the Texas Supreme Court held that, even assuming¹⁸¹ that proof of notice was the plaintiff's burden, the defendant's failure to object to the non-submission of notice was deemed to support the judgment pursuant to rule 278 of the Texas Rules of Civil Procedure (TRCP).¹⁸² The plaintiff's attorney's testimony, unobjected to by the defendant, constituted some evidence of proper notice.¹⁸³ The dissent asserted that it is unequivocally the consumer's burden to prove proper notice.¹⁸⁴ To discharge this burden the consumer must, in the dissent's view, prove that the notice was timely given, a question of fact.¹⁸⁵ Second, the consumer must establish that the notice was legally sufficient, a question of law.¹⁸⁶ The dissent argued that since this latter question, is one of law, as opposed to fact, a court cannot deem that the legal sufficiency requirement supports the judgment.¹⁸⁷ Finally, the dissent argued that the testimony offered did not establish the sufficiency of the notice.¹⁸⁸

The consumer avoids the necessity of proving proper notice when he pleads notice and the defendant does not specifically deny that notice has been given as required by rule 54 of TRCP.¹⁸⁹ Since notice is only required when the plaintiff files suit seeking damages under the DTPA, a party may file an action not seeking DTPA damages and later give the requisite notice. Thirty days after the plaintiff gives notice, he is free to amend his pleading to allege entitlement to DTPA damages.¹⁹⁰ In addition, the United States Court of Appeals for the Fifth Circuit has held that when the original complaint contains a DTPA claim, notice after suit is filed comes too late for a new DTPA theory even though it was first alleged more than thirty days

181. The court emphasized that it was *assuming* that proof of notice was the consumer's burden. *Id.* at 11.

182. 744 S.W.2d at 11. TEX. R. CIV. P. 278 provides in part:

Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the author is one relied upon by the opposing party.

Id.

183. 744 S.W.2d at 11.

184. *Id.* at 11-12 (Gonzalez, J., dissenting). The DTPA supports this view in the language of section 17.505(a), which provides that notice is "a *prerequisite* to filing a suit." TEX. BUS. & COM. CODE ANN. § 17.505(a) (Vernon 1987) (emphasis added).

185. 744 S.W.2d at 12 (Gonzalez, J., dissenting).

186. *Id.*

187. *Id.*

188. *Id.* at 11-12.

189. *Investors, Inc. v. Hadley*, 738 S.W.2d 737 (Tex. App.—Austin 1987, writ denied).

190. *See Miller v. Presswood*, 743 S.W.2d 275, 281 (Tex. App.—Beaumont 1987, no writ). The *Miller* court also confirmed that a defendant who contends that he was not given adequate notice must object and request a plea in abatement. *Id.*; *see The Moving Co. v. Whitten*, 717 S.W.2d 117, 123 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

after the notice.¹⁹¹

II. INSURANCE

This Survey period, like the last, included important cases dealing with noncontractual first party claims against insurance companies. In *Arnold v. National County Mutual Fire Insurance Co.*¹⁹² the Texas Supreme Court had held that an insurance company owes a duty of good faith and fair dealing to its insured.¹⁹³ In *Aranda v. Insurance Co. of North America*¹⁹⁴ the court held that a worker's compensation carrier owes a duty of good faith and fair dealing to an injured worker who asserts a claim for worker's compensation.¹⁹⁵ In so holding the court concluded that the same type of special relationship exists between a worker and the carrier as exists between the insurer and insured in other settings, and accordingly, protection of the worker justifies recognition of this duty.¹⁹⁶ The court rejected the argument that the Workers Compensation Act provided an exclusive remedy.¹⁹⁷ The court reasoned that the exclusivity clause related only to damages for personal injuries in the course and scope of employment, not to damages arising after the injury that resulted from the relationship between the worker and the carrier.¹⁹⁸ The court held that to establish a breach of duty the worker must establish (1) the absence of a reasonable basis for denying or delaying payment of the benefits of the policy and (2) that the carrier knew or should have known that there was not a reasonable basis for denying the claim or delaying payment of the claim.¹⁹⁹

