

Attorney's Fees and Breach of Warranty



Show Me a Breach of Warranty, and I'll Show You a Contract

By Richard M. Alderman*

Introduction

The general rule under American law is that each party to a dispute is responsible for his or her own attorney's fees.¹ In Texas, a major exception to this rule is provided by section 38.001 of the Texas Civil Practice and Remedies Code,² which provides:

A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for:

- (1) rendered services;
- (2) performed labor;
- (3) furnished material;
- (4) freight or express overcharges;
- (5) lost or damaged freight or express;
- (6) killed or injured stock;
- (7) a sworn account; or
- (8) an oral or written contract³

Under subsections (1) thru (7) of this provision, attorney's fees may be awarded for a host of claims arising out of various types of specific transactions. More broadly, however, subsection (8) authorizes the recovery of attorney's fees if the claim is for an "oral or written contract."⁴ The clear intent of this provision is

to authorize the award of attorney's fees whenever the claim is for "breach of contract."⁵ In most cases, courts have little problem applying this provision, which requires merely a finding that a contract exists and the claim arises from its breach.⁶

Recently, however, several courts have suggested that although attorney's fees may be recovered under section 38.001(8) for breach of contract, they may not be recovered for a "breach of warranty."⁷ This article will review this interpretation and show that this conclusion is a serious misapplication of section 38.001, Texas Supreme Court doctrine, and basic principles of contract law.⁸ As the Texas Supreme Court recently noted while commenting on the relationship between the DTPA and the award of attorney's fees for breach of warranty, "[e]conomic damages and attorney's fees are certainly remedial, but they were recoverable in contract and warranty long before the DTPA was passed."⁹

Breach of Contract

To recover attorney's fees under section 38.001(8), it is necessary to show that the claim is for an "oral or written contract." The term contract is generally broadly interpreted to include any promise that the law will enforce.¹⁰ Section 1 of the Restatement 2nd of Contracts defines a contract as, "a promise or

a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”¹¹

Among the most common form of contracts are those for the sale of goods. In Texas, contracts for the sale goods are subject to the Uniform Commercial Code, enacted in Texas as the Texas Business and Commerce Code. Section 1.103(11) defines the term contract to mean, “[t]he total legal obligation which results from the parties’ agreement as affected by this title and any other applicable rules of law.”¹²

It is clear from either the general definition of contract or the specific language of section 1.103(11) that whenever a seller and a buyer enter into an agreement whereby the seller agrees to sell a product or a service to the buyer for a price, a contract exists. The seller’s failure to perform as agreed or the buyer’s failure to pay as agreed is a breach of that contract. It would appear clear, therefore, that in any suit by either a buyer or seller of goods or services to recover damages arising from a breach of that contract, attorneys’ fees should be awarded pursuant to section 38.001(8).

Appearances, however, may be deceiving. No court questions the fact that a seller is entitled to an award of attorney’s fee whenever suit is brought against a breaching buyer for non-payment. Several Texas courts, however, have held that when a buyer of defective goods or services sues a seller, the buyer is not entitled to an award of attorney’s fees.¹³ The basis for this distinction is the fact that although the seller’s suit against the buyer is for breach of contract, the buyer’s claim against the seller arising from the same contract, is for “breach of warranty.” According to these courts, because section 38.001(8) requires a breach of contract to support the award of attorney’s fees, the buyer suing for breach of warranty is out of luck. This application of section 38.001(8) is based on a distinction the Texas Supreme Court established between “breach of contract” and “breach of warranty.”

The Source of the Problem: *Southwestern Bell Telephone Company v. FDP Corporation*

Any discussion concerning the recoverability of attorney’s fees for breach of warranty must begin with the Texas Supreme Court’s opinion in *Southwestern Bell Telephone Company v. FDP Corporation*.¹⁴ In *FDP*, the Texas Supreme Court was faced with the issue of when a service provider has breached a warranty, actionable under the Texas Deceptive Trade Practices Act.¹⁵ The resolution of this issue is significant because it has been clearly established that a mere breach of contract is not a violation of the DTPA.¹⁶ On the other hand, a breach of warranty claim may be brought through the DTPA, and entitles the consumer to the enhanced remedies of the Act.¹⁷ The court posed the issue as follows:

