

The DTPA and Warranty Law: An Overview

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I. Introduction

This article presents an overview of warranty law and the Texas Deceptive Trade Practices Act (DTPA). The DTPA provides a cause of action for “breach of express and implied warranty.”¹ What constitutes a breach of warranty must be established independently of the DTPA as “there are no true DTPA warranties.”² The relationship between the DTPA and warranty law is complicated. Some claims are best presented as warranty claims under the UCC or common law; other claims are best presented as warranty claims based upon the UCC or common law but pled under the DTPA; still others are best presented by skipping warranty law altogether and instead asserting a DTPA laundry-list violation.

This article necessarily just scratches the surface. The best place to further explore this topic is found in Richard M. Alderman, *The Lawyer’s Guide to the Texas Deceptive Trade Practices Act* ch. 5 (2d ed. 2018).

II. The DTPA and Warranty Law

In 1984, the Texas Supreme Court decided *La Sara Grain v. First Nat'l Bank of Mercedes*, the most important case on warranty claims and the DTPA.³ There, an employee of a business was able to embezzle funds because the bank honored company checks despite not having the required two signatures. The business sued the bank, claiming the bank breached an implied warranty that it would follow its customer's instructions to require two signatures. In oft-quoted language, the court stated, "The DTPA does not define the term 'warranty.' Furthermore, the act does not create any warranties; therefore any warranty must be established independently of the act."⁴ As Richard Alderman has noted, this statement "should be clear and straightforward" but some courts appear to be confused about the relationship between the DTPA and warranty law.⁵

In 2019, the Texas Supreme Court re-affirmed *La Sara's* approach to the DTPA and warranty law.⁶ Despite *La Sara's* very plain statement that the DTPA does not create any warranties and "any warranty must be established independently of the act,"⁷ several courts of appeals somehow managed to hold that the *Melody Home* warranty only existed within the DTPA.⁸ Only the Tyler Court of Appeals and the Fifth Circuit held that the *Melody Home* warranty also could be brought under the common law.⁹ This battle over whether the *Melody Home* warranty was DTPA-only mattered because if a consumer could sue only under the DTPA, then the consumer was under the DTPA's two-year limitations period. Thus, the plaintiff could not seek refuge under a longer limitations period.¹⁰

In *Melody Home*, the Texas Supreme Court held that "an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner is available to consumers suing *under the DTPA*."¹¹ The courts that subsequently held the *Melody Home* warranty was only found in the DTPA were fixated on the "under the DTPA" part of that sentence, concluding it meant "only under the DTPA." This was a surprising interpretation of *Melody Home* because the Texas Supreme Court had already decided that the DTPA did not create any warranties in *La Sara* three years before *Melody Home*. Chief Justice Hecht in *Nghiem* pointed out that the court in *Melody Home* had relied upon *La Sara* and that the court's holding "cannot reasonably be read to directly contradict authority on which we expressly relied."¹² He concluded: "The implied warranty of workmanlike repairs is a creature of the common law. A breach of the warranty can be asserted in an action for violations of the DTPA, but it also can be asserted in a common-law action."¹³

The Texas Supreme Court thus decided that the DTPA's limitations did not apply to the *Melody Home* warranty brought under the common law. Unfortunately, the court ended the opinion with an inconclusive discussion about whether the two-year limitations or the four-year residual limitations period from the Civil Practice and Remedies Code would apply.¹⁴ The issue of the limitations period for the *Melody Home* warranty will have a second round of litigation because the first round only settled that the DTPA's two-year limitations period did not apply.

In order to recover for a breach of warranty under the DTPA, the plaintiff must prove he or she is a consumer, that a warranty was made, the warranty was breached, and that, as a result of the breach, an injury resulted.¹⁵

III. UCC Warranties and the DTPA

If goods are involved, then Chapter 2 of the Texas Busi-

ness and Commerce Code will apply whether the warranty claim is brought under Chapter 2 or the DTPA.

A. UCC Warranties

Chapter 2 establishes three warranties: express warranty, implied warranty of merchantability, and the implied warranty of fitness for a particular purpose.

1. Express Warranty

To recover for the breach of an express warranty, a plaintiff must prove: (1) an express affirmation of fact or promise by the seller relating to the goods; (2) that such affirmation of fact or promise became a part of the basis of the bargain; (3) that the plaintiff relied upon the affirmation of fact or promise; (4) that the goods failed to comply with the affirmation of fact or promise; (5) that the plaintiff was injured by such failure of the product to comply with the express warranty; and (6) that such failure was the cause of plaintiff's injury.¹⁶

Chapter 2 establishes express warranties in section 2.313. Three situations will create an express warranty: (1) any affirmation of fact or promise made by the seller to the buyer that relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise; (2) any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description, and (3)

any sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.¹⁷ Section 2.313 notes that "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."¹⁸ This is known as the "puffing" defense.

A statement that constitutes puffing or "sales talk" won't be considered an express warranty. Puffery is "an expression of opinion by a seller not made as a representation of fact."¹⁹ What is puffing and what is an affirmation of fact or promise obviously will depend on what is said. For example, a homebuilder's statements that the buyers would be getting a "kick butt house" and "would be pleased as punch" were "slang terms constituting an opinion and are not fact assertions."²⁰ Similarly, the homebuilder's statements that the house would be a "magnificent home with a quality level rarely seen in Tarrant County" and that it would be "one of the finest homes in the City" were just expressions of opinion.²¹ But that same homebuilder's statements that a leak was "fixed" and "will not pose a future problem" were actionable.²²

The "fact that the statement is a warranty does not preclude it from being actionable" as a DTPA laundry-list misrepresentation.²³ That is important to remember if the warranty claim would be subject to defenses under warranty law that would not apply to a DTPA misrepresentation claim. But a statement that is considered puffing under warranty law is going nowhere as a DTPA misrepresentation.²⁴ The Texas Supreme Court has stated that misrepresentations are actionable under the DTPA "so long as they are of a material fact and not merely 'puffing' or opinion."²⁵

2. Implied Warranty of Merchantability

Chapter 2 of the Uniform Commercial Code establishes an implied warranty of merchantability for goods "if the seller is a merchant with respect to goods of that kind."²⁶ Section 2.314 gives six examples of the standard that a merchantable good must



meet.²⁷ Most cases discuss whether the goods were fit for their ordinary purpose.²⁸

