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ANATOMY OF A TRIAL OF A WARRANTY CASE

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I. INTRODUCTION

For the past two decades product liability has garnered much attention not only in legal periodicals but also in courtrooms across the country. Warranty has taken a back seat to the expanding field of product liability law. With the advent of consumer protection statutes in the last several years, however, the law of warranty has become the focus of rekindled interest. Texas is no exception in this regard.[1] The reported appellate decisions are replete with cases dealing with breaches either of an express or of an implied warranty under the Texas Deceptive Trade Practices Act (DTPA).

The purpose of this article is to sketch the trial outline of a warranty case. Little emphasis is directed to the substantive law of product liability. Breach of warranty as defined within the article contemplates damage resulting solely in economic loss, not personal injury. Further, the article does not address pretrial discovery but is

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1. *See* TEX. BUS. & COM. CODE ANN. §§ 17.41-17.50B (Vernon Supp. 1982-1983). This section of the Texas Business and Commerce Code is commonly referred to as the Texas Deceptive Trade Practices Act (DTPA).

based on the assumption that counsel has conducted thorough discovery, including depositions, requests for admissions, and interrogatories.

The trial of a warranty case imports not only a mastery of procedural and evidentiary tools but also a thorough understanding of the substantive law. Three provisions in the Texas Business and Commerce Code (Business Code) dominate the proliferation of warranty suits under the DTPA.[2] Section 2.313 of the Code provides that express warranties are created by the seller in one of three ways. The seller can create an express warranty by making certain representations as to the goods which become part of the basis of the bargain.[3] The Business Code also provides that any "description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to that description."[4] Finally, any sample or model, made part of the basis of the bargain, creates an express warranty that all the goods shall conform to the sample or model.[5] Section 2.313 of the Business Code does not define the warranty itself, but rather provides the means by which such express warranties may be created.[6] Since an express warranty has its basis in contract, a seller may either define or limit its obligation under the contract, provide the manner in which the warranty will be satisfied, or stipulate the measure of damages for its breach.[7]

Section 2.314 of the Business Code provides that a warranty of merchantability is implied in a contract for the sale of goods, unless otherwise modified or excluded, if the seller is a merchant with respect to the kind of goods sold. Thus, for the implied warranty of merchantability to attach there must be: (1) a seller; (2) who is a merchant; (3) with respect to the goods which are the subject of the transaction. The Business Code does not limit the definition of merchantability. In fact, the language of section 2.314(b) implies that the six subsections following that section are not exhaustive in defining merchantability.[8] A seller is defined by the Business Code

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2. *See id.* §§ 2.313-2.315 (Tex. UCC) (Vernon 1968).
3. *See id.* § 2.313(a)(1).
4. *Id.* § 2.313(a)(2).
5. *See id.* § 2.313(a)(3).
6. *See* Cravens v. Skinner, 626 S.W.2d 173, 176 (Tex. App.—Fort Worth 1981, no writ).
7. *See* Donelson v. Fairmont Foods Co., 252 S.W.2d 796, 799 (Tex. Civ. App.—Waco 1952, writ ref'd n.r.e.).
8. *See* TEX. BUS. & COM. CODE § 2.314 (Tex. UCC) (Vernon 1968) provides that:

as one "who sells or contracts to sell goods."[9] "Seller" is not limited to the immediate seller but has also been construed to incorporate the manufacturer who analytically is a more remote seller.[10] A merchant is defined in part by the Business Code as a person who deals in goods of the kind sold.[11] Section 2.314 provides a more limited construction of "merchant" than the definitional section of 2.104(a). Thus, a seller might possess special skill and knowledge as required by section 2.104(a) but fail to fall under section 2.314, particularly if he sells goods unrelated to the transaction in dispute or does not consistently deal in the kind of goods made the subject of the transaction.[12]

An implied warranty of fitness arises in instances where, at the time of contracting, the seller has reason to know of any particular purpose for which the goods are required and, also, that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods.[13] The "particular purpose" envisions a specific use by the buyer which is peculiar to the nature of his business.[14] If the seller is not informed of the particular purpose for which the goods are purchased, then no implied warranty of fitness attaches to the sale of

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(b) Goods to be merchantable must be at least such as

(1) pass without objection in the trade under the contract description; and

(2) in the case of fungible goods, are of fair average quality within the description; and

(3) are fit for the ordinary purposes for which such goods are used; and

(4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(5) are adequately contained, packaged, and labeled as the agreement may require; and

(6) conform to the promises or affirmations of fact made on the container or label if any. *See id.*

9. *See id.* § 2.103(a)(4).

10. *See* Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 81 (Tex. 1977) (definition of seller not limited to intermediate seller); *see also* Karczewski v. Ford Motor Co., 382 F. Supp. 1346, 1352 (N.D. Ind. 1974), *aff'd mem.*, 515 F.2d 511 (7th Cir. 1975); Bishop v. Sales, 336 So. 2d 1340, 1345 (Ala. 1976); Eckstein v. Cummins, 321 N.E.2d 897, 902 (Ohio Ct. App. 1974). *But see* Ford Motor Co. v. Pittman, 227 So. 2d 246, 248-49 (Fla. Dist. Ct. App. 1969), *cert. denied*, 237 So. 2d 177 (Fla. 1970).

11. *See* TEX. BUS. & COM. CODE ANN. § 2.104(a) (Tex. UCC) (Vernon 1968).

12. *See* Jatco, Inc. v. Charter Air Center, Inc., 527 F. Supp. 314, 319-20 (S.D. Ohio 1981); Bevard v. Ajax Mfg. Co., 473 F. Supp. 35, 38 (E.D. Mich. 1979).

13. *See* TEX. BUS. & COM. CODE ANN. § 2.315 (Tex. UCC) (Vernon 1968).

