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DECEPTIVE TRADE PRACTICES AND COMMERCIAL TORTS

by

Michael Curry and Melissa Krakauer***

I. STATUTORY AMENDMENTS

PERHAPS as a consequence of its broad application, the Texas Deceptive Trade Practices - Consumer Protection Act (DTPA)¹ has been amended in virtually every legislative session since its enactment in 1973. Several bills introduced during the 1989 session sought to eliminate much of the procedural and substantive protection afforded Texas consumers under the DTPA. The bill that ultimately passed, however, affects only two procedural and two limited substantive issues under that statute. On the other hand, the legislature passed amendments to the Texas Property Code² (the Code) that dramatically alter the rights and remedies of consumers and homebuilders. A brief discussion of these statutory changes follows.

A. The 1989 Amendments to the DTPA

The 1989 DTPA amendments apply to any action commenced on or after September 1, 1989, unless statutory notice was given prior to that date and suit filed within 120 days after the date of delivery or mailing of the notice.³ The amendments are not keyed to accrual of the cause of action as were earlier amendments.⁴

Pre-Suit Notice. A consumer must now give written notice advising the defendant in reasonable detail of his specific complaint at least sixty days prior to filing suit.⁵ During the sixty-day period, the defendant may inspect the goods or services in question at a reasonable time and place.⁶ Refusing to permit the inspection results in forfeiture of the mandatory additional damages available for the first \$1,000 of actual damages.⁷

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1. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon 1987 & Supp. 1990).

2. TEX. PROP. CODE ANN. §§ 27.001-.005 (Vernon Supp. 1990).

3. Deceptive Trade Practices Act, Ch. 380, §§ 6-7, 1989 Tex. Gen. Laws 1493.

4. *Cf Pennington v. Singleton*, 606 S.W.2d 682, 685 n.1 (Tex. 1980) (revision of DTPA in effect when unlawful conduct occurs governs disposition of case).

5. TEX. BUS. & COM. CODE ANN. § 17.505(a) (Vernon Supp. 1990).

6. *Id.*

7. *Id.*

Tender of Settlement. The amendments provide that any tender or offer of settlement is not admissible as evidence.⁸ Also, when the amount offered is the same as, substantially the same as, or more than the amount of actual damages, as determined by the trier of fact, the consumer may recover only the lesser of the amount tendered or the actual damages.⁹

Waiver by Consumers. The DTPA declares that a consumer's waiver of the provisions of the DTPA is contrary to public policy and unenforceable.¹⁰ The new amendments carve out a narrow exception to this prohibition when five conditions are met: (1) the consumer was represented by legal counsel during the transaction; (2) the waiver was set forth as an express provision in a written contract signed by both the consumer *and* the consumer's lawyer; (3) the transaction did not involve the purchase or lease of a family residence; (4) the transaction involved consideration in excess of \$500,000; and (5) the consumer was not in a significantly disparate bargaining position.¹¹ The amendments make clear that waiver is an affirmative defense, and, therefore, the defendant must plead and prove all five of the above conditions.¹² Moreover, disparate bargaining position cannot be proven or disproven as a matter of law solely by evidence of the consumer's relative financial position or by recitations contained in a written contract as to the relative bargaining positions of the parties.¹³ Thus, it is difficult for a defendant to win a summary judgment motion based solely on the defendant's net worth relative to the consumer's or on a fine print provision in a contract between the parties that professes equal bargaining positions.

Comparative Responsibility Defenses. The most significant of the 1989 DTPA amendments provides that certain "tort reform" principles¹⁴ apply in DTPA actions for (1) wrongful death, (2) personal injury other than mental anguish or distress, and (3) damage to property other than goods acquired in the consumer transaction if the damage arises out of an occurrence involving death or bodily injury.¹⁵ In these DTPA cases only, the defendant may assert comparative responsibility as a defense.¹⁶ Also, in these cases the consumer may receive additional statutory damages only upon a showing of fraud, malice, or gross negligence.¹⁷ Additional damages are no longer limited to three times the actual damages; rather, they may not exceed the greater of four times the amount of actual damages or \$200,000.¹⁸

8. *Id.* § 17.505(d).

9. *Id.*

10. TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon 1987).

11. TEX. BUS. & COM. CODE ANN. § 17.42(a) (Vernon Supp. 1990) (emphasis supplied).

12. *Id.*

13. *Id.* § 17.42(b).

14. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001-.017, 41.001-.009 (Vernon 1986 & Supp. 1990).

15. TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon Supp. 1990).

16. TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001-.003.

17. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a) (Vernon Supp. 1990).

18. *Id.* § 41.007.

*B. The 1989 Amendments to the Texas Property Code*¹⁹

The Texas Property Code (the Code) amendments apply to all actions to recover damages for residential construction defects, except actions for personal injury, survival, or wrongful death or for damage to goods.²⁰ Recoverable damages in residential construction cases generally include the cost of repairing the structure, any residual loss of value to the home due to the stigma associated with certain major structural defects, and any mental anguish suffered by the consumer.²¹ The recent amendments to the Code primarily impact two areas. First, the amendments provide new defenses to homebuilders and contractors. Second, the amendments require homebuyers to give homebuilders notice and an opportunity to repair.

Defenses to Liability. The Code expressly provides defenses to liability for damages, or any percentage of damages, caused by four specific events:²² (1) negligence of a person other than the contractor or his agent, employee, or subcontractor;²³ (2) failure of a person other than the contractor or his agent, employee, or subcontractor, to take reasonable action to mitigate the damages;²⁴ (3) normal wear, tear, or deterioration;²⁵ or (4) normal shrinkage due to drying or settlement of construction components within the tolerance of building standards.²⁶ These four limitations on liability are not intended to limit other defenses which may be applicable to a specific case.²⁷

The term "normal" is not defined in the Code. Clearly, however, the purpose of these provisions is not to excuse defective construction. There is nothing normal about a cracked foundation that results from a contractor's failure to take into account the soil conditions under a house. Similarly, bowed walls could not be considered normal when they result from the use of improperly cured lumber. Instead, the legislature intended these provisions to protect homebuilders who use good homebuilding practices.²⁸

Notice and Opportunity to Repair. Common law did not require that the homebuyer notify the builder and afford him an opportunity to repair the defects. Most homebuyers do not want the builder to perform major repairs because they believe that if the builder did not construct the home properly in the first place, then the builder is incapable of properly repairing the home. The amendments, however, require that the homeowner give notice sixty days before suit is filed.²⁹ Moreover, the contractor must be given an

19. The 1989 amendments to the Texas Property Code are set forth in chapter 27 of the Texas Property Code. TEX. PROP. CODE ANN. § 27.001-.005 (Vernon Supp. 1990). Chapter 27 is titled "Residential Construction Liability."

20. TEX. PROP. CODE ANN. § 27.002.

21. See BRAGG, MAXWELL & LONGLEY, TEXAS CONSUMER LITIGATION 2d § 8.03 (1983).

22. TEX. PROP. CODE ANN. § 27.003.

23. *Id.* § 27.003(a)(1).

24. *Id.* § 27.003(a)(2).

25. *Id.* § 27.003(a)(3).

26. *Id.* § 27.003(a)(4).

27. *Id.* § 27.003(b).

28. See *id.* § 27.003-.004.

29. *Id.* § 27.004(a).

opportunity to inspect the home for the alleged defects within twenty-one days of receiving notice of the lawsuit.³⁰

The pre-filing notice letter must specify the claimed defects in reasonable detail.³¹ The reasonableness of the detail contained in the notice letter should be examined in light of the relative positions of the parties. The adequacy of the pre-filing letter, therefore, should be tested by determining whether the information provided is sufficient to put the builder on notice that defects in construction exist.

Within thirty-one days after receiving notice, the prospective defendant may make an offer to repair or to pay for the repair of the defects in the home.³² The offer to repair must specify in reasonable detail the repairs that will be made.³³ The reasonableness of the detail in the contractor's letter offering to repair should be tested by determining whether sufficient information is presented to enable a homebuyer to determine whether the repairs will be effective. If a contractor's offer to repair is accepted, the repair work must be completed within forty-five days after the date on which the homebuilder received the homebuyer's acceptance of the offer to repair.³⁴

If the consumer files suit before satisfying the notice provisions, the defendant may move for the court to abate the lawsuit. Such abatement allows the defendant an opportunity to inspect the home and to make an offer to repair the alleged defects.³⁵ If a homebuilder fails either to make an offer to repair or to properly and timely perform the offered repairs, or if the homebuyer reasonably rejects an offer to repair, then the limitations on damages provided by the Code do not apply.³⁶ If a homebuyer unreasonably rejects an offer to repair or to pay for repairs, or accepts a settlement offer and subsequently does not permit the contractor to repair the defects, then the homebuyer may not recover damages in excess of the reasonable cost of repairs plus attorney's fees incurred before the offer was rejected.³⁷

When a contractor makes repairs in the time allowed and in a good and workmanlike manner, a homebuyer may not recover any damages, attorney's fees or court costs arising from the defects unless the trier of fact finds that a repair attempt was not made in good faith and did not cure the defects

30. *Id.* Different provisions apply if the limitations period will expire within the pre-suit notice period, or when the claim is asserted as a counterclaim. *Id.* § 27.004(c).