The issue in this case is whether a seller’s partial failure to perform under a sales agreement may serve as the basis for a breach of warranty claim under the Texas Deceptive Trade Practice—Consumer Protection Act, TEX. BUS. & COM. CODE §§17.41-63 (the “DTPA”). The court of appeals held that certain oral statements made by the seller to induce a sale constituted an express warranty, and that the seller’s failure to perform one of the items in the contract was a breach of that warranty.¹⁸

The Texas Supreme Court agreed with the court of appeals regarding the breach of warranty issue, and in a brief opinion established a simple rule: breach of warranty in a service contract requires defective performance. The complete failure to perform, on the other hand, is not a breach of warranty, although it is still

a breach of contract. The court based this distinction in part on application of the damage rules of the Uniform Commercial Code. As the court stated:

The UCC recognizes that breach of contract and breach of warranty are not the same cause of action. The remedies for breach of contract are set forth in section 2.711, and are available to a buyer “where the seller fails to make delivery.” The remedies for breach of warranty, however, are set forth in section 2.714, and are available to a buyer who has finally accepted goods, but discovers that the goods are defective in some manner. Indeed, “the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell.” No sound reason exists to apply a different standard when the contract is for services instead of goods. In light of the forgoing discussion of the purpose and rationale for warranty liability, we reject Bell’s argument that its failure to publish the double quarter column display was exclusively a breach of contract.¹⁹

As the supreme court notes, its rule, distinguishing between complete non-performance and partial defective performance, is derived in large part by analogy to the remedial provisions of the Uniform Commercial Code. It is interesting to note, however, that the provisions of the Code do not in fact distinguish between remedies for “breach of contract” and “breach of warranty.” Rather, the Code provides different remedies based on whether the goods have been “accepted” by the buyer.²⁰ Under the Code, a breach of warranty claim arises only in those cases where the buyer has accepted the goods.²¹ In other cases, where the goods have either not been delivered or the goods have been rejected²² by the buyer, breach of warranty damages are not recoverable and the buyer must resort to the Code’s other remedies.²³ In other words, under the UCC, a buyer is provided with different remedies based on whether the buyer did not receive the goods, or received defective goods. This is a distinction similar to that adopted by the Texas Supreme Court for service contracts. The Code, however, does not announce different remedial rules based on whether there is a breach of contract or breach of warranty.

In *FDP*, the Texas Supreme Court discussed the Code’s remedial distinction and used it by analogy to determine when a breach of warranty exists in a service contract. Without using the Code’s “acceptance” distinction, the court adopted a similar focus distinguishing between service contracts that have not been performed and those that have been performed defectively. In *FDP*, the court found that the breaching party had performed, but performed defectively, and therefore had breached a warranty. The court noted that had there been no performance, there would have been only a breach of contract.

At no point, however, does the court suggest that the concepts of breach of warranty and breach of contract are mutually exclusive. In fact, the court recognizes that breach of contract is a “non-exclusive” classification when it states, “[w]e reject Bell’s argument that its failure to publish the double quarter column display was *exclusively* a breach of contract.”²⁴ In other words, the court appears to recognize that the fact that a claim is a breach of contract does not mean that it is not also a breach of warranty. By using a test analogous to that of the UCC, the Texas Supreme

At no point, however, does the court suggest that the concepts of breach of warranty and breach of contract are mutually exclusive.

Court has developed a consistent standard for determining when a non-performing party has breached a warranty and when damages for that breach may be limited. It does not, however, establish mutually exclusive classifications. Perhaps the best way to view the court's analysis is to say that a breach of contract rises to the level of a breach of warranty only whenever defective goods are delivered or defective services are performed.

The contract/warranty dichotomy established in *FDP* is significant anytime a claim is asserted that could be brought under the DTPA, or whenever a contract contains a warranty disclaimer or limitation.²⁵ A few simple examples demonstrate the application of the *FDP* contract/warranty distinction:

1. Consumer contracts with Contractor to build a deck in the backyard. Contractor takes consumer's money and fails to build the deck as required by the contract. Consumer has a claim against Contractor for breach of contract. Consumer has no claim under the DTPA for breach of warranty. Consumer may not use the DTPA unless it can be shown that provider has violated the laundry list or acted in an unconscionable manner.