14. *See* Lanphier Constr. Co. v. Fowco Constr. Co., 523 S.W.2d 29, 41 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

the goods.[15] The buyer must further show that he relied on the seller's skill or judgment in selecting the goods.[16]

The implied warranties of merchantability and fitness may be excluded or modified in accordance with the provisions of section 2.316 of the Business Code. A manufacturer may disclaim such warranties by doing so in the materials included with the goods or by expressly disclaiming in the retailer's contract with the remote buyer.[17] To exclude the implied warranty of merchantability, the exclusionary language must mention merchantability and must be conspicuous if written.[18] To exclude the implied warranty of fitness, the exclusion must also be written and conspicuous.[19] The Business Code also provides that the implied warranties of fitness and merchantability may be excluded by the use of the expressions "as is", "with all faults", or other language which in common understanding would indicate to a buyer that he purchases the goods without any implied warranties.[20]

The following language has been held effective to exclude the implied warranties of fitness and merchantability:

> **THERE ARE NO UNDERSTANDINGS, AGREEMENTS, REPRESENTATIONS, OR WARRANTIES, EXPRESS OR IMPLIED (INCLUDING ANY REGARDING THE MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE), NOT SPECIFIED HEREIN, RESPECTING THIS CONTRACT OR EQUIPMENT HEREUNDER. THIS CONTRACT STATES THE ENTIRE OBLIGATION OF SELLER IN CONNECTION WITH THIS TRANSACTION.**[21]

The language comports with the requirement that the writing be

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15. *See* Tracor, Inc. v. Austin Supply & Drywall Co., 484 S.W.2d 446, 448 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.).

16. *See* Two Rivers Co. v. Curtiss Breeding Serv., 624 F.2d 1242, 1252 (5th Cir. 1980), *cert. denied*, 450 U.S. 920 (1981); Donald v. City Nat'l Bank, 329 So. 2d 92, 96 (Ala. 1976); Prince v. LeVan, 486 P.2d 959, 965 (Alaska 1971); Klipfel v. Neill, 494 P.2d 115, 117 (Colo. Ct. App. 1972); Wilson v. Massey-Ferguson, Inc., 315 N.E.2d 580, 582 (Ill. App. Ct. 1974); Mohasco Indus., Inc. v. Anderson Halverson Corp., 520 P.2d 234, 236 (Nev. 1974); Collins Radio Co. v. Bell, 623 P.2d 1039, 1054 (Okla. Ct. App. 1980); Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 83 (Tex. 1977).

17. *See* Clark v. DeLaval Separator Corp., 639 F.2d 1320, 1324 (5th Cir. 1981).

18. *See* TEX. BUS. & COM. CODE ANN. § 2.316(b) (Tex. UCC) (Vernon 1968).

19. *See id.*

20. *See id.* § 2.316(c)(1).

21. *See* W.R. Weaver Co. v. Burroughs Corp., 580 S.W.2d 76, 81 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.).

conspicuous in that the clause is in bold type.[22] Further, the language excludes the implied warranty of merchantability since the writing mentions merchantability and is conspicuous.[23] In addition, the language excludes the implied warranty of fitness since it is in writing and is conspicuous.[24] To properly exclude the implied warranties, the seller should adhere to the requirements of the Business Code. Recent decisions have eschewed the idea that an express warranty provision can exclude implied warranties without a specific disclaimer of the implied warranty.[25] This is not to say, however, that an express warranty may not limit or exclude an implied warranty without following the language of the Business Code.[26] The question of exclusion of implied warranties under non-Business Code circumstances, such as the sale of a new house, may depend on the individual merits of each case. Certainly the exclusionary language must be clear and free of doubt.[27]

One of the main advantages of filing a warranty action is the beneficial limitations period provided for in the Business Code; a plaintiff has four years in which to bring suit rather than two years.[28] At least as to actions based upon breach of an implied warranty, however, courts have not construed and applied the limitation statute in a consistent manner.[29] In *Clark v. DeLaval Separator Corp.*,[30] the

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22. *See* TEX. BUS. & COM. CODE ANN. § 1.201(10) (Tex. UCC) (Vernon 1968).

23. *See id.* § 2.316(b).

24. *See id.* § 2.316(b).

25. *See* Vaughn Bldg. Corp. v. Austin Co., 620 S.W.2d 678, 680 (Tex. Civ. App.—Dallas 1981), *aff'd*, 643 S.W.2d 113 (Tex. 1983).

26. *Cf.* G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 393 (Tex. 1982). In *Robichaux,* the Texas Supreme Court held that the following language effectively excluded the implied warranty of fitness in a non-Business Code case: ". . . and the plans constitute the entire agreement between the parties hereto with reference to the erection of said improvements, there being no oral agreement, representations, conditions, warranties, express or implied, in addition to said written instruments." *See id.* at 393.

27. *See id.* at 393.

28. *Compare* TEX. BUS. & COM. CODE ANN. § 2.725 (Tex. UCC) (Vernon 1968) (action for personal injury based on breach of warranty in sales contract limited four years) *with* TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon Supp. 1982-1983) (action for personal injury based on tort limited to two years).

29. *See* TEX. BUS. & COM. CODE ANN. § 2.725(b) (Tex. UCC) (Vernon 1968). The statute of limitations for actions based on a breach of a contract for sale states that such action must be commenced within four years after the cause of action accrues and further provides:

> 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

court held that the limitation period in an implied warranty action runs from the seller's tender of delivery of the goods,[31] and not, as the plaintiff argued, from the time the breach is or should have been discovered. Stating that an "implied warranty by its nature cannot explicitly extend to future performance,"[32] the court thereby limited the "discovery" rule of section 2.725(b) to breaches of an express warranty. Conversely, in *Morton v. Texas Welding & Manufacturing Co.*,[33] the court construed the limitation period for implied warranties as running from the time a buyer discovers or should have discovered the breach.[34] Additionally, it appears that courts distinguish the origin of the implied warranty when determining which limitation period is applicable. Thus, courts have applied the "discovery" rule in actions based upon a warranty implied by common law arising from a non-goods transaction.[35] In an action on an implied warranty arising from the sale of goods, courts have applied the four-year limitation statute of the Business Code which by its terms limits the use of the "discovery" rule to certain circumstances.[36] Further, if the buyer has relied on the seller's or manufacturer's efforts to repair the defect during the warranty period only to have the repair efforts prove to be unsatisfactory, a court may utilize the doctrine of equitable estoppel and toll the statute of limitations.[37]

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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.

