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Warranties, Disclaimers, Limitation of Remedies, and the Texas Deceptive Trade Practices Act.

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WARRANTIES, DISCLAIMERS, LIMITATION OF REMEDIES, AND THE TEXAS DECEPTIVE TRADE PRACTICES ACT

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I. INTRODUCTION

Texas merchants engaged in negotiations for the purchase and sale of goods, and lawyers attempting to draft contracts embodying the result of these negotiations are confronted with two legislative provisions, both relating to the sale of goods, which appear to be in conflict.

The first of these is section 2.719 of the Texas Business and Commerce Code[1] which, with certain exceptions, none of importance here,[2] allows the agreement to "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 re-

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1. TEX. BUS. & COM. CODE ANN. § 2.719 (Tex. UCC)(Vernon 1968).

2. The exceptions under section 2.719 are: (1) the contract remedy is optional unless expressly agreed to be exclusive; (2) code remedies become available if the contract remedy fails of its essential purpose; and (3) a limitation or exclusion of consequential damages must not be unconscionable. *Id.*

placement of non-conforming goods or parts."[3] This provision has been employed in numerous contracts of sale and, as will be detailed below, clauses limiting damages pursuant to this provision have been consistently approved and enforced by Texas courts.

The conflicting provision is section 17.42, also of the Texas Business and Commerce Code[4] and part of the Deceptive Trade Practices-Consumer Protection Act, hereinafter referred to as the "DTPA." This provision declares that "any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void."[5]

The provisions are in conflict because, under section 17.50(a)(2) of the DTPA, "breach of an express or implied warranty" constitutes a deceptive trade practice giving rise to an action under the DTPA,[6] and section 17.50(b)(1) provides that "i[n] a suit filed under this section, each consumer who prevails may obtain:

(1) The amount of actual damages found by the trier of fact."[7]

The DTPA does not independently provide for "actual damages"; therefore, the consumer's actual damages must derive from common law or statute[8] which, in case of breach of warranty for the sale of goods, would be sections 2.714-715 of the U.C.C.[9] and would be waivable under section 2.719 as "damages recoverable under this chapter."[10]

However, when merchants agree upon a limitation of remedies for breach of warranty that complies with section 2.719 of the U.C.C.,[11] the buyer, upon breach of express or implied warranties, is free to bring suit under section 17.50(a)(2) of the DTPA[12] and the limitation, being a waiver of recovery of the "actual damages" allowed under

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3. TEX. BUS. & COM. CODE ANN. § 2.719(a)(1) (Tex. UCC)(Vernon 1968).

4. TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon 1987).

5. *Id.* The provision allows an experienced, aware and knowledgeable business consumer, with genuine assets of $5,000,000 or more, to waive the provisions of the Act. *Id.*

6. *Id.* § 17.50(a)(2).

7. *Id.* § 17.50(b)(1).

8. Woo v. Great Southwestern Acceptance Corp., 565 S.W.2d 290, 297-98 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.)(under DTPA damages additional to other procedures or remedies provided for by other laws).

9. TEX. BUS. & COM. CODE ANN. §§ 2.714-715 (Tex. UCC)(Vernon 1968).

10. *Id.* § 2.719(a)(1).

11. *Id.* § 2.719.

12. TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon 1987).

DTPA section 17.50(b)(1),[13] is against public policy under section 17.42,[14] and is thus "unenforceable and void." This has the practical effect of severely, if not mortally, wounding section 2.719.[15]

Hold your applause, because this is not always a desirable result. Unmerchantability is the exception rather than the rule in sales of goods and there are many merchant buyers who, in a particular transaction, would prefer to take the risk of a limitation of remedies in return for a reduced purchase price rather than pay an increased purchase price necessitated by the seller's increased risk of full damages in case of a breach of warranty. Such a buyer's preference is denied to most merchants by DTPA section 17.42.[16] This represents a serious infringement upon the right of consenting adults to freely contract for the sale and purchase of goods.

By way of contrast, section 2.316 of the U.C.C.[17] allows sellers and buyers, even non-merchant buyers, to agree to a total elimination of implied warranties by way of disclaimers and, unlike the fate of section 2.719 limitations of remedies, a proper disclaimer is not affected by section 17.42 of the DTPA.[18] This is because DTPA section 17.50(a)(2) gives rise to an action only if a warranty is breached, and, if all implied warranties have been disclaimed and no express warranties given, there are no warranties to breach, hence no action under section 17.50(a)(2) and nothing to waive under section 17.42.

The inconsistencies and anomalies arising from these various provisions of the Texas Business and Commerce Code relating to the sale of goods understandably have posed problems to the Texas courts. This article will discuss how the courts have resolved or failed to resolve these problems and will propose some further solutions.

II. THE DISTINCTION BETWEEN DISCLAIMERS OF WARRANTY AND LIMITATIONS OF REMEDIES

Before proceeding further, it is important to note carefully the distinction between a disclaimer of warranty under section 2.316 on the

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13. *Id.* § 17.50(b)(1).

14. *Id.* § 17.42.

