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THE UNIFORM COMMERCIAL CODE AND THE DECEPTIVE TRADE PRACTICES ACT

EUGENE M. ANDERSON, JR.*

When the Texas Legislature passed the Deceptive Trade Practices-Consumer Protection Act¹ in 1973, it provided that a consumer may maintain an action for damages caused by the failure of any person to comply with an express warranty.² There is no definition of express or implied warranty in the Act, nor does it purport to create warranties.³ But elsewhere in the Texas Business and Commerce Code, of which the Act forms a part, warranties are created and their scope defined.⁴ Chapter 2 of the Uniform Commercial Code details both express and implied warranties, and their application to the sale of goods. These are the only warranties created in the Business and Commerce Code which apply to goods. It therefore seems only logical that these warranties are the ones contemplated by the Deceptive Trade Practices Act (DTPA). In an extraordinary progression, novel among other states, Texas has substantially broadened areas applicable to the warranty concepts of the Uniform Commercial Code. In many UCC breach of warranty actions, Texas has uniquely provided for judgments assessing treble damages, together with court costs and attorneys' fees.⁵

Because of the interesting possibilities, the interaction between the UCC and the DTPA should be examined. The purpose of this article is to demonstrate how UCC provisions are incorporated in the DTPA, and attention will be given to two areas, warranties and unconscionability.

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1. TEX. BUS. & COMM. CODE ANN. §§ 17.41-17.63 (Supp. 1976).

2. *Id.* § 17.50(a)(2).

3. *Cf.* CAL. CIV. CODE §§ 1792-1797.4 (Deering 1972) (consumer warranties). The similarity of language, and conversations by the author with some of the principal drafters of the Deceptive Trade Practices Act, indicate inspiration for some of the Act's provisions may have stemmed from California law. The end result, however, of the Texas legislation is much different from the narrowly drawn California statute. While that statute contains definitions of warranties similar to those found in the UCC, the purpose of the legislation appears to be to simply force manufacturers of products to establish service and repair facilities in California. *See id.* §§ 1793.2, 1793.5.

4. TEX. BUS. & COMM. CODE ANN. §§ 2.312-2.315 (Tex. UCC 1968).

5. TEX. BUS. & COMM. CODE ANN. § 17.50(b)(1) (Supp. 1976).

WARRANTIES

Common Law Warranties

As already noted, the courts will probably hold that the warranties mentioned in the DTPA are those created in the UCC. It is possible, however, that the courts will apply instead the common law warranties which arose before the enactment of the UCC. Therefore, these pre-Code warranties should be examined and compared with those of the UCC.

The UCC creates a warranty of title.⁶ Under pre-Code Texas law, a seller in possession of personal property, who sold it for a fair price, impliedly warranted that he had title.⁷ This implied warranty of title enabled a buyer to obtain relief whenever the seller's title failed, either wholly or partially.⁸ The rule, however, presupposed that the buyer had no notice of the seller's defective title;⁹ consequently, there was no implied warranty of title where the parties had equal knowledge of title defects.¹⁰

Express warranties are created under the UCC by affirmation, promise, description, and sample.¹¹ Pre-Code Texas law maintained that any covenant, promise, or assertion by the seller concerning the quality of the article sold, not offered as an opinion, amounted to a warranty if relied upon by the purchaser.¹² Similarly, a warranty could be created by description, such as where a dealer who sold an article by its commercial name was held to warrant that the article sold was the thing described.¹³ The early cases, however, apparently treated a sale by description as creating an implied rather than express warranty.¹⁴ Ear-

6. TEX. BUS. & COMM. CODE ANN. § 2.313 (Tex. UCC 1968).

7. Hagen v. Brzozowski, 336 S.W.2d 213, 215 (Tex. Civ. App.—San Antonio 1960, no writ); Nichols v. Lorenz, 237 S.W. 629, 633 (Tex. Civ. App.—San Antonio 1922, no writ) (defendant seller made false representations of his undivided interest in cattle).

8. Mathews v. Allen, 6 Tex. 330, 332 (1851).

9. Nichols v. Lorenz, 237 S.W. 629, 633 (Tex. Civ. App.—San Antonio 1922, no writ).

10. See Gurley v. Dickason, 46 S.W. 53, 55 (Tex. Civ. App.—1898, no writ) (both parties charged with knowledge of law of descent and distribution).

11. TEX. BUS. & COMM. CODE ANN. § 2.313 (Tex. UCC 1968).

12. Wintz v. Morrison, 17 Tex. 372, 378-79 (1856); Griswold v. Tucker, 216 S.W.2d 276, 279 (Tex. Civ. App.—Fort Worth 1948, no writ) (defendant seller represented truck to be 1947 model whereas it was actually 1946 model); El Paso & S.W.R.R. v. Eichel & Weikel, 130 S.W. 922, 937 (Tex. Civ. App.—1910, writ ref'd).