Id.

30. *See* Clark v. DeLaval Separator Corp., 639 F.2d 1320, 1325 (5th Cir. 1981).

31. *See id.* at 1325.

32. *Id.* at 1325.

33. 408 F. Supp. 7 (S.D. Tex. 1976).

34. *See id.* at 11.

35. *See* Vaughn Bldg. Corp. v. Austin, 620 S.W.2d 678, 679, 681 (Tex. Civ. App.—Dallas 1981) ("discovery" rule applied in action based on implied warranty from construction contract), *aff'd on other grounds*, 643 S.W.2d 113, 116 (Tex. 1983); Metal Structures Corp. v. Plains Textiles, Inc., 470 S.W.2d 93, 99 (Tex. Civ. App.—Amarillo 1971, writ ref'd) (applying "discovery" rule in action on implied warranty arising from construction contract).

36. *See, e.g.,* Clark v. DeLaval Separator Corp., 639 F.2d 1320, 1325 (5th Cir. 1981) (action on implied warranty from sale of goods governed by section 2.725 which limits "discovery" rule); Cleveland v. Square-D Co., 613 S.W.2d 790, 791 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (implied warranty action based on sale of goods governed by section 2.725); W. R. Weaver Co. v. Burroughs Corp., 580 S.W.2d 76, 80 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.) (section 2.725 applies to action on implied warranty arising from sale of goods).

37. Bedford v. James Leffel & Co., 558 F.2d 216, 218 (4th Cir. 1977); Nowell v. Great Atlantic & Pacific Tea Co., 108 S.E.2d 889, 891 (N.C. 1959).

Probably the most significant development in the law of warranty in Texas has been the steady erosion of the doctrine of privity of contract. In *Nobility Homes of Texas, Inc. v. Shivers,*[38] the Texas Supreme Court held with respect to implied warranties that the definition of seller is not limited to an intermediate seller but also includes the manufacturer. Thus, the decision paved the way for the abolition of the requirement of privity of contract in "vertical privity" cases, i.e., those parties in the distribution chain from the original supplier to the ultimate consumer. Three years later, the court in *Garcia v. Texas Instruments, Inc.*[39] held that privity of contract was not required to enforce an implied warranty for parties in "horizontal privity", i.e., those parties not in the distribution chain from the original supplier. Express warranty by its very nature would seem to require some privity of contract. The cases in Texas are split on this issue. More recent decisions tend to favor abolishing the need for privity in regard to express warranty.[40] In other instances, courts have not abandoned the privity requirement for actions on express warranty and, consequently, the definition of "seller" under the Business Code has not been expanded.[41]

II. VOIR DIRE

The initial phase of the trial of any civil case is the voir dire. The voir dire in a warranty case, like any other civil case, mandates that counsel possess a substantive understanding of the law as it applies

38. 557 S.W.2d 77, 81 (Tex. 1977).

39. 610 S.W.2d 456, 465 (Tex. 1980).

40. *See* Basin Operating Co. v. Valley Steel Prods. Co., 620 S.W.2d 773, 777 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.); Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co., 602 S.W.2d 282, 287 (Tex. Civ. App.—Dallas 1980, no writ); Barthlow v. Metcalf, 594 S.W.2d 143, 144 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ dism'd w.o.j.).

41. *See, e.g.,* Texas Processed Plastics, Inc. v. Gray Enters., Inc., 592 S.W.2d 412, 415 (Tex. Civ. App.—Tyler 1979, no writ) (privity of contract required in breach of express warranty case dealing with only economic loss); Pioneer Hi-Bred Int'l, Inc. v. Talley, 493 S.W.2d 602, 606-07 (Tex. Civ. App.—Amarillo 1973, no writ) (privity of contract essential in breach of express warranty action and loss only economic); Thermal Supply of Texas, Inc. v. Asel, 468 S.W.2d 927, 930 (Tex. Civ. App.—Austin 1971, no writ) (privity of contract required involving cases dealing solely with economic loss). If a buyer revokes acceptance under section 2.608 of the Uniform Commercial Code, the majority of cases do not expand the definition of seller to a manufacturer. *See* Voytovich v. Bangor Punta Operations, Inc., 494 F.2d 1208, 1211 (6th Cir. 1974); Conte v. Dwan Lincoln-Mercury, Inc., 374 A.2d 144, 150 (Conn. 1976).

to the case. Voir dire not only enables counsel to "educate" the panel but should be directed toward issue submission.

Counsel's inquiry on voir dire is for most purposes unfettered. Specific questions should be addressed to the panel. All too often counsel unknowingly employs general lines of questioning as a substitute for a meaningful examination. In warranty cases, counsel might consider the following categories of questions:

a) Would any juror require that the manufacturer account for all the actions of its independent dealers?

b) Does any juror believe that a manufacturer and a dealer in that manufacturer's product are one and the same entity?

c) Has any juror had prior business dealings with the manufacturer or dealer?

d) Has any juror purchased a product similar to the one involved in the suit?

e) Does any juror possess any mechanical, specialized, product-oriented skills?

f) Is any juror familiar with the warranty involved in the instant case?

g) Does any juror believe that the manufacturer's standard warranty is unfair?

h) Does any juror believe that the instant warranty should be expanded?

i) Does any juror believe that limitations or disclaimers on the warranty are unfair?

j) Has any juror ever had a problem with a product during its warranty period?

k) Has any juror experienced problems during the warranty period and been able to satisfactorily resolve the problem?

l) Has any juror experienced problems with a product "out of warranty" but believed that the manufacturer or retailer should be responsible nevertheless?

