
Common Law Defenses to DTPA Claims

By Richard M. Hunt

Over the last several years Texas Courts, and especially the Texas Supreme Court, have consistently narrowed the common law defenses that may be asserted in an action under the Deceptive Trade Practices Act (“DTPA”).¹ Today, only one such defense has practical effectiveness. This article reviews what has been destroyed, and what remains, in order to assist practicing lawyers as they prosecute or defend claims under the DTPA, and to assist the courts in developing a coherent scheme for the continued development of this area of the law.

1. Estoppel as a Defense

One of the most remarkable assertions of the death of a defense is found in *Home Savings Association v. Guerra*.² Without any discussion or argument the court asserted that “[t]he common law defense of estoppel is not available in a DTPA action.”³ Under Texas law, proof of estoppel requires proof of a representation that is at least constructively known to be false.⁴ The Supreme Court has said that the purpose of the doctrine is to prevent “fraud resulting in injustice.”⁵ *Guerra*, if taken literally, would permit a consumer to defraud the defendant and avoid a defense based on that fraud.

2. Contractual Requirements of Notice of a Claim

A single case disposes of contractual notice requirements in a DTPA case. In *NL Well Service/NL Industries, Inc. v. Flake Industrial Services, Inc.*,⁶ Flake rented industrial uniforms to NL Well Service. Under their agreement, NL Well Service was obligated to give written notice of any breach in writing within 10 days of the date of that breach or waive every claim for that breach.⁷ The court held that the notice requirement was void under the anti-waiver provisions in Section 17.42 of the DTPA.⁸

Flake is significant not only for what it held, but also for what it ignored. First, the court ignored (or NL Well Service forgot to tell it about) Section 16.071 of the Texas Civil Practice and Remedies Code⁹ which made the notice provision void without respect to the DTPA. Second, the court ignored the distinction between NL Well Services claims for breach of warranty and its claims for deceptive acts, a

distinction that has governed the analysis of similar defenses in other cases.

3. Contractual Limits on the Amount of Damages

The validity of a contractual limit on damages has not been resolved, and the cases give contradictory rules. At one extreme, in *Eppler, Guerin & Turner, Inc. v. Purolator Armored, Inc.*,¹⁰ the court held that a contract clause limiting liability was effective in actions both for breach of Warranty and for deceptive acts under the DTPA.¹¹ At the other extreme, in *Hycel, Inc. v. Wittstruck*,¹² *Martin v. Lou Poliquin Enterprises, Inc.*,¹³ *EDP Corp. v. Southwestern Bell Telephone Co.*,¹⁴ and *Town East Fort Sales, Inc. v. Gray*,¹⁵ courts held that a clause limiting liability did not apply at all in an action under the DTPA. *Reliance Universal, Inc. v. Sparks Industrial Services, Inc.*,¹⁶ adopts a middle position. It holds that a contractual limit on the amount of damages can be enforced in an action under the DTPA for breach of an express warranty, but not in an action based on misconduct defined in §17.46(b) of the DTPA (for convenience, these will be called “deceptive act” claims in this article).¹⁷ It thus adopts the distinction most commonly used to decide whether a common law defense will be enforced.

4. Contractual Disclaimers of Warranties

The Supreme Court's most recent decision on contractual disclaimers of warranties is in its second opinion in *Melody Home Manufacturing Co. v. Barnes*.¹⁸ This case puts new limits on the effectiveness of such provisions.

Before *Melody Home*, the Supreme Court and courts of appeals distinguished between breach of warranty claims and deceptive act claims when dealing with contractual warranty disclaimers. They generally followed the reasoning described in *Singleton v. LaCour*.¹⁹

We do not read this section [Section 17.50 of the DTPA] to *create* any warranties; instead, it provides relief when a warranty is breached. The warranty must first be found elsewhere. In this case, however, all warranties were effectively disposed of through compliance with Section 2.316 [of the Texas Business and Commerce Code]. Since there were no warranties, there cannot be an actionable breach under the DTPA.²⁰

The Supreme Court was willing to permit Article 2 type disclaimers even in non-Business and Commerce Code transactions like the sale of residential real estate.²¹

Melody Home ignores this distinction entirely. The case was based on the court's recognition of an implied warranty that services will be performed in a good and workmanlike manner.²² The court recognized that this warranty is nothing new, and existed at common law.²³ Unlike other warranties though, this one cannot be waived:

