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Manufacturer May Not Raise Defense of Lack of Privity in Suit by Remote Consumer for Economic Damages Caused by Defective Product.

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the DTPA should be reimbursed for court costs, both for trial and appeals.[80]

It appears that treble damages under the DTPA are mandatory despite a contrary assertion by the court in *Mallory*. Further, an award of "actual" damages in addition to the treble damages is improper, although restitution to a party to the suit of money or property acquired in violation of the Act may be obtained.[31] Attorneys' fees should be granted on the basis of the work expended, and all trial and appellate court costs should be recouped. Although the DTPA should effectively protect consumers, its ultimate value depends largely upon consumer-oriented judicial construction. Absent an overly restrictive interpretation of the DTPA by the courts, the Act should effectively deter most of those businessmen whose "arms are unquestionably longer than others."[32]

Kenneth L. Malone

UNIFORM COMMERCIAL CODE—Warranty—Manufacturer May Not Raise Defense of Lack of Privity in Suit by Remote Consumer for Economic Damages Caused by Defective Product

Nobility Homes, Inc. v. Shivers,

539 S.W.2d 190 (Tex. Civ. App.—Beaumont 1976, writ granted).

John Shivers bought a mobile home from Marvin Hurley, an independent mobile home dealer, for $22,168.75. The mobile home was constructed in such an unworkmanlike manner that its actual value was substantially below the original purchase price. Since Hurley had gone out of business and could not be located, Shivers brought suit against the manufacturer, Nobility Homes, for $8,750.00. This amount represented the difference between the reasonable market value of the home at the time of purchase and the original contract price. Plaintiff alleged that the home was so defectively constructed that it was not fit for its intended purpose as a residence. Nobility Homes, however, contended that it was not liable for any damage to Shivers because there was no privity of contract between them and that

30. TEX. BUS. & COMM. CODE ANN. § 17.50(b)(1) (Supp. 1976-1977); *see* note 29 *supra* and accompanying text.

31. TEX. BUS. & COMM. CODE ANN. § 17.50(b)(3) (Supp. 1976-1977).

32. *See generally* Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1, 8 (1976).

only economic damages were sought.[1] The trial court rendered a judgment for the plaintiff. Held—*Affirmed.* In an implied warranty action privity is not required in order for a remote consumer to recover purely economic damages from a manufacturer.[2]

Lack of privity of contract was historically an absolute defense for a manufacturer in an implied warranty suit by a remote consumer.[3] It now seems settled that the manufacturer may be held liable where a defective product causes personal injury to the consumer or damage to his property.[4] The use of lack of privity as a defense now remains unclear only where the consumer attempts to recover purely economic damages.[5]

This ambiguity has resulted from both a vague explanation of the basis of recovery for personal injury and property damage[6] and a steadfast accept-

1. There are three basic forms of injury which a consumer may suffer because of a defective product: physical harm to his person, physical harm to property other than the defective product, and economic loss. The first two forms are self-explanatory. A consumer's economic damage is the pecuniary injury resulting from loss of the bargain or the cost of repair or replacement. Zammit, *Manufacturers' Responsibility for Economic Loss Damages in Products Liability Cases: What Result in New York?*, 20 N.Y.L.F. 81 (1974); *see* Comment, *Strict Liability—Will It Be Expanded to Allow Recovery for Commercial Loss?*, 16 S. TEX. L.J. 341, 344 (1975).

2. Nobility Homes, Inc. v. Shivers, 539 S.W.2d 190, 194 (Tex. Civ. App.—Beaumont 1976, writ granted); *accord*, Lynne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F.2d 1177, 1181 (3d Cir. 1972) (applying Pennsylvania law); Mack Trucks, Inc. v. Jet Asphalt & Rock Co., 437 S.W.2d 459, 462 (Ark. 1969); Manheim v. Ford Motor Co., 201 So. 2d 440, 442 (Fla. 1967); Baughman v. Quality Mobile Homes, Inc., 289 So. 2d 376, 379 (La. Ct. App. 1973); Santor v. A & M Karagheusian, Inc., 207 A.2d 305, 310 (N.J. 1965); Kassab v. Central Soya, 246 A.2d 848, 852 (Pa. 1968) (dictum); Ford Motor Co. v. Lemieux Lumber Co., 418 S.W.2d 909, 911 (Tex. Civ. App.—Beaumont 1967, no writ). *Contra*, Seely v. White Motor Co., 45 Cal. Rtpr. 17, 23 (1965); Koellmer v. Chrysler Motors Corp., 276 A.2d 807, 812 (Conn. Cir. Ct. App. Div. 1970); Necktas v. General Motors Corp., 259 N.E.2d 234, 236 (Mass. 1970); Iacono v. Anderson Concrete Corp., 326 N.E.2d 267, 271 (Ohio 1975); Hupp Corp v. Metered Washer Serv., 472 P.2d 816, 817 (Ore. 1970); Thermal Supply, Inc. v. Asel, 468 S.W.2d 927, 929 (Tex. Civ. App.—Austin 1971, no writ).