m) Has any juror ever had a claim or dispute with either a retailer or manufacturer in regard to a product purchased by the juror (or a family member or friend)?

n) Does any juror believe that a manufacturer of a product (or seller) should be held responsible for the product's performance if that manufacturer never had ample opportunity to cure the problem (if any)?

o) Does any juror believe that a manufacturer of a product (or seller) should be held responsible for the product's performance if that manufacturer never received notice of the plaintiff's complaint?

p) Does any juror believe that the manufacturer or retailer should be held responsible for the product's performance if the plaintiff has failed to take care of the product (abuse, misuse, etc.)?

q) Would any juror limit the manufacturer or seller to a given number of complaints or a set number of times in attempting to repair problems with the product?

r) Has any panel member ever received a complaint on a product he has sold?

s) Has any juror ever notified (by letter or otherwise) any seller or manufacturer about a product purchased by the juror?

The questions above assume that counsel has covered the litany of other subjects on voir dire which are traditionally asked. These include familiarity with the parties, attorneys, the explanation of burden of proof, nature of objections, and prior knowledge of the facts in dispute.

III. ELEMENTS OF PROOF

To recover for breach of warranty a buyer must plead and prove the existence of a warranty, a breach thereof, and resultant damages.[42] If a cause of action is based on a breach of an express warranty, the pleader should attempt to either set out the warranty in detail or incorporate the warranty by an appropriate exhibit.[43] The implied warranties of merchantability and fitness are created by operation of law unless otherwise excluded.[44] Therefore, to hold a manufacturer liable for breach of an implied warranty, all that need be shown is the unmerchantability or the unfitness of the product.[45] The very substance of an express warranty, however, can arise only from specific conduct of the seller-manufacturer. Consequently, to hold the manufacturer liable for breach of an express warranty, the buyer must demonstrate the existence of an express warranty and a

42. *See* Swift & Co. v. Bennett, 373 S.W.2d 569, 570-71 (Tex. Civ. App.—Texarkana 1963, writ ref'd n.r.e.).

43. *See* Fairdale, Ltd. v. Sellers, 651 S.W.2d 725, 726 (Tex. 1982).

44. *See* Clark v. DeLaval Separator Corp., 639 F.2d 1320, 1322 (5th Cir. 1981).

45. *See* Ford Motor Co. v. Tidwell, 563 S.W.2d 831, 835 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).

resultant breach thereof.[46] Express warranty submission is relatively clear cut, and can be directly predicated on the manufacturer's warranty.[47] The buyer need only inquire whether the manufacturer failed to honor its express warranty as reflected by the written warranty.

Generally, the express warranty sued upon is the manufacturer's limited warranty. Many standard warranties guarantee that the manufacturer, through its selling dealer or representatives, will repair or replace any defects in material or workmanship within a stated time period or a degree of product use whichever is earlier. This standard warranty is not a warranty that the product is free of defects, but rather an express warranty of repair.[48] Other warranties guarantee the performance of the product and do not limit liability to repair and replacement of defective parts.

As stated previously, the burden of proof is on the buyer to prove breach of warranty.[49] The seller must be notified of the breach or else the buyer is barred from recovery.[50] The buyer has the burden of submitting an issue on notice of breach to the seller. Issues relating to notice are issues "relied upon by the opposing party".[51] Therefore, the defendant-seller need only object to the omission of a notice issue to preserve error.[52] Further, there is no duty to object where the entire theory of warranty is omitted from the court's charge.[53]

The Business Code is silent on the buyer's responsibility to notify the manufacturer. Must the manufacturer receive notice of the

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46. *See id.* at 835.

47. See the Appendix for a proposed set of special issues in a warranty case.

48. *See* Preston v. Sears, Roebuck & Co., 573 S.W.2d 560, 563 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.).

49. *See* TEX. BUS. & COM. CODE ANN. § 2.607(d) (Tex. UCC) (Vernon 1968); *see also* Cox v. Mesa Petroleum Co., 572 S.W.2d 110, 112 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.).

50. *See* TEX. BUS. & COM. CODE ANN. § 2.607(c)(1) (Tex. UCC) (Vernon 1968) (notice to seller required for recovery under warranty theory); *see also* Southwest Lincoln-Mercury, Inc. v. Ross, 580 S.W.2d 2, 4 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ) (notice must be given seller); Import Motors, Inc. v. Matthews, 557 S.W.2d 807, 809 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.) (buyer must notify seller of defect).

51. *See* TEX. R. CIV. P. 279.

52. *See* Clarostat Mfg., Inc. v. Alcor Aviation, Inc., 544 S.W.2d 788, 794-95 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.).

53. *See* Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co., 602 S.W.2d 282, 289 (Tex. Civ. App.—Dallas 1980, no writ).

breach in order to become liable? Under Business Code terminology "seller" means a person who sells or contracts to sell goods.[54] One Texas case has held that the Business Code's notice provision runs only to the immediate seller, not to the manufacturer.[55] The decision seemingly ignores, however, the fact that under the Business Code a manufacturer is also a seller, an issue resolved by the Texas Supreme Court in *Nobility Homes of Texas, Inc.*.[56] Presumably, the Business Code is based on the assumption that the immediate seller will notify the manufacturer of the breach.[57] The better view is that the warrantor must be notified even if the warrantor is not the immediate seller.[58]

Proof problems in implied warranty cases as compared to express warranty cases are more onerous for the plaintiff. As a general rule, the implied warranty of merchantability relates to the date of sale and does not cover defects which are not in existence at the time of sale or inherent in the article sold.[59] Absent a showing of an implied warranty for a fixed period of time, the burden is on the buyer to prove that the product was defective at the time it left the manufacturer or seller.[60] If the buyer proves that the implied warranty was for a fixed period of time, however, he is entitled to an issue submission regarding that period of time; otherwise, the issue must be limited to the date of sale.[61] Consequently, if the warranty limits implied warranties to the duration of the express warranty, the buyer is entitled to an issue submission to the time specified in the warranty rather than an issue confined to the date of sale. This is significant since proof of a defect on the date of sale is arguably more difficult than proof of one occurring within the specified duration of the limited warranty. The better practice for a plaintiff-buyer is to submit issues for breach of both express and implied warranties.