Chief Justice Phillips dissented and asserted that the workers' compensation system provided a comprehensive statutory scheme controlling the relationship between the carrier and the employee.²⁰⁰ Imposition of a common law remedy was not justified in his opinion.²⁰¹ Finally, Chief Justice Phillips found nothing in the allegations to indicate bad faith in this case.²⁰²

In *Vail v. Texas Farm Bureau Mutual Insurance Co.*²⁰³ the Texas Supreme Court decided one of the most important cases under the Texas

191. *Boyd Int'l Ltd. v. Honeywell, Inc.*, 837 F.2d 1312, 1314-16 (5th Cir. 1988).

192. 725 S.W.2d 165 (Tex. 1987).

193. *Id.* at 167.

194. 748 S.W.2d 210 (Tex. 1988).

195. *Id.* at 212-13.

196. *Id.* As in *Arnold* the court found the insured depends on the insurer for benefits and will not have immediate recourse if an arbitrary decision to deny a claim is made. 748 S.W.2d at 212.

197. 748 S.W.2d at 214. TEX. REV. CIV. STAT. ANN. art. 8306, § 3(a) (Vernon Supp. 1989). The statute provides: "the employees of a subscriber...shall have no right of action against their employer . . . for damages for personal injuries . . ." *Id.*

198. 748 S.W.2d at 214.

199. *Id.* at 213.

200. *Id.* at 215 (Phillips, C.J., dissenting).

201. *Id.*

202. *Id.* at 217-18 (Phillips, C.J., dissenting). Justice Wallace filed a dissenting opinion stating that while he would not preclude a bad faith suit by an employee against a carrier, he found that the allegations that the carriers had failed to pay the claim and had appealed to the Industrial Accident Board did not constitute bad faith. *Id.* at 218 (Wallace, J., dissenting).

203. 754 S.W.2d 129 (Tex. 1988).

Insurance Code (Insurance Code). The Vails brought suit under the DTPA alleging that Texas Farm Bureau Mutual Insurance Company (Texas Farm) had violated the Texas Insurance Code by unfairly denying the Vails' claim under their fire insurance policy.²⁰⁴ The trial court rendered judgment for the Vails based upon jury findings that Texas Farm had failed to exercise good faith in processing the claim. The court of appeal affirmed in part and reversed in part.²⁰⁵ The Texas Supreme Court, in a split decision, reversed and rendered judgment for the Vails.²⁰⁶

At the outset the court ruled that the DTPA incorporates the provisions of the Insurance Code in its entirety.²⁰⁷ Accordingly, any relief available pursuant to Insurance Code is available through the DTPA.²⁰⁸ Both provisions permit recovery for unfair claims settlement practices.

The court also addressed the following alternative violations argued by the Vails in support of the judgment:

(1) *Violation of Section 4(a) of Board Order 18663.*²⁰⁹ This section prohibits those acts or practices defined by the Insurance Code or rules or regulations promulgated thereto as unfair or deceptive. The court held that a definition of unfair practices contained in article 21.21-2 section 2(d) of the Insurance Code, referred to as the Unfair Claim Settlement Practices Act, could form the basis for a cause of action under article 21.21 of the Insurance Code and section 17.50(a)(4) of the DTPA.²¹⁰ The court thereby dismissed Texas Farm's argument that one cannot incorporate the definitional section of article 21.21-2 into article 21.21 because article 21.21-2 does not itself confer a private cause of action.²¹¹ The court also rejected the argument that a plaintiff utilizing an article 21.21-2 definition must establish that the defendant's conduct was committed with frequency; this is only a requisite in enforcement actions by the State Board of Insurance under article 21.21-2.²¹²

(2) *Violation of Section 4(b) of Board Order 18663.*²¹³ This section prohib-

204. TEX. BUS. & COM. CODE ANN. § 17.50(a)(4) (Vernon 1987); TEX. INS. CODE ANN. art 21.21 (Vernon 1981 & Supp. 1989).

205. *Tex. Farm Bureau Mut. Ins. Co. v. Vail*, 695 S.W.2d 692 (Tex. App.—Dallas 1989), *rev'd*, 754 S.W.2d 129 (Tex. 1988).