[W]e further hold that the implied warranty that repair or modification services of existing tangible goods or property will be performed in a good and workmanlike manner may not be waived or disclaimed.²⁴

The court overruled *G-W-L, Inc., v. Robichaux*, “[t]o the extent that it conflicts,”²⁵ presumably indicating that the implied warranty of habitability for residential real estate now cannot be contractually waived or disclaimed either.²⁶

The argument used in *Melody Home* to support its holding leaves little room for any contractual disclaimer of warranties, express or implied:

When disclaimers are permitted, adhesion contracts—standardized contract forms offered to consumers of goods and services on an essentially ‘take it or leave it’ basis [—]...become commonplace.²⁷

Whether or not the court will extend this reasoning to implied warranties under Article 2 of the Business and Commerce Code,²⁸ or to express warranties, remains to be seen. As shown below, it may not really matter.²⁹

5. The Doctrine of Merger and the Parole Evidence Rule

The Supreme Court's most recent examination of common law defenses in the DTPA context again limits the availability of a defense. In *Alvarado v. Bolton*,³⁰ the Supreme Court held that:

[T]he doctrine of merger may not be applied to defeat a cause of action under the DTPA for breach of an express warranty made in an earnest money contract....³¹

Defense lawyers should not take much comfort from the narrow way in which the holding of the case is stated. In its discussion, the court relies in part on its earlier opinion in *Weitzel v. Barnes*,³² in which it held that the parole evidence rule would not bar proof of misrepresentations in a DTPA case. Clearly, both the

parole evidence rule and the doctrine of merger, which share a common purpose and almost identical application, are very weak if they have any use at all against DTPA claims.

Like *Melody Home*, *Alvarado* ignores what seems to be a well established distinction between deceptive act and warranty claims. As the dissent points out, the claims made were only for breach of warranty, not for misrepresentation.³³ The court accepts this, and cites its earlier opinion in *Smith v. Baldwin* for the proposition that:

[A] primary purpose of the Act was to provide consumers a cause of action for deceptive trade practices without the numerous defenses encountered in a common law fraud or *breach of warranty* suit.³⁴

The deceptive act/warranty distinction that has, until now, kept a few common law defenses alive appears to be on its last leg.

6. The Statute of Frauds

Even before *Alvarado*, it was far from clear that the distinction between breach of warranty and deceptive act claims had any real meaning. Cases describing how the Statute of Frauds applies in DTPA cases show how the inability of the courts effectively to use that distinction had already destroyed its meaning.

*Keriotis v. Lombardo Rental Trust*³⁵ was a suit for damages based on the defendant's failure to perform an oral contract to sell real estate. The plaintiff characterized his claim as one based on a “misrepresentation” that the defendant would sell the property.³⁶ The court refused to accept this characterization, noting that based on the “nature of the damages sought” and the “relationship of the promise to the purpose of the Statute of Frauds,” the claim was one for breach of an oral contract, and so barred by the Statute of Frauds.³⁷ It quoted with approval language from a common law fraud case based on similar facts:

[I]t is apparent that his action, while cast in language sounding in tort, is an indirect attempt to recover for the breach of the unenforceable promise and is, therefore, barred by the statute of frauds.³⁸

Although clever characterization did not succeed for the plaintiff in *Keriotis*, a more carefully crafted claim did avoid the Statute of Frauds in *Lawson v. Commercial Credit Business Loans, Inc.*³⁹ In that case the plaintiff had been assured that his bid to buy jewelry had been accepted and was not being “shopped.” When he discovered that the jewelry had

been sold to someone else at a higher price, he sued. The court of appeals overruled a summary judgment in favor of the defendant based on the Statute of Frauds because the misrepresentation that the bid was “not being shopped” and a post-sale misrepresentation that the jewelry was still unsold were actionable *apart* from a breach of contract.⁴⁰

The problem with the distinction made in *Lawson* is that it ignores the real basis for the *Keriotis* holding—a realistic analysis of the underlying claim in terms of the damages sought and the facts supporting it. From the court’s discussion of the facts in *Lawson*, it appears that Lawson’s only loss as a result of the “misrepresentation” was that a \$5,000 deposit check was held for a few days.⁴¹ His real claim was clearly one for the difference between the cost of the goods and their much higher value — a contract measure of damages. By focusing exclusively on the allegation of misrepresentation without considering how it related to the claim as a whole, the court failed to properly apply the rule set out in *Keriotis*.