31. *Id.* § 27.004(a).

32. *Id.* § 27.004(b).

33. *Id.*

34. *Id.*

35. Section 27.004(c) expressly authorizes an abatement "[i]f, while a suit . . . is pending, the statute of limitations . . . would have expired and it is determined that the [notice] provisions . . . were not properly followed, the suit shall be abated for up to 75 days in order to allow compliance . . ." *Id.* § 27.004(c). Presumably, even if the statute of limitations would not have expired, abatement would be the proper remedy for noncompliance with the statutory notice provisions. *Cf.* BRAGG, MAXWELL & LONGLEY, TEXAS CONSUMER LITIGATION (2nd) § 1.07 (1983) (abatement not proper if defendant fails to raise issue of lack of notice in that court).

36. TEX. PROP. CODE ANN. § 27.004(e); *Miller v. Presswood*, 743 S.W.2d 275, 281 (Tex. App. - San Antonio 1987, writ denied).

37. TEX. PROP. CODE ANN. § 27.004(d).

in question.³⁸ This provision appears, however, to unjustifiably forfeit the homebuyer's right to recover damages for any residual loss of value to the home remaining after completion of the repairs.³⁹

Finally, when the defects in a home imminently threaten the health or safety of the inhabitants, the Code requires the contractor to take reasonable steps to cure the defect as soon as practicable.⁴⁰ If the contractor fails to respond promptly, the homebuyer may have the defect cured and recover from the homebuilder the cost of the repairs, attorney's fees and court costs, as well as any other damages to which the homebuyer may be entitled.⁴¹

II. DECEPTIVE TRADE PRACTICES ACT

A. Status as a Consumer

Only consumers have standing to bring a lawsuit under the DTPA.⁴² Several cases decided during the Survey period dealt with the question of a party's status as a consumer.⁴³

For example, in *National Bugmobiles, Inc. v. Jobi Properties*⁴⁴ the purchaser of a home brought suit for breach of warranty against the exterminator who had treated the home for termites for the prior owner. The exterminator had issued a retreatment warranty guaranteeing that any additional treatment required during the term of the warranty⁴⁵ would be performed at no cost. The policy of the exterminator was to automatically transfer the warranty to subsequent owners; the purchasers received the warranty from the sellers at closing. Within the term of the warranty, the homeowners discovered termites and requested the exterminator to treat the house, but he refused. On appeal, the exterminator argued that the purchaser was not a consumer. The court of appeals, applying well-established rules, rejected this argument.⁴⁶

A plaintiff who does not himself seek or purchase the services of the defendant may nonetheless be a consumer if (1) he acquires the benefits of

38. *Id.* § 27.004(c).

39. *Cf. Ludt v. McCollum*, 762 S.W.2d 575 (Tex. 1988) (DTPA allows recovery for residual loss of value).

40. TEX. PROP. CODE ANN. § 27.004(j).

41. *Id.*

42. Tex. Bus. & Com. Code Ann. § 17.50 (Vernon 1987); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535 (Tex. 1981).

43. The DTPA defines consumer as:

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

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

44. 773 S.W.2d 616 (Tex. App. - Corpus Christi 1989, writ denied).

45. The warranty term was one year but renewable annually upon payment of a fee. *Id.* at 619.

46. *Id.* at 622.

those services as part of a transaction involving a sale or lease;⁴⁷ and (2) the services form the basis of his complaint.⁴⁸ The court held that the purchaser acquired the benefits of the retreatment warranty by automatic assignment when he bought the property.⁴⁹ The exterminator's failure to honor the warranty formed the basis of the purchaser's complaint.⁵⁰ The court followed established case law in holding that privity of contract was not required for standing as a consumer,⁵¹ and specifically held that privity was not "necessarily required in order to establish a breach of an express warranty."⁵²

*Rodriguez v. Ed Hicks Imports*⁵³ presented the question of a bystander's status as a consumer. Rodriguez suffered injuries when the radiator on his girlfriend's automobile exploded, spraying him with scalding liquid. Rodriguez, however, was not involved in the purchase of the car. The court of appeals affirmed a summary judgment for the defendant on Rodriguez' DTPA claim, correctly holding that since Rodriguez had neither sought nor acquired by purchase or lease any goods or services, he was not a consumer.⁵⁴

In *Plaza National Bank v. Walker*⁵⁵ Haywood Walker brought suit as next friend of his daughter, Beth Walker, alleging that the bank committed deceptive trade practices in offsetting Beth's savings account to satisfy a past-due note owed by Haywood.⁵⁶ The court held that a savings account depositor acquires services sufficient to qualify him as a consumer.⁵⁷ In so holding, the court followed *La Sara Grain Co. v. First National Bank*,⁵⁸ which established that a bank's services provided in connection with a checking account fall within the scope of the DTPA.⁵⁹

47. *Kennedy v. Sale*, 689 S.W.2d 890, 892 (Tex. 1985) (party who seeks or acquires goods or services purchased for his benefit by another is consumer).

48. *Cameron v. Terrell & Garrett, Inc.* 618 S.W.2d at 535, 538 (Tex. 1981) (consumer must seek or acquire goods or services by purchase or lease and goods or services must form basis of complaint).

49. *National Bugmobiles*, 773 S.W.2d at 621.

50. *Id.* at 622.

51. *Id.*; *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 707 (Tex. 1983); *Cameron*, 618 S.W.2d at 541.

52. *National Bugmobiles*, 773 S.W.2d at 622. The court held that [w]here an exterminator furnishes a perpetual, freely transferable express written warranty, which warrants that it will unconditionally treat any future termite infestation, knowing that the home owner is likely to one day use the warranty to induce the sale of the home, no privity between the buyer of the home and the exterminator is required.

Id.

53. 767 S.W.2d 187 (Tex. App.-Corpus Christi 1989, no writ).

54. *Id.* at 191. Clearly, if the daughter, rather than her boyfriend, had been injured, she would have been a consumer even though the vehicle was purchased for her by her mother. See *Birchfield v. Texarkana Memorial Hosp.*, 747 S.W.2d 361, 368 (Tex. 1987); *Kennedy v. Sale*, 689 S.W.2d 890, 892 (Tex. 1985).

55. 767 S.W.2d 276 (Tex. App.-Beaumont 1989, writ denied).

56. *Id.* The opinion's recitation of facts is sketchy but supports this reconstruction.

57. *Id.* at 278.

58. 673 S.W.2d 558 (Tex. 1984).

59. *Id.* at 564.

In contrast, the court in *Smith v. United States Bank*⁶⁰ rebuffed a bank customer's claim to consumer status. In that case, Scruggs borrowed money from a bank to repay certain creditors who threatened to foreclose on his property. Smith guaranteed the note. United States Bank of Galveston purchased the note and Smith's guarantee. Ultimately Smith was sued on his guarantee, and he sought relief against the bank under the DTPA. The court of appeals reasoned that the bank was not liable under the DTPA to Smith unless Scruggs was a consumer.⁶¹ Relying on *Riverside National Bank v. Lewis*,⁶² the court held that Scruggs's objective in borrowing the money was not the purchase of goods or services but rather the repayment of a debt.⁶³ In the court's view, Scruggs had sought only an extension of credit, and, accordingly, was not a consumer.⁶⁴

*Thomas C. Cook, Inc. v. Rowhanian*⁶⁵ presented the question of whether the purchaser of travelers checks had consumer standing to sue the issuer of the checks under the DTPA. The plaintiff purchased the checks from the original purchaser. The plaintiff lost the checks and sought a refund from the defendant who issued the checks. The defendant denied the refund on the grounds that, at the time of plaintiff's purchase, the checks already had been signed and countersigned in violation of the instructions provided at the time of issuance.⁶⁶ The court held that generally the purchaser of travelers checks purchases a service: the right to a refund if the check is lost or stolen.⁶⁷ The court, however, denied consumer status to the plaintiff in this case.⁶⁸ The court reasoned that the original purchaser was not a consumer of the refund service since he failed to comply with the countersignature instructions.⁶⁹ In the court's view, the plaintiff, a subsequent holder of the checks, occupied no better position than the original purchaser.⁷⁰

While the court's detailed discussion of the rights of the parties under the

60. 767 S.W.2d 820 (Tex. App.-Texarkana 1989, writ denied).

61. *Id.* at 824.

62. 603 S.W.2d 169 (Tex. 1980). In *Riverside*, the Texas Supreme Court held that money is not a good and the mere extension of credit is not the rendition of a service. Accordingly, one who attempts to borrow money is not, by that activity alone, seeking to acquire a good or service. *Id.* at 174-75. The *Riverside* rule has been construed narrowly in subsequent cases. See *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 707 (Tex. 1983) (purchaser of house is consumer as to both home builder and lender); *Knight v. International Harvester Credit Corp.*, 627 S.W.2d 382, 389 (Tex. 1982) (purchaser of truck is consumer as to both retailer and lender).