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54. *See* TEX. BUS. & COM. CODE ANN. § 2.103(a)(4) (Tex. UCC) (Vernon 1968).

55. *See* Vintage Homes, Inc. v. Coldiron, 585 S.W.2d 886, 888 (Tex. Civ. App.—El Paso 1979, no writ).

56. 557 S.W.2d 77 (Tex. 1977).

57. *See* TEX. BUS. & COM. CODE ANN. § 2.607(e)(1) (Tex. UCC) (Vernon 1968).

58. *See* Draffin v. Chrysler Motors Corp., 166 S.E.2d 305, 307-08 (S.C. 1969).

59. *See* Ford Motor Co. v. Tidwell, 563 S.W.2d 831, 835 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).

60. *See id.* at 834-35.

61. *See id.* at 834-35.

IV. DAMAGE CONSIDERATIONS

Courts have struggled over the proper issue submission on damages for breach of warranty. The general measure of damages is the difference between the value of the defective goods as accepted and the value of the goods had they been as warranted, both values measured at the time and place of acceptance.[62] Some decisions have expressly stated that the cost of repairs is not the appropriate measure of damages in a breach of a warranty of merchantability case.[63] One decision has applied a formula involving both cost of repairs and market value difference.[64] In a breach of warranty of repair case, however, the more precise measure of damages is the cost of repair.[65] It is important, therefore, to distinguish breach of an implied or express warranty of merchantability or fitness from breach of a warranty to repair.[66] In the latter instance, cost of repairs should be the proper measure of damages unless the repairs have been totally ineffective. On the other hand, market value difference still governs issue submission for breach of the implied warranty of merchantability.[67] Thus, if the plaintiff sues on both theories of ex-

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62. *See* TEX. BUS. & COM. CODE ANN. § 2.714(b) (Tex. UCC) (Vernon 1968); *see also* Valley Datsun v. Martinez, 578 S.W.2d 485, 490 (Tex. Civ. App.—Corpus Christi 1979, no writ). The Business Code provides that this is the proper measure of damages "unless special circumstances show proximate damages of a different amount." TEX. BUS. & COM. CODE ANN. § 2.714(b) (Tex. UCC) (Vernon 1968).

63. *See* Chaq Oil Co. v. Gardner Mach. Corp., 500 S.W.2d 877, 878 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ); Neuman v. Spector Wrecking & Salvage Co., 490 S.W.2d 875, 877 (Tex. Civ. App.—Beaumont 1973, no writ).

64. *See* Orr Chevrolet, Inc. v. Courtney, 488 S.W.2d 883, 886 (Tex. Civ. App.—Texarkana 1972, no writ). In *Courtney,* the court stated that:

> If the cost of repairing the vehicle [is] more than the loss in its fair market value, then the loss in fair market value [is] the proper measure of damage[s]. If the car [is] subject to repair, and the cost of its repair [is] less than the loss in fair market value, then the cost-of-repair measure of damages [is] applicable.

Id. at 886. Therefore, proof of damages may require submission of two findings: market value difference and cost of repair.

65. *See* Smith v. Kinslow, 598 S.W.2d 910, 914 (Tex. Civ. App.—Dallas 1980, no writ). If the warranted good has no value, the buyer may recover the amount paid for the good. *See id.* at 913. Further, the buyer may be entitled to recover the reasonable cost of repairing the good elsewhere, even if such cost is greater than the contract price. *See id.* at 914.

66. *See* Preston v. Sears, Roebuck & Co., 573 S.W.2d 560, 562 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.). Distinguishing between a warranty of repair and a warranty of merchantability, the court in *Preston* held that treble damages under the DTPA were not recoverable in an action based on the former. *See id.* at 563.

67. *See* Chrysler Corp. v.Schuenemann, 618 S.W.2d 799, 805 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

press warranty of repair as well as implied warranty of merchantability, he should be entitled to submission on both issues. The two concepts are not mutually exclusive. If the product's decline in market value cannot be off-set by the cost of repairs, then market value diminution should determine the buyer's damages.

Proof of the product's market value in the condition delivered and in the condition it should have been delivered presents no evidentiary burden. It is well-established that an owner can testify as to value of his personal property.[68] The only predicate required is that the owner testify that he is familiar with the value of the product.[69] The laxity of value testimony is shown by the following line of questioning in *Classified Parking System v. Kirby:*[70]

Q: Do you have an opinion as to the value of the car on the day it was stolen?

Mr. Red: I object to that, your Honor.

The Court: Overrule the objection.

Q: (By Mr. Cage) Do you have an opinion?

A: To me the car was worth at least $3500.

Q: That is your opinion as to its value?

A: Yes, sir.

Frequently, counsel neglects to establish the two requisite elements of market value as a measure of damages. In *Overseas Motors Corp. v. First Century Christian Church, Inc.,*[71] both parties agreed that the purchase price of the automobile could be taken as evidence of the value of the automobile as warranted. Plaintiff introduced evidence of the vehicle's value at the time of trial, however, and not at the time of acceptance. The court held that there was insufficient evidence to sustain the verdict.[72] Further, to admit testimony on the cost of repairs, there must be some evidence that the cost of repairs was reasonable and necessary before that figure may be used as a predicate for sustaining a finding on the damage issue.[73]

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68. *See* Chrysler-Plymouth City, Inc. v. Guerrero, 620 S.W.2d 700, 703 (Tex. Civ. App.—San Antonio 1981, no writ).

69. *See* National Surety Corp. v. Seale, 499 S.W.2d 753, 754-55 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

70. 507 S.W.2d 586, 587-88 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ).