206. 754 S.W.2d at 137.

207. *Id.* at 132.

208. *Id.*

209. St. Bd. of Ins., 28 TEX. ADMIN. CODE § 21.3 (West July 21, 1988).

210. 754 S.W.2d at 134.

211. *Id.* 133-34. In a dissenting opinion, Justice Gonzalez argued that the legislature did not intend to create a private cause of action for unfair claims settlement practices as described in article 21.21-2. *Id.* at 138. In his opinion, the legislature would have listed those practices in the DTPA or article 21.21 of the Insurance Code. *Id.*

212. *Id.* at 134-35. The court reasoned that "frequency" was not part of the definition of unfair settlement practices but rather was merely a requirement before the Insurance Board would issue cease and desist orders. *Id.* at 134. The court also reaffirmed its decision in *Chitsey v. National Lloyds Ins. Co.*, 738 S.W.2d 641 (Tex. 1987) requiring proof of frequency to establish a violation of Board Order 41454, St. Board of Ins., 28 TEX. ADMIN. CODE § 21.203 (West July 21, 1988). *Id.* at 134-135. In separate dissents, both Justice Gonzalez and Chief Justice Phillips remained unpersuaded by the court's reasoning. The dissents argued that the frequency rule articulated in *Chitsey* applied to article 21.21-2, as well. 754 S.W.2d at 138-39.

213. 28 TEX. ADMIN. CODE § 21.3.

its acts or practices that the law determines are unfair or deceptive. The court had decided in a prior opinion that a jury finding did not constitute a determination by law.²¹⁴ In *Vail* the court held that the court's own decisions did qualify as such a determination and specifically held that its opinions in *Arnold v. National County Mutual Fire Insurance Co.*,²¹⁵ and *Aranda v. Insurance Co. of North America*²¹⁶ constituted legal determinations that an insurer's failure to exercise good faith was an unfair or deceptive act.²¹⁷ Accordingly, the jury's finding that Texas Farm failed to exercise good faith in the handling of the Vails' claim established a violation of Board Order 18663 section 4(b) as incorporated into article 21.21 of the Insurance Code and was actionable under section 17.50(a)(4) of the DTPA.²¹⁸

(3) *Violation of Section 17.46(a) of the DTPA.*²¹⁹ A violation of section 17.46 of the DTPA is actionable under article 21.21 section 16 of the Insurance Code. Article 21.21 includes violations of subdivision (a) of 17.46 which is not available to a consumer in a direct action under the DTPA.²²⁰ The court held that the jury's finding that Texas Farm had failed to exercise good faith in its handling of the Vails' claim qualified as a finding that Texas Farm had engaged in a deceptive act or practice prohibited by section 17.46(a) of the DTPA.²²¹ The violation was actionable through article 21.21 of the Insurance Code and section 17.50(a)(4) of the DTPA.²²²

On the issue of damages, the court held that when an insurer unfairly fails to pay an insured's claim, the insured as a matter of law, recovers damages of at least the amount of the policy benefits improperly withheld.²²³ Automatic treble damages were available under the Insurance Code, which the DTPA incorporated, justifying treble damages in the Vails' action under that provision.²²⁴

In *Gulf States Underwriters of Louisiana Inc. v. Wilson*²²⁵ the court held that an insurance company's actions, inconsistent with the clear meaning of the insurance policy, were at most a simple breach of contract that could not be a violation of the DTPA or the Insurance Code.²²⁶ The court's holding appears to be overbroad. Even though a simple breach of contract does not

214. *Chitsey v. National Lloyds Ins. Co.*, 738 S.W.2d 641, 643 (Tex. 1987).