63. *Smith*, 767 S.W.2d at 824.

64. *Id.* If Scruggs sought merely to refinance a loan, then the court's analysis would be correct. Scruggs' objective in obtaining the loan, however, was apparently to pay off the liens held by the party threatening foreclosure. If so, Scruggs arguably utilized the loan proceeds to acquire superior title to real property. The purchase of real estate is a good under the DTPA. The stronger rationale may have been that Smith, as a guarantor, did not himself seek or acquire goods or services.

65. 774 S.W.2d 679 (Tex. App. - El Paso 1989, no writ).

66. The instructions required the checks to be countersigned at the time of purchase and not before. The court held that a countersigned check is not entitled to refund if lost or stolen. *Id.* at 683.

67. *Id.* at 682.

68. *Id.* at 683.

69. *Id.*

70. *Id.*

terms of the travelers check agreement may be correct, its analysis of the DTPA consumer issue unfortunately confuses the question of standing with the question of liability under the DTPA. Clearly, both the original purchaser and the plaintiff were consumers as they both sought to acquire by purchase the refund services of defendant.⁷¹ The original purchaser actually acquired the defendant's services at the time of purchase but later lost his right to a refund by prematurely countersigning the checks.⁷² The plaintiff, through no fault of the defendant, did not succeed in acquiring the refund services he sought. While that fact, without more, did not establish that the defendant committed a deceptive trade practice, it did not negate plaintiff's consumer standing.

B. Breach of Warranty

In *Stewart Title Guaranty Co. v. Cheatham*⁷³ a landowner sued its title insurer under the DTPA for losses resulting from the insurer's failure to reveal in the title policy the existence of an easement across the insured property. There was no evidence that the insurer was aware of the title defect. The trial court rendered judgment for the owner for treble damages. The court of appeals reversed.⁷⁴ The court of appeals described the title policy as a contract of indemnity that only obligated the insurer to pay the insured for damages upon the failure of the guaranty.⁷⁵ The court further articulated that the title insurance company was not a title abstract company employed to examine the title; the title insurance company had no duty to disclose the existence of an easement, but only to indemnify the insured against any loss caused by the title defects.⁷⁶ The court held that the title policy made no warranty that the land was free of easements except for the purpose of indemnifying the landowner under the policy terms.⁷⁷ It is important to recognize that the court's holding does not preclude DTPA claims whenever a title insurance policy is involved.⁷⁸ A title insurer may

71. See, e.g., *Mother & Unborn Baby Care v. State*, 749 S.W.2d 533, 538 (Tex. App.-Fort Worth 1988, writ denied) (party seeking but not receiving service qualifies as consumer), *cert. denied*, 109 S.Ct. 2431, 104 L.Ed.2d 988 (1989); *McCran v. Klaneckey*, 667 S.W.2d 924, 926 (Tex. App.-Corpus Christi 1984, no writ) (party who sought but did not acquire insurance was a consumer); *Irizarry v. Amarillo Pantex Fed. Credit Union*, 695 S.W.2d 91, 92 (Tex. App.-Amarillo 1985, no writ) (similar language).

72. See *supra* note 63.

73. 764 S.W.2d 315 (Tex. App.-Texarkana 1988, writ denied).

74. *Id.* at 322.

75. *Id.* at 318.

76. *Id.* at 319. The *Cheatham* court's no duty holding is correct since a party does not have a duty to disclose unknown facts. *Robinson v. Preston Chrysler - Plymouth, Inc.* 633 S.W.2d 500, 502 (Tex. 1982). Cf. *Stewart Title Guar. Co. v. Sterling*, 772 S.W.2d 242, 246 (Tex. App.-Houston [14th Dist.] 1989, no writ) (title company had no duty to discover and disclose the title defects, but could be held liable for non-disclosure) (emphasis in original).

77. *Cheatham*, 764 S.W.2d at 319. The court held that the title defect did not constitute a breach of warranty, but a failure by the insurer to indemnify for any loss would constitute a breach. *Id.* at 319 n.3.

78. The court noted:

[T]his is not to say that there cannot be a violation of the DTPA when a title insurance policy is involved. The mere existence, however, of a title policy and a

still be held liable for misrepresentations or failure to disclose known facts.⁷⁹

One of the issues in *Easterly v. HSP of Texas, Inc.*⁸⁰ concerned whether an implied warranty arose in connection with the rendition of medical services. The defendant hospital administered epidural anesthesia to Easterly during the delivery of her child. The first attempt at anesthetizing Easterly failed and the catheter used in the procedure broke and remained in Easterly's spine. This required subsequent surgery. Among other claims, Easterly and her husband sued for breach of warranty under the DTPA. The trial court granted summary judgment for the hospital. Affirming the trial court's opinion, the court of appeals held that the primary relationship between the hospital and Easterly involved the rendition and procurement of services, the delivery of her child, and not the sale of goods, and, therefore, no implied warranties arose under the Uniform Commercial Code (UCC).⁸¹ The court refused to recognize the existence of an implied warranty in the rendition of medical services.⁸²

Finally, in a decision of current interest, the court in *Diversified, Inc. v. Gibraltar Savings Association*⁸³ refused to find an implied warranty in the sale of property at a foreclosure sale.⁸⁴ The court concurred with the view expressed in another case that one who purchases property at a foreclosure sale does so "at his own peril."⁸⁵

C. Deceptive Trade Practices

In *Donwerth v. Preston II Chrysler-Dodge*⁸⁶ the purchaser of a used car claimed that the seller represented the vehicle was of a particular standard, quality or grade when it was of another.⁸⁷ The court of appeals found no evidence to support the jury finding of misrepresentation. The Texas Supreme Court reversed, holding that evidence that the brakes began groaning within a few months of purchase, the odometer had been rolled back approximately 20,000 miles, and the brakes were "metal to metal" five months after the purchase established that the brakes were excessively worn

subsequent loss under the terms of that title policy because of an undisclosed easement is not such a violation.

Id. at 319-20 (footnote omitted).

79. See, e.g., *Stewart*, 772 S.W.2d at 246 (title company may be held liable for misrepresentations and non-disclosure); *Gibbs v. Main Bank*, 666 S.W.2d 554 (Tex. App. - Houston [1st Dist.] 1984, no writ) (court remanded case to trial court for determination of whether title company and seller conspired to conceal information of pre-existing lien on property).

80. 772 S.W.2d 211 (Tex. App.-Dallas 1989, no writ).

81. *Id.* at 214.

82. *Id.* at 214-15. Texas law currently does not recognize an implied warranty in the provision of professional services. *Dennis v. Allison*, 698 S.W.2d 94, 96 (Tex. 1985).

83. 762 S.W.2d 620 (Tex. App.-Houston [14th Dist.] 1988, no writ).

84. *Id.* at 622.

85. *Id.* quoting *Diversified, Inc. v. Walker*, 702 S.W.2d 717 (Tex. App. - Houston [1st Dist.] 1985, writ ref'd n.r.e.).

86. 775 S.W.2d 634 (Tex. 1989).

87. Section 17.46 (b)(7) prohibits "representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another." TEX. BUS. & COM. CODE ANN. § 17.46(b)(7) (Vernon 1987).

and defective at the time of sale.⁸⁸ Therefore, the salesman's statement that there was nothing wrong with the brakes misrepresented the standard, quality or grade of the vehicle.⁸⁹

*Best v. Ryan Auto Group, Inc.*⁹⁰ involved the purchase by Best of a Harley-Davidson motorcycle dealership. The purchase included the inventory that was subject to a floor planning lien held by a third party. Best testified that at the time of the franchise sale, the seller misrepresented that Best would be able to buy inventory from Harley-Davidson. In fact, however, the dealership as sold did not include this right. After the purchase, the third party sued the seller and repossessed the inventory, which effectively put Best out of business. Best brought suit alleging that the seller had violated section 17.46(b)(12) of the DTPA.⁹¹ The court of appeals found no evidence linking the misrepresentation to the lost profits damages awarded by the jury; rather, the damages resulted from the third party repossession. The Texas Supreme Court disagreed, holding in a per curiam opinion that Best's testimony constituted legally sufficient evidence of a misrepresentation that produced his subsequent damages.⁹²

D. Damages

A recurring question in the area of DTPA damages concerns the probative effect of a consumer's testimony as to the value of his real or personal property.⁹³ The leading case is *Porras v. Craig*,⁹⁴ in which the Texas Supreme Court held that a property owner is qualified to testify about the market value of his own property even though that owner would not generally be qualified to render an opinion about the value of property belonging to others.⁹⁵ The owner's testimony "must show that [the opinion] refers to market [value], rather than intrinsic or some other value of the property."⁹⁶

Pontiac v. Elliott,⁹⁷ decided during the Survey period, presented another challenge to the consumer's valuation testimony. The consumers in that case purchased a Suburban from the defendant. Unknown to the consumers, the vehicle previously had been sold to another buyer who returned it com-

88. Donwerth, 775 S.W.2d at 636.

89. *Id.*

90. 33 Tex. Sup. Ct. J. 314 (March 21, 1990).