71. 608 S.W.2d 288, 289-90 (Tex. Civ. App.—Dallas 1980, no writ).

72. *See id.* at 290.

73. *See* Jordan Ford, Inc. v. Alsbury, 625 S.W.2d 1, 3 (Tex. Civ. App.—San Antonio

Recent decisions have emphasized the lawyer's obligation to come to a firm understanding of the law of warranty. In *Nobility Homes of Texas, Inc.*, the Texas Supreme Court restricted the scope of strict liability causes of action by denying recovery for economic loss under such an action and limiting recovery for economic loss to an action for breach of warranty under the Business Code.[74] A year later, the court further restricted strict liability causes of action by holding that damage to the product itself constitutes economic loss recoverable only under a breach of warranty action.[75] Damages to the product itself are considered property damage and are recoverable under strict liability, however, when "the product itself has become part of the accident risk or the tort by causing collateral property damage. . . ."[76] To recover collateal property damage, a plaintiff may proceed under section 402A of the Restatement (Second) of Torts for property damage or under section 2.715 of the Business Code for consequential damages resulting from a breach of an implied warranty.[77]

V. LIMITATIONS AND EXCLUSIONS

The Business Code provides that the seller may limit the buyer's remedies for breach of an express or implied warranty.[78] In addition, most limited warranties specifically exclude damages for loss of time, inconvenience, commercial loss, or consequential damages. A distinction must be made, however, between the limitation of remedies and the exclusion of specific types of damages for the purposes of avoiding such limitation or exclusion. Where the seller has limited a buyer's remedy to either repair or replacement of defective parts or to a particular dollar amount,[79] the buyer is not bound by

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1981, no writ); Bavarian Autohaus, Inc. v. Holland, 570 S.W.2d 110, 115 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

74. *See* Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 80 (Tex. 1977).

75. *See* Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308, 313 (Tex. 1978).

76. *See* Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 325 (Tex. 1978).

77. *See id.* at 325.

78. *See* TEX. BUS. & COM. CODE ANN. §§ 2.316(d), 2.718, 2.719 (Tex. UCC) (Vernon 1968).

79. *See* Rinehart v. Sonitrol of Dallas, Inc., 620 S.W.2d 660, 663 (Tex. Civ. App.—Dallas 1981, no writ) (limitation of damages to specific dollar amount); Smith v. Kinslow, 598 S.W.2d 910, 914 (Tex. Civ. App.—Dallas 1980, no writ) (warranty limited to repair or replacement).

the remedy unless it is mutually agreed by both parties that the remedy is exclusive.[80] Further, if the warranty does provide for an exclusive remedy, the plaintiff-buyer must plead and prove that the warranty failed of its essential purpose in order to avoid the limitation.[81] Where the seller has excluded consequential damages under a warranty, however, the buyer must show that the exclusion is unconscionable in order to recover.[82] In regard to the burden of proof to show unconscionability, a recent case, *Chrysler Corp. v. Roberson,*[83] held that the manufacturer's reliance on a contractual exclusion of consequential damages is an affirmative defense under Rule 94 of the Texas Rules of Civil Procedure, thus placing the burden on the defendant-seller to plead and prove the consequential damages exclusion.[84] The holding of *Roberson*, however, conflicts with the majority of other cases which place the burden of proof on the buyer to show that either the warranty failed of its essential purpose or is unconscionable.[85] Requiring the buyer to bear the burden of proof on failure of essential purpose, yet requiring the manufacturer to do so on unconscionability would not comport with the literal language of the Business Code.[86] If courts follow the reasoning of *Roberson* and refuse to place the burden of unconscionability on the

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80. *See* TEX. BUS. & COM. CODE ANN. § 2.719(a)(2) (Tex. UCC) (Vernon 1968).

81. *See id.* § 2.719(b); *see also* Lankford v. Rogers Ford Sales, 478 S.W.2d 248, 251 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.).

82. *See* TEX. BUS. & COM. CODE ANN. § 2.719(c) (Tex. UCC) (Vernon 1968).

83. 619 S.W.2d 451 (Tex. Civ. App.—Waco 1981, no writ).

84. *See id.* at 458.

85. *See, e.g.,* Bill Stremmel Motors, Inc. v. IDS Leasing Corp., 514 P.2d 654, 657 n.3 (Nev. 1973) (buyer has burden to prove unconscionability); Lankford v. Rogers Ford Sales, 478 S.W.2d 248, 251 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.) (buyer must prove failure of essential purpose); Schroeder v. Fageol Motors, Inc., 544 P.2d 20, 25 (Wash. 1975) (burden of proof on buyer to show unconscionability). If section 2.719(c), the limitation of damages provision, is read in conjunction with section 2.302, the provision defining unconscionability, then whether the clause is unconscionable on limitation of damages is a question of law, not fact. *See* Weintraub, *Disclaimer of Warranties and Limitation of Damages for Breach of Warranty Under the UCC,* 53 TEXAS L. REV. 60, 75-82 (1974). Some courts have applied the definition of unconscionability in section 2.302 to section 2.719(c). *See* Monsanto Co. v. Alden Leeds, Inc., 326 A.2d 90, 98-99 (N. J. Super. Ct. Law Div. 1974); Schroeder v. Fageol Motors, Inc., 544 P.2d 20, 23 (Wash. 1975). Outside the ambit of section 2.719(c), however, unconscionability is ordinarily treated as an affirmative defense to be pleaded and proven by the party seeking to avoid the contract term. *See generally* Ganda, Inc. v. All Plastics Molding, Inc., 521 S.W.2d 940, 942 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.); Note, *Presumptions of Unconscionability and Nondefective Products Under the Uniform Commercial Code,* 50 N.Y.U. L. REV. 148 (1975).