13. Hunter Milling Co. v. Satterwhite, 60 S.W.2d 316, 319 (Tex. Civ. App.—Galveston 1933, no writ); American Warehouse Co. v. Ray, 150 S.W. 763, 765 (Tex. Civ. App.—San Antonio 1912, writ ref'd) (seller contracted to deliver pure broom corn but delivered mixed seed instead).

14. See Jones v. George, 61 Tex. 345, 349 (1884); American Warehouse Co. v. Ray,

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ly cases even went so far as to maintain that an implied rather than express warranty was created where the seller expressly agreed that the goods sold would conform to the sample.¹⁵

An implied warranty of merchantability is created by the UCC.¹⁶ Whereas the UCC creates six classifications under which goods may be considered merchantable, the concept of merchantability was not clearly defined by pre-Code Texas law; consequently, it is difficult to draw the line of demarcation between an implied warranty of merchantability and the implied warranty of fitness for a particular purpose.¹⁷

Generally, under pre-Code Texas law there was an implied warranty of merchantability between dealers.¹⁸ The warranty between a dealer and a consumer was that of particular purpose, and the pre-Code law in Texas is settled in concluding that a seller impliedly warrants goods which are purchased for a known purpose.¹⁹ This implied warranty of fitness for a particular purpose is included in the UCC.²⁰ Thus, should

150 S.W. 763, 765 (Tex. Civ. App.—San Antonio 1912, writ ref'd) (law implied warranty from the representations of seller); cf. *Ferguson v. Johnson*, 205 S.W. 512, 513 (Tex. Civ. App.—Amarillo 1918, no writ) (express warranty is collateral to contract, while description is regarded as part of contract).

15. *Boehringer v. Richards Medicine Co.*, 29 S.W. 508, 511-12 (Tex. Civ. App.—1894, no writ). Where there was a sale by sample, pre-Code law implied a warranty on the part of the seller that the goods delivered would correspond to the sample. *Brantley v. Thomas*, 22 Tex. 271, 272 (1858) (tobacco sold by sample includes implied warranty that it should be as good as sample); *Adkins-Polk Co. v. John Barkley & Co.*, 297 S.W. 757, 761 (Tex. Civ. App.—El Paso 1927, writ dismissed).

16. TEX. BUS. & COMM. CODE ANN. § 2.314 (Tex. UCC 1968).

17. Under the pre-Code law, there was no implied warranty in several circumstances. *Anheuser-Busch, Inc. v. Butler*, 180 S.W.2d 996, 997-98 (Tex. Civ. App.—Amarillo 1944, no writ) (beverage seller who does not manufacture bottles does not impliedly warrant safe bottles); accord, *Latham v. Coca-Cola Bottling Co.*, 175 S.W.2d 426, 427 (Tex. Civ. App.—Fort Worth 1943, no writ); *Jax Beer Co. v. Schaeffer*, 173 S.W.2d 285, 287 (Tex. Civ. App.—El Paso 1943, writ ref'd w.o.m.); *Fulwiler Elec. Co. v. Jinks McGee & Co.*, 211 S.W. 480, 482 (Tex. Civ. App.—El Paso 1919, no writ) (warranty of "soundness" inapplicable to apparent defects; no implied warranty of soundness in sale of animals).

18. In *Brantley v. Thomas*, 22 Tex. 271 (1858), it is stated that "where goods are ordered by one dealer and sent by another, there is an implied warranty, that the goods sent . . . are merchantable, and suited to the market where they are to be sold." *Id.* at 274; see *Keeling v. Collins Grain Co.*, 59 S.W.2d 226, 227-28 (Tex. Civ. App.—Fort Worth 1933, no writ).

19. *Four Star Grocery Co. v. Gray*, 97 S.W.2d 355, 359-60 (Tex. Civ. App.—Fort Worth 1936, writ dismissed); *Fulwiler v. Lawrence*, 7 S.W.2d 636, 637 (Tex. Civ. App.—Eastland 1928, no writ).

Although arguably involving implied warranties of fitness for a particular purpose, there are several instances in pre-Code law in which a warranty of merchantability was implied in dealer-consumer transactions. See *Kimball Co. v. Parson*, 49 S.W.2d 821, 822 (Tex. Civ. App.—Amarillo 1932, no writ); *Norvell-Wilder Hardware Co. v. McCamey*, 290 S.W. 772, 773 (Tex. Civ. App.—Eastland 1927, writ dismissed) (a warranty of soundness and suitability will be implied where goods are purchased for a particular purpose known to seller at time of sale).

20. TEX. BUS. & COMM. CODE ANN. § 2.315 (Tex. UCC 1968).

the courts follow an illogical course and hold that the warranties contemplated in the DTPA are those developed by the Texas courts rather than those of the UCC, the outcome will be substantially the same.