91. 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." TEX. BUS. & COM. CODE ANN. § 17.46(b)(12).

92. *Best*, 33 Tex. Sup. Ct. J. at 314.

93. See, e.g., *Porras v. Craig*, 675 S.W.2d 503, 505 (Tex. 1984) (property owner may testify regarding market value of own property even though could not testify regarding value of another property); *Mercedes-Benz of N. Am., Inc. v. Dickenson*, 720 S.W.2d 844, 848 (Tex. App.-Fort Worth 1986, no writ) (similar language); *Bower v. Processor and Chemical Serv., Inc.*, 672 S.W.2d 30, 32 (Tex. App.-Houston [14th Dist.] 1984, no writ) (similar language).

94. 675 S.W.2d 503 (Tex. 1984).

95. *Id.* at 504.

96. *Id.* at 505. The court noted that this requirement is normally satisfied by asking the witness if he is familiar with the property's market value. *Id.* The court concluded that the owner's testimony reflected the value of the vehicle to him personally rather than its market value. *Id.*

97. 775 S.W.2d 395 (Tex. App. - Houston [1st Dist.] 1989, no writ).

plaining of engine problems. The defendants had adjusted the engine prior to the consumer's purchase. One of the consumers testified that in light of the prior ownership, damages, and repairs, her assessment of the value of the vehicle was zero. She testified that she would not have bought the vehicle had she known its history, stating that the vehicle would not have been worth a cent to her.⁹⁸ The court held that there was nothing in the testimony to show that the consumers were referring to market value rather than an intrinsic or personal value, and, accordingly, there was no evidence to support the finding that the vehicle was worthless at the time of delivery.⁹⁹ Justice Dunn dissented, arguing that the consumer based her opinion on the defective and unsafe condition of the vehicle.¹⁰⁰ Although the consumer did not use the word "market," the testimony as a whole reflected an opinion as to market value, rather than a loss of value due to personal reasons.¹⁰¹

Relying on *Luna v. North Star Dodge Sales, Inc.*,¹⁰² the *Pontiac* court also held that one of the consumers, Mrs. Elliott, could not recover for her mental anguish because she failed to prove that the defendant knowingly committed the misconduct that caused her mental anguish.¹⁰³ The Texas Supreme Court, however, has held that either knowing conduct or resultant physical injury authorizes the recovery of damages for mental anguish.¹⁰⁴ Recently, the courts have abolished the physical injury requirement in other contexts, and have authorized mental anguish damages without proof of scienter or a resulting physical injury.¹⁰⁵ The Texas Supreme Court's broad language suggests that the physical injury requirement generally has been discarded.¹⁰⁶ If so, the *Pontiac* court's holding is overly restrictive.¹⁰⁷

In *Danny Darby Real Estate, Inc. v. Jacobs*¹⁰⁸ Jacobs contracted to purchase a tract of land from the defendant. Based upon the defendant's representation that Jacobs was eligible for financing through the Texas Vet-

98. In addition, the husband testified that the vehicle was not worth anything at the time of sale due to its defective condition.

99. *Pontiac*, 775 S.W.2d at 399.

100. *Id.* at 402.

101. *Id.* This case is extremely close. The testimony clearly would have been sufficient had the questioner or witness referred to market value. See *Mercedes-Benz of N. Am., Inc. v. Dickenson*, 720 S.W.2d 844, 849-50 (Tex. App.-Fort Worth 1986, no writ).

102. 667 S.W.2d 115 (Tex. 1984).

103. *Pontiac*, 775 S.W.2d at 400.

104. *Luna*, 667 S.W.2d at 117; *Farmers & Merchants State Bank v. Ferguson*, 617 S.W.2d 918, 921 (Tex. 1981) (mental anguish damages recoverable upon showing of willful tort, gross negligence, willful disregard or physical damage); *Duncan v. Luke Johnson Ford, Inc.*, 603 S.W.2d 777, 779 (Tex. 1980) (similar language).

105. *St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649 (Tex. 1987) (abolished requirement of proof of physical injury in suits alleging negligent infliction of emotional distress); *Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986) (abolished physical injury requirement in wrongful death cases).

106. *St. Elizabeth*, 730 S.W.2d at 650 (physical injury no longer required for mental anguish recovery in intentional torts, gross negligence, or willful and wanton disregard of another's rights); *Moore*, 722 S.W.2d at 684 (similar language).

107. See *Centroplex Ford, Inc. v. Kirby*, 736 S.W.2d 261, 264 (Tex. App.-Austin 1987, no writ) (dictum) (proof of physical injury not required to recover for mental anguish); *Kold-Serve v. Ward*, 736 S.W.2d 750, 756 (Tex. App. - Corpus Christi 1987, writ dismissed) (dictum) (proof of physical injury not required to recover mental anguish damages).

108. 760 S.W.2d 711 (Tex. App.-Dallas 1988, writ denied) (on remand).

erans Land Board, and with the defendant's permission, Jacobs purchased a mobile home and expended money improving the land. Jacobs did not receive the financing, resulting in loss of the land and sale of his mobile home. Jacobs brought suit to recover his deposit and down payment on the mobile home and his expenses for improvements to the land. On appeal, the court held that Jacobs was entitled to these damages.¹⁰⁹ In so holding, the court relied upon well-established authority that a DTPA consumer can recover the greatest amount of actual damages, including related and reasonably necessary expenses, if he proves the damages were caused by the deceptive trade practice.¹¹⁰ The only qualification is that the damages sought be of a type available at common law.¹¹¹

In *Carrow v. Bayliner Marine Corp.*¹¹² the Austin court of appeals considered the type of proof necessary to recover repair costs. The case involved the purchase of a motoryacht, which the jury found to be defective. The Carrows, the purchasers of the boat, brought suit against the manufacturer and retailer seeking rescission or, alternatively, damages. The trial court denied the request for rescission and rendered judgment against the manufacturer for some, but not all, of the damages found by the jury to have resulted from DTPA violations. Three of the jury findings of repair costs were disregarded for lack of evidence. On appeal, the manufacturer sought to uphold the trial court's action, arguing that there was no evidence the repairs were reasonable, no evidence to support the amount of the repairs and that rescission was not available under the facts of the case.

The court of appeals first addressed the damages issue. The court acknowledged the traditional rule that repair costs are compensable only when the consumer establishes the repairs were necessary and the costs reasonable.¹¹³ The court held that the consumer is only required to present sufficient evidence from which the trier of fact may justifiably conclude that the repairs and costs were necessary and reasonable.¹¹⁴ In addition, the court held that it is not fatal to recovery that the witness failed to use the words "reasonable" and "necessary."¹¹⁵ The court held that the Carrows' expert's objective estimate of the cost of repair constituted evidence from which the jury could infer that the repairs were necessary and the cost reasonable.¹¹⁶

109. *Id.* at 718-19.

110. *Kish v. Van Note*, 692 S.W.2d 463, 466 (Tex. 1985). The *Jacobs* court added that a consumer is not limited to the out of pocket or benefit of the bargain measures of damages. *Jacobs*, 760 S.W.2d at 718-19.

111. *Kish*, 692 S.W.2d at 466.

112. 781 S.W.2d 691 (Tex. App.-Austin 1989, no writ).

113. *Id.* at 693. See, *Pena v. Ludwig*, 766 S.W.2d 298, 304 (Tex. App.-Waco 1989, no writ) (evidence of repair costs insufficient to establish reasonableness); *GATX Tank Erection Corp. v. Tesoro Petroleum Corp.*, 693 S.W.2d 617, 619 (Tex. App.-San Antonio 1985, writ ref'd n.r.e.) (evidence that repairs were necessary does not establish reasonableness). The *Carrow* court found it unnecessary to reach the issue posed by the concurring opinion in *Jacobs v. Danny Darby Real Estate, Inc.*, 750 S.W.2d 174, 176 (Tex. 1988) (Kilgarlin, J., concurring) as to whether proof of the reasonableness and necessity of damages is required under the DTPA. *Carrow*, 781 S.W.2d at 693-94.

114. *Carrow*, 781 S.W.2d at 694.