15. TEX. BUS. & COM. CODE ANN. § 2.719 (Tex. UCC)(Vernon 1968).

16. TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon 1987). Only those buyers with assets of $5,000,000 or more can avail themselves of this option. *See id.*

17. TEX. BUS. & COM. CODE ANN. § 2.316(b)-(c) (Tex. UCC)(Vernon 1968).

18. TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon 1987)(section 17.42 only applies to limitations of actual damages not warranty disclaimers).

one hand, and a limitation of remedies for breach of warranty under section 2.719 on the other.

A disclaimer of warranty under section 2.316 has the effect of excluding the disclaimed warranty from the contract.[19] Thus, if a bushel of beans is delivered and accepted and turns out to be unmerchantable, a disclaimer of the implied warranty of merchantability, if properly included in the contract in accordance with section 2.316, has the effect of denying the buyer any cause of action for breach of warranty.[20] There is no warranty to breach. There is no point in worrying about remedies because there is no breach to remedy.

A limitation of remedies, however, assumes and admits the existence of some kind of warranty, express or implied, and acknowledges that in case of its breach the buyer has a cause of action; however, the buyer's remedies for breach of that warranty are limited to those specified in the contract such as, and often, return of the purchase price and/or repair or replacement of defective parts.[21] There is a warranty, there is a breach, but only limited remedies. Assume that the above buyer of beans has an express or implied warranty that the beans are merchantable, but his remedies are properly limited under section 2.719 to a return of the purchase price of the beans and consequential damages are excluded.[22] Ordinarily, if the beans turn out to be unmerchantable, the buyer has a cause of action but can recover only the purchase price of the beans. He will be denied recovery for the loss of any resale or other economic consequences of the breach.[23]

The distinction is expressly recognized in the official comments to both sections 2.316 and 2.719. Comment 2 under section 2.316 states:

> This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of

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19. *Id.* § 2.316.

20. *Id.* (disclaimer must be conspicuous and specifically state warranty of "merchantability" disclaimed).

21. TEX. BUS. & COM. CODE ANN. § 2.719(a)(1) (Tex. UCC)(Vernon 1968).

22. *Id.*

23. For further discussion of the distinctions, see generally Weintraub, *Disclaimer of Warranties and Limitation of Damages for Breach of Warranty Under the U.C.C.*, 53 TEX. L. REV. 60 (1974) and J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 12.1 (West 3d ed. 1988).

course no problem of limiting remedies for breach of warranties.[24]

Comment 3 under section 2.719 recognizes that "[t]he seller in all cases is free to disclaim warranties in the manner provided in Section 2.316."[25]

Understanding this distinction is vital to a proper determination of the rights of parties to a contract of sale, particularly when the DTPA is involved because, as noted above, under the combined effect of sections 17.42, 17.50(a)(2) and 17.50(b)(1) of the DTPA,[26] a section 2.719 limitation of remedies[27] is contrary to public policy, whereas a section 2.316 disclaimer of warranties[28] is not. The logic of the distinction compels this result: the buyer of beans hypothecated above, with a disclaimer of warranties, cannot sue under the DTPA because he has no action for breach of warranty, but the one with a limitation of remedies can not only sue under the DTPA but can sue free of the limitation of remedies in the contract and can recover all consequential damages incurred and, if appropriate, have them trebled. This follows even though the buyer is an experienced merchant and knowingly and willingly accepted the limitation of remedies and benefited from any consequent reduction in purchase price.[29]

Despite its importance, or perhaps because of it, the difference between disclaimers and limitations of remedies has not always been carefully observed by Texas courts in DTPA litigation.

III. CASES DECIDED SOLELY UNDER COMMON LAW OR UNDER ARTICLE 2 OF THE U.C.C.

Prior to adoption of the Uniform Commercial Code in Texas,[30] the imposition of warranties of quality and quantity in sales of goods and the ability to disclaim them or limit remedies for their breach was common in Texas. An excellent and brief synopsis of the development of implied warranties in Texas common law can be found in the

24. TEX. BUS. & COM. CODE ANN. § 2.316 comment 2 (Tex. UCC)(Vernon 1968).

25. *Id.* § 2.719 comment 3.

26. TEX. BUS. & COM. CODE ANN. §§ 17.42, 17.50(a)(2), 17.50(b)(1) (Vernon 1987).

27. TEX. BUS. & COM. CODE ANN. § 2.719 (Tex. UCC)(Vernon 1968).

28. *Id.* § 2.316.

29. Assuming assets of less than $5,000,000. There is no authority on the question of whether a limitation of remedies under section 2.719, without more, would qualify as a waiver of DTPA remedies under section 17.42 when buyer has assets exceeding $5,000,000.