To recover on a claim for breach of implied warranty of merchantability, the plaintiff must prove: (1) the defendant sold or leased a product to the plaintiff, (2) the product was not merchantable, (3) the plaintiff notified the defendant of the breach, and (4) the plaintiff suffered injury.²⁹ To prove that the good was not merchantable, a plaintiff must show there was some defect in the product, that there was a condition of the goods that rendered them unfit for the ordinary purpose for which they are used because of a lack of something necessary for adequacy.³⁰

While most courts recognized that the implied warranty of merchantability applies to used goods, the Texas courts of appeals were outliers on this issue.³¹ This forty-year reign of error by these courts ended when the Texas Supreme Court finally addressed whether the implied warranty of merchantability applies to used goods.³² The supreme court held that a downstream buyer could sue the manufacturer for breach of the implied warranty of merchantability.³³ The court did not address whether that buyer would have an implied-warranty claim against the immediate seller.³⁴

The courts of appeals had long held otherwise, which put Texas with a very small number of states on this issue.³⁵ The case that led the march down the wrong path was *Chaq Oil Co. v. Gardner Machinery Corp.*, a case decided by the Fourteenth Court of Appeals in 1973.³⁶ In a powerful display of judicial inertia, every other court of appeals that subsequently addressed this issue also held that the implied warranty of merchantability did not apply to used goods.³⁷ The rule became known as the “*Chaq Oil* rule.” In 2012, the Fourteenth Court of Appeals—where the rule was born—tried to limit the effect of its *Chaq Oil* rule by narrowing the holding. The court was well aware of the mess it made, noting that “Texas is one of the few states to follow the *Chaq Oil* Rule; most state courts that have addressed this issue have concluded that a warranty of merchantability is implied in a contract for the sale of goods, even if the buyer purchases the goods knowing that they are used.”³⁸ The court held that *Chaq Oil* only applied when the subsequent buyer was suing the subsequent seller; *Chaq Oil* did not apply when the subsequent buyer was suing the manufacturer.³⁹

The Texas Supreme Court affirmed the court of appeals in an opinion that is often read as a reminder to manufacturers that the implied warranty of merchantability could be disclaimed. Justice Willett, writing for the court, held that the resale of a used good does not “automatically terminate any remaining implied-warranty obligation” for the manufacturer.⁴⁰ Justice Willett seemed wistful about the procedural posture of the case, lamenting that “we take cases as they come, and given how this

cases was tried, we agree with the court of appeals that the downstream buyer was entitled to rely on the implied warranty of merchantability.”⁴¹ The defendant made a pleading error. Because an express disclaimer is an affirmative defense, it had to be pled. While there may have been an as-is clause, the defendant “failed to raise it as an affirmative defense in its pleadings” and the issue was not tried by consent.⁴² The court of appeals held that the manufacturer failed to plead the affirmative defense in the trial court, and the manufacturer did not challenge that holding at the supreme court. Justice Willett sadly had to conclude, “We therefore must affirm the court of appeals on this issue.”⁴³

The Texas Supreme Court next belatedly joined the overwhelming majority of courts on the issue of used goods and merchantability, finding “no reason why the merchant’s legally imposed duty to issue merchantable goods should automatically end when a good passes to subsequent buyers.”⁴⁴ The court disapproved of the *Chaq Oil* rule “insofar as the holding extends to an implied-warranty claim by a second-hand buyer against the original manufacturer.”⁴⁵

The court also declared that “inspection does play a role” in determining whether the second-hand purchaser obtains an implied warranty of merchantability.⁴⁶ The court seemingly suggested that without “a reasonable and prudent examination under the circumstances” the implied warranty of merchantability for used goods is waived.⁴⁷

But inspection probably will not be an issue in the future since Justice Willett spent the rest of the opinion hyping as-is clauses. He helpfully informed manufacturers that the court’s holding on implied warranties and used goods only applies when manufacturers do not “exclude or modify implied warranties, which Texas law undeniably permits.”⁴⁸ The court concluded:

If the manufacturer validly disclaims implied warranties at the first sale, as is commonly done, that disclaimer carries with the good, just as the warranty otherwise would. Absent such disclaimer language, manufacturers do not escape liability merely because a good has transferred owners, and the purchaser of a used good can rely upon an implied warranty created at the time of first sale. The law imposes an obligation that merchants sell merchantable goods, and when they fall short of this standard, a second-hand buyer who suffers an economic loss from a defect has the right of recovery through an implied-warranty action.⁴⁹

3. Implied Warranty of Fitness for Particular Purpose

Section 2.315 states the requirements for the warranty of fitness for particular purpose:

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.⁵⁰

For this implied warranty to operate, the seller must know, or have reason to know, two things: first, the particular purposes for which the goods are required, and, second, that the buyer is relying on the seller to select appropriate goods to accomplish that purpose. If the buyer simply relies on the description of the goods

provided on the container, this warranty does not apply. If such goods do not perform as expected, the warranty of merchantability may be breached, but this warranty requires specific knowledge on the part of the seller. This warranty, like the implied warranty of merchantability, may be modified or excluded.⁵¹

The Official Comments to section 2.315 help explain the scope of this warranty:

1. Whether or not this warranty arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting. Under this section the buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists. The buyer, of course, must actually be relying on the seller.

2. A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.⁵²

The particular purpose must be a particular non-ordinary purpose.⁵³ There are not a lot of fitness for particular purposes cases and even fewer cases with any kind of extended discussion of this type of warranty.⁵⁴

B. Defenses to UCC Warranties

A corollary to *La Sara's* pronouncement that warranty claims must be established independently of the DTPA is that defenses to these warranties also will be brought into the DTPA.⁵⁵ Generally, the provisions of the DTPA cannot be waived or disclaimed; however, DTPA claims based upon breach of express or implied warranty are exceptions to this rule.⁵⁶ Warranty law provides for such defenses as disclaimers and limitations of remedies.