2. Consumer contacts with Contractor to build a deck in the backyard. Contractor completes the deck and is paid by consumer. Consumer discovers that the deck has not been built in accordance with the terms of the contract. Consumer has a claim against Contractor for breach of warranty that may also be brought under the DTPA. Consumer may also have additional claims under the DTPA if it can be shown contractor has violated the laundry list or acted in an unconscionable manner.

3. Consumer contracts with Seller to purchase a television. Seller promises to deliver the set on Tuesday but fails to deliver as required by the contract. Consumer has a claim against Seller for breach of contract. Consumer has no claim under the DTPA for breach of warranty. Consumer may not use the DTPA unless it can be shown that Seller has violated the laundry list or acted in an unconscionable manner.

4. Consumer contracts with Seller to purchase a television. The set is delivered but does not perform at the level specified in the contract. Consumer has a claim against Seller for breach of warranty that may also be brought through the DTPA. Consumer may have additional claims under the DTPA if it can be shown that Seller has violated the laundry list or acted in an unconscionable manner.

The above examples demonstrate two important aspects of the breach of contract/breach of warranty distinction. First, the complete failure to perform does not give rise to a claim for breach of warranty, but may be a breach of contract. Second, any breach of warranty is premised on and arises out of a breach of contract. It is this second point that forms the basis for the remaining discussion.

Attorneys' Fees—*FDP* Misapplied

Shortly after the Texas Supreme Court enunciated the breach of warranty/breach of contract distinction in *FDP*, several courts of appeals utilized the distinction for purposes other than classifying a cause of action for purposes of the DTPA. For example, in *JHC Venture, L. P. v. Fast Trucking Inc.*,²⁶ the court

looked to the rationale of *FDP* to establish damages when a seller breached an express warranty under the UCC. Although the court recognized that in an appropriate case the Civil Practice and Remedies Code authorizes the award of attorney's fees for breach of contract, it stated:

We, therefore, turn to whether under section 38.001(8), a UCC breach of warranty claim is the same as a claim for breach of contract.

In *Southwestern Bell Telephone Co. v. FDP Corp.*, 811 S.W.2d 572, 576 (Tex. 1991), the supreme court noted that the "UCC recognizes that breach of contract and breach of warranty are not the same cause of action." Because *Southwestern Bell* noted that these two claims are distinct, the First Court of Appeals in *Harris Packaging Corp. v. Baker Concrete Constr. Co.*, 982 S.W.2d 62, 69 (Tex. App.—Houston [1st Dist.] 1998, pet. denied), observed that a party could not recover attorney's fees under a breach of express warranty claim. See also *Ellis v. Precision Engine Rebuilders, Inc.*, 68 S.W.3d 894, 897 (Tex. App.—Houston [1st Dist.] 2002, no pet.). We agree and hold that a party cannot recover attorney's fees under a UCC breach of warranty claim. This issue is sustained.²⁷

More recently, in *JCW Electronics, Inc. v. Garza*,²⁸ the court restated the rationale of *JHC Venture*, and held that attorney's fees are not recoverable for breach of the warranty of fitness for a particular purpose under the Texas Business and Commerce Code.²⁹

The result of the decisions that have applied the contract/warranty distinction to the question of attorney's fees under section 38.001(8) is an interesting dichotomy. By definition, only sellers or service providers make warranties. Therefore, whenever a buyer breaches a contract for the sale of goods or services, complaining *sellers or service providers may always recover attorney's fees*. The buyer's breach is a breach of contract.³⁰ On the other hand, *buyers may never recover attorney's fees against that same seller*, whenever the seller has defectively performed. Applying the contract/warranty distinction to resolve the question of whether attorney's fees should be awarded is not only pedagogically incorrect; it creates an absurd result. It also ignores the true nature of a warranty.