115. *Id.*

116. *Id.* at 695. The court further held that for the purposes of a no evidence challenge it

The court also analyzed types of relief available under DTPA section 17.50(b)(3).¹¹⁷ It first considered rescission, as contemplated by the UCC, which under certain circumstances authorizes a buyer to reject a product or revoke acceptance of a product and receive restitution of the purchase money.¹¹⁸ The court held that a consumer may avail himself of this remedy under DTPA section 17.50(b)(3).¹¹⁹ The jury found that the Carrows accepted the boat and there was no finding that the Carrows revoked this acceptance. The court held that in the absence of proof of revocation, the Carrows were not entitled to "rescission" under the UCC.¹²⁰

The court next considered the remedy of equitable rescission and restitution pursuant to section 17.50(b)(3) of the DTPA. The court held that to obtain equitable rescission a purchaser must give timely notice of rescission and return or offer to return the product and the value of any benefit derived from its possession.¹²¹ The court rejected the Carrow's claim to equitable rescission because they failed to prove compliance with these requirements.¹²²

Finally, the court acknowledged authority for the position that section 17.50(b)(3) provides an independent statutory right to obtain restoration of money and property independent of any equitable rights or rights under the UCC.¹²³ Without deciding that such right exists, the court held that the purchasers could not avail themselves of this relief because they failed to obtain a jury finding as to what property the defendant obtained in violation of the DTPA.¹²⁴

was not necessary that the amounts found by the jury correspond precisely with the amounts to which the expert testified. *Id.*

117. Section 17.50(b)(3) authorizes "orders necessary to restore to any party to the suit any money or property, real or personal, which may have been acquired in violation of this subchapter." TEX. BUS. & COM. CODE ANN. § 17.50(b)(3).

118. See TEX. BUS. & COM. CODE ANN. §§ 2.602, 2.608 (Vernon 1968). The court correctly noted that the UCC does not deal with rescission per se, but rather with rejection and revocation of acceptance. *Carrow*, 781 S.W.2d at 695.

119. *Carrow*, 781 S.W.2d at 695; see *Green Tree Acceptance, Inc. v. Pierce*, 768 S.W.2d 416 (Tex. App.-Tyler 1989, no writ); *Freeman Oldsmobile Mazda Co. v. Pinson*, 580 S.W.2d 112, 113 (Tex. Civ. App.-Eastland 1979, writ ref'd n.r.e.).

120. *Carrow*, 781 S.W.2d at 696.

121. *Id.* The court further cautioned that continued use of the product with knowledge of the grounds for rescission will forfeit any right to that relief. *Id.*

122. *Id.* The court reasoned further that since there was no contract between the manufacturer and the Carrows, there was no basis to award rescission from the manufacturer — i.e., there was nothing to rescind. *Id.*

123. *Id.* It is clear that the DTPA creates an independent statutory right to restoration of money or property. This conclusion is compelled by the fact that the DTPA does not codify the common law or impliedly incorporate other statutes but rather creates an independent statutory cause of action. See *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980). Accordingly, a consumer is entitled to recover the money or property acquired by the defendant without the requirement of proving grounds for equitable rescission or statutory rejection or revocation of acceptance. TEX. BUS. & COM. CODE ANN. § 17.50(b)(3). The court's reference to codification of the equitable remedy of rescission and incorporation of the UCC was unfortunate.

124. *Carrow*, 781 S.W.2d at 696. Under the facts of the case, the court's holding that the verdict did not justify § 17.50(b)(3) restoration is correct. A party seeking statutory restoration should obtain a finding, separate and apart from any damage finding, of the amount of money obtained by the defendant through DTPA violation. The consumer does not have to

E. Attorney's Fees

As a general rule, in a case involving more than one claim the court can award attorney's fees only for necessary legal services rendered in connection with the claims for which recovery is authorized.¹²⁵ Accordingly, the party seeking attorney's fees generally must allocate the time spent between those causes of action for which attorney's fees are available and those for which they are not, except when the claims are so interrelated as to require proof of essentially the same facts.¹²⁶ In one DTPA case decided during the Survey period, failure to segregate fees between multiple defendants did not bar an award of attorney's fees because the exception to the general rule applied.¹²⁷ In that case, the suit for rescission of a mobile home purchase contract brought against the manufacturer, the seller, and the financier assignee involved the same set of circumstances and the issues were so interrelated that prosecution of the suit required proof of the same facts.¹²⁸ Therefore, a special issue on the amount of attorney's fees attributable to each defendant was not necessary.¹²⁹

A defendant who prevails on a DTPA claim is entitled to an award of attorney's fees if the court finds the action was groundless, brought in bad faith, or to harass the defendant.¹³⁰ In *Donwerth v. Preston II Chrysler-Dodge, Inc.*¹³¹ the Texas Supreme Court expressly held that the court, and not the fact finder, must make this determination of groundlessness, bad faith, or harassment.¹³² Reversing the decision of the court of appeals, the court held that "groundless" under the DTPA has the same meaning as "groundless" under rule 13 of the Texas Rules of Civil Procedure.¹³³ Under that rule, groundless means: "No basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law."¹³⁴ The court held that the Donwerths' action as a matter of law was not groundless.¹³⁵ The court further stated that although Preston II had not preserved its contention that the Donwerth's action was brought for the purpose of harassment, Preston II probably could not have prevailed on that claim.¹³⁶ The court reasoned that since this provision requires that the suit

prove the amount of damages caused by the defendant's misconduct as a predicate for restitution or restoration. *Green Tree Acceptance v. Pierce*, 768 S.W.2d 416, 419-20 (Tex. App.-Tyler 1989, no writ).

125. See *International Sec. Life Ins. Co. v. Finck*, 496 S.W.2d 544, 546-47 (Tex. 1973).

126. *Southern Concrete Co. v. Metrotec Fin., Inc.* 775 S.W.2d 446, 448-49 (Tex. App. - Dallas 1989, no writ); *Bullock V. Kehoe*, 678 W.S.2d 558, 560 (Tex. App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.).

127. *Green Tree*, 768 S.W.2d 416.

128. *Id.* at 425.

129. *Id.*

130. TEX. BUS. & COM. CODE ANN. § 17.50(c).

131. 775 S.W.2d 634 (Tex. 1989).

132. *Id.* at 637. The court held that it is a question of law reviewable on appeal under an abuse of discretion standard.

133. *Id.*

134. TEX. R. CIV. P. 13.

135. *Donwerth*, 775 S.W.2d at 638.

136. *Id.*

be brought solely to harass, a case that was not groundless would not be likely to result in a finding of harassment.¹³⁷ In a concurring opinion, Chief Justice Phillips disagreed with this logic, reasoning that the language of the amended statute demonstrates that a finding of harassment alone will justify an award of attorney's fees.¹³⁸

In *Splettstosser v. Myers*,¹³⁹ the court relied on *Donwerth* to again reverse a court of appeals' judgment on bad faith attorney's fees.¹⁴⁰ In holding that the action was not groundless as a matter of law, the court of appeals reasoned that when a plaintiff's DTPA cause survives a motion for directed verdict, neither the trial court nor an appellate court logically can find the lawsuit groundless.¹⁴¹ Expressly disapproving this standard, the court remanded the case to the court of appeals to determine whether the evidence as a whole demonstrated an arguable basis in fact and law for the consumer's claim.¹⁴²

Although decided before *Donwerth*, *Kenbel v. Port Enterprises, Inc.*¹⁴³ provides a useful discussion on the issue of bad faith.¹⁴⁴ To establish bad faith, the defendant must prove that the consumer's suit was motivated by a malicious or discriminatory purpose.¹⁴⁵ Although not a prerequisite, personal ill will or spite on the part of the consumer toward the defendant is relevant to the issue of malice.¹⁴⁶ If no ill will exists, the defendant may be able to show that the consumer was motivated by a reckless disregard for the defendant's rights.¹⁴⁷

F. Defenses

In *Woods v. William M. Mercer, Inc.*¹⁴⁸ Chief Justice Phillips, writing for the court, held that the discovery rule is a plea in confession and avoidance and not an affirmative defense.¹⁴⁹ The party availing itself of the discovery rule, therefore, must plead the rule in response to the defendant's assertion

137. *Id.* "Because any purpose for recovering money damages, however small, as a motivating factor would defeat such a finding, it is difficult to conceive of a case which was not groundless but was brought for purposes of harassment." *Id.*

138. *Id.* at 639 (Phillips, C.J., concurring).

139. 779 S.W.2d 806 (Tex. 1989).

140. *Id.* at 807.

141. *Myer v. Splettstosser*, 759 S.W.2d 514, 518 (Tex. App.-Austin 1988), *rev'd*, 779 S.W.2d 806 (Tex. 1989).

142. *Splettstosser*, 779 S.W.2d at 808. In its defense, the court of appeals' opinion did correctly anticipate the Texas Supreme Court's holding that the question of bad faith attorney's fees is one for the court. The court of appeals also held that harassment alone would not support the award of bad faith attorney's fees.

143. 760 S.W.2d 829 (Tex. App.-Corpus Christi 1988, writ denied).

144. *Id.* at 831-32. The court's discussion on the issue of groundlessness, *id.* at 832, should be read in light of the Texas Supreme Court's opinion in *Donwerth v. Preston II Chrysler-Dodge*, 775 S.W.2d 634 (Tex. 1989).

145. 760 S.W.2d at 831.

146. *Id.*

147. *Id.* at 832.

148. 769 S.W.2d 515 (Tex. 1988).