1. Notice

Both the DTPA and Chapter 2 require notice to the defendant. The failure to give timely notice has very different consequences under these statutes. The DTPA requires a 60-day presuit notice and the failure to give notice can only result in abatement.⁵⁷ But section 2.607(c)(1) provides: "Where tender has been accepted, the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."⁵⁸ That means failure to give timely notice for a breach of warranty claim is fatal.⁵⁹ This notice requirement also applies to Chapter 2 breach-of-warranty claims brought under the DTPA.⁶⁰

Because notice is in the nature of a condition precedent rather than an affirmative defense, the burden of alleging and proving proper notice is on the buyer.⁶¹ Typically, notice is a question of fact to be decided by the trier of fact; it is a question of law only if there is no room for ordinary minds to differ.⁶² Obviously, sellers should be able to succeed on dispositive motions when no

notice was given. It is much more difficult to show that actual notice was unreasonable as a matter of law.⁶³

Notice to a remote manufacturer probably is required. It is difficult for a plaintiff to argue that the manufacturer is a "seller" for the purpose of his or her warranty claim but is not a "seller" for the purposes of notice.⁶⁴ This issue of whether notice is required to the remote manufacturer was reserved by the Texas Supreme Court in 1986 and has not yet been addressed by the court.⁶⁵ Five Texas courts of appeals have addressed this issue, with four holding that notice must be given to the remote manufacturer.⁶⁶ The Fifth Circuit has followed the view of the majority of Texas courts of appeals.⁶⁷

2. Disclaimers

The UCC sets the following requirements for the exclusion or modification of express and implied warranties in section 2.316. Texas's version reads in full as follows:

a. Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this chapter on parol or extrinsic evidence (Section 2.202) negation or limitation is inoperative to the extent that such construction is unreasonable.

b. Subject to Subsection (c), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

c. Notwithstanding Subsection (b)

1. unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

2. when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

3. an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.⁶⁸

I have not been able to find a Texas case that has enforced a disclaimer of express warranty under section 2.316.⁶⁹ Cases that have upheld a disclaimer of express warranties have relied upon the court-made rule from *Prudential* that sidesteps the more narrow strictures of section 2.316 or DTPA waiver.⁷⁰

One commentator has explained the difficulty involved in interpreting a express-warranty disclaimer:

The section calls for courts to construe "words

The particular purpose must be a particular non-ordinary purpose.

or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty...as consistent" if reasonable, but a seller's attempt to exclude or modify a warranty fails "to the extent that such construction is unreasonable." As with section 2-313, this section creates confusion. Language creating warranties and disclaiming them can hardly be "consistent." Courts understandably throw up their hands in despair when applying this section too and often decide solely by weighing the specificity and conspicuousness of the disclaimer. Some courts even suggest that an inconsistent disclaimer can trump an express warranty. Most decisions nonetheless seem to favor the express warranty over any disclaimer.⁷¹

In other jurisdictions, disclaimers of express warranties have been enforced where the express warranty does not appear in the written agreement and that agreement either specifically or generally disclaims all oral express warranties.⁷²

There are many more cases on disclaimers of implied warranties than disclaimers of express warranties. The issue in these cases typically is whether the disclaimer was conspicuous.⁷³ Section § 1.201(10) says "conspicuous" means "so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it." Whether a term is "conspicuous" is a matter of law.⁷⁴ Section § 1.201(10) gives these examples of "conspicuous terms":

- (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
- (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.⁷⁵

3. Limitation of Liability

Chapter 2 allows parties to limit liability and remedies.

Section 2.719 provides:

a. Subject to the provisions of Subsections (b) and (c) of this section and of the preceding section on liquidation and limitation of damages,

(1) the agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(2) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

b. Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this title.

c. Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.⁷⁶

In *Southwestern Bell Tel. Co. v. FDP Corp.*, the supreme court made a distinction between a non-warranty DTPA claim and a warranty-based DTPA claim: the warranty claim could be limited by a limitation-of-liability clause while the non-warranty DTPA claim could only be affected by the DTPA's waiver provision, not by a limitation-of-liability clause. The court explained:

We agree that a liability limitation would be invalid under §17.42 insofar as it purported to waive liability for an act defined as deceptive under §17.46(b). Unlike a "laundry list" claim, however, an action for breach of warranty is not a creation of the Act. Because claims for breach of warranty derive from common-law principles of other statutory provisions, we must consult these sources in determining the nature and extent of warranties. For example, the UCC creates an implied warranty of merchantability, and it also allows sellers to disclaim the warranty if certain specific prerequisites are met. Such a disclaimer does not offend the "no waiver" provision in a suit for breach of warranty under the DTPA.⁷⁷

While *Prudential Ins. of Am. v. Jefferson Assocs.* complicates this distinction when as-is clauses are involved, this dichotomy of warranty versus non-warranty claims and the efficacy of limitation-of-liability clauses within the DTPA still stands.⁷⁸

Limitation-of-liability clauses are routinely enforced in Texas courts on claims based upon breach of warranty or contract.⁷⁹ Some courts have noted, "So long as the agreement does not violate public policy, it will be enforceable; it will not violate public policy if there is no disparity in bargaining power between the parties."⁸⁰ The language about disparity of bargaining power might afford some room for a plaintiff to argue that the clause is not enforceable.

The Texas Supreme Court recently addressed whether limitation-of-liability clauses in the parties' agreements barred a punitive damages award.⁸¹ The purchase agreement for an aircraft stated: "Flexjet will not be liable to either customer for any indirect, special, consequential damages as punitive damages."⁸² The seller failed to disclose problems with aircrafts two engines; the engines had problems; a lawsuit ensued.⁸³ Plaintiffs sued for both breach of contract and fraud. The jury awarded \$2,694,160 in actual damages for fraud and \$5,388,320 in exemplary damages.⁸⁴ The plaintiffs chose to recover under fraud.

The supreme court upheld the legal sufficiency of the evidence to support the award of actual damages for fraud, but reversed the punitive damages award.⁸⁵ The court asserted that "a damages-limitation clause is a limited warranty that is the basis of the bargain and will limit recovery to the limited damages."⁸⁶ In other words, the defendant was giving the plaintiffs a better price because it no longer had to worry about its exposure to punitive damages. The court also pointed out such clauses are "generally valid and enforceable."⁸⁷ Critical to the court's pro-fraud jurisprudence is its reliance on the "strongly

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embedded public policy favoring freedom of contract.”⁸⁸

The plaintiffs’ argument basically was that fraud changes everything, pointing to supreme court precedent that had held “fraud vitiates whatever it touches.”⁸⁹ The court of appeals concluded that “a buyer cannot be bound by an agreement waiving exemplary damages if the seller commits fraud by nondisclosure.”⁹⁰ Enforcement of the limitation-of-damages clause would allow sellers to “deliberately fail to disclose material facts to entice a buyer to enter a contract and then shield himself from a damage to which the buyer is entitled.”⁹¹

The supreme court rejected plaintiff’s fraud-is-bad arguments and reversed this portion of the trial court’s judgment. The court concluded instead that fraud is not so bad that it would render the limitation-of-damages clause ineffective. The court pointed out:

We have never held, however, that fraud vitiates a limitation-of-liability clause. We must respect and enforce terms of a contract that parties have freely and voluntarily entered.... We note that the purchasing parties did not waive a claim for fraud; they only waived the ability to recover punitive damages for any fraud.⁹²

The court was being a little disingenuous when it said it had never held that that fraud vitiates a limitation-of-liability clause. Since this was a case of first impression, the court also had never held that fraud does vitiate a limitation-of-liability clause. If fraud vitiates everything it touches, it seems like it would have vitiated this clause. In any event, the court found that the defendant’s fraud did not touch this clause.