215. 725 S.W.2d 165 (Tex. 1987).

216. 748 S.W.2d 210 (Tex. 1988).

217. 754 S.W.2d at 135. Chief Justice Phillips argued in his dissent that those opinions established the *duty* of good faith and fair dealing and did not determine what constitutes a deceptive act or practice *Id.* at 140.

218. *Id.* at 135.

219. TEX. BUS. & COM. CODE ANN. § 17.46(a) (Vernon 1987).

220. *See Allstate Ins. Co. v. Kelly*, 680 S.W.2d 595, 605 (Tex. App.— Tyler 1984, writ ref'd n.r.e).

221. 754 S.W.2d at 135-36. Chief Justice Phillips argued in his dissent that the jury's finding did not establish a violation of § 17.46(a). Justice Phillips would require an additional finding that the failure to exercise good faith was deceptive. *Id.* at 140.

222. *Id.* at 136.

223. 754 S.W.2d at 136-37.

224. 754 S.W.2d at 137. The court also held that prejudgment interest may not be awarded on the treble damages. *Id.*

225. 753 S.W.2d 422 (Tex. App.—Beaumont 1988, no writ).

226. *Id.* at 430.

establish a statutory violation, if the conduct constituting the breach also constitutes a misrepresentation or unfair settlement practice, then one has clearly established a statutory cause of action.²²⁷

In *Street v. Honorable Second Court of Appeals*²²⁸ the Texas Supreme Court clarified the time frame during which an insured may institute a *Stowers* action.²²⁹ The court had previously held that a *Stowers* cause of action does not accrue until the judgment obtained against the insured becomes final.²³⁰ In *Street* the court held that a judgment becomes final, even if appealed, if a court does not supersede execution of the judgment.²³¹ Nevertheless, the statute of limitations in a *Stowers* action will not begin to run until one exhausts the appeals process regardless of whether a court supersedes the judgment.²³² In *Nash v. Carolina Casualty Insurance Co.*²³³ the court held that the statute of limitations for claims under the DTPA and Insurance Code complaining of an insurance carrier's refusal to defend begins to run on the date of the refusal.²³⁴

III. TORTIOUS INTERFERENCE AND BUSINESS DISPARAGEMENT

In *Champion v. Wright*²³⁵ the court faced a suit for tortious interference with a contractual and business relationship. Wright and Berkes were partners in a records retrieval company, ARS. Berkes was also an employee of the partnership in charge of the San Antonio office. The defendants induced Berkes to leave ARS and form a similar retrieval company. Wright brought suit against the defendants for interference with the contractual and business relationship between ARS and Berkes and obtained favorable jury findings. The court of appeals sustained the plaintiff's recovery and held that Texas recognizes a cause of action for tortious interference with both existing contractual and prospective business relationships.²³⁶ The court noted that while the elements of the two causes of action are substantially the same, tortious interference with a business relationship encompasses all intentional interference with a contractual relationship regardless of whether a breach of contract actually occurs.²³⁷ Therefore the trial court did not need to inquire

227. See *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129 (Tex. 1988); *Aetna Casualty & Sur. Co. v. Marshall*, 724 S.W.2d 770 (Tex. 1987).

228. 756 S.W.2d 299 (Tex. 1988).

229. A *Stowers* action is one instituted pursuant to *G.A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929, holdings approved), wherein the court recognized an insured's cause of action against his liability insurer for negligent failure to settle a claim filed against the insured by a third party.

230. *Linkenhoger v. American Fidelity & Casualty Co.*, 152 Tex. 534, 260 S.W.2d 884, 887 (Tex. 1953).

231. 756 S.W.2d at 301.

232. *Id.* at 302.