149. *Id.* at 517. Past opinions of the Texas courts have done little to clarify the application of the discovery rule as a defense to limitations. See *Smith v. Knight*, 608 S.W.2d 165, 166 (Tex. 1980) (the discovery rule is an affirmative defense to statute of limitations); *Weaver v.*

that the action is time-barred.¹⁵⁰ In addition the party invoking the discovery rule must bear the burden of pleading and proof and the burden of securing favorable findings on the rule.¹⁵¹ Ms. Woods did not plead the discovery rule at trial nor did either side request or obtain any issues as to when she discovered, or in the exercise of reasonable diligence should have discovered, defendant Mercer's misrepresentations. Hence, the court held that Woods waived her right to invoke the discovery rule and affirmed the court of appeals' take-nothing judgment in favor of Mercer.¹⁵²

In a concurring and dissenting opinion, Justice Kilgarlin noted that continuing misrepresentations would toll limitations as long as the misrepresentations continued, and submitted that because Mercer failed to obtain findings in support of the date of the last fraudulent act or misrepresentation, he waived limitations as a defense.¹⁵³ In a separate opinion, Justice Mauzy, joined by Justices Robertson and Ray, argued that because Mercer failed to object to Woods' omission of a discovery rule issue, he waived the right to complain that the suit was barred by limitations.¹⁵⁴ Because none of the dissenting justices found conclusive evidence that Woods' cause was time-barred, they deemed reversal of the court of appeals' judgment for Mercer to be proper.¹⁵⁵

The court reviewed the defense of indemnity in *Plas-Tex, Inc. v. U.S. Steel Corp.*¹⁵⁶ U.S. Steel manufactured and Plas-Tex sold allegedly defective goods to the plaintiff. The trial court rendered judgment against U.S. Steel for breach of warranty and violations of the DTPA and rendered a take-nothing judgment in favor of Plas-Tex, ruling that U.S. Steel should indemnify Plas-Tex for its attorney's fees pursuant to DTPA section 17.55A (now section 17.555).¹⁵⁷ U.S. Steel appealed and the court of appeals reversed and remanded the entire case for new trial. The Texas Supreme Court held that

Witt, 561 S.W.2d 792, 794 (Tex. 1977) (the discovery rule is not plea in confession and avoidance).

150. *Woods*, 769 S.W.2d at 518.

151. *Id.*

152. *Id.* The court also confirmed that the DTPA limitations provision does not apply in cases governed by the pre-1979 version of the DTPA. *Id.* at 517 n.1. The court indicated that the two year limitations provision in TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1986) controlled in the case at bar. *Id.* at 517. If a claim is evidenced by or has grown out of a written contract, then a four year statute of limitations would apply. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (Vernon 1986). See *Jim Walter Homes, Inc. v. Castillo*, 616 S.W.2d 630, 633 (Tex. Civ. App.-Corpus Christi 1981, no writ).

153. *Woods*, 769 S.W.2d at 519.

154. *Id.* at 520.

155. *Id.* at 519-21.

156. 772 S.W.2d 442 (Tex. 1989).

157. *Id.* at 443, 445. Section 17.555 of the DTPA provides:

A person against whom an action has been brought under this subchapter may seek contribution or indemnity from one who, under the statute law or at common law, may have liability for the damaging event of which the consumer complains. A person seeking indemnity as provided by this section may recover all sums that he is required to pay as a result of the action, his attorney's fees reasonable in relation to the amount of work performed in maintaining his action for indemnity, and his costs.

TEX. BUS. & COM. CODE ANN. § 17.555 (Vernon 1987).

section 17.55A was intended to incorporate into the DTPA "existing principals of contribution and indemnity law."¹⁵⁸ The court held that the court of appeals properly reversed Plas-Tex's award of indemnity for attorney's fees because the indemnitor, U.S. Steel, had not been found liable to the plaintiff (due to the court of appeals' reversal of the trial court's finding).¹⁵⁹ Since under established law no right of indemnity exists against a defendant who is not liable to the plaintiff,¹⁶⁰ Plas-Tex had to await the results of the remanded trial before seeking indemnification from U.S. Steel.¹⁶¹

Finally, in *Quinn v. Memorial Medical Center*¹⁶² the court of appeals affirmed summary judgment in favor of a hospital, finding that the plaintiff's claim under the DTPA clearly was barred by the health care provider exception to the Medical Liability and Insurance Improvement Act.¹⁶³ The plaintiff alleged that the hospital pharmacist was negligent in dispersing a prescription drug. The court concluded that as a result of the health care provider exception, the hospital would not be held liable.¹⁶⁴ The court reasoned that since the pharmacist was acting within the scope of the employment relationship, there could be no action under the DTPA for negligent acts.¹⁶⁵ Strictly speaking, this statement is correct. If the plaintiff had alleged the commission of breach of warranty, deceptive trade practice or unconscionable action by the pharmacist, however, the health care provider exception would not apply since those claims involve conduct other than negligence.¹⁶⁶

III. INSURANCE

Several notable cases during the Survey period addressed the issue of an insurer's liability for unfair claims settlement practices. In *Paramount National Life Insurance Co. v. Williams*¹⁶⁷ the insured, Mrs. Williams, sued

158. *Plas-Tex*, 772 S.W.2d at 446.

159. *Id.*

160. *Id.*; *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 553 (Tex. 1981).

161. *Plas-Tex*, 772 S.W.2d at 447.

162. 764 S.W.2d 915 (Tex. App.-Corpus Christi 1989, no writ).

163. *Id.* TEX. REV. CIV. STAT. ANN. art. 4590i, § 12.01(a) (Vernon Supp. 1990) expressly states:

Notwithstanding any other law, no provisions of Sections 17.41-17.63, Business & Commerce Code, shall apply to . . . health care providers as defined in Section 1.03(3) of this Act, with respect to claims for damages for personal injury . . . alleged to have resulted, from negligence on the part of any . . . health care provider.

TEX. REC. CIV. STAT. ANN. art. 4590i, § 1.03(3) (Vernon Supp. 1990) describes a health care provider as any:

[P]erson, partnership, professional association, corporation, facility, or institution duly licensed or chartered by the State of Texas to provide health care as a . . . hospital . . . or an . . . employee . . . thereof acting in the course and scope of his employment.

164. *Quinn*, 764 S.W.2d at 918; accord *Easterly v. HSP of Texas, Inc.*, 772 S.W.2d 211 (Tex. App.-Dallas 1989, no writ).

165. *Quinn*, 764 S.W.2d at 918.

166. See Alderman, *The Business of Medicine - Health Care Providers, Physicians, and the Deceptive Trade Practices Act*, 26 HOUS. L. REV. 109, 140-43 (1989).

167. 772 S.W.2d 255 (Tex. App.-Houston [14th Dist.] 1989, no writ).

her medical insurer after it denied two claims and cancelled her policy. When Mrs. Williams applied for coverage, she was sixty-four and had a long history of medical problems. She described her medical history to the insurer's agent, Cox, at the time she made the application, but Cox told her he only needed information on the preceding five years. When Mrs. Williams subsequently filed claims under her policy, the insurer denied them on the grounds that she had failed to disclose her full medical history on her initial application and that the illnesses for which she received treatment were pre-existing conditions. The jury found all issues in Williams' favor and the court of appeals, reviewing the insurer's twenty-five points of error, affirmed subject to a partial remittitur.¹⁶⁸

Among other rulings, the court held that the admission of petitions, pleadings and discovery from various lawsuits against the insurer was proper for the purpose of showing a plan or scheme by which the insurer consistently and purposely denied claims without reasonable investigation.¹⁶⁹ The court found sufficient evidence establishing Cox's apparent authority to bind the insurer and rejected the insurer's tenuous argument that Cox acted on behalf of Mrs. Williams in taking the application and, accordingly, any misrepresentations would be attributable not to the insurer, but to Mrs. Williams.¹⁷⁰ The court also found the evidence sufficient to support the jury's findings that the insurer had breached its duty of good faith and fair dealing.¹⁷¹ In this regard, the court noted that the insurer did not investigate Mrs. Williams' contention that her medical condition had been fully disclosed to the agent and that the evidence did not clearly establish that her claim arose from a preexisting condition.¹⁷²

In *Transamerica Title Insurance Co. v. San Benito Bank and Trust Co.*¹⁷³ the title insurance company denied any breach of the duty of good faith and fair dealing in connection with an adverse claim to the insured property. Due to Transamerica's negligent omission of a prior lien from its description of the insured's title policy, San Benito acquired only a third lien when it believed it would be acquiring a second lien. The parties discovered the error when the true second lienholder posted the property for foreclosure. The

168. *Id.* at 259. The court ordered a remittitur of \$250,000 of the \$500,000 awarded as exemplary damages. The court, however, sustained Mrs. Williams' crosspoint that requested additional recovery, pursuant to statute, of twelve percent penalty damages on the amount of loss due to the insurer's failure to pay within thirty days of demand. *Id.*; TEX. INS. CODE ANN. art. 3.62 (Vernon 1981).

169. *Paramount*, 772 S.W.2d at 259-60. In so holding, the court followed *Underwriters Life Insurance Co. v. Cobb*, 746 S.W.2d 810 (Tex. App.-Corpus Christi 1988, no writ).