Such limitation-of-liability clauses now will be enforced against contract of warranty claims or warranty claims brought under DTPA. These clauses still should not be enforced against DTPA laundry-list or unconscionability claims.⁹³

Both DTPA waivers and Chapter 2 disclaimers of implied warranties must be conspicuous. But a limitation-of-liability clause probably does not have to be conspicuous because it would not be considered to have shifted risk in such an extraordinary way that it exculpated a party from the consequences of its own future negligence.⁹⁴

4. Statute of Limitations

Chapter 2 provides for a four-year limitations period. It states, in pertinent part, that:

a. An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

b. A cause of action accrues when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.⁹⁵

A warranty claim brought through the DTPA would



be subject to the DTPA’s two-year limitation period.⁹⁶ Chapter 2 seemingly provides a longer limitations period than that of the DTPA but it that may not be true in all circumstances. Section 2.725 does not include the discovery rule but the DTPA does. Limitations for breach of warranty begin when the breach occurs “regardless of the aggrieved party’s lack of knowledge of the breach” and the breach occurs upon delivery. But the DTPA’s limitations period begins “after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice.”⁹⁷ This means it is possible that the DTPA might afford more time to sue.

5. Mere Breach of Contract

While a breach of warranty is actionable under the DTPA, a breach of contract, without more, is not.⁹⁸ The Texas Supreme Court noted that “it has long been the rule in Texas that mere nonfeasance under a contract creates liability only for breach of contract” while conceding that courts and commentators have struggled to clarify the boundary between contract claims and other causes of action.⁹⁹ An allegation of a mere breach of contract, without more, also does not constitute a “false, misleading or deceptive act” in violation of the DTPA.¹⁰⁰ Since breach of contract is not actionable under the DTPA, defendants reflexively argue that the plaintiffs’ alleged warranty claims are contract claims.¹⁰¹

A court’s determination of whether a claim is for warranty or contract invariably begins with *FDP Corp.* Courts of appeals characterize claims as breach of contract when the seller fails to make any delivery and as warranty when the seller delivers defective goods.¹⁰²

IV. Common-Law Warranties for Services and the DTPA

A. Common-Law Warranties for Services

Warranties for services are common-law creations. In Texas, express warranties for services borrow from Chapter 2. Texas courts have been very reluctant to establish common-law implied warranties.¹⁰³ The Texas Supreme Court has been willing to establish a common-law implied warranty only when there is a gap to be filled in existing law.¹⁰⁴

1. Express Warranties for Services

Although the warranty provisions of Chapter 2 explicitly do not apply to services, the Texas Supreme Court has held that Chapter 2 is “instructive” for express warranties for services.¹⁰⁵ The elements of a claim for breach of an express warranty for

services are: “(1) the defendant sold services to the plaintiff; (2) the defendant made a representation to the plaintiff about the characteristics of the services by affirmation of fact, by promise, or by description; (3) the representation became part of the basis of the bargain; (4) the defendant breached the warranty; (5) the plaintiff notified the defendant of the breach; and (6) the plaintiff suffered injury.”¹⁰⁶

2. Implied Warranties for Services

At the absolute height of the remedial revolution in American courts, the Texas Supreme Court recognized the implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner.¹⁰⁷ But even the relatively liberal *Melody Home* court assured doctors and lawyers that the issue of “whether an implied warranty applies to services in which the essence of the transaction is the exercise of professional judgement by the service provider” was not before the court.¹⁰⁸ Seventeen years before *Melody Home*, the Texas Supreme Court held that a home builder impliedly warranted that a house was constructed in a good workmanlike manner and was suitable for human habitation.¹⁰⁹

The *Melody Home* and *Humber* warranties remain the most significant common-law warranties in Texas. Texas courts have taken a very conservative approach to implied service warranties for the last thirty years. In *Parkway Co. v. Woodruff*, the supreme court cautioned that “an implied warranty will not be judicially imposed unless there is a demonstrated need for it.”¹¹⁰ Since *Melody Home* was decided in 1987, no Texas court has recognized any new implied warranties. In *Murphy v. Campbell*, the supreme court held there was no cause of action for breach of an implied warranty of accounting services.¹¹¹ That would have been a significant change of Texas warranty law and the supreme court was no longer interested in such dramatic changes.

Plaintiffs also have tried arguing for small, incremental changes in service warranty law. These attempts to create new, relatively minor, implied warranties have all failed. Courts have rebuffed attempts to establish an implied warranty for services incidental to helicopter maintenance,¹¹² or an implied warranty of the security of property left in a health club locker,¹¹³ or an implied warranty to provide reasonably proficient and safe and sound banking services.¹¹⁴ Plaintiffs have succeeded only when arguing their case fits squarely within the parameters of already established implied warranties. For example, in *Archibald v. Act III Arabians*, the plaintiff won in the Texas Supreme Court by showing in a horse-training case that the horse was the tangible good and the horse training was the repair or modification of an existing good.¹¹⁵ The Austin Court of Appeals refused to extend the *Melody Home* good and workmanlike performance to a subcontractor.¹¹⁶ Any petition that now asks a court to recognize a new implied service warranty would now be subject to the new Rule 91a motion to dismiss.¹¹⁷

If a rogue court were to create an implied warranty for professional services, the DTPA contains a firewall that would prevent any such warranty from becoming a DTPA claim. In 1995, the legislature added the professional services exemption, which initially provides that the DTPA does not apply to any claim for damages “based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill.”¹¹⁸ But this exemption does not apply to any “express misrepresentation or a material fact that cannot be characterized as advice, judgment, or opinion.”¹¹⁹ At first glance, it appears to mean that professional services are exempt from most DTPA claims unless the consumer can prove a DTPA violation, which does not seem to accomplish much. But one claim is not listed in these exceptions—implied warranties.