3. *E.g.*, Wood v. General Elec. Co., 112 N.E.2d 8, 11 (Ohio 1953); Odom v. Ford Motor Co., 95 S.E.2d 601, 603-04 (S.C. 1956); Cohan v. Associated Fur Farms, Inc., 53 N.W.2d 788, 791 (Wis. 1952).

4. *E.g.*, Hiigel v. General Motors Corp., 544 P.2d 983, 989 (Colo. 1975) (property damage); Iacono v. Anderson Concrete Corp., 326 N.E.2d 267, 271 (Ohio 1975) (property damage); Ellithorpe v. Ford Motor Co., 503 S.W.2d 516, 519 (Tenn. 1973) (personal injury); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 792 (Tex. 1967) (personal injury); RESTATEMENT (SECOND) OF TORTS § 402A (1965). *See generally* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Annot., 16 A.L.R.3d 683 (1967).

5. *Compare* Santor v. A & M Karagheusian, Inc., 207 A.2d 305, 310 (N.J. 1965), *with* Cloer v. General Motors Corp., 395 F. Supp. 1070, 1071-72 (E.D. Tex. 1975).

6. *See* Cova v. Harley Davidson Motor Co., 182 N.W.2d 800, 804 (Mich. Ct. App. 1970) (recovery of economic loss supported by rationale including aspects of both tort and contract); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 612, 164 S.W.2d 828, 831 (1942) (imposition of warranty liability supported by tort rationale).

ance of the common law distinctions between contract and tort when economic damages are sought.[7] As a result, courts have employed three distinct rationales in allowing recovery for economic loss.[8] The first is the extension of tort liability to permit recovery for economic loss.[9] The second is the expansion of the traditional contract cause of action by eliminating the requirement of privity.[10] Finally, some courts ignore the common law characterizations and grant relief on public policy grounds.[11]

The Texas Supreme Court has yet to rule on the propriety of awarding damages for economic loss.[12] While most lower court decisions have denied recovery,[13] the Texas position is best characterized as a general rule denying recovery but which is being eroded by a growing number of exceptions allowing recovery.[14] There is no consensus among these exceptions as to the correct theory of recovery,[15] but the fact that recovery is now frequently al-

7. *E.g.*, Seely v. White Motor Co., 45 Cal. Rptr. 17, 21-23 (1965); Hawkins Constr. Co. v. Matthews Co., 209 N.W.2d 643, 653 (Neb. 1973); Eli Lilly & Co. v. Casey, 472 S.W.2d 598, 600 (Tex. Civ. App.—Eastland 1971, writ dism'd).

8. Nobility Homes, Inc. v. Shivers, 539 S.W.2d 190, 193 (Tex. Civ. App.—Beaumont 1976, writ granted).

9. Hiigel v. General Motors Corp., 544 P.2d 983, 989 (Colo. 1975); Baughman v. Quality Mobile Homes, Inc., 289 So. 2d 376, 379 (La. Ct. App. 1973); Santor v. A & M Karagheusian, Inc., 207 A.2d 305, 310 (N.J. 1965).

10. State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc., 110 N.W.2d 449, 452 (Iowa 1961); Santor v. A & M Karagheusian, Inc., 207 A.2d 305, 310 (N.J. 1965); Kassab v. Central Soya, 246 A.2d 848, 852 (Pt. 1968) (dictum); *see* Randy Knitwear, Inc. v. American Cyanamid Co., 226 N.Y.S.2d 363, 370 (1961) (express warranty).

11. Hiigel v. General Motors Corp., 544 P.2d 983, 989 (Colo. 1975); Santor v. A & M Karagheusian, Inc., 207 A.2d 305, 311 (N.J. 1965); Nobility Homes, Inc. v. Shivers, 539 S.W.2d 190, 194 (Tex. Civ. App.—Beaumont 1976, writ granted).