170. *Paramount*, 722 S.W.2d at 261-62. The court pointed to the forms supplied to the agent by the insurer which referred to the agent as a "Duly Licensed Representative." The court discounted a disclaimer in the forms that the insurer was not bound by statements made by the agent, holding it ineffective to negate the apparent authority bestowed on the agent. *Id.* at 262. Finally, the court found sufficient evidence that the insurer had ratified the transaction by retention of premiums with knowledge of facts that should have provoked inquiry into the nature of the transaction. *Id.* at 267.

171. *Id.* at 265.

172. *Id.* at 264.

173. 756 S.W.2d 772 (Tex. App.-Corpus Christi 1988), writ granted, 773 S.W.2d 13 (Tex. 1989).

title policy gave Transamerica the right to reestablish the status quo of the insured¹⁷⁴ by settling the adverse claim to the property. Although Transamerica instituted negotiations, it failed to reestablish the status quo or otherwise protect San Benito's interest. In dismissing Transamerica's argument that it owed no obligation to act before a loss occurred, the court held that once the insurer began to act in handling the claim, the duty of good faith and fair dealing applied.¹⁷⁵ Finding that the insurer breached this duty,¹⁷⁶ the court affirmed judgment for San Benito, including exemplary damages.¹⁷⁷

Practitioners should be aware, however, that if the insured intends to combine contract and claim handling causes of action in one suit, it may be necessary to prosecute fully all causes of action. In *Marino v. State Farm Fire & Casualty Insurance Co.*¹⁷⁸ the insured under a homeowner's policy successfully sued on the insurance contract and alleged DTPA and Insurance Code violations.¹⁷⁹ Marino then brought a second suit alleging a breach of the duty of good faith and fair dealing. Both the trial court and court of appeals held that *res judicata* barred Marino's good faith and fair dealing claim in the second lawsuit, since he had raised the issue of State Farm's claim handling in the first suit and could have, but did not, allege breach of the duty of good faith and fair dealing.¹⁸⁰

*Hermann Hospital v. National Standard Insurance*¹⁸¹ involved the question of a third party's standing to bring suit under article 21.21 of the Texas Insurance Code.¹⁸² In that case, the insured suffered a stab wound on the job. He was taken to Memorial Hospital which subsequently sought to transfer him to Hermann Hospital. Prior to accepting the transfer, Hermann Hospital contacted the insured's insurance company which verified insurance coverage. When the insurer later denied coverage, the hospital brought suit against the insurance company to recover the expenses incurred in the treatment of the insured. The trial court granted summary judgment to the insurance company. On appeal, the hospital contended that the trial court erred in rejecting its claim under article 21.21. The court of appeals agreed.¹⁸³ The court pointed out that section 16(a) of article 21.21¹⁸⁴ autho-

174. The title policy gave Transamerica three options in case of a claim. It could represent San Benito in court and pay the actual amount of loss, pay the policy amount, or re-establish the status quo by effecting a settlement. *Id.* at 774.

175. *Id.* at 775.

176. *Id.* at 776.

177. *Id.* at 777. See *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 168 (Tex. 1987) (exemplary damages are available for breach of the duty of good faith and fair dealing).

178. 774 S.W.2d 107 (Tex. App.-Fort Worth 1989), *writ granted*, 33 Sup. Ct. J. 96 (Nov. 22, 1989).

179. Although the insured alleged these violations, the insured did not submit jury questions or obtain findings on these allegations.

180. *Marino*, 774 S.W.2d at 109-10. Note that the Texas Supreme Court has granted writ on the *res judicata* issue.

181. 776 S.W.2d 249 (Tex App.-Houston [1st Dist.] 1989, no writ).

182. TEX. INS. CODE ANN. art. 21.21 (Vernon 1981 & Supp 1989).

183. *Hermann*, 776 S.W.2d at 252.

184. Section 16(a) provides:

rizes an action by any person who has been injured by another's unfair or deceptive acts in the business of insurance.¹⁸⁵ The court refused to limit standing to an insured or beneficiary under an insurance policy or to those in the insurance business.¹⁸⁶ The court observed that hospitals must rely upon an insurer's representation of coverage and concluded that it could find no reason to deny standing to the hospital.¹⁸⁷

Despite a number of cases dealing with the application of the Employee Retirement Income Security Act (ERISA)¹⁸⁸ to employee benefit plans, the scope of ERISA's preemption of state law remains unsettled.¹⁸⁹ The Supreme Court of Texas recently granted the applications for writ of error in two cases presenting the question whether ERISA preempts state causes of action for unfair insurance practices.¹⁹⁰ In both cases the Houston court of appeals held that ERISA preempted the plaintiff's various state law causes of action brought under common law theories, articles 21.21 and 3.62 of the Texas Insurance Code, rules and regulations of the State Board of Insurance and the DTPA.¹⁹¹ The outcome of these cases should help determine whether the statutory causes of action are saved from preemption as laws regulating the business of insurance.¹⁹²

IV. FRAUD AND NEGLIGENT MISREPRESENTATION

Generally, a cause of action for fraud cannot be predicated on representations concerning matters of law because such representations constitute

Any person who has [been injured by] . . . 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.

TEX. INS. CODE ANN. art 21.21.

185. *Hermann*, 776 S.W.2d at 251.

186. *Id.* at 251-52. In holding that standing is not limited to those in the business of insurance, the court followed *Ceshker v. Bankers Commercial Life Ins. Co.*, 568 S.W.2d 128, 129 (Tex. 1978). The court distinguished *Chaffin v. Transamerica Ins. Co.*, 731 S.W.2d 728 (Tex. App. - Houston [14th Dist.] 1987, writ ref'd n.r.e.) in which the court denied standing under article 21.21 to a party who sought to sue his tort-feasor's liability insurance company which had wrongfully denied coverage.

187. *Hermann*, 776 S.W.2d at 252.

188. 29 U.S.C. §§ 1001-1461 (1985).

189. The preemption clause of ERISA provides that ERISA supersedes all state laws that relate to any employee benefit plan. 29 U.S.C. § 1144(a) (1982). The savings clause excepts from the preemption clause any state law that regulates insurance. *Id.* § 1144 (b)(2)(A). The deemer clause provides that no employee benefit plan shall be deemed to be an insurance company for purposes of any state law purporting to regulate insurance. *Id.* § 1144 (b)(2)(B).

190. *Cathey v. Metro. Life Ins. Co.*, 764 S.W.2d 286 (Tex App-Houston [1st Dist.] 1988), writ granted, 33 Sup. Ct. J. 41 (Oct. 18, 1989); *Gorman v. Life Ins. Co. of N. Am.*, 752 S.W.2d 710 (Tex. App.-Houston [1st Dist.] 1988), writ granted, 33 Tex. Sup. Ct. J. 40 (Oct. 18, 1989).

191. *Cathey*, 764 S.W.2d at 290; *Gorman*, 752 S.W.2d at 714.

192. See also *Mayfield v. Hartford Life Ins. Co.*, 699 F. Supp. 605, 606 (W.D. Tex. 1988) (ERISA did not preempt plaintiff's claims under Texas Insurance Code to the extent that article 21.21 fell within ERISA savings clause).

statements of opinion rather than fact.¹⁹³ Thus, when the State asserted that construction of a condominium partly on a public beach violated the Open Beaches Act,¹⁹⁴ the developer's action on the basis of fraud failed.¹⁹⁵ Since the State's assertion or representation was a legal position, the court did not even consider whether the construction actually encroached the public easement.¹⁹⁶

Where a duty of disclosure exists, deliberate suppression of material facts establishes fraud.¹⁹⁷ In *Chase Commercial Corp. v. Datapoint Corp.*¹⁹⁸ Datapoint assigned two equipment leases to Chase but failed to disclose to Chase that the lessee had filed bankruptcy. Pointing to a contract provision by which Datapoint agreed to provide Chase a complete copy of any proposed lessee's financial statement and other credit information, the appellate court readily found probative evidence of a duty to disclose material facts and reliance on such information.¹⁹⁹ The court viewed Datapoint's acknowledgement of not disclosing the bankruptcy and its denial of any duty to disclose as closely analogous to the denial of a promise coupled with a failure to perform the promise,²⁰⁰ and, as such, found evidence of fraudulent intent.²⁰¹

Relying on the Texas Supreme Court's holding in *Ojeda De Toca v. Wise*,²⁰² the Dallas court of appeals reversed a summary judgment on fraud and DTPA claims that had been granted in favor of a vendor and broker of real property.²⁰³ The vendor and broker had successfully argued in the trial court that the purchaser had constructive notice of height restrictions through deed records. The court held that constructive notice of the contents of the real property records was not a defense to a claim for deceptive trade practices and fraud.²⁰⁴ The defendants had further argued that since the deed was subject to other outstanding interests, it did not purport to convey property free of height restriction and any previous representations to the contrary were merged into the deed, extinguished, and no longer actionable. The court rejected this argument, commenting that if the defendants were correct, then a cause of action for fraud in the sale of real estate

193. See *Fina Supply, Inc. v. Abilene Nat'l. Bank*, 726 S.W.2d 537, 540 (Tex. 1987). Exceptions to this general rule arise when there is a relationship of trust and confidence between the parties or when a party having superior knowledge takes advantage of another's ignorance of the law in order to deceive him. *Id.*

194. TEX. NAT. RES. CODE ANN. § 61.018 (Vernon 1978).

195. *Executive Condominiums, Inc. v. Texas*, 764 S.W.2d 899, 902 (Tex. App.-Corpus Christi 1989, writ denied).