At the very least, a dispositive motion based upon the professional services exemption would eliminate any implied warranties. The professional services exemption thus immunizes professionals from any DTPA claim based upon an implied warranty. In 2011, the Texas legislature gave realtors an even better deal. An exemption was added for realtors that blocks any DTPA claim based upon either express or implied warranties.¹²⁰

B. Defenses to Common-Law Warranties

1. Defenses to Express Service Warranties

The defense of puffing would be available to any service express warranty claims.¹²¹ In *Humble National Bank*, the court of appeals held that the bank’s slogan “A Tradition of Excellence” was so vague and general that it is impossible to know what is expressly warranted.¹²² Similarly, the bank’s purported policy of “knowing its customers” was not sufficiently specific regarding the services to be performed.¹²³

2. Superseding Implied Service Warranties

Implied service warranties are considered “gap-fillers” by the Texas Supreme Court. When there is no gap, there is no implied warranty. This approach was adopted in *Centex Homes*, where the court addressed whether a homebuilder may disclaim the implied warranties of habitability and good and workmanlike construction that accompany a new home sale. The court held the implied warranty of habitability cannot be waived except under limited circumstances where somebody buys a “problem house with express and full knowledge of the defects that affect its habitability.”¹²⁴ But when the parties’ agreement sufficiently describes the manner, performance or quality of construction, the express agreement may supersede the implied warranty of good workmanship because the implied warranty is no longer needed to protect the buyer.¹²⁵

When the Texas Supreme Court in *Melody Home* decided to recognize the implied warranty, it also foresaw that service providers would attempt to disclaim the warranty. Instead of waiting for that issue to reach the court, the court preemptively held 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.”¹²⁶ In 2013, the court revisited whether the *Melody Home* warranty could be disclaimed or superseded in *Gonzales v. Southwest Olshan Foundation Repair Co.*¹²⁷ The court was guided by its reasoning in *Centex*, explaining:

The *Melody Home* warranty is a “gap-filler” warranty similar to the one we addressed in *Centex Homes v. Buecher* for good and workmanlike construction of a new home. As in *Buecher*, we hold that parties cannot disclaim but can supersede the implied warranty for good and workmanlike repair of tangible goods or property if the parties’ agreement specifically describes the manner, performance, or quality of the services. Because the parties’ agreement here specifies that the service provider would perform foundation repair in a good and workmanlike manner and adjust the foundation for the life of the home due to settling, the express warranty sufficiently describes the manner, performance, or quality of the services so as to supersede the *Melody*

Home implied warranty.¹²⁸

The court belatedly found that the *Melody Home* implied warranty of good and workmanlike repair of tangible goods or property was a “gap-filler” warranty. It found this gap-filler warranty may not be disclaimed but may be superseded if “the parties’ agreement sufficiently describes the manner, performance or quality” of the services.¹²⁹ Based upon the facts in the case, the court set a low bar on whether the *Melody Home* warranty has been superseded by the agreement. After *Gonzales*, the implied warranty of good and workmanlike repair of tangible goods or property only attaches to a contract if the parties’ agreement does not provide for the quality of the services to be rendered or how such services are to be performed.

V. Attorneys Fees and Warranty Claims

It is long-settled law in Texas that a party who prevails in a lawsuit is entitled to recover attorneys fees only if permitted by statute or by contract.¹³⁰ If a consumer prevails on any warranty claim brought through the DTPA, then she is entitled to attorneys fees.¹³¹

A plaintiff also can recover attorneys fees for a breach of an express warranty under Chapter 38.¹³² The supreme court held in 2008 that Texas Civil Practice and Remedies Code section 38.001(8), which allows attorneys fees for claims based on oral or written contracts, applied to breach of express warranty claims.¹³³ The court reasoned that an express warranty claim is based upon contract because it is “part of the basis of a bargain and is contractual in nature.”¹³⁴

Two courts of appeals have held that Chapter 38 also applies to implied warranties provided the plaintiff is claiming damages from economic loss only.¹³⁵ The First Court of Appeals was fairly persuasive in the *Howard Industries* case that a breach of implied warranty of merchantability was based upon contract because “an implied warranty becomes part of the terms of a contract.”¹³⁶ The court of appeals noted that the Texas Supreme Court instructed that “[i]mplied warranties are created by operation of law and are grounded more in tort than in contract.”¹³⁷ But the court of appeals also noted that the supreme court had explained in *JCW Electronics* that, “[c]onceptually, the breach of an implied warranty can either be in contract or in tort depending on the circumstances,” noting that “Dean Prosser observed long ago, this area of the law is complicated ‘by the peculiar and uncertain nature and character of warranty, a freak hybrid born of the illicit intercourse of tort and contract.’”¹³⁸ Two other courts of appeals have held that recovery of attorneys fees for a common-law breach of implied warranty claim is not authorized by statute.¹³⁹

The Texas Supreme Court probably would follow the reasoning from *Howard Industries* and allow attorneys fees when the claim is about economic loss only. If it does not though, then the implied warranty claims could be brought through the DTPA, where attorneys fees would be mandated if the plaintiff prevails.

VI. Conclusion

Since changes to the DTPA in 1995, plaintiffs lawyers have increasingly ignored its provisions. Those lawyers should not overlook the possibility of bringing claims for breach of express or implied warranty under the DTPA. Pleading a warranty claim under the DTPA should ensure the award of attorneys’ fees for successful plaintiffs and possibly allow for the award of additional damages if predicate findings are met. Whether to plead a warranty claim under the DTPA deserves careful review. And the old adage “don’t put all your eggs in one basket” has particular relevance to plaintiffs’ pleadings.

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1 TEX. BUS. & COM. CODE § 17.50(A)(2).

2 *Enterprise-Laredo Assocs. v. Hacha’s, Inc.*, 839 S.W.2d 822, 830 (Tex. App.—San Antonio 1992, writ denied).

3 673 S.W.2d 558 (Tex. 1984).

4 *Id.* at 565.

5 RICHARD ALDERMAN, THE LAWYER’S GUIDE TO THE TEXAS DECEPTIVE TRADE PRACTICES ACT § 5.02 (2d ed. 2018).

6 *Nghiem v. Sajib*, 567 S.W.3d 718 (Tex. 2019).

7 *La Sara Grain Co.*, 673 S.W.2d at 565.