30. Act of Sept. 1, 1967, ch. 785, 1967 Tex. Gen. Laws 2343.

opinion of the Texas Supreme Court in *Humber v. Morton*,[31] where the implied warranty is described as "the antithesis of caveat emptor."[32] Express warranties were also recognized and readily enforced.[33]

Disclaimers of warranties were upheld,[34] and at least on one occasion, even a disclaimer of an express warranty was honored.[35] Limitations of remedies were honored without hesitation.[36]

After the adoption of article 2 of the Uniform Commercial Code,[37] the opinions of Texas courts interpreting and enforcing disclaimers under section 2.316 and limitations of remedies under section 2.719[38] are generally straightforward and exhibit a firm understanding of the differences between disclaimers and limitations of remedies. A representative case is *Henderson v. Ford Motor Co.*[39] Ms. Henderson purchased a new car from the defendant under a contract of sale that contained an "AS IS" disclaimer of implied warranties that appeared to comply in all respects with section 2.316.[40] The contract did contain a twelve month express warranty of quality, but the remedy for its breach was limited to repair or replacement of defective parts in accordance with section 2.719.[41] The car was defective in several re-

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31. 426 S.W.2d 554 (Tex. 1968).

32. *Humber*, 426 S.W.2d at 557.

33. *See* Donelson v. Fairmont Foods Co., 252 S.W.2d 796, 799 (Tex. Civ. App.—Waco 1952, writ ref'd n.r.e.)(seller may define or limit obligation and provide limits or warranty in contract).

34. *See* Dutch Mill Gardens v. J.J. Grullemans & Sons, 238 S.W.2d 232, 233 (Tex. Civ. App.—Galveston 1951, writ ref'd)(upholding nonwarranty provision as part of binding contract).

35. Pyle v. Eastern Seed Co., 198 S.W.2d 562, 563-64 (Tex. 1946). In this case the contract called for "babosa onion seed" and another variety was delivered. *Id.* Because the contract disclaimed all warranties, express or implied, the court held for the seller. *Id.* at 564. This result would be changed by section 316(a) of article 2, which in effect prohibits disclaimers of express warranties.

36. First Nat'l Bank v. Fuller, 191 S.W. 830, 832 (Tex. Civ. App.—Fort Worth 1917, writ ref'd)(limiting remedy on return of horse); Buffalo Pitts Co. v. Alderdice, 177 S.W. 1044, 1046-47 (Tex. Civ. App.—Dallas 1915, writ ref'd)(remedy provided by seller was exclusive of all others).

37. TEX. BUS. & COM. CODE ANN. §§ 2.101-2.725 (Tex. UCC) (Vernon 1968).

38. *Id.* §§ 2.316, 2.719.

39. 547 S.W.2d 663 (Tex. Civ. App.—Amarillo 1977, no writ).

40. *Id.* at 665; *see also* TEX. BUS. & COM. CODE ANN. § 2.316 (Tex. UCC)(Vernon 1968)(disclaimer must be conspicuous and mention merchantability to disclaim that warranty).

41. *Henderson*, 547 S.W.2d at 665; *see also* TEX. BUS. & COM. CODE ANN. § 2.719 (Tex. UCC)(Vernon 1968)(remedies may be limited in agreement to certain extent).

spects and had to be taken back to the dealer for repairs on many occasions.[42] However, the court found that "[a]ll of the evidence [showed] that . . . every defect was repaired."[43] The court applied section 2.316[44] to exclude implied warranties and section 2.719[45] to limit Ms. Henderson's remedies for breach of her express warranty and denied her all relief.[46]

The sensible impact of section 2.316(a),[47] prohibiting disclaimers at least of written express warranties, has consistently been honored,[48] although alleged oral express warranties can be lost by merger into a written agreement, as they are subject to the code's parol evidence rule.[49] It has been held that implied warranties cannot be disclaimed by the mere giving of an express warranty or by the seller's insuring the goods or generally by any means other than those specified in section 2.316.[50] Accordingly, the disclaimer must have been conspicuous and seen or readily available to be seen by the buyer.[51] There is

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42. *Henderson*, 547 S.W.2d at 666.

43. *Id.* at 667.

44. TEX. BUS. & COM. CODE ANN. § 2.316 (Tex. UCC)(Vernon 1968).

45. *Id.* § 2.719.

46. Henderson v. Ford Motor Co., 547 S.W.2d 663, 671 (Tex. Civ. App.—Amarillo 1977, no writ). Other issues are presented in the *Henderson* case, but the statement in the text covers all those that concern this article.

47. TEX. BUS. & COM. CODE ANN. § 2.316(a) (Tex. UCC)(Vernon 1968).

48. *See, e.g.*, 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.)(disclaimer invalid where express warranty inconsistent with express disclaimer); Bowen v. Young, 507 S.W.2d 600, 605 (Tex. Civ. App.—El Paso 1974, no writ)(disclaimer of express warranty unenforceable where express warranty goes to essence of bargain); Mobile Housing, Inc. v. Stone, 490 S.W.2d 611, 614-15 (Tex. Civ. App.—Dallas 1973, no writ)(disclaimer invalid where repugnant to express warranty going to essence of bargain).

49. *See* Balderson Berger Equip. Co., Inc. v. Blount, 653 S.W.2d 902, 908 (Tex. App.—Amarillo 1983, no writ)(express oral warranty excluded from contract); *see also* TEX. BUS. & COM. CODE ANN. § 2.202 (Tex. UCC)(Vernon 1968).