Determination of Damages for Breach of Warranty

Assuming the warranties of the Act are those of the UCC, difficulties are apparent, for Section 17.50 of the Deceptive Trade Practices Act provides that a customer who prevails may obtain three times *actual* damages plus court costs and reasonable attorneys' fees.²¹ It does not provide how these actual damages are to be determined. A ready solution would be to consider the treble damage provision of the Act as an expansion of the buyer's remedies provisions of the UCC.²² This would seem to be anticipated by Section 1.106 of the Business and Commerce Code which states that the provisions of the UCC should be liberally administered so the aggrieved party "may be put in as good a position as if the other party had actually performed but neither consequential or special nor penal damages may be had except as specifically provided by this title or by other rule of law."²³ Section 2.714 of the Uniform Commercial Code provides that as a part of the remedy for breach of warranty, incidental and consequential damages are to be awarded where appropriate. The net effect of the DTPA, as applied to breach of warranty in connection with the sale of goods, is to supply the "other rule of law" mentioned in section 1.106, and thereby authorize punitive treble damages together with court costs and reasonable attorneys' fees, where the plaintiff fits within its peculiar definition of consumer.²⁴ If this analysis is correct it is a unique, almost mind-boggling amendment to the more stoic UCC remedies.

21. TEX. BUS. & COMM. CODE ANN. § 17.50(b)(1) (Supp. 1976).

22. TEX. BUS. & COMM. CODE ANN. § 2.714 (Tex. UCC 1968).

23. *Id.* § 1.106.

24. Section 17.46(a)(19) of the Deceptive Trade Practices Act contains a proviso clause which is totally unrelated to the premise of the section and was the result of an amendment in committee. The section states:

[N]othing in this subchapter shall be construed to expand the implied warranty of merchantability as defined in Sections 2.314 through 2.318 of the Business and Commerce Code to involve obligations in excess of those appropriate to the goods.

TEX. BUS. & COMM. CODE ANN. § 17.46(a)(19) (Supp. 1976). The meaning of this clause is totally unclear. The Act does not create, much less expand, any warranty of merchantability. This occurs only in § 2.314 of the Business and Commerce Code. The other cited sections deal with different warranties. The nature and scope of the merchantability warranty is explicitly defined in the section which provides that it statutorily arises by implication in any sales contract, unless limited as authorized in § 2.316. It is not created by representation, although representations may be express warranties as defined by § 2.313, and deceptive representation is the premise of §

Waiver of Warranties

One of the more intriguing features of the Deceptive Trade Practices Act is that consumers may not waive any of its provisions, and any attempt to do so is declared void.²⁵ Waiver by the consumer of a warranty implied in law is simply looking at the transaction from the consumer's point of view. Looking at it from the seller's perspective, such a waiver is called a disclaimer. Since both parties must agree to the contract terms, it would seem that the effect of the statute is to nullify disclaimers in transactions subject to it. This would occur despite Sections 2.316 and 2.719 of the UCC which permits such disclaimers.²⁶ Since section 17.42 is the more recent statute, it controls and will repeal by necessary implication any prior inconsistent legislation.²⁷ There seems to be no way to reconcile the legislation as it applies to consumers. The UCC sections, of course, will continue to apply in full to non-consumer transactions.

UNCONSCIONABILITY

Another substantial change in former law wrought by the Deceptive Trade Practices Act is in the application of the illusive concept of unconscionability. Under Section 2.302 of the Uniform Commercial Code unconscionability can be used by parties to a sales transaction as a shield but not as a sword. Where the court finds an unconscionable provision in the contract, it is authorized to refuse to enforce the entire contract, enforce it in part without the objectionable provision, or limit its application in order to avoid an unconscionable result.²⁸ Now the consumer is given a sword. A consumer who is the victim of any unconscionable act or practice may maintain an action for damages, which again are trebled, together with costs and reasonable attorneys' fees.²⁹ What the Act does not do, however, is define unconscionability

17.46(a)(19). What the Act has expanded is the *remedy* for breach of warranties, not the warranties themselves. Remedies for breach of warranties are dealt with in UCC § 2.714. The writer can only agree with the commentator who doubts that the proviso clause of § 17.46(a)(19) is meaningful. See Comment, *Caveat Vendor: The Texas Deceptive Practices and Consumer Protection Act*, 25 BAYLOR L. REV. 425, 434-35 (1973).

25. TEX. BUS. & COMM. CODE ANN. § 17.42 (Supp. 1976).

26. TEX. BUS. & COMM. CODE ANN. §§ 2.316, 2.719 (Tex. UCC 1968).

27. See *State v. Easley*, 404 S.W.2d 296, 300 (Tex. 1966); *Cole v. State ex rel. Cobolini*, 106 Tex. 472, 170 S.W. 1036 (1914); *Halsell v. Texas Water Comm'n*, 380 S.W.2d 1, 15 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.).