8 *Southwest Olshan Found. Repair Co. v. Gonzales*, 345 S.W.3d 431, 437 (Tex. App.—San Antonio 2011), *aff’d on other grounds*, 400 S.W.3d 52 (Tex. 2013); *Foreman v. Pettit Unlimited, Inc.*, 886 S.W.2d 409, 412 (Tex. App.—Houston [1st Dist.] 1994, no writ); *Darr Equip. Co. v. Allen*, 824 S.W.2d 710, 712 (Tex. App.—Amarillo 1992, writ denied).

9 *Basic Energy Serv., Inc. v. D-S-B Props., Inc.*, 367 S.W.3d 254, 268-269 (Tex. App.—Tyler 2011, no pet.); *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 362-363 (5th Cir. 1988).

10 *See Walker*, 853 F.2d at 363.

11 *Melody Home Mfg Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987) (emphasis added).

12 *Nghiem*, 567 S.W.3d at 723.

13 *Id.*

14 *See* TEX. CIV. PRAC. & REM. CODE §§ 16.003, 16.051.

15 *McDade v. Texas Commerce Bank Nat’l Ass’n*, 822 S.W.2d 713, 718 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

16 *Great Am. Prods. v. PermaBond Int’l*, 94 S.W.3d 675, 681 (Tex. App.—Austin 2002, no pet.).

17 TEX. BUS. & COM. CODE § 2.313.

18 *Id.*

19 *Dowling v. NADW Mktg., Inc.*, 631 S.W.2d 726, 729 (Tex. 1982).

20 *Kramer v. Hollman*, No. 02-11-00136-CV (Tex. App.—Fort Worth Nov. 21, 2012, pet. denied) (mem. op.).

21 *Id.* at *3.

22 *Id.* at *5.

23 ALDERMAN, *supra* note 5, § 5.02.

24 *Humble Nat’l Bank v. DCV, Inc.*, 933 S.W.2d 224, 229-230 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

25 *Pennington v. Singleton*, 606 S.W.2d 682, 687 (Tex. 1980); *see also Kessler v. Fanning*, 953 S.W.2d 515, 519 (Tex. App.—Fort Worth 1997, no pet.).

26 TEX. BUS. & COM. CODE § 2.314.

27 *Id.*

28 *See, e.g., MAN Engines & Components, Inc. v. Shows*, 434 S.W.3d 132 (Tex. 2014); *Garrick v. Autoliv ASP, Inc.*, No. 14-17-00818-CV (Tex. App.—Houston [14th Dist.] July 12, 2018, no pet.) (mem. op.); *Tatsch v. Chrysler Group, LLC*, No. 04-13-00757-CV (Tex. App.—San Antonio Dec. 3, 2014, no pet.) (mem. op.).

29 *Equistar Chems., L.P. v. Dresser-Rand Co.*, 240 S.W.3d 864, 867 (Tex. 2007) (quoting *Polaris Indus. v. McDonald*, 119 S.W.3d 331, 336 (Tex. App.—Tyler 2003, no pet.)).

30 *See Plas-Tex, Inc. v. United States Steel Corp.*, 772 S.W.2d 442, 444 (Tex. 1989).

31 See, e.g., *Beck Enters., Inc. v. Hester*, 512 S.W.2d 672, 675-76 (Miss. 1987).

32 *MAN Engines & Components, Inc.*, 434 S.W.3d at 132.

33 *Id.* at 142.

34 *Id.* at 138.

35 See *Shows v. MAN Engines & Components, Inc.*, 364 S.W.3d 348, 352 (Tex. App.—Houston [14th Dist.] 2012), *aff'd*, 434 S.W.3d 132 (Tex. 2014); see also Diane Schmauder, *Annotation, Liability on Implied Warranties in Sale of Used Motor Vehicle*, 47 A.L.R. 5th 677 § 3 (1997).

36 500 S.W.2d 877 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).

37 See, e.g., *Southerland v. Northeast Datsun, Inc.*, 659 S.W.2d 889, 891 (Tex. App.—El Paso 1983, no writ).

38 *Shows*, 364 S.W.3d at 352.

39 *Id.* at 352-53.

40 *MAN Engines & Components, Inc. v. Shows*, 434 S.W.3d 132, 134 (Tex. 2014).

41 *Id.*

42 *Id.* at 135.

43 *Id.* at 137.

44 *Id.* at 138.

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.* at 140.

49 *Id.* at 141-42.

50 TEX. BUS. & COM. CODE § 2.315.

51 *Id.*

52 TEX. BUS. & COM. CODE § 2.315 Official Comments cmts. 1-2 (2019).

53 *Chandler v. Gene Messer Ford, Inc.*, 81 S.W.3d 493, 503 (Tex. App.—Eastland 2002, no pet.).

54 See, e.g., *Strauss v. Ford Motor Co.*, 439 F. Supp. 2d 680, 686 (N.D. Tex. 2006) (using a car for transportation is not a particular purpose).

55 See *Materials Mktg. Corp. v. Spencer*, 40 S.W.3d 172, 175 (Tex. App.—Texarkana 2001, no pet.).

56 *Southwestern Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 576 (Tex. 1991).

57 TEX. BUS. & COM. CODE § 17.505(A), (C).

58 TEX. BUS. & COM. CODE § 2.607(C)(1).

59 *Hull v. South Coast Catamarans, L.P.*, 365 S.W.3d 35, 43-44 (Tex. App.—Houston [1st Dist.] 2011, pet. denied); *U.S. Tire-Tech, Inc. v. Boeran, B.V.*, 110 S.W.3d 194, 198-202 (Tex. App.—Houston [1st Dist.] 2003, pet. denied); *Lochinvar Corp. v. Meyers*, 930 S.W.2d 182, 189-90 (Tex. App.—Dallas 1995, no writ.).

60 See *Southwest Lincoln-Mercury, Inc. v. Ross*, 580 S.W.2d 2, 4 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

61 *Hull*, 365 S.W.3d at 43-44; *U.S. Tire-Tech, Inc.*, 110 S.W.3d at 199-200.

62 *Hull*, 365 S.W.3d at 43-44.

63 *Compare Ketter v. ESC Med. Sys., Inc.*, 169 S.W.3d 791 (Tex. App.—Dallas 2005, no pet.) (notice received two years and seven months after sale was not unreasonable as a matter of law when the date of discovery of breach not shown) *with Southerland v. Northeast Datsun, Inc.*, 659 S.W.2d 889, 892-93 (Tex. App.—El Paso 2005, no writ) (notice given three years, eleven months after discovery of breach is unreasonable as a matter of law).