7. Does the Warranty/Deceptive Act Distinction Make Sense?

This kind of result is inevitable while the warranty/deceptive act distinction is used because it cannot, alone, appropriately separate claims in which common law defenses should be applied from those in which they should not be. A better distinction would be that suggested by *Keriotis* and partially endorsed by prior decisions—that between actions that are essentially for breach of contract and those essentially sounding in tort.

The distinction between warranty and deceptive act claims does not produce appropriate results because it leaves outcomes dependent on the characterization rather than the reality of the underlying transaction. It is clear that the word “warranty” includes representations about present quality as well as promises about future performance. The Houston court of appeals observed in *McCrea v. Cubilla Condominium Corp. N.V.*⁴² that:

An express warranty is created when a seller makes an affirmation of fact or a promise to the purchaser, which relates to the sale and warrants a conformity to the affirmation as promised.⁴³

Similarly, every broken promise or false statement of fact can be called a deceptive act under one or more sub-sections of 17.46(b) of the DTPA. This means that the warranty/deceptive act distinction does not, in principle, govern the outcome of any case, which instead turns on the characterization chosen by the pleader, or by the court asked to accept the pleading.

Examples of this can be found in three Dallas court of appeals cases. In *Ellmer v. Delaware Mini-Computer Systems, Inc.*,⁴⁴ the court enforced a limitation of remedies provision despite a misrepresentation claim because “[t]he facts alleged by Datafast as the basis for its deceptive trade practice claim are the same as those alleged as breaches of warranty”⁴⁵ In *Brown Foundation Repair & Consulting, Inc. v. McGuire*,⁴⁶ and *Honeywell, Inc. v. Imperial Condominium Association, Inc.*,⁴⁷ on the other hand, the court refused to apply the parole evidence rule because the claims for breach of a pre-agreement promise were called claims for misrepresentation.

Honeywell best illustrates this. The plaintiff in *Honeywell* did not call the broken promises breaches of warranty, but misrepresentations.⁴⁸ The court agreed, arguing that under *Smith v. Baldwin*,⁴⁹ an unkept promise was a misrepresentation about goods or services to be provided in the future and so a violation of §17.46(b) (5).⁵⁰ Reading *Smith* will show that it blurred the distinction between promises and representations because the defendant argued that his warranty about the finished condition of a house was just a promise about how well it would be built.⁵¹ With this kind of reasoning, *Alvarado* is superfluous. After *Honeywell*, a determined plaintiff need only plead the right kind of claim, regardless of the nature of its fins, to avoid the parole evidence rule.

There is authority besides *Keriotis* for a distinction based on whether the essential claim is for tort or breach of contract. The Supreme Court recognized in *Ashford Development, Inc. v. USLife Real Estate Services Corp.*,⁵² that the DTPA was not intended to supercede the law of contract:

An allegation of a mere breach of contract, without more, does not constitute a ‘false, misleading or deceptive act’ in violation of the DTPA.⁵³

As another court observed: “[A] failure to perform a promise does not constitute a misrepresentation that violates the Deceptive Trade Practice Act,”⁵⁴ The Supreme Court has also observed that DTPA deceptive act claims are most analogous to tort claims. For example, in *Weitzel v. Barnes*,⁵⁵ the Supreme Court declined to apply the parole evidence rule, but observed: “There was no effort on the part of the Weitzel to show a breach of contract. . . . The oral misrepresentations. . . constitute the basis of this cause of action, so traditional contractual notions do not apply.”⁵⁶

The courts also distinguish contract from tort claims when determining what damages can be recovered in a DTPA action. “Actual damages means those recoverable at common law.”⁵⁷ In *Chrysler Corp. v. McMorries*,⁵⁸ the court of appeals showed the

kind of analysis that is needed to determine what damages can be recovered. Though the consumer was entitled to the highest applicable measure of damages, and in this case could choose between a tort and a contract measure, the availability of both had to be established based on the kind of claim made; “[t]he proper measure of damages is dependent upon, the nature of the cause of action.”⁵⁹ *Farrell v. Hunt*⁶⁰ shows the same kind of analysis at work—the court had to first identify the common law measure of damages applicable to the claim so that it could determine whether there was evidence to support an award of those damages.⁶¹

The courts can make principled distinctions about when common law defenses should apply, but it will require the kind of analysis done in *Keriotis*⁶² — viewing the defense in terms of its original purpose and the true character of the claim made. If the statute of frauds and parole evidence rule were intended to prevent the all too easy escape from obligations that is possible when prior promises are claimed, it makes no sense to refuse to apply the defense just because a broken promise can be called a ripened prospective misrepresentation. At the same time, it makes no sense to enforce warranty disclaimers based only on whether the plaintiff’s attorney pleaded a breach of warranty instead of a misrepresentation. The Supreme Court should adopt the approach taken by *Keriotis*,⁶³ looking in each case at the real nature of the claim, the policies of the DTPA, and the policies behind any common law defense, before deciding whether it applies. That way the result will be the same in every genuinely similar case, not just in similarly pleaded cases.