50. TEX. BUS. & COM. CODE ANN. § 2.316 (Tex. UCC)(Vernon 1968)(implied warranties may be disclaimed if disclaimer conspicuous and readily noticeable); *see also* Vaughn Bldg. Corp. v. Austin Co., 620 S.W.2d 678, 680 (Tex. Civ. App.—Dallas 1981)(express warranty or failure of insurance does not exclude implied warranty), *aff'd*, 643 S.W.2d 113 (Tex. 1983); Lanphier Const. Co. v. Fawco Const. Co., 523 S.W.2d 29, 40 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.)(implied warranty not excluded in accordance with Texas U.C.C. § 2.316(b)). *But see* Emmons v. Durable Mobile Homes, 521 S.W.2d 153, 154 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.)(implied warranty excluded where express written warranty offered in lieu of implied warranty).

51. *See* Willoughby v. Ciba-Geigy Corp., 601 S.W.2d 385, 388 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.)(disclaimer ineffective where never disclosed or made known to buyer).

some authority for the proposition that a disclaimer is not effective unless the goods themselves have been seen and inspected by the buyer,[52] although there is considerable question as to how far this requirement should be extended.[53]

However, when a disclaimer appears in the contract and is totally in compliance with section 2.316,[54] the courts have not hesitated to deny the buyer any relief for breach of any and all implied warranties that have been disclaimed.[55] Limitation of remedies, proper under section 2.719,[56] and where no DTPA claim is involved, have been enforced without reservation by Texas courts applying article 2 of the U.C.C. in consumer transactions[57] as well as in commercial transactions.[58]

IV. CASES APPLYING THE DTPA AND SECTION 17.42 TO DISCLAIMERS AND LIMITATIONS OF REMEDIES

A. *Disclaimers*

Singleton v. LaCoure[59] presents an excellent analysis of the proper treatment of disclaimers in suits maintained under section 17.50(a)(1) of the DTPA[60] for breach of U.C.C. implied warranties.[61] The contract at issue in *Singleton v. LaCoure* contained a disclaimer of im-

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52. *See* Diamond v. Meacham, 699 S.W.2d 950, 952 (Tex. App.—El Paso 1985, writ ref'd n.r.e.)(limitation of warranty ineffective where goods or building cannot be inspected prior to signing of contract).

53. *See id.* at 951 (involved sale of new home rather than goods).

54. TEX. BUS. & COM. CODE ANN. § 2.316 (Tex. UCC)(Vernon 1968)(disclaimer must be conspicuous and seen or readily seen).

55. *See* Mid Continent Aircraft v. Curry County Spraying Serv., 572 S.W.2d 308, 313 (Tex. 1978)(implied warranties eliminated with an "as is" disclaimer); *see also* Balderson - Bergen Equip. Co., Inc. v. Blount, 653 S.W.2d 902, 908 (Tex. App.—Amarillo 1983, no writ)(implied warranties may be excluded where in writing and conspicuous); Chaq Oil Co. v. Gardner Mach. Corp., 500 S.W.2d 877, 878 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ)(implied warranties may be excluded or modified in proper manner).

56. TEX. BUS. & COM. CODE ANN. § 2.719 (Tex. UCC)(Vernon 1968)(agreement may limit remedy to return of goods and repayment of price or repair or replacement).

57. Henderson v. Ford Motor Co., 547 S.W.2d 663, 667-68 (Tex. Civ. App.—Amarillo 1977, no writ)(automobile purchaser held to limited remedies in sales contract); Lankford v. Rogers Ford Sales, 478 S.W.2d 248, 251 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.)(limitation of remedy to repair or replace not unconscionable or overreaching).

58. Fredonia Broadcasting Corp., Inc. v. RCA Corp., 481 F.2d 781, 798-99 (5th Cir. 1973)(RCA's limited warranty was exclusive remedy available to plaintiff).

59. 712 S.W.2d 757 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

60. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (Vernon 1987).

61. *See Singleton*, 712 S.W.2d at 759-60.

plied warranties which the court found to be in compliance with section 2.316.[62] The plaintiff argued that section 17.42 of the DTPA[63] voided the disclaimer for DTPA purposes.[64] The court correctly rejected this argument, stating:

> Section 17.42 specifically provides, "[a]ny waiver by a consumer of the provisions *of this subchapter* is contrary to public policy and is unenforceable and void . . . ." Tex. Bus. & Comm. [sic] Code Ann. § 17.42 (Vernon Supp. 1986)(*emphasis added*). As emphasized, the statute makes it clear that the prohibition against waiver applies only to that particular subchapter, namely the DTPA. Section 2.316, however, is not a part of that subchapter; rather, it appears in the Uniform Commercial Code section. Consequently, we do not believe section 17.42's prohibitive language is applicable to 2.316.
>
> Furthermore, section 17.50 of the DTPA describing relief for consumers states that a consumer may maintain a DTPA action for breach of an express or implied warranty. We do not read the section to *create* any warranties; instead, it provides relief when a warranty is breached. The warranty must first be found elsewhere. In this case, however, all warranties were effectively disposed of through compliance with section 2.316. Since there were no warranties, there cannot be an actionable breach under the DTPA.[65]

Accordingly, the court upheld a summary judgment for the seller.[66] By the same token, if a purported disclaimer does not comply with section 2.316,[67] it will not deter a buyer's recovery under the DTPA.[68]

It would be easy to conclude from the cases that, as far as disclaimers are concerned, they will be treated under DTPA actions based solely on section 17.50(a)(2)[69] in exactly the same manner as they would be treated under a U.C.C. breach of warranty action. If they

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62. *Id.* at 759 (disclaimer was such that reasonable person would have noticed existence); *see also* TEX. BUS. & COM. CODE ANN. § 2.316 (Tex. UCC)(Vernon 1968).