64 *Compare* TEX. BUS. & COM. CODE § 2.313-2.315 WITH TEX. BUS. & COM. CODE § 2.607 (C) (1); see also *McKay v. Novartis Pharm. Corp.*, 751 F.3d 694, 706-07 (5th Cir. 2014).

65 *Wilcox v. Hillcrest Mem'l Park*, 701 S.W.2d 842 (Tex. 1986) (per curiam); *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 674 (Tex. 2004).

66 *Barocio v. General Electric Co.*, No. 07-12-00311-CV (Tex. App.—Amarillo Jan. 3, 2014, no pet.) (mem. op.) (notice required); *Bailey v. Smith*, No. 13-05-085-CV (Tex. App.—Corpus Christi May 18, 2006, no pet.) (mem. op.) (notice required); *U.S. Tire-Tech, Inc. v. Boeran, B.V.*, 110 S.W.3d 194, 199 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (notice required); *Wilcox v. Hillcrest Mem'l Park of Dallas*, 696 S.W.2d 423, 424-25 (Tex. App.—Dallas 1995), writ *ref'd per curiam*, 701 S.W.2d 842 (Tex. 1986) (notice required); *Vintage Homes, Inc. v. Coldiron*, 585 S.W.2d 886, 888 (Tex. App.—El Paso 1979, no writ) (only notice to immediate seller required).

67 *McKay*, 751 F.3d at 706-07.

68 TEX. BUS. & COM. CODE § 2.316. The helpful Official Comments to this section provide as follows:

1. This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude “all warranties, express or implied.” It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise. . . .

3. Disclaimer of the implied warranty of merchantability is permitted under subsection (2), but with the safeguard that such disclaimers must mention merchantability and in case of a writing must be conspicuous.

4. Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous.

5. Subsection (2) presupposes that the implied warranty in question exists unless excluded or modified. Whether or not language of disclaimer satisfies the requirements of this section, such language may be relevant under other sections to the question whether the warranty was ever in fact created. Thus, unless the provisions of this Article on parol and extrinsic evidence prevent, oral language of disclaimer may raise issues of fact as to whether reliance by the buyer occurred and whether the seller had “reason to know” under the section on implied warranty of fitness for a particular purpose.

6. The exceptions to the general rule set forth in paragraphs (a), (b) and (c) of subsection (3) are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer’s attention to the fact that no implied warranties are made or that a certain implied warranty is being excluded.

7. Paragraph (a) of subsection (3) deals with general terms such as “as is,” “as they stand,” “with all faults,” and the like. Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved. The terms covered by paragraph (a) are in fact merely a particularization of paragraph (c) which provides for exclusion or modification of implied warranties by usage of trade.

8. Under paragraph (b) of subsection (3) warranties may be excluded or modified by the circumstances where the buyer examines the goods or a sample or model of them before entering into the contract. “Examination” as used in this paragraph is not synony-

mous with inspection before acceptance or at any other time after the contract has been made. It goes rather to the nature of the responsibility assumed by the seller at the time of the making of the contract. Of course if the buyer discovers the defect and uses the goods anyway, or if he unreasonably fails to examine the goods before he uses them, resulting injuries may be found to result from his own action rather than proximately from a breach of warranty.

In order to bring the transaction within the scope of “refused to examine” in paragraph (b), it is not sufficient that the goods are available for inspection. There must in addition be a demand by the seller that the buyer examine the goods fully. The seller by the demand puts the buyer on notice that he is assuming the risk of defects which the examination ought to reveal. The language “refused to examine” in this paragraph is intended to make clear the necessity for such demand.

Application of the doctrine of “caveat emptor” in all cases where the buyer examines the goods regardless of statements made by the seller is, however, rejected by this Article. Thus, if the offer of examination is accompanied by words as to their merchantability or specific attributes and the buyer indicates clearly that he is relying on those words rather than on his examination, they give rise to an “express” warranty. In such cases the question is one of fact as to whether a warranty of merchantability has been expressly incorporated in the agreement. Disclaimer of such an express warranty is governed by subsection (1) of the present section.

The particular buyer’s skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination. A failure to notice defects which are obvious cannot excuse the buyer. However, an examination under circumstances which do not permit chemical or other testing of the goods would not exclude defects which could be ascertained only by such testing. Nor can latent defects be excluded by a simple examination. A professional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in the field ought to observe, while a nonprofessional buyer will be held to have assumed the risk only for such defects as a layman might be expected to observe. TEX. BUS. & COM. CODE § 2.316 Official Comments.cmts. 1, 3-8 (2019)

69 See, e.g., *Luig v. North Bay Enterprises, Inc.*, 55 F. Supp. 3d 942 (N.D. Tex. 2014); *Materials Mktg. Corp. v. Spencer*, 40 S.W.3d 172, 175 (Tex. App.—Texarkana 2001, no pet.); *Mobile Housing, Inc. v. Stone*, 490 S.W.2d 611, 615 (Tex. Civ. App.—Dallas 1973, no writ).

70 See, e.g., *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 110-11 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

71 Robert A. Hillman, *U.C.C. Article 2 Express Warranties and Disclaimers in the Twenty-First Century*, 11 DUQ. BUS. L.J. 167, 170-71 (2009).

72 Kurt M. Saunders, *Can You Ever Disclaim an Express Warranty?*, 9 J. BUS. ENTREPRENEURSHIP & L. 59, 64-65 (2016).

73 See, e.g., *Fieldtech Avionics & Instruments, Inc. v. Component Control.Com, Inc.*, 262 S.W.3d 813 (Tex. App.—Fort Worth 2008, no pet.); *Cronus Offshore, Inc. v. Kerr McGee Oil & Gas Corp.*, 369 F. Supp. 2d 848 (E.D. Tex. 2004), *aff’d*, 133 F. App’x 944 (5th Cir. 2005).

74 *Fieldtech Avionics & Instruments, Inc.*, 262 S.W.3d at 829.

75 *Id.*; see also *Cate v. Dover Corp.*, 790 S.W.2d 559, 560-61 (Tex. 1990).

76 TEX. BUS. & COM. CODE § 2.719.

77 *Southwestern Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 576-77 (Tex. 1991).