The court may already have decided to reject any distinction that would permit common law defenses to DTPA claims, for the majority opinion in *Alvarado*⁶⁴ seems to leave little room for their application. If so, this is a mistake, for it assumes that the Act’s policy of protecting consumers cannot be implemented without a blanket denial of laws in which there are already specific protections for consumers, like the warranty disclaimer provisions of Article 2, and doctrines proven over centuries to protect every party in a business transaction from fraud.

Right now, based on the cases and the assumption of clever pleading, only one common law defense has effective practical meaning. Merger and the parole evidence rule were killed by *Alvarado*.⁶⁵ The Statute of Frauds is meaningless because, under *Honeywell*⁶⁶ and *Brown Foundation*,⁶⁷ every promise is a misrepresentation to which it does not apply. Contractual warranty disclaimers do nothing for express warranty claims because they cannot apply to misrepresentation cases, and every warranty that proves false is a misrepresentation. All that remains is the disclaimer of implied warranties, and then only as applied to a sale of goods governed by Article 2 of the Business and Commerce Code. This does not seem

to be a result required by the policies of the DTPA, but it is up to the courts, and especially the Supreme Court, to formulate rules that provide a principled basis for deciding cases based on appropriate policy concerns.

¹ Tex. Bus. & Com. Code Ann. §§17.41-63 (Vernon 1987). One court has asserted that no such defenses remain. *Joseph v. PPG Indus., Inc.*, 674 S.W.2d 862, 865 (Tex.App.—Austin 1984, writ ref’d n.r.e.).

² 720 S.W.2d 636 (Tex.App.—San Antonio 1986), *modified on other grounds*, 733 S.W.2d 134 (Tex. 1987).

³ *Id.* at 644.

⁴ *Brooks Fashion Stores, Inc. v. Northpark Nat’l Bank*, 689 S.W.2d 937, 945 (Tex.App.—Dallas 1985, no writ); *O’Dowd v. Johnson*, 666 S.W.2d 619, 621 (Tex. App.—Houston (1st Dist.) 1984, writ ref’d n.r.e.).

⁵ *Kuehne v. Denson*, 219 S.W.2d 1006, 1009 (Tex. 1949) (quoting 31 C.J.S. *Estoppel* §1 (1942)).

⁶ 656 S.W.2d 884 (Tex.App.—Fort Worth 1983, writ red n r e.).

⁷ *Id.* at 586-87.

⁸ *Id.* at 587.

⁹ Tex. Civ. Prac. & Rem. Code Ann. §16.071 (Vernon 1986).

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

¹¹ *Id.* at 296.

¹² 690 S.W.2d 914 (Tex.App.—Waco 1985, writ dism’d).

¹³ 696 S.W.2d 180 (Tex.App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.).

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

¹⁵ 730 S.W.2d 796 (Tex.App.—Dallas 1987, no writ).

¹⁶ 688 S.W.2d 890 (Tex.App.—Beaumont 1985, writ ref’d n.r.e.).

¹⁷ *Id.* at 892. See also *Rinehart v. Sonitrol of Dallas, Inc.*, 620 S.W.2d 660 (Tex.Civ.App.-Dallas 1981, writ ref’d n.r.e.).

¹⁸ S.W.2d 349 (Tex. 1987).

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

²⁰ *Id.* at 760 (emphasis in original). See also, *McCrea v. Cubilla Condominium Corp. N. V.*, 685 S.W.2d 755, (Tex.App.—Houston 1st Dist.] 1985, writ ref’d n.r.e.); *Ellmer v. Delaware Mini-Computer Sys., Inc.*, 665 S.W.2d 158 (Tex.App.—Dallas 1983, no writ); *Metro Ford Truck Sales, Inc. v. Davis*, 709 S.W.2d 785, 789-90 (Tex.App.—Fort Worth 1986, writ ref’d n.r.e.); *Mercedes-Benz, Inc. v. Dickenson*, 720 S.W.2d 844, 852 (Tex.App.—Fort Worth 1986, no writ).

