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Merger Doctrine No Defense to Deceptive Trade Practices Suit for Breach of Express Warranty.

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CASENOTES

CONSUMER PROTECTION—Breach of Warranty—Merger Doctrine No Defense To Deceptive Trade Practices Suit For Breach Of Express Warranty. *Alvarado v. Bolton*, 749 S.W.2d 47 (Tex. 1988).

In 1973, David R. Bolton and other investors purchased a fifty acre parcel of land.[1] In connection with the purchase, Bolton acquired ownership of one-half of the property's mineral rights.[2] Bolton subdivided 29.2 acres of the property into twenty-six lots and thereafter sold the lots to individual purchasers, one of whom was Eusebio Alvarado.[3] Alvarado's earnest money contract provided that Bolton would convey his lot by general warranty deed free and clear from all unlisted encumbrances.[4] Alvarado's contract, however, omitted any reference to a reservation of Bolton's one-half mineral ownership.[5] At closing, Bolton delivered and Alvarado accepted the deed which reserved Bolton's mineral interests.[6]

Subsequent to Alvarado and Bolton closing the transaction, oil was dis-

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1. Alvarado v. Bolton, 749 S.W.2d 47, 47 (Tex. 1988). Bolton was the general partner of a limited partnership participating in the land acquisition. *Id.*

2. *Id.* The original grantor of the land reserved the balance of the mineral rights within the deed to the fifty acre parcel. *See* Bolton v. Alvarado, 714 S.W.2d 119, 120 (Tex. App.—Houston [1st Dist.] 1986), *rev'd*, 749 S.W.2d 47 (Tex. 1988). In addition to owning the land and mineral rights, Bolton acted as trustee for the venture that subdivided and sold the lots. *See Alvarado*, 749 S.W.2d at 47.

3. *Id.* Each prospective purchaser signed an earnest money contract with Bolton evidencing their agreement of sale. *Id.*

4. Alvarado v. Bolton, 749 S.W.2d 47, 47 (Tex. 1988). The pertinent portion of the provision governing Bolton's delivery of the general warranty deed stated "seller agrees to execute and deliver General Warranty Deed to purchaser conveying said property free and clear of all encumbrances except those named herein." *Bolton*, 714 S.W.2d at 120.

5. *Alvarado*, 749 S.W.2d at 47. Some of Bolton's purchasers received earnest money contracts which contained provisions reserving Bolton's mineral interest. *Id.* Alvarado's contract, however, had omitted any reservation of Bolton's mineral ownership. *Id.*

6. *Id.* at 47-48. All of the deeds delivered by Bolton contained a reservation of his mineral ownership. *Id.* at 47. In spite of Bolton's specific reservation of his mineral rights in the deed, the owner's title policy issued by Gulfland Title Company to Alvarado failed to include

covered under the fifty acre parcel.[7] The oil discovery precipitated Alvarado's suit against Bolton for reformation of the deed and damages under the Deceptive Trade