233. 741 S.W.2d 598 (Tex. App.—Dallas 1987, writ denied).

234. *Id.* at 600-01.

235. 740 S.W.2d 848 (Tex. App.—San Antonio 1987, writ denied).

236. *Id.* at 853.

237. *Id.* "The essential elements of a claim for tortious interference with an existing contract are: (1) a contract existing that was subject to interference; (2) the act of interference was willful and intentional; (3) such intentional act was a proximate cause of plaintiff's damages, and (4) actual damages or loss occurred." *Id.*

into whether there had been a breach.²³⁸ The court further clarified that tortious interference may embrace a contract terminable at will.²³⁹ Finally, although interference with business relations requires a finding of malice, a special issue that inquires whether the interfering party had actual knowledge of the contractual or business relationship and still overreached, may suffice to prove malicious interference.²⁴⁰

In a later case, the San Antonio court of appeals noted that not all interferences with contractual relations are tortious in nature.²⁴¹ When a party exercises its own rights or has an interest that is equal or superior to that of the plaintiff's, privileged interference may result.²⁴² Thus, where a consulting engineer employed by the city to oversee a project rejected work that did not meet contract specifications, he did not act with malicious intent and did not tortiously interfere with contractual relations by recommending that the city fire the contractor handling the project.²⁴³

In *Maynard v. Caballero*²⁴⁴ the court again considered whether interference with a contract was privileged or justified. In this case an attorney for one defendant in a multi-defendant criminal action was entitled to privilege with respect to a claim by one of the other defendants and therefore had not interfered with that defendant's own attorney-client contract.²⁴⁵ A tortious interference suit should not result when an attorney not in privity with other litigants merely discusses joint defenses and strategies with the other litigants' attorneys.²⁴⁶

Finally, in *Magcohar North American v. Grasso Oilfield Services, Inc.*²⁴⁷ the court held that in an action for tortious interference a third party may not use as a defense the unenforceability of a contract.²⁴⁸ Thus, a claim for tortious interference may succeed even though an underlying claim for contractual damages fails.²⁴⁹

IV. FRAUD AND NEGLIGENT MISREPRESENTATION

The courts have held, as a general rule, that a cause of action for fraud grounded upon the defendant's failure to perform a promise requires proof that the defendant did not intend to perform the promise at the time it was made.²⁵⁰ In *Hebisen v. Nassau Development Co.*²⁵¹ the court held that the

238. *Id.* at 854.

239. *Id.*

240. *Id.* at 855.

241. *Victor M. Solis Underground Util. & Paving Co., Inc. v. City of Laredo*, 751 S.W.2d 532, 535 (Tex. App.—San Antonio 1988, no writ).

242. *Id.*

243. *Id.*

244. 752 S.W.2d 719 (Tex. App.—El Paso 1988, writ denied).

245. *Id.* at 721.

246. *Id.*

247. 736 S.W.2d 787 (Tex. App.—Corpus Christi 1987, writ dismissed).

248. *Id.* at 801.

249. *Id.*

250. *See Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986.); *Dowling v. NADW Mktg., Inc.*, 631 S.W.2d 726, 728 (Tex. 1982).

251. 754 S.W.2d 345 (Tex. App.—Houston [14th Dist.] 1988, no writ).

requisite intent may be established by circumstantial evidence, including acts before and after the promise was made.²⁵² The court enumerated the following factors as relevant: (1) circumstances under which the promise was made; (2) the relationship between parties; (3) their individual interests; (4) the nature of the transaction; (5) the failure to perform; and (6) the efforts to perform.²⁵³ The court held that evidence of the defendant lessee's failure to make the rental escalation payments as promised and denial of any obligation to make them, coupled with the absence of any testimony that they ever intended to make the payments, supported a jury's finding of an intent not to perform the promise.²⁵⁴