63. TEX. BUS & COM. CODE ANN. § 17.42 (Vernon 1987).

64. Singleton v. LaCoure, 712 S.W.2d 757, 759 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

65. *Id.* at 760.

66. *Id.* at 758.

67. TEX. BUS. & COM. CODE ANN. § 2.316 (Tex. UCC)(Vernon 1968).

68. Walter Baxter Seed Co. v. Rivera, 677 S.W.2d 241, 245 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.)(disclaimer not valid because not conspicuous); Chrysler Corp. v. Schuenemann, 618 S.W.2d 799, 803 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.)(limited warranty alone does not disclaim or exclude implied warranties).

69. TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon 1987).

comply with section 2.316[70] they are effective; if they fail to comply, they are ineffective.

Hovering over all of this, however, is the opinion of the Texas Supreme Court in *Melody Home Manufacturing Co. v. Barnes*,[71] which casts doubt upon disclaimers of warranty in any DTPA action. This DTPA case involved unsatisfactory repairs to a defective mobile home and gave the supreme court an opportunity to hold "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."[72]

Of more relevance to this article, the supreme court went further, stating:

> Consistent with the trend in recent consumer protection legislation and sound public policy, we further hold 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 . . . . It would be incongruous if public policy required the creation of an implied warranty, yet allowed the warranty to be disclaimed and its protection eliminated merely by a pre-printed standard form disclaimer or an unintelligible merger clause.[73]

This "holding"[74] almost certainly invalidates disclaimers in contracts to sell real estate and residences to consumers, such as the one involved and upheld in *G-W-L, Inc. v. Robichaux*,[75] which was specifically overruled in *Melody Home*.[76] Whether it affects disclaimers of implied warranties in the sale of goods, such as the one upheld in *Singleton v. LaCoure*,[77] remains to be seen. The all encompassing statement in *Melody Home* ominously threatens such disclaimers; on the other hand, it would be unusual, to say the least, for the Supreme Court of Texas to declare that time-honored and obviously constitu-

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70. TEX. BUS. & COM. CODE ANN. § 2.316 (Tex. UCC)(Vernon 1968).

71. 741 S.W.2d 349 (Tex. 1987).

72. *Melody Home Mfg. Co.*, 741 S.W.2d at 354.

73. *Id.* at 355 (citations omitted).

74. Although the court uses the word "hold," the statement is actually dicta because no disclaimer was involved or claimed in the transaction between Barnes and Melody Home. *Id.*

75. 643 S.W.2d 392 (Tex. 1982).

76. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 355 (Tex. 1987); *see also* McCrea v. Cubilla Condominium Corp., 685 S.W.2d 755, 758 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.)(case cites and follows).

77. 712 S.W.2d 757, 760 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.)(warranty exclusion regarding trailer held valid).

tional legislation such as section 2.316[78] is suddenly void as against public policy.

B. *Limitations of Remedies*

The real problem in DTPA warranty cases involves limitations of remedies, proper under section 2.719[79] but improper under section 17.42,[80] as waivers of the actual damages available under section 17.50(b)(1).[81] There do not appear to be any cases where a court has been willing to follow strict logic and employ section 17.42[82] to strike down an otherwise valid limitation of remedies in a suit filed solely under section 17.50(a)(2)[83] for DTPA breach of warranty. This is probably because, in most cases wherein warranty limitations have been voided, "laundry list"[84] violations were involved as well as breach of U.C.C. warranties and the courts were free to point out that although section 2.719[85] might apply to a warranty provision, it could not apply to violations of "the laundry list," which are made separately actionable under DTPA section 17.50(a)(1).[86] The closest case is *FDP Corp. v. Southwestern Bell Telephone*[87] which employed section 17.42 to strike down a limitation of remedies in a DTPA breach of warranty action.[88] However, this case involved the placing of an advertisement in the yellow pages of the telephone directory and thus represents a contract for services not directly subject to section

78. TEX. BUS. & COM. CODE ANN. § 2.316 (Tex. UCC)(Vernon 1968).

79. *Id.* § 2.719.

80. TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon 1987).

81. *Id.* § 17.50(b)(1). A successful DTPA plaintiff may recover actual damages plus two times the actual amount up to $1000. *Id.* If the trier of fact finds that defendant acted knowingly, it may award plaintiff up to three times the amount of actual damages exceeding $1000. *Id.*

82. *Id.* § 17.42 (section prohibiting disclaimers as against public policy).