The True Nature of Warranty

As noted above, in *FDP*, the Texas Supreme Court found it necessary to distinguish between breach of contract and breach of warranty for purposes of determining when a claim is actionable under the DTPA. The court's analysis, however, does not support the conclusion that a breach of warranty may not also be a breach of contract, a question not before the court and not relevant to the issue discussed by the court. In fact, *although all contract breaches are not necessarily a breach of warranty, every breach of warranty is also a breach of contract*.³¹

A warranty is nothing more than an obligation imposed on a party to a contract. First and foremost, for a warranty to arise there must be a contract between the parties.³²

Black's Law Dictionary defines warranty as: "an express or implied promise that something in furtherance of the contract is guaranteed by one of the contracting parties; esp., a seller's promise that the thing being sold is as represented or promised."³³ Courts have long recognized "the universal rule that a warranty either express or implied, must grow out of contractual relations between the parties."³⁴

Consistent with this analysis, the Texas Business and

Commerce Code, relied on in *FDP*, requires a contract for the sale of goods before a warranty obligation arises in a contract for the sale of goods. For example, section 2.314 provides for a warranty of merchantability *in a contract* for the sale of goods. Subsection 2.314(a) states, “[u]nless excluded or modified (Section 2.316), a warranty that the goods shall be merchantable is implied in a contract for their sale....”³⁵ As stated in Section 2.315, creating the implied warranty of fitness for a particular purpose also recognizes the existence of a contract, providing that:

Where the seller *at the time of contracting* has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.³⁶

It is clear that both express and implied warranties under Chapter 2 of the Texas Business and Commerce Code are creatures of a contract for the sale of goods. This conclusion is further supported by the classification system of the West Digest,³⁷ which includes a breach of warranty claim as a sub-heading under, “Actions for Breach of Contract.”³⁸

While every breach of contract is not a breach of warranty, the converse is not true. In fact, all warranty breaches also are a breach of contract.

In a contract for the sale of goods or services, each party undertakes certain obligations. The seller promises to deliver goods in accordance with the express and implied terms of the agreement, and the buyer agrees to pay. As the Texas courts have correctly noted, the buyer’s remedy for the delivery of defective goods or defective performance of a service contract is a claim for breach of warranty. In fact, most of the cases brought by buyers involve defective performance—a breach of warranty claim. If the strict contract/warranty analysis suggested by some courts is followed, none of these buyers are entitled to attorney’s fees. Sellers of goods or services, who can never maintain a claim for breach of warranty and always sue simply for what the court would term a “breach of contract,” on the other hand, are always entitled to attorney’s fees. It is clear from the above analysis that this conclusion is not supported by either law or common sense. Chapter 38 of the Texas Civil Practice and Remedies Code authorizes the recovery of attorney’s fees for all claims based on a breach of contract. That must include claims by both buyers and sellers.

Conclusion

In *Southwestern Bell Telephone Co. v. FDP Corp.*,³⁹ the Texas Supreme Court noted the difference between a breach of contract and a breach of warranty. As the court made clear, not every breach of contract by a seller rises to the level of a breach of warranty, and a mere breach of contract claim is not actionable under the Texas Deceptive Trade Practices Act. The court’s purpose was to limit application of the DTPA, and it did so by providing a test for establishing when a breach of warranty exists.

The court, however, did not hold that the terms “breach of warranty” and “breach of contract” are mutually exclusive.⁴⁰ As discussed above, while every breach of contract is not a breach of warranty, the converse is not true. In fact, all warranty breaches also are a breach of contract.

Section 38.001(8) authorizes the recovery of attorney’s

fees for breach of an oral or written contract. As noted above, in *PPG Industries, Inc. v. JMB/Houston Centers Partners Limited Partnership*⁴¹ the Texas Supreme Court stated, “[e]conomic damages and attorney’s fees are certainly remedial, but they were recoverable in contract and warranty long before the DTPA was passed.”⁴² This statement, made in connection with a decision limiting the ability to sue a remote manufacturer for a violation of the DTPA, could not be more to the point or more correct.

Attorney’s fees are recoverable for breach of warranty. Breach of warranty by definition arises out of a contract, and as such is clearly within the language of Section 38.001(8). A breach of warranty is nothing more than the seller’s failure to perform in accordance with the express and implied contract description of the goods or services. Those courts that have held breach of contract and breach of warranty are “different” for purposes of the award of attorneys’ fees are inappropriately applying a distinction that is clearly designed to be used for an entirely different purpose. The breach of contract/warranty distinction matters for purposes of application of the DTPA, period. Hopefully, subsequent courts to consider this issue will carefully analyze any claim for attorney’s fees under Section 38.001(8), and conclude as the Texas Supreme Court recognized in *PPG*—breach of warranty is nothing more than the seller’s breach of contract and attorneys’ fees should be awarded for that breach.