In *Greenstein, Logan & Co. v. Burgess Marketing Inc.*²⁵⁵ the court faced an unusual case of accountant liability for negligent misrepresentation. In *Greenstein* a partner in the defendant accounting firm had recommended to the plaintiff, its client, that it hire Norman Dunham as its comptroller. Prior to becoming comptroller Dunham was a certified public accountant in the defendant accounting firm. Dunham substantially misstated the plaintiff company's financial condition, ultimately resulting in the company going bankrupt. The plaintiff alleged that the defendant had negligently misrepresented Dunham's competence as an accountant, causing plaintiff to hire Dunham. The jury found negligent misrepresentation, as alleged.²⁵⁶ The court of appeals affirmed recovery for the plaintiff under the Restatement (Second) of Torts,²⁵⁷ which imposes liability for negligent misrepresentations made by professionals, among others.²⁵⁸ The court held that evidence that another of the defendant's clients made a prior complaint that Dunham was incompetent supported the conclusion that the defendant knew or should have known that Dunham's competence was questionable.²⁵⁹

252. *Id.* at 347.

253. *Id.* at 347-48.

254. *Id.* at 348.

255. 744 S.W.2d 170 (Tex. App.—Waco 1987, writ denied).

256. The jury also found that the defendant was negligent in the audits the defendant performed during the period that Dunham was comptroller.

257. RESTATEMENT (SECOND) OF TORTS § 552(1) (1977). Section 552(1) reads as follows: 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.

Id.

258. 744 S.W.2d at 189. In connection with the plaintiff's cause of action for negligence in failing to perform its audits in accordance with generally accepted auditing standards, the court held, in a decision of first impression, that "the contributory negligence of the client is a defense only where it has contributed to the accountant's failure to perform the contract and to report the truth." *Id.* at 190 (quoting *Lincoln Grain, Inc. v. Coopers & Lybrand*, 345 N.W.2d 300, 307 (Neb. 1984)) (emphasis omitted).

259. *Id.* at 189.

V. CONVERSION

In *Intermarkets U.S.A., Inc. v. C-E Natco*,²⁶⁰ the plaintiff sold a steam generator to the defendant. To pay for the generator, the defendant assigned the proceeds of a letter of credit issued by a third party. The defendant received the proceeds of a successor letter of credit but failed to pay these to the plaintiff. The plaintiff brought suit alleging, among other causes of action, conversion. The court of appeals upheld the jury's findings that the proceeds of the letter of credit constituted a specific identifiable sum of money and that the wrongful retention of the money gave rise to a cause of action for conversion.²⁶¹

In *Security State Bank v. Valley Wide Electric Supply Co., Inc.*²⁶² a sub-contractor, Sweeney, contracted to purchase materials for a construction project from a supplier, Valley Wide. The defendant made a loan to Sweeney, secured by an assignment of Sweeney's contract with the general contractor. The bank instructed Valley Wide to submit its invoices with the understanding that the bank would pay Valley Wide from the money paid by the general contractor to Sweeney's account. The bank did not pay Valley Wide but rather applied the money received from the general contractor to Sweeney's debt to the bank. On appeal the bank argued that the failure to pay Valley Wide did not constitute conversion because the funds were not specifically identified. The court of appeals rejected this argument reasoning that the money had been designated for a particular use and qualified as specific money.²⁶³ The court held further that the bank, in accepting the money with knowledge of its specific purpose, held the money in trust. The bank then converted the money when it applied the money to reduce Sweeney's debt to the bank, in violation of the trust.²⁶⁴

260. 749 S.W.2d 603 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

261. *Id.* at 604.

262. 752 S.W.2d 661 (Tex. App.—Corpus Christi 1988, writ denied).

263. *Id.* at 664-65. The bank argued that it was impossible to determine what portion of the general contractor's checks were intended for Valley Wide. The court held that a bank has a duty to segregate funds in a mixed account before applying any portion to cover overdrafts. *Id.* at 665.

264. *Id.*