83. TEX. BUS. & COM. CODE ANN. § 17.50(a)(2)(Vernon 1987)(DTPA action for breach of warranty).

84. The term "laundry list" is commonly used to refer to section 17.46(b) of the DTPA, wherein 24 separate instances of "false, misleading, or deceptive acts or practices" are described. TEX. BUS. & COM. CODE ANN. § 17.46(b)(1)-(24) (Vernon 1987).

85. TEX. BUS. & COM. CODE ANN. § 2.719 (Tex. UCC)(Vernon 1968).

86. *See, e.g.*, Hycel, Inc. v. Wittstruck, 690 S.W.2d 914, 923 (Tex. App.—Waco 1985, writ dism'd)(while limitation may prevent recovery of consequential damages it has no effect under DTPA); Metro Ford Truck Sales, Inc. v. Davis, 709 S.W.2d 785, 789 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.)(waiver of warranty may preclude DTPA action based on breach of warranty but has no effect on suit for false representation under DTPA).

87. 749 S.W.2d 569 (Tex. App.—Houston [1st Dist.] 1988, writ granted).

88. *Id.* at 571 (limitation of liability ineffective in DTPA suit).

2.719.[89]

In the very few cases involving pure U.C.C. warranties translated to DTPA actions under section 17.50(a)(2), courts have employed a variety of reasons for upholding the limitations of remedies, at least in part. An example is *Rinehart v. Sonitrol of Dallas, Inc.*,[90] a case filed under section 17.50(a)(2) and based exclusively upon a breach of an express warranty that a burglar alarm system installed in plaintiff's building would operate properly, which it failed to do.[91] Plaintiff's "actual damages" were stipulated to be $10,000 but the contract limited Sonitrol's liability to $5,000.[92] By this provision, the Rineharts were waiving $5,000 in actual damages which they would otherwise have been entitled to receive under section 17.50(b)(1),[93] a "provision" of the DTPA. The court applied section 17.42[94] but only to revive the additional damages provision of section 17.50.[95] The waiver of actual damages was upheld with the result that the Rineharts recovered $15,000 instead of $30,000. The court's treatment of the Rinehart's "actual" damages, available under section 17.50(b)(1) of the DTPA[96] as not being derived from "a provision" of the Act subject to section 17.42, while treating the additional damages available under the same section as being subject to section 17.42, is difficult if not impossible to defend from the standpoint of logic.

Limitations of remedies have also been upheld by blurring the distinction between disclaimers and limitations of remedies and either treating the two together or treating limitation of remedies as disclaimers and upholding them by citing cases upholding valid disclaimers. A typical example of this process is *Ellmer v. Delaware Mini-Computer*.[97] This case involved a contract containing a SERVICE WARRANTY and a LIMITATION OF LIABILITY - SOLE

89. *See also* Martin v. Lou Poliquin Enter., Inc., 696 S.W.2d 180, 185 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.)(section 2.719 of U.C.C. cannot limit or waive consumer right to sue under DTPA).

90. 620 S.W.2d 660 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).

91. *Id.* at 661. Like most claims based upon express warranties, this case could have been maintained under sections 5, 7 and possibly 23 of the "laundry list," but apparently it was not. *See* TEX. BUS. & COM. CODE ANN. § 17.46(b)(5), (7), (23) (Vernon 1987).

92. *Rinehart*, 620 S.W.2d at 662.

93. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 1987).

94. *Id.* § 17.42 (section prohibiting damage limitations).

95. *Id.* § 17.50(b)(1).

96. *Id.*

97. 665 S.W.2d 158 (Tex. App.—Dallas 1983, no writ).

REMEDY providing for a sixty day warranty limited to repair or replacement and expressly excluding all other warranties. In a suit filed under section 17.50(a)(2), the buyer attacked this provision as "unenforceable under Section 17.42."[98] The court ruled for the seller stating:

> The question then is whether the *disclaimer* is rendered unenforceable by Section 17.42 of the Deceptive Trade Practices Act. We conclude that the question has been resolved adversely to Datafast by *G-W-L, Inc. v. Robichaux* . . . where the Supreme Court gave effect to the disclaimer in a deceptive trade practice case.[99]

This reasoning is erroneous for several reasons. First and foremost, the provision is clearly a limitation of remedies, not a disclaimer, and thus is not controlled by *G-W-L*. Secondly, *G-W-L* involved an attempted disclaimer of a "Humber Warranty,"[100] which applies to sales of new residences, and the supreme court in *G-W-L* specifically held the U.C.C. inapplicable.[101] Further, section 17.42 is not mentioned or considered in *G-W-L*, and finally, *G-W-L* has since been overruled by the Texas Supreme Court.[102]

A similar case is *Eppler, Guerin & Turner v. Purolator Armored*,[103] a DTPA action wherein the court upheld a provision in a contract for a delivery service that the defendant would not be liable for any loss resulting from delays.[104] This case is not directly in point because it involves a service contract not subject either to section 2.316 or to section 2.719,[105] and the clause in question, although couched in terms of remedies, can arguably be considered a disclaimer rather than a limitation of remedies.

Without question, there is a reluctance on the part of Texas courts to follow the logic of section 17.42[106] and strike down limitations of

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98. *Id.* at 160.