* Associate Dean for Academic Affairs, Dwight Olds Chair in Law, and Director of the Center for Consumer Law, University of Houston Law Center. LL.M. University of Virginia, 1973; J.D. Syracuse University, 1971; B.A. Tulane University, 1968. Alderman@uh.edu.

1 The American Rule, in contrast to the English Rule that generally provides a “loser pays” system, is somewhat unique and often attacked. See generally, W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the “Odd Man Out” In How It Pays Its Lawyers*, 16 ARIZ. J. INTL & COMP. LAW 361, 372-73 (1999) (From very early in its history, America denied the winner of a lawsuit the right to collect legal fees from the loser.); John F. Vargo, *The American Rule On Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U. L. REV. 1567, 1635 (1993) (“In general, the English Rule operates as a greater impediment to access to justice than does the American Rule.”); Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A critical Overview*, 1982 DUKE L. J. 651 (“With its general rule that each side in civil litigation has ultimate responsibility for its won lawyer’s fees and that the system will not require the loser to pay anything toward the winner’s representation, this country stands in a small minority among the industrialized democracies.”).

2 For a brief discussion of the history of section 38.001, see *G.R.A.V.I.T.Y. Enter. Inc. v. Reece Supply Co.*, 177 S.W.3d 537, 547-551 (Tex. App.—Dallas 2005).

3 Note that the language of section 38.001 is to be liberally construed. Section 38.005 states: This chapter shall be liberally construed to promote its underlying purposes. See, e.g., *Great Am. Ins. Co. v. North Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 427 (Tex. 1995).

4 Note that section 38.001 requires recovery of damages for a claimant to entitled to recover attorney’s fees. See *Green Int’l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997). There is, however, no need for there to be a “net” recovery by the claimant. Attorney’s fees may be recovered even if the claimant’s recovery is entirely offset by counterclaims. See *McKinley v. Drozd*, 685 S.W.2d 7, 7-10 (Tex. 1985). As a general rule, Section 38.001 does not provide for attorney’s fees for a party’s successful defense against a breach of contract claim. See, e.g., *G.R.A.V.I.T.Y. Enter. Inc. v. Reece Supply Co.*, 177 S.W.3d 537, 548 (Tex. App.—Dallas 2005); *Wilson & Wilson Tax Servs. V. Mohammed*, 131 S.W. 3d 231, 240 (Tex. App.—Houston [14th Dist] 2004, no pet.); *Melson v. Stemma Exploration & Prod. Co.*, 801 S.W.2d 601, 604 (Tex. App.—Dallas 1990, no writ). There is no requirement in the statute that the demand

for payment of attorney's fees be made prior to the time the suit is filed. *See, e.g.,* Palestine Water Well Serv's. Inc. v. Vance Sand and Rock, Inc., 188 S.W.3d 321 (Tex. App.—Tyler 2006).

5 Chapter 38 of the Code permits a prevailing party to recover attorneys' fees and costs in a breach

of contract case. To obtain attorneys' fees under Chapter 38, a party must satisfy three requirements: (1) prevail and recover damages in its breach of contract action; (2) present evidence of a reasonable fee for the services rendered in connection with the prevailing claim; and (3) satisfy the procedural requirements of Section 38.002 regarding "presentment." Provided that a litigant satisfies these requirements, recovery of attorneys' fees under this provision is mandatory. A trial court has discretion to fix the amount of attorneys' fees, but the general rule is that the court does not have the discretion to completely deny attorneys' fees if a litigant has satisfied the requirements of Section 38.001.

Ralph I. Miller, Angela C. Zambrano, Michelle Hartmann, *Annual Survey of Texas Law: Attorneys' Fees*, 57 S.M.U. L. Rev. 571, at 572-73 (2004).