78 896 S.W.2d 156 (Tex. 1995). On limitation-of-liability clauses and DTPA non-warranty claims, see *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 505 (Tex. 2001) (limitation-of-liability clauses cannot preclude plaintiff’s lost-profit recovery for DTPA misrepresentations or unconscionability); see also *Arthur’s Garage, Inc. v. Racal-Chubb Sec. Sys.*, 997 S.W.2d 803, 811 (Tex. App.—Dallas 1999, no pet.).

79 *Head v. U.S. Inspect DFW, Inc.*, 159 S.W.3d 731 (Tex. App.—Fort Worth 2005, no pet.).

80 *Fox Elec. Co. v. Tone Guard Sec.*, 861 S.W.2d 79, 82-83 (Tex. App.—Fort Worth 1993, no writ.); see also *Albright, Inc. v. Elledge*, 515 S.W.2d 266, 267 (Tex. 1974).

81 *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings*, 572 S.W.3d 213 (Tex. 2019).

82 *Id.* at 217.

83 *Id.* at 218-19.

84 *Id.* at 219.

85 *Id.* at 233-34.

86 *Id.* at 230.

87 *Id.* at 231.

88 *Id.* at 230.

89 *Id.* at 232 (citing *Hooks v. Samson Lone Star, Ltd. P’ship*, 457 S.W.3d 52 (Tex. 2015)). *Fraus omnia corrumpit* (fraud vitiates everything it touches) is a long-recognized rule in Texas. See, e.g., *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co.*, 341 S.W.3d 323, 336 (Tex. 2011); *Computer Assocs. Int’l v. Altai*, 918 S.W.2d 453, 455 (Tex. 1994); *Borderlon v. Peck*, 661 S.W.2d 907, 908-09 (Tex. 1983); *Morris v. House*, 32 Tex. 492, 495 (1870).

90 *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 565 S.W.3d 280, 305 (Tex. App.—Dallas 2017), *rev’d in part*, 572 S.W.3d 213 (Tex. 2019).

91 *Id.*

92 *Bombardier Aerospace Corp.*, 572 S.W.3d at 232.

93 *Southwestern Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 576 (Tex. 1991).

94 *Bergholtz v. Southwestern Bell Yellow Pages, Inc.*, 324 S.W.3d 195, 199 (Tex. App.—El Paso 2010, no pet.).

95 TEX. BUS. & COM. CODE § 2.725.

96 *Lochinvar Corp. v. Meyers*, 930 S.W.2d 182, 188 (Tex. App.—Dallas 1996, no writ).

97 TEX. BUS. & COM. CODE § 17.565.

98 See *Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12 (Tex. 1996) (per curiam).

99 *Id.* at 13.

100 *Ashford Development, Inc. v. USLife Real Estate Servs.*, 661 S.W.2d 933, 935 (Tex. 1983).

101 See *Southwestern Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 574 (Tex. 1991) (“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.”); see generally ALDERMAN, THE LAWYER’S GUIDE TO THE TEXAS DECEPTIVE TRADE PRACTICES ACT §8.023.

102 See, e.g., *Ellis v. Precision Engine Rebuilders, Inc.*, 68 S.W.3d 894 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

103 See, e.g., *Dennis v. Allison*, 698 S.W.2d 94 (Tex. 1985) (no need to impose an implied warranty theory as a matter of public policy because the patient of a psychiatrist has adequate remedies to redress wrongs committed during treatment).

104 *Centex Homes v. Buecher*, 95 S.W.3d 266, 273 (Tex. 2002).

105 *Southwestern Bell Tel. Co.*, 811 S.W.2d at 575.

106 *Paragon Gen. Contractors, Inc. v. Larco Constr., Inc.*, 227 S.W.3d 876, 886 (Tex. App.—Dallas 2007, no pet.).

107 *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349 (Tex. 1987).

108 *Id.* at 354.

109 *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968).

110 901 S.W.2d 434, 439 (Tex. 1995).

111 964 S.W.2d 265 (Tex. 1997).

112 *Rocky Mountain Helicopter, Inc. v. Lubbock County Hosp. Dist.*, 987 S.W.2d 50 (Tex. 1999).

113 *Sisters of Charity of the Incarnate Word, Houston, Texas v. Meaux*, 122 S.W.3d 428 (Tex. App.—Beaumont 2003, pet. denied).

114 *Humble Nat'l Bank v. DCV, Inc.*, 933 S.W.2d 224 (Tex. App.—Houston [14th Dist.] 1996, writ denied.).

115 755 S.W.2d 84 (Tex. 1988).

116 *Codner v. Arellano*, 40 S.W.3d 666 (Tex. App.—Austin 2001, no pet.).

117 TEX. R. CIV. P. 91a.

118 TEX. BUS. & COM. CODE § 17.49(c).

119 *Id.*

120 *See id.* § 17.49 (i).

121 *Humble Nat'l Bank v. DCV, Inc.*, 933 S.W.2d 224 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

122 *Id.* at 231.

123 *Id.*

124 *Centex Homes v. Buecher*, 95 S.W.3d 266, 274 (Tex. 2002).

125 *Id.* at 275.

126 *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987).

127 400 S.W.3d 52 (Tex. 2013).

128 *Id.* at 53.

129 *Id.* at 56 (quoting *Centex Homes*, 95 S.W.3d at 268).

130 *Medical City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 58 (Tex. 2008).

131 *Elliott v. Kraft Foods N. Am., Inc.*, 118 S.W.3d 50, 58-59 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (holding the trial court's failure to award attorneys' fees was reversible error when consumer established a claim for breach of implied warranty of merchantability).

132 *Medical City Dallas, Ltd.*, 251 S.W.3d at 63.

133 *Id.*

134 *Id.* at 60.

135 *Howard Indus. v. Crown Cork & Seal Co., LLC*, 403 S.W.3d 347, 351-52 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (breach of implied warranty of merchantability); *City Direct Motor Cars, Inc. v. Expo Motorcars, L.L.C.*, No. 14-13-00122-CV (Tex. App.—Houston [14th Dist.] June 5, 2014, no pet.) (mem. op.) (breach of implied warranty of title).

136 403 S.W.3d at 352.

137 *Id.* (citing *JCW Elecs., Inc. v. Garza*, 257 S.W.3d 701, 704 (Tex. 2008)).

138 *Id.*

139 *Basic Energy Serv., Inc. v. D-S-B Props., Inc.*, 367 S.W.3d 254, 268-69 (Tex. App.—Tyler 2011, no pet.); *7979 Airport Garage L.L.C. v. Dollar Rent A Car Sys.*, 245 S.W.3d 488, 507-09 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).