99. *Id.* at 160-61 (emphasis added).

100. This warranty takes its name from the case of *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968), wherein it was first recognized in Texas.

101. G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 394 (Tex. 1982).

102. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 355 (Tex. 1987)(overruling *G-W-L*).

103. 701 S.W.2d 293 (Tex. App.—Dallas 1985, no writ).

104. *Eppler, Guerin & Turner*, 701 S.W.2d at 296.

105. *Id.* (contract for delivery service); *see also* TEX. BUS. & COM. CODE ANN. §§ 2.316, 2.719 (Tex. UCC)(Vernon 1968)(U.C.C. applies only to sale of goods).

106. TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon 1987)(section prohibiting limitation of damages).

remedies that are properly included in contracts of sale by virtue of section 2.719.[107] It is too easy to say that the ability to distinguish between disclaimers and limitations of remedies, so well refined by Texas courts before enactment of the DTPA, has suddenly been lost in cases applying the DTPA, even though this is indicated by *Ellmer* and *Eppler*, cited and discussed above.[108] It is more likely that the courts are reluctant to deny experienced business persons, with evenly balanced bargaining positions, the right to contract on their own terms. In all of the cases discussed above, where the plaintiff's case is based on section 17.50(a)(2), and the "laundry list"[109] is either not raised or not applicable, the plaintiff buyer is a merchant, not a consumer. If a transaction such as this is tainted with fraud, there is a common-law remedy.[110] If the limitation of remedies is unconscionable, it can be attacked under either section 2.719(c)[111] or under DTPA section 17.50(a)(3)[112] as an unconscionable act. There is little or no danger that undue advantage can be taken successfully in such transactions.

However, although the objective of the courts may be salutary, the results have been confusing. There ought to be a better way to preserve rights of contract than to ignore or misconstrue legislation.

V. SOLUTIONS

A practical solution employed by lawyers whenever feasible has the effect of at least eliminating the confusion. Whenever possible, the DTPA action is filed solely under the "laundry list"[113] or as an unconscionable act as defined in the DTPA,[114] and contractual warranties, translated into the DTPA by section 17.50(a)(2) are ignored. When this happens, the court is spared the duty of dealing with

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107. TEX. BUS. & COM. CODE ANN. § 2.719 (Tex. UCC)(Vernon 1968)(remedies may be limited if in conformity with section 2.719).

108. Eppler, Guerin & Turner v. Purolator Armored, 701 S.W.2d 293, 296 (Tex. App.—Dallas 1985, no writ).

109. TEX. BUS. & COM. CODE ANN. § 17.46(b) (Vernon 1987).

110. *See* Stone v. Lawyers Title Ins. Corp., 554 S.W.2d 183, 185 (Tex. 1977)(fraud lies where false representation made recklessly with knowledge of falsity).

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

112. TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (Vernon 1987). This section allows a consumer to sue under the DTPA for "any unconscionable action or cause of action" which is defined in section 17.45(5) of the DTPA. *Id.*

113. *Id.* § 17.46(b).

114. *Id.* § 17.45(5).

problems created by the difference between the DTPA and U.C.C. article two. This was the tactic in *Metro Ford Truck Sales, Inc. v. Davis*,[115] where Davis' suit "did not contain a cause of action based upon contract or breach of warranty, but was restricted to the deceptive representation and unconscionability features of the act."[116] The court held that the written disclaimer in the contract was properly excluded from evidence, because "we are dealing with a cause of action based solely upon false representations and not upon breach of warranty."[117] This route is generally satisfactory in cases wherein there is a misrepresentation or other conduct that brings the transaction under the "laundry list"[118] or amounts to an unconscionable course of conduct.[119] However, cases can arise wherein a consumer's only DTPA cause of action is for breach of an implied warranty or a contractual express warranty under section 17.50(a)(2), and in such cases the courts and parties must deal with section 17.42 and the authorities applying or not applying its provisions to such actions.

A more permanent and satisfactory solution could be afforded by legislation expanding the types of "consumers"[120] who are eligible to waive rights under the Act. Section 17.42 in its present form recognizes the need for some escape by allowing business consumers with assets of $5,000,000 or more to contract for themselves.[121] However, making assets the criteria seems to be neither a realistic nor a satisfactory, nor possibly even a constitutional, solution to the problem. Why should a person or entity with $5,000,000 be better able to take care of itself than one with $4,900,000? Undoubtedly, there are instances wherein a small business entity with assets of $50,000 is just as wise

115. 709 S.W.2d 785 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.).

116. *Id.* at 787.

117. *Id.* at 789-90; *see also* Mercedes-Benz of N. Am. v. Dickenson, 720 S.W.2d 844, 852 (Tex. App.—Fort Worth 1986, no writ)(even proper disclaimer cannot waive action for misrepresentation under DTPA).

118. TEX. BUS. & COM. CODE ANN. § 17.46(b) (Vernon 1987).

119. *Id.* § 17.45(5).

120. The DTPA defines "consumer" in an extremely broad manner as follows:

> "Consumer" means an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of $25 million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more.

TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987).