²¹ See e.g., *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392 (Tex. 1982).

²² 741 S.W.2d at 354.

23 *Id.* at 352.
24 *Id.* at 355.
25 *Id.*
26 See *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392,
394 (Tex. 1982).
27 *Melody Home*, 741 S.W.2d at 355.
28 See Tex. Bus. & Com. Code Ann. §§2.312-317
(Vernon 1968 & Supp. 1989).
29 Note that a post-transaction waiver has been
upheld where made knowingly. *MBank Fort*
Worth, N.A. v. Trans Meridian, Inc., 820 F.2d
716, 721-22 (5th Cir. 1987); *Rocha v. U.S.*
Home/Homecraft Corp., 653 S.W.2d 53, 56-57
Tex.App.—San Antonio 1983, writ red n.r.e.).
30 749 S.W.2d 47 (Tex. 1988).
31 *Id.* at 48.
32 691 S.W.2d 598 (Tex. 1985).
33 *Alvarado*, 749 S.W.2d at 49 (Wallace, J.,
dissenting).
34 *Id.* at 48 (emphasis added) (citing *Smith v.*
Baldwin, 611 S.W.2d 611, 616 (Tex. 1980).
35 607 S.W.2d 44 (Tex.Civ.App.—Beaumont 1980,
writ ref'd n.r.e.).
36 *Id.* at 45.
37 *Id.* at 46.
38 *Id.* at 45 (quoting *Collins v. McCombs*, 511
S.W.2d 745, 747 (Tex.Civ.App.—San Antonio
1974, writ ref'd n.r.e.).
39 690 S.W.2d 679 (Tex.App.—Eastland 1985, writ
ref'd n.r.e.).
40 *Id.* at 681. See also, *McClure v. Duggan*, 674
F.Supp. 211, 223 (N.D. Tex.1987).
41 *Lawson*, 690 S.W.2d at 681.
42 685 S.W.2d 755 (Tex.App.—Houston [1st Dist.]
1985, writ ref'd n.r.e.).
43 *Id.* at 757.
44 665 S.W.2d 158 (Tex.App.—Dallas 1983, no
writ).
45 *Id.* at 160.
46 711 S.W.2d 349 (Tex.App.—Dallas 1986, writ
ref'd n.r.e.).
47 716 S.W.2d 75 (Tex.App.—Dallas 1986, no writ).
48 *Id.* at 77.
49 611 S.W.2d 611 (Tex. 1980).
50 *Honeywell*, 716 S.W.2d at 79.
51 *Smith v. Baldwin*, 611 S.W.2d at 613-15.
52 661 S.W.2d 933 (Tex. 1983).
53 *Id.* at 935, citing *Dura-Wood Treating Co. v.*
Century Forest Indus., Inc., 675 F.2d 745 (5th
Cir. 1982); *Coleman v. Hughes Blanton, Inc.*, 599
S.W.2d 643 (Tex.Civ.App.—Texarkana 1980, no
writ).
54 *Coleman*, 599 S.W.2d at 646.
55 691 S.W.2d 598 (Tex. 1985).
56 *Id.* at 600.
57 *Farrell v. Hunt*, 714 S.W.2d 298, 300 (Tex. 1986).
58 657 S.W.2d 858 (Tex.App.—Amarillo 1983, no
writ).
59 *Id.* at 864.
60 714 S.W.2d at 298.

61 *Id.* at 299-300. A similar analysis of the real
nature of a claim as opposed to its pleaded
characterization is made in determining which
statute of limitation applies. *Gallagher v. Bintliff*,
740 S.W.2d 118, 119 (Tex.App.—Austin 1987,
writ denied).
62 *Keriotis v. Lombardo Rental Trust*, 607 S.W.2d
44 (Tex.Civ.App.—Beaumont 1980, writ ref'd
n.r.e.).
63 *Id.*
64 *Alvarado v. Bolton*, 749 S.W.2d 47 (Tex. 1988).
65 *Id.*
66 *Honeywell, Inc. v. Imperial Condominium Ass'n,*
Inc., 716 S.W.2d 75 (Tex.App.—Dallas 1986, no
writ).
67 *Brown Found. Repair & Consulting, Inc. v.*
McGuire, 711 S.W.2d 349 (Tex.App.—Dallas,
1986, writ ref'd n.r.e.).