6 For examples of cases where the court awarded attorney's fee pursuant to the contract provision of section 38.001, *see, e.g.,* Gavenda v. Strata Energy, Inc., 705 S.W.2d 690, 693 (Tex. 1986) (oil royalty owner entitled to attorney's fees in contract suit against operators); Stockton v. Cotton Bledsoe Tighe & Dawson, P.C., 2005 Tex. App. LEXIS 241, *13 (Tex. App.—Beaumont 2005) (law firm entitled to attorney's fees in breach of contract case against client); Murphy v. McDaniel, 2004 Tex. App. LEXIS 9538, *15 (Tex. App.—Dallas 2004) (landlord entitled to attorney's fees in breach of contract case); Valdez v. Frank, 2004 Tex. App. LEXIS 8419 (Tex. App.—San Antonio 2004) (contract for sale of furniture); Dixon v. Modelist, 157 S.W.3d 454, 456 (Tex. App.—Houston [14th Dist.] 2004) (property owner entitled to attorney's fees for breach of contract); Petco Animal Supplies, Inc. v. Schuster, 144 S.W.3d 554, 568 (Tex. App.—Austin 2004) (attorney's fees awarded for claim arising out of dog grooming contract); Beaird v. Wagner, 1987 Tex. App. LEXIS 6720, *4 (Tex. App.—Houston [14th Dist.] 1987) (attorney's fees awarded in suit for breach of contract related to dog breeding services); Collin County Sav. & Loan of Plano, Tex. v. Miller Lumber Co., 653 S.W.2d 114, 119 (Tex. App.—Dallas 1983) (bank depositor entitled to attorney's fees in contract suit against bank).

7 *See e.g.,* JHC Venture, L.P. v. Fast Trucking, Inc., 94 S.W.3d 762, 769 (Tex. App.—San Antonio 2002); Ellis v. Precision Engine Rebuilders, Inc., 68 S.W.3d 894, 897 (Tex. App.—Houston [1st Dist.] 2002, no pet.); Harris Packaging Corp. v. Baker Concrete Constr. Co., 982 S.W.2d 62, 69 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

8 It must be emphasized that the focus of this article is the recovery of attorney's fees for breach of warranty under the Civil Practice and Remedies Code. The author recognizes that there are additional statutes that permit recovery for such fees, specifically the Texas Deceptive Trade Practices Act, and the Magnuson-Moss Warranty Act.

Section 2310(d) of the Magnuson-Moss Warranty Act states:

(d) Civil action by consumer for damages, etc.; jurisdiction; recovery of costs and expenses; cognizable claims.

(1) Subject to subsections (a)(3) and (e), a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this title [15 USCS §§2301 et seq.], or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief—

(A) in any court of competent jurisdiction in any State or the District of Columbia; or

(B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.

(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

Section 17.50(d) of the DTPA provides:

(d) Each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees.

The DTPA and Magnuson-Moss permit the recovery of attorney's fees for breach of express or implied warranty, and each may be used in addition, or as an alternative, to section 38.001. In many cases, however, these additional statutes may not be applicable and, therefore, section 38.001 is the exclusive means of recovering attorney's fees. For example, the DTPA applies to only "consumers," and does not apply to a breach of implied warranty action brought against a remote manufacturer. PPG Industries, Inc. v. JMB/Houston Ctrs Partners LTD, P'ship, 146 S.W.3d 79 at 89 (Tex. 2004). Similarly, Magnuson-Moss applies to only "consumers" and requires that the product be a "consumer good."

9 PPG Industries, Inc. v. JMB/Houston Ctrs Partners LTD, P'ship, 146 S.W.3d 79 at 89 (Tex. 2004).

10 For an excellent discussion of contract law, *see generally* E. Allen Farnsworth, *CONTRACTS, FOURTH EDITION* (2004).

11 *RESTATEMENT OF CONTRACTS* 2nd, §1 (1981).

12 *TEX. BUS. & COM. CODE* §1.103(11).

13 *See* note 7, *supra*.

14 811 S.W.2d 572 (Tex. 1991).

15 The reason that the contract/warranty distinction is of such importance is the enhanced damages recoverable for breach of warranty under the DTPA. *See* section 17.50(b) of the DTPA, which authorizes the recovery of damages for mental anguish and up to three times damages based on a finding the defendant acted knowingly or intentionally. For a general discussion of the DTPA's damage provisions, *see* Richard M. Alderman, *THE LAWYERS' GUIDE TO THE TEXAS DECEPTIVE TRADE PRACTICES ACT 2ND ED.*, Chapter 9 (2006).