121. *Id.* § 17.42.

and canny in the ways of the business world as one with $5,000,000 or more. The criteria should be experience and knowledge, not assets.

The most effective form of remedial legislation would be to take merchants out of section 17.42.[122] This could be accomplished by prefacing section 17.42 with the phrase "except for merchants" so that it would read "except for merchants, any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable." "Merchant" could then be defined in much the same way as it is defined in Article Two of the U.C.C. as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."[123] This solution is reached through a different approach by the California Consumers Legal Remedies Act[124] which provides that "any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void"[125] and, while not limiting its overall remedial provisions to consumers, defines consumer as "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes".[126]

Such a change in no way violates the primary purpose of the DTPA which is to protect "the ignorant, the unthinking and the credulous" and to give a remedy for consumer fraud that makes such cases cost effective for legal representation.[127] The Court of Appeals for the Fifth Circuit recently surveyed the cases discussed hereinabove and, after noting that "the Texas Supreme Court has never explicitly addressed the scope of Section 17.42," summed up with the following observations: "[T]he Texas cases can be reconciled by recognizing that the anti-waiver provision was intended to prevent the use of unequal bargaining power to circumvent the DTPA protection of con-

122. *Id.*

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

124. CAL. CIV. CODE § 1750-1748 (West 1973 & Supp. 1981).

125. *Id.* § 1751.

126. *Id.* § 1761.

127. *See* Hill, *Introduction*, 8 ST. MARY'S L.J. 609, 613 (1977).

sumers."[128] Allowing "merchants" to bargain freely and to waive or not waive the remedial provisions of the DTPA as they choose is consistent with this intent.

A similar solution, which has been adopted in many states, is to confine consumer remedies to true consumers by defining consumers in much the same terms as the definition in Article Nine of the U.C.C., that is as "persons who use or buy goods for use primarily for personal, family or household purposes,"[129] and to confine consumer remedies to these individuals. This approach probably represents the consensus of consumer legislation in the United States.[130]

A less drastic, and perhaps more desirable change from the standpoint of the very broad application of the present Texas non-waiver provision would be to insulate all DTPA remedies from waiver except for disclaimers and limitations of remedies that comply in all respects with sections 2.316 or 2.719 of the U.C.C.[131] This would resolve the anomaly of the legislative declaration in one provision of the Business and Commerce Code that another provision of the same code is against public policy and would relieve the courts of straining to resolve the anomaly. It would leave intact the non-waiver provision as applicable to all laundry list violations and unconscionable conduct and would continue the very broad definition of consumer. Such a change could be accomplished by adopting a provision similar to one adopted in Tennessee as follows:

> "Waiver of Rights. - (a) No provision of this part may be limited or waived by contract, agreement or otherwise notwithstanding any other provision of law of the contract, provided, however, the provisions of this part shall not alter, amend, or repeal the provisions of the Uniform Commercial Code relative to express or implied warranties or the exclusion or modification of such warranties."[132] [or to the limitation of

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128. MBank Fort Worth N.A. v. Trans Meridian, Inc., 820 F.2d 716, 721 (5th Cir. 1987)(court found waiver by conduct).

129. TEX. BUS. & COM. CODE ANN. § 9.109(1) (Tex. UCC)(Vernon Supp. 1988).

130. *See, e.g.*, Alabama Deceptive Trade Practices Act, ALA. CODE § 8-19-3(2) (Supp. 1982); Illinois Consumer Fraud and Deceptive Business Practices Act, ILL. REV. STAT. ch. 121 1/2, § 272-367 (Supp. 1988); Louisiana Unfair Trade Practices and Consumer Protection Law, LA. REV. STAT. ANN. § 51:1401-1408 (West 1987); West Virginia General Consumer Protection, W. VA. CODE §§ 46A-6-102-46A-6-109 (1980 & Supp. 1982); Wisconsin Consumer Act, WIS. STAT. ANN. §§ 421.101-427.105 (West 1974 & Supp. 1981).

131. TEX. BUS. & COM. CODE ANN. §§ 2.316, 2.719 (Tex. UCC)(Vernon 1968).

132. TENN. CODE ANN. § 47-18-113 (Michie 1988).

remedies for their breach.][133]

Finally, in an opposite direction, for those who do not give high priority to the right of sophisticates to contract, the inconsistencies and confusion inherent in the present legislation could be resolved by amending section 2.719 so as to allow limitations of remedies only in transactions where the buyer has more than $5,000,000. This is the logical effect of section 17.42 under the present legislation and only the courts have kept freedom of contract alive.

VI. CONCLUSION

The problem outlined in this article, although confined to the narrow situation wherein the contract is for the sale of goods to a merchant buyer with less than $5,000,000 in assets and involves implied warranties only so as to prevent resort to the "laundry list" is, nevertheless, a real problem in the negotiation of commercial transactions, in drafting commercial contracts, and in the resolution of disputes regarding such transactions. It is a problem that can be readily resolved by remedial legislation without harming the essential purposes and benefits of the DTPA. Such legislation is recommended herein.

133. The bracketed provision is necessary to resolve the problem relating to limitations of remedies.