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the DTPA should be reimbursed for court costs, both for trial and appeals.\textsuperscript{80}

It appears that treble damages under the DTPA are mandatory despite a contrary assertion by the court in \textit{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.\textsuperscript{81} 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.”\textsuperscript{82}

\textit{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

\textit{Nobility Homes, Inc. v. Shivers},


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

\textsuperscript{30. \textsc{Tex. Bus. \\& Comm. Code Ann.} § 17.50(b)(1) (Supp. 1976-1977); see note 29 supra and accompanying text.}


\textsuperscript{32. See generally Bragg, \textit{Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act}, 28 \textsc{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 damage⁶ and a steadfast accept-
ance of the common law distinctions between contract and tort when economic damages are sought. As a result, courts have employed three distinct rationales in allowing recovery for economic loss. The first is the extension of tort liability to permit recovery for economic loss. The second is the expansion of the traditional contract cause of action by eliminating the requirement of privity. Finally, some courts ignore the common law characterizations and grant relief on public policy grounds.

The Texas Supreme Court has yet to rule on the propriety of awarding damages for economic loss. While most lower court decisions have denied recovery, 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. There is no consensus among these exceptions as to the correct theory of recovery, but the fact that recovery is now frequently al-


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.\(^\text{16}\) While the rationale is not entirely clear, *Nobility Homes* does reject a tort approach because this theory requires injury to person or other property.\(^\text{17}\) 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.\(^\text{18}\) To insulate the manufacturer from the economic loss suffered by the ultimate consumer would ignore contemporary economic realities.\(^\text{19}\)

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.\(^\text{20}\) 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.

*Frank A. Porter*


\(^{\text{17}}\) Id. at 194.

\(^{\text{18}}\) Id. at 194.

\(^{\text{19}}\) Id. at 194.

\(^{\text{20}}\) 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.