12. *See generally* Sales, *An Overview of Strict Tort Liability in Texas*, 11 HOUS. L. REV. 1043 (1974); Comment, *Implied Warranties and "Economic Loss,"* 24 BAYLOR L. REV. 370 (1972); Comment, *Strict Liability—Will It Be Expanded to Allow Recovery for Commercial Loss?*, 16 S. TEX. L.J. 341 (1975).

13. Eli Lilly & Co. v. Casey, 472 S.W.2d 598, 600 (Tex. Civ. App.—Eastland 1971, writ dism'd); Thermal Supply, Inc. v. Asel, 468 S.W.2d 927, 929 (Tex. Civ. App.—Austin 1971, no writ); Melody Home Mfg. Co. v. Morrison, 455 S.W.2d 825, 826 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ). *Contra*, Geigy Chem Corp. v. Hall, 449 S.W.2d 115, 118 (Tex. Civ. App.—Amarillo 1969, no writ); Ford Motor Co. v. Lemieux Lumber Co., 418 S.W.2d 909, 911 (Tex. Civ. App.—Beaumont 1967, no writ).

14. *See* Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 612, 164 S.W.2d 828, 832 (1942) (unwholesome food intended for human consumption); United States Pipe & Foundry Co. v. City of Waco, 130 Tex. 126, 129-30, 108 S.W.2d 432, 434 (1937) (express warranty); O.M. Franklin Serum Co. v. C.A. Hoover & Son, 410 S.W.2d 272, 274 (Tex. Civ. App.—Amarillo 1966) (unwholesome drugs intended for animal consumption), *writ ref'd n.r.e. per curiam*, 418 S.W.2d 482 (1967); Cudmore v. Richardson-Merrell, Inc., 398 S.W.2d 640, 644 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.), *cert. denied*, 385 U.S. 1003 (1967) (unwholesome drugs intended for human consumption); Burrus Feed Mills, Inc. v. Reeder, 391 S.W.2d 121, 126 (Tex. Civ. App.—Amarillo 1965, no writ) (unwholesome food intended for animal consumption).

15. *See, e.g.*, Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 612, 164 S.W.2d 828, 829 (1942) (public policy); United States Pipe & Foundry Co. v. City of Waco, 130 Tex. 126, 108 S.W.2d 432 (1937) (contract); O.M. Franklin Serum Co. v. C.A. Hoover

lowed suggests that the last rampart of Dean Prosser's citadel is crumbling in Texas.

The Beaumont Court of Civil Appeals attempted to clarify the Texas position in *Nobility Homes* by holding that a manufacturer extends an implied warranty of reasonable fitness to the consumer as a matter of public policy.[16] While the rationale is not entirely clear, *Nobility Homes* does reject a tort approach because this theory requires injury to person or other property.[17] The court held that it will no longer distinguish between physical injury to person or property and economic loss, since in each instance there is an injury to the public sector which must be remedied.[18] To insulate the manufacturer from the economic loss suffered by the ultimate consumer would ignore contemporary economic realities.[19]

The dissent in *Nobility Homes* criticized the expansion of contract liability, relying upon the traditional distinctions between tort and contract and apparently placing a higher priority upon the form of action than upon the form of relief sought.[20] While the majority retains the dichotomy between tort and contract, the public policy rationale seems to indicate that the court is now more interested in providing a remedy for an injury than in sustaining common law distinctions. In this respect the traditionally helpless consumer now has another weapon in his fight to force responsibility upon the manufacturer of consumer goods.

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& Son, 410 S.W.2d 272, 274 (Tex. Civ. App.—Amarillo 1966), *writ ref'd n.r.e. per curiam*, 418 S.W.2d 482 (1967) (tort).

16. Nobility Homes, Inc. v. Shivers, 539 S.W.2d 190, 193-94 (Tex. Civ. App.—Beaumont 1976, writ granted).

17. *Id.* at 194.

18. *Id.* at 194.

19. *Id.* at 194.

20. *Id.* at 194-97. The distinction between the two opinions seems to be that the minority is unwilling to discard the traditional approach to contracts while the majority is prepared to do so when equity requires. The confrontation is the traditional one between the structure of the law and the remedies which that structure provides.