28. TEX. BUS. & COMM. CODE ANN. § 2.302 (Tex. UCC 1968).

29. TEX. BUS. & COMM. CODE ANN. § 17.50(a)(3), 17.50(b) (Supp. 1976).

and courts have had difficulty in doing so even in applying the UCC defensive provision.³⁰

The Act has also affected the scope of transactions to which the application of warranties and the expanded concept of unconscionability are to be applied. By the use of a novel definition of consumer,³¹ transactions involving both the sale and lease of goods as well as services are covered.³² While many types of cases possibly could be brought within the broadened scope of the Act, two illustrations will suffice.

1. A patient visited a dentist's office to have a tooth filled. While the dentist was administering a local anesthetic, the reusable hypodermic needle broke just below the patient's gum line. A very painful operation was required to remove the broken piece of metal. A defect in the needle, and not any negligence of the dentist, was the cause of the break. The patient sued the dentist for breach of warranty.³³

2. An employee, while driving an automobile leased to his employer from U-Drive Co., which had complete charge of its maintenance, was injured when the automobile failed to stop due to

30. The official comment to UCC § 2.302 (emphasis added) suggests:

The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise . . . and *not the disturbance* of allocation of risks because of superior bargaining power.

Although this excerpt contains an internal contradiction in that superior bargaining power can be used oppressively, some understanding of at least a baseline concept of unconscionability is provided. So much has been written about its meaning as to make any brief treatment here meaningless.

31. TEX. BUS. & COMM. CODE ANN. § 17.45(4) (Supp. 1976) provides: "As used in this chapter . . . 'consumer' means any individual who seeks or acquires by purchase or lease, any goods or services." Since some sections of the California Deceptive Practices Act are similar to parts of the Texas Act, a contrast of the California definition of consumer is interesting. The California definition is similar to the UCC definition of consumer goods found in UCC § 9.109(1), which is made applicable to the sales portion of the UCC by § 2.103(c). See CAL. CIV. CODE § 1761(d) (Deering 1972). The Texas definition contains no limitation on who can be a consumer except that he must be "an individual who seeks or acquires by purchase or lease, any goods or services." (emphasis added). See Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 701 (1976) (discussion of requirement that consumer be an individual).

32. Cf. TEX. BUS. & COMM. CODE ANN. § 2.102 (Tex. UCC 1968). Due to the specific language in sales warranties relating the rights there created to the sale of goods, which are defined in § 2.105(a) to clearly exclude services, there could be technical difficulty in the application of these warranties to services or leases. The injunction of § 17.44 of the DTPA for a "liberal construction and application" of the Act should overcome such objections. See Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957).

33. *Magrine v. Krasnica*, 227 A.2d 539 (N.J. Hudson County Ct. 1967), *aff'd sub nom.* *Magrine v. Spector*, 241 A.2d 637 (N.J. App. Div. 1968), *aff'd per curiam*, 250 A.2d 129 (N.J. 1969) (holding for the dentist).

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defective brakes. The employee sued U-Drive in a breach of warranty action.³⁴

Both of these factual situations, in which the same jurisdiction reached different results, should now be cognizable under the Texas Deceptive Trade Practices Act. While the importance of this expansion may not be as great as before the adoption by Texas of the strict liability doctrine, it is still significant.

CONCLUSION

This analysis of those portions of the Deceptive Trade Practices Act which deal with warranties and unconscionable acts or practices, the expansions of remedies available for its violation, and the no waiver provision as applied to contractual agreements, illustrates that very substantial changes have been made in the traditional remedies of the law of sales, as well as in the analogous areas of the sale of services and leasing of goods. This analysis, however, is conservative. Should full reign be given to the legislative command of liberal construction and application, the outer perimeters of the legislation would be difficult to foresee.

Yet it is safe to predict that litigation leading to the Act's application in a manner as is here analyzed, which the plain words of the statute seem to command, will be lengthy and interim decisions contradictory. This is so for three reasons: Many of the concepts are novel, the subject matter is important, and the stakes may be high in a given case. The treble damage remedy alone promotes large recoveries. The normal inertia of the judicial process and the innate conservatism of the judicial mind trained in the stare decisis approach to decision making, assure that the Act will not have an enthusiastic reception in many forums.

34. This is a slight variation of *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 212 A.2d 769 (N.J. 1965), in which the UCC was cited even though no sale was involved. The court held that the issue of implied warranty should have been submitted to the jury. One writer has argued that UCC warranties should have been applied by analogy in both of these examples. R. NORDSTROM, *HANDBOOK OF THE LAW OF SALES* § 21, at 42 (1970).