16 "Our first inquiry is whether FDP's allegations state a claim for breach of warranty, which is actionable under the DTPA, or merely a claim for breach of contract." *FDP*, 811 S.W.2d at 574. *See, e.g.,* Helms v. Southwestern Bell Tel. Co., 794 F.2d 188, 191 (5th Cir. 1986); Dura-Wood Treating Co. v. Century Forest Indus., Inc., 675 F.2d 745, 756 (5th Cir. 1982); La Sara Grain Co. v. First Nat'l Bank of Mercedes, 673 S.W.2d 558, 565 (Tex. 1984); West Anderson Plaza v. Feyznia, 876 S.W.2d 528 (Tex. App.—Austin 1993, no writ); Enterprise-Laredo Ass'n v. Hachar's, 839 S.W.2d 822, 828-9 (Tex. App.—San Antonio 1992). *See generally* Richard M. Alderman, *THE LAWYER'S GUIDE TO THE TEXAS DECEPTIVE TRADE PRACTICES ACT 2ND ED.*, §8.023 (2006).

17 The DTPA provides for remedies not generally available for a breach of contract claim. For example, section 17.50(b) of the DTPA states that a consumer who prevails on an action under the Act based on a breach of warranty may recover damages for mental anguish and up to three times economic damages. *TEX. BUS. & COM. CODE* §17.50(b).

18 *FDP*, 811 at 573. Five years prior to the decision in *FDP*, the court of appeals in *Donnelley Marketing v. Lionel Sosa, Inc.*, 716 S.W.2d 598 (Tex. App.—Corpus Christi 1986, no writ) stated a similar rule:

An action for breach of warranty and an action for breach of contract are separate and distinct causes of action. Although a disclaimer of warranty may be effective to preclude or limit one's liability under a breach of warranty cause of action, it does not so operate under a breach of contract cause of

action. A warranty warrants that the goods contracted for will perform in a promised manner or will be of a certain quality. A warranty presupposes that the goods contracted for are the goods received. When the goods ordered and received fail to live up to the promises made regarding their performance, a breach of warranty action will lie. On the other hand, a breach of contract action lies when the goods ordered are not the goods received.

Id. at 604.

19 *Id.* at 576. (Footnotes deleted) Although the Code does not apply to a service contract, the trial court relied upon the definition of warranty found in section 2-313. Neither party contested the submitted definition, which provided:

You are instructed that an “express warranty” is any affirmation of fact or a promise made by a seller to a buyer which relates to the subject matter of the agreement and becomes a part of the basis of the bargain. It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that the seller have a specific intention to make a warranty.

20 Acceptance is governed by section 2.606, “What Constitutes Acceptance of Goods.” TEX. BUS. & COM. CODE §2.606. In addition to limiting the buyer’s remedial choices, “acceptance” also imposes an obligation upon the buyer to “pay at the contract rate for any goods accepted.” TEX. BUS. & COM. CODE §2.607(a).

21 The buyer’s remedies for breach of warranty are governed by section 2.714 entitled “Buyer’s Damages for Breach in Regard to Accepted Goods.” Subsection (b) of that section states “The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.” TEX. BUS. & COM. CODE §2.714(b).

22 Section 2.602 governs the manner and effect of a rightful rejection of goods. TEX. BUS. & COM. CODE §2.602.

23 All of the buyer’s remedies prior to acceptance are listed in section 2.711, entitled “Buyer’s Remedies in General; Buyer’s Security Interest in Rejected Goods.” This section begins by stating, “Where a seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance...” TEX. BUS. & COM. CODE §2.711(a). Because a breach of warranty requires that the buyer accept the goods, none of the remedial provisions found in section 2.711 apply to a breach of warranty. As noted in the text, however, the Code does not use the term “breach of contract,” when referring to these non-breach of warranty remedies.

24 811 S.W.2d at 576.

25 After concluding Bell had breached an express warranty, the court continued its discussion, and held that damages for breach of warranty may be disclaimed or limited, notwithstanding the fact that the claim is brought through the DTPA. Thus, *FDP* establishes two important rules regarding the relationship between breach of warranty and the DTPA. First, it recognizes that breach of warranty is actionable through the DTPA; while breach of contract is not. Second, damages for warranty claims may be reduced or eliminated through the use of a disclaimer or limitation of damage provision. For example, in *FDP*, although the plaintiff prevailed on its breach of warranty claim, the court limited its damages based on a provision in the contract.