196. *Id.*

197. See *State Nat'l Bank v. Farah Mfg. Co.*, 678 S.W.2d 661, 681 (Tex. App. - El Paso 1984, writ dismissed w.o.j.).

198. 774 S.W.2d 359 (Tex. App. - Dallas 1989, no writ).

199. *Id.* at 366.

200. *Id.* at 367; accord *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986).

201. *Chase*, 774 S.W.2d at 367.

202. 748 S.W.2d 449 (Tex. 1988) (imputed or constructive notice under real property recording statutes is not defense to buyer's action for DTPA violations and fraud).

203. *ECC Parkway Joint Venture v. Baldwin*, 765 S.W.2d 504, 509 (Tex. App. - Dallas 1989, writ denied).

204. *Id.*

could never exist unless the deed itself contained the misrepresentation.²⁰⁵ Hence, the doctrine of merger will not bar claims of fraud, accident, or mistake in transactions consummated in a deed.²⁰⁶

Finally, in *Hermann Hospital v. National Standard Insurance Co.*²⁰⁷ a hospital that had provided medical services to an insured patient sued the insurer for negligent misrepresentation as well as misrepresentation and deceptive trade practices under the Texas Insurance Code, based on the insurer's denial of the hospital's claim for expenses incurred. The hospital had verified coverage with the insurer both before and after accepting the patient. Relying on this representation of coverage, the hospital treated the patient and incurred over \$200,000 in expenses. The Houston court of appeals reversed summary judgment for the insurer and remanded the case.²⁰⁸ With regard to the hospital's claim of negligent misrepresentation, the court stated that the insurer owed a legal duty to those for whom it verified coverage despite the fact that the verification service was gratuitous.²⁰⁹ The court further stated that even though contractual privity did not exist between the insurer and the hospital, a duty of care was imposed by law.²¹⁰ The court noted that liability for negligent misrepresentation extends (1) to persons whom the maker of the representation intends to benefit and (2) to those who the maker should foresee will act in reliance upon the representation.²¹¹ The court held that the allegations raised a fact issue as to whether the insurer was liable for negligent misrepresentation.²¹²

V. TORTIOUS INTERFERENCE AND BUSINESS DISPARAGEMENT

In *Sterner v. Marathon Oil Co.*,²¹³ the Texas Supreme Court affirmed that a cause of action exists for tortious interference with an employment contract that is terminable at will.²¹⁴ While working for Marathon Oil Company, James Sterner was injured. He filed suit against Marathon and recovered damages for the injuries he suffered. Approximately five years later, Sterner was hired by an independent contractor to work at Marathon's refinery. On his third day of work, Sterner received a dismissal notice from the contractor per Marathon's directive. The court held that the terminable-at-will status of a contract is no defense to an action for tortious interference with its performance.²¹⁵ The court noted that "[u]ntil terminated, the contract is valid and subsisting, and third persons are not free to tortiously inter-

205. *Id.* at 511-12.

206. *Id.* The Texas Supreme Court has held that the defense of merger does not apply to actions brought under the DTPA. *Alvarado v. Bolton*, 749 S.W.2d 47 (Tex. 1988).

207. 776 S.W.2d 249 (Tex. App. - Houston [1st Dist.] 1989, no writ).

208. *Id.* at 250.

209. *Id.* at 253.

210. *Id.*

211. *Id.* at 254.

212. *Id.*

213. 767 S.W.2d 686 (Tex. 1989).

214. *Id.* at 688.

215. *Id.* at 689.

ferre with it."²¹⁶

Overruling prior decisions to the contrary,²¹⁷ the court further held that the privilege of legal justification or excuse in the interference of contractual relations is an affirmative defense upon which the defendant carries the burden of proof.²¹⁸ The court stated that the jury's refusal to find from a preponderance of the evidence that Marathon acted with justification or excuse meant, at law, that Marathon failed to carry its burden of proof.²¹⁹ The court held that Marathon did not establish legal justification or excuse as a matter of law.²²⁰

Several cases during the Survey period illustrate the importance of proving a causal connection between the tortious interference with a contractual relationship and the plaintiff's damages. Although the court in *Cantrell Oil Co. v. Hino Gas Sales, Inc.*²²¹ held that the covenant not to compete at issue was reasonable and enforceable,²²² it reversed the award of damages against the competitor because the employer failed to show that the tortious interference proximately caused his price cut damages.²²³ Luckily for the employer, the court affirmed the award of damages against the individual employee defendant because he failed to challenge this point on appeal.²²⁴ Similarly, in *Strain v. Gansle*²²⁵ the court reversed a judgment for breach of covenant not to compete and interference with contract because the causation of damages issue was contested at trial but no causation issue was submitted to the jury.²²⁶ When the plaintiff meets the causation hurdle and proves that the tortfeasor acted with actual malice, the plaintiff may recover exemplary damages.²²⁷

VI. CONVERSION

In *Collision Center Paint & Body, Inc. v. Campbell*²²⁸ the buyer of an

216. *Id.*; (citing RESTATEMENT (SECOND) OF TORTS § 766 comment g (1979).

217. See *Sakowitz, Inc. v. Steck*, 669 S.W.2d 105 (Tex. 1984); *Black Lake Pipe Line Co. v. Union Constr. Co.*, 538 S.W.2d 80 (Tex. 1976).

218. *Sterner*, 767 S.W.2d at 690.

Under the defense of legal justification or excuse, one is privileged to interfere with another's contract (1) if it is done in a bona fide exercise of his own rights, or (2) if he has an equal or superior right in the subject matter to that of the other party.

Id. at 691.

219. *Id.* at 690. Thus, the court's standard of review was whether justification or excuse was established as a matter of law.

220. *Id.* On remand, the court of appeals held that the jury's failure to find that Marathon acted with legal justification or excuse was not against the great weight and preponderance of the evidence. *Marathon Oil Co. v. Sterner*, 777 S.W.2d 128, 132 (Tex. App. - Houston [14th Dist.] 1989, no writ).

221. 756 S.W.2d 781 (Tex. App.-Corpus Christi 1988, no writ).

222. *Id.* at 783.

223. *Id.* at 785.

224. *Id.* at 786.

225. 768 S.W.2d 345 (Tex. App.-Corpus Christi 1989, writ denied).

226. *Id.* at 347.

227. See *Corporate Wings, Inc. v. King*, 767 S.W.2d 485 (Tex. App. - Dallas 1989, no writ).

228. 773 S.W.2d 354 (Tex. App. - Dallas 1989, no writ).

automobile defaulted on payments owed to the purchase money lienholder, Campbell, as well as repair costs owed to Collision Center. Pursuant to the Texas Property Code, Collision Center sent a statutory worker's lien notice to Campbell.²²⁹ Campbell timely tendered payment of the amount stated in the statutory notice, but Collision Center refused to release the vehicle, claiming that additional storage fees and attorney's fees were due and owing. The court of appeals held that Campbell's proper tender of the amount claimed in the notice (which Collision Center never amended) was sufficient,²³⁰ and that the subsequent refusal to surrender the car to the lienholder constituted conversion.²³¹

*Ames v. Ames*²³² involved a suit for conversion and breach of fiduciary duty brought by beneficiaries of a pension and profit-sharing plan against the trustee of the plan and a third-party bank. The benefit plan had been organized pursuant to the Employment Retirement Income Security Act (ERISA).²³³ Addressing the question of whether the state court properly exercised jurisdiction, the Texas Supreme Court held that the provisions of ERISA did not continue to control because the benefit plan had been terminated before the trustee wrongfully converted the funds to his own use.²³⁴ Hence, the beneficiaries' cause of action arose out of the failure or refusal of the trustee of a terminated plan to convey benefits, and not the violation of fiduciary duty created by ERISA in the continuing administration of a retirement plan.²³⁵ Given these circumstances, ERISA preemption did not apply, and the state court properly exercised jurisdiction.²³⁶

229. A worker's lien arises under § 70.001 when a worker labors to repair a motor vehicle; the worker may retain possession of the vehicle until paid. TEX. PROP. CODE ANN. § 70.001 (Vernon 1984).

230. *Collision*, 773 S.W.2d at 357.

231. *Id.*

232. 776 S.W.2d 154 (Tex. 1989).

233. 29 U.S.C. §§ 1001-1461 (1985).

234. *Ames*, 776 S.W.2d at 157.

235. *Id.* at 158.

236. *Id.*