86. *See* Orr Chevrolet, Inc. v. Courtney, 488 S.W.2d 883, 887 (Tex. Civ. App.—Texar-

buyer, a global request for damages would suffice as a tacit pleading of unconscionability and put the onus on the seller to prove that any exclusion of consequential damages is commercially acceptable. Two separate issue submissions are required for both the issue of failure of an essential purpose as to a limitation of remedies and the issue of unconscionability as to the exclusion of consequential damages. The two are, perforce, independent of each other. If there is a finding of failure of essential purpose, the contractual exclusion on consequential damages is not per se unconscionable.[87]

In determining unconscionability, the courts generally have taken the following factors into consideration: the general commercial setting; conspicuousness of terms and prior course of dealings;[88] the parties' sophistication or understanding; duress or force;[89] entire circumstances under which the agreement was made; alternatives available to the parties; non-bargaining ability of one party; legality of the contract; and, whether the contract is oppressive.[90]

VI. Defenses Available Under the Texas Business and Commerce Code and the Deceptive Trade Practices Act

The defendant-seller should also be aware of the defenses available under the Business Code as well as the DTPA. Under section 2.715 of the Business Code, the buyer may recover only those consequential damages proximately caused by the breach of warranty; the buyer may not recover consequential damages proximately caused by his own negligence or fault.[91] Where both the defective product and the buyer's negligence cause the damage, the trier of fact must determine "the respective percentages (totalling 100 percent) by which the concurring causes contributed to the consequential dam-

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kana 1972, no writ); Lankford v. Rogers Ford Sales, 478 S.W.2d 248, 251 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.).

87. *See* Kohlenberger, Inc. v. Tyson's Foods, Inc., 510 S.W.2d 555, 558 (Ark. 1974); Anderson, *Failure of Essential Purpose and Essential Failure on Purpose: A Look at Section 2-719 of the Uniform Commercial Code,* 31 Sw. L.J. 759, 764-65 (1977).

88. *See* Schroeder v. Fageol Motors, Inc., 544 P.2d 20, 24 (Wash. 1975).

89. *See* Durham v. Uvalde Rock Asphalt Co., 599 S.W.2d 866, 872 (Tex. Civ. App.—San Antonio 1980, no writ).

90. *See id.* at 872; Wade v. Austin, 524 S.W.2d 79, 86 (Tex. Civ. App.—Texarkana 1975, no writ).

91. *See* Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d. 320, 329 (Tex. 1978).

ages."[92] Thus, if the buyer's fault proximately causes 75 percent of his damages, he still may recover 25 percent of the damages. If the buyer's fault contributes to the damages, such fault should be affirmatively pled by the manufacturer-seller under Rule 94 of the Texas Rules of Civil Procedure.

Under the 1977 amendments to the DTPA, the defendant can limit an award to actual damages under three circumstances.[93] The two most common defenses are proof of no written notice and no reasonable opportunity to cure defects.[94] The defenses to a consumer's complaint under the DTPA are now set out in section 17.50B of the Business Code. The burden is on the plaintiff to prove that written notice was given prior to filing of suit.[95] In addition, the DTPA now imposes a two-year statute of limitations.[96]

Some circumstances may justify the defendant seeking attorney's fees and costs against the plaintiff. The DTPA provides for an award of reasonable and necessary attorney's fees and court costs if the court finds that the action is groundless and brought in bad faith or for the purpose of harassment.[97] If the court determines that the suit is groundless, then a defendant is entitled to an issue submission on bad faith or harassment.[98]

VII. CONCLUSION

The trial of a warranty case requires a thorough understanding of the Business Code. Although warranty has its origin in contract law, courts frequently treat warranty cases as a quasi tort and often ignore the remedies available to the parties. With a sound understand-

92. *See id.* at 329. One case has held that the proper issue submission for the question of the buyer's negligence would be to inquire "if the acts or omissions of the buyer occurred, if they were unreasonable under the circumstances, and what percentage of the buyer's damages were solely caused by his unreasonable use." Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co., 602 S.W.2d 282, 292 (Tex. Civ. App.—Dallas 1980, no writ).

93. TEX. BUS. COM. CODE ANN. § 17.50B (Vernon Supp. 1982-1983).

94. *See id.*

95. *See id.*

96. *See id.* § 17.56A.

97. *See id.* § 17.50(c).

98. *See* Genico Distribs., Inc. v. First Nat'l Bank, 616 S.W.2d 418, 420 (Tex. Civ. App.—Texarkana 1981, writ ref'd n.r.e.). In *Genico Distributors, Inc.,* the following issue regarding bad faith was submitted: "Do you find from the preponderance of the evidence that this suit brought by . . . [Plaintiff] alleging deceptive trade practices was brought in bad faith?" *Id.* at 420.

ing of proof and issue submission, counsel for both parties can avoid much of the confusion that has long plagued the courts as well as the bar.

APPENDIX

The following special issues are not intended to be a standard form or complete set of issues for every warranty trial. Controlling issues will vary depending on the facts of each case and the evidence introduced at trial. The following issues should be modified or deleted or additional issues added to adapt to the particular circumstances.

SPECIAL ISSUE NO. 1[99]

Do you find from a preponderance of the evidence that Defendant-Seller did not honor its express warranty to Plaintiff?

In connection with this issue, you are instructed that the express warranty referred to is the terms and conditions as written in Plaintiff's [Defendant's] Exhibit No. ____.

ANSWER: "It did not honor" or "It did honor."

SPECIAL ISSUE NO. 2[100]

Do you find from a preponderance of the evidence that the product was not merchantable at the time of sale thereof to Plaintiff?