26 94 S.W.3d 762 (Tex. App.—San Antonio 2002).

27 *Id.* at 769.

28 176 S.W.3d 618 (Tex. App.—Corpus Christi 2005, pet. filed).

29 The court stated:

Attorney’s fees are generally recoverable for a successful action on breach of contract. However, because breach of contract is not a valid basis for the trial court’s judgment, the award of attorney’s fees is not proper on that ground and Texas courts have consistently held that a party cannot recover

attorney’s fees under a UCC breach of warranty claim. The trial court therefore erred in awarding attorney’s fees to appellees.

Id. at 633. See also *Ellis v. Precision Engine Rebuilders, Inc.*, 68 S.W.3d 894, 897 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *JHC Ventures, L.P.*, 94 S.W.3d at 769; *Harris Packaging Corp. v. Baker Concrete Constr.*, 982 S.W.2d 62, 69 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

30 A buyer’s only responsibility under a contract is to pay for the goods or services. The failure to pay will always be a breach of contract, entitling the seller to attorney’s fees under section 38.001.

31 This is similar to the distinction between negligence and tort. All negligence actions are torts; however, not all torts are negligence.

32 “An express warranty is entirely a matter of contract.” *Cravens v. Skinner*, 626 S.W.2d 173, 176 (Tex. App.—Fort Worth 1981, no writ) (quoting *Donelson v. Fairmont Foods, Co.*, 252 S.W. 2d 796, 799 (Tex. App.—Waco 1952, writ ref’d n.r.e.). See also *Bossier Chrysler Dodge II v. Rauschenberg*, 201 S.W.3d 787, 805 (Tex. App.—Waco 2006) (to prove the breach of an express warranty, the plaintiff must present proof of the terms of the express warranty and proof that one or more of those terms has been breached).

33 BLACK’S LAW DICTIONARY, 8th ed., at 1618 (2004)

34 See, e.g., *Coca-Cola Bottling Co. v. Smith*, 97 S.W.2d 761 (Tex. Civ. App.—Fort Worth 1936, no writ).

35 TEX. BUS. & COM. CODE §2.314(a).

36 TEX. BUS. & COM. CODE §2.315.

37 The West Digest System has long been the standard for indexing and classifying legal doctrines. As one author recently noted:

When one considers that the United States has over three million reported cases, with about 100,000 new reported cases each year, the need for systematic case-searching techniques is clear. Until the advent of Lexis and Westlaw, the most important tool to locate cases was the digest. Digests consist of headnotes from cases arranged by topic. Over 275,000 headnotes are written each year. West editors place these headnotes into specific digest topics. Editors’ initial choice of digest topics for particular headnotes is extremely important.

Fritz Snyder, *The West Digest System: The Ninth Circuit and the Montana Supreme Court*, 60 MONT. L. REV. 541 at 542 (1999).

38 The WEST DIGEST title “SALES,” includes a sub-heading “VII. REMEDIES OF BUYER” which includes a sub-heading “(C) ACTIONS FOR BREACH OF CONTRACT,” which includes breach of warranty. The courts have long recognized that a UCC breach of warranty claim arises out of the contract. See, e.g., *Fredonia Broadcasting Corp., Inc. v. RCA Corp.*, 481 F.2d 781 at 802 (5th Cir. 1973) wherein the court stated:

Thus, the aggrieved party when faced with an anticipatory repudiation can seek his remedies for breach as provided in U.C.C. §2-711(a) and (b), V.T.C.A. Bus. & C. § 2.711(a) and (b), and can also maintain an action for breach of the contract such as a suit for a breach of warranty.

39 811 S.W.2d 572 (Tex. 1991).

40 In fact, the court recognized that a breach of contract claim is not “exclusive” when it stated, “[w]e reject Bell’s argument that its failure to publish the double quarter column display was exclusively a breach of contract.” *Id.* at 576. As this statement recognizes, breach of contract is not exclusive and includes claims for breach of warranty.

41 146 S.W.3d 79 (Tex. 2002).

42 *Id.* at 89.