In connection with Special Issue No. 2, you are instructed that to be merchantable, the product must be at least as follows:

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99. *See* Chrysler Corp. v. Roberson, 619 S.W.2d 451, 454 (Tex. Civ. App.—Waco 1981, no writ); *see also* General Supply & Equip. Co. v. Phillips, 490 S.W.2d 913 (Tex. Civ. App.—Tyler 1972, writ ref'd n.r.e.). In *Phillips,* the court held that to recover under section 2.313 of the Business Code the buyer must prove: a) a promise or affirmation; b) which becomes part of the basis of the bargain; c) reliance; d) failure of goods to comply with the promise or affirmation; e) inquiry; and f) proximate cause. Other decisions have not required a showing of reliance by the buyer to recover for breach of an express warranty. *See* Elanco Prods. Co. v. Akin-Tunnell, 474 S.W.2d 789, 792 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.); Walter E. Heller & Co. v. Da-Jor Constr. Co., 460 S.W.2d 266, 272 (Tex. Civ. App.—Beaumont 1970, no writ); *see generally* Whitman, *Reliance As An Element In Product Misrepresentation Suits: A Reconsideration,* 35 Sw. L.J. 741 (1981). *But see* Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co., 602 S.W.2d 282, 293 (Tex. Civ. App.—Dallas 1980, no writ). An alternative issue in a breach of repair case might be incorporated as follows:

> Do you find from the preponderance of the evidence that [the Defendant-Seller/Manufacturer] failed to make necessary repairs of the defects, if any, found to exist in the automobile in question?

Overseas Motors, Corp. v. First Century Christian Church, Inc., 608 S.W.2d 288, 289 (Tex. Civ. App.—Dallas 1980, no writ).

100. *See* Chrysler Corp. v. Roberson, 619 S.W.2d 451, 454 (Tex. Civ. App.—Waco 1981, no writ).

[List the relevant subsections of section 2.314 of the Texas Business and Commerce Code.]

ANSWER: "It was" or "It was not."

If you have answered Special Issue No. 1, "It did not honor," or if you have answered the preceding Special Issue No. 2, "It was not," then answer the following Special Issue; otherwise do not answer it.

SPECIAL ISSUE NO. 3[101]

Do you find from the preponderance of the evidence that such failure to honor the warranty or lack of merchantability, if you have so found, was a proximate cause of Plaintiff's damages, if any?

ANSWER: "It was" or "It was not."

You are instructed that the term proximate cause as used in the foregoing Special Issue, is defined as a cause which, in a natural and continuous sequence, produces an event, and without which the event would not have occurred.

If you have answered Special Issue No. 3, "It was," then answer the following Special Issue; otherwise do not answer it.

SPECIAL ISSUE NO. 4[102]

Do you find from a preponderance of the evidence that Plaintiff within a reasonable time after he discovered or should have discovered that the product was not merchantable or that the Defendant-Seller failed to honor its express warranty, if you have so found,) notified Defendant-Seller of such fact?

ANSWER: "He did" or "He did not."

SPECIAL ISSUE NO. 5

If the buyer wishes to avoid a limitation of remedy clause, it is his burden to submit an issue on failure of essential purpose.[103] The following proposed issue should suffice:

Do you find from the preponderance of the evidence that Defend-

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101. *See id.* at 455. The court does not decide whether proximate cause rather than producing cause is the proper causation submission.

102. *See id.* at 455; TEX. BUS. & COM. CODE ANN. § 2.607(c)(1) (Vernon Supp. 1982-1983).

103. *See* Lankford v. Rogers Ford Sales, 478 S.W.2d 248, 251 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.).

ant-Seller's warranty as exhibited by Plaintiff's Exhibit No. __ failed of its essential purpose?

You are instructed that the warranty evidenced by Plaintiff's Exhibit No. __ fails of its essential purpose, if any, if the following occurs:

a) Defendant repudiated the warranty or willfully failed or refused to comply with the warranty;

b) was unable to comply with the terms of the warranty;

c) was dilatory in complying with the warranty;

d) failed to comply with the terms of the warranty within a reasonable time.[104]

SPECIAL ISSUE NO. 6

From the preponderance of the evidence, find the fair market value in _____ County, Texas, of the product on the date it was delivered to Plaintiff in the condition it should have been.

Answer in dollars and cents, if any.

SPECIAL ISSUE NO. 7

Find from the preponderance of the evidence the actual fair market value in _____ County, Texas, of the product as delivered to Plaintiff on date of sale. (If the implied warranty is for a fixed duration, incorporate the period into the issue submission.)

Answer in dollars and cents, if any.

A definition of market value and a curative instruction on diminution of value should be given:

"Fair market value" means the amount which would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but who is under no necessity of selling.[105]

In connection with Special Issue No. 7, you will consider only such diminution of value, if any, which you may find from a preponderance of the evidence was caused by the product's not being of merchantable quality. You will not consider claims for loss of time, profits, rental of substitute product, incidential or consequential

104. *See generally* Tracy, *Disclaiming and Limiting Liability for Commercial Damages,* 83 COM. L.J. 8 (1978).

105. *See* City of Pearland v. Alexander, 483 S.W.2d 244, 247 (Tex. 1972).

claims, if any.[106]

SPECIAL ISSUE NO.8[107]

Find from the preponderance of the evidence the reasonable and necessary cost of repairs in _____ County, Texas, to put the product in the condition it should have been as represented by Plaintiff's Exhibit ___.

Answer in dollars and cents, if any.

SPECIAL ISSUE NO. 9

Do you find from the preponderance of the evidence that Defendant _____ had no written notice of Plaintiff's complaint before suit was filed?

ANSWER: "It had no written notice" or "It had written notice."

SPECIAL ISSUE NO. 10

Do you find from the preponderance of the evidence that Defendant was not given a reasonable opportunity to cure the defects or malfunctions, if any, before suit was filed?

ANSWER: "It was not" or "It was."

106. *See* Chrysler Corp. v. Roberson, 619 S.W.2d 451, 454 (Tex. Civ. App.—Waco 1981, no writ); *see also* Overseas Motors, v. First Century Christian Church, Inc., 608 S.W.2d 288, 289 (Tex. Civ. App.—Dallas 1980, no writ) for an acceptable instruction and issue on market value difference.

107. *See* Applebaum v. Michaels, 384 S.W.2d 148, 149 (Tex. Civ. App.--Texarkana 1964, writ ref'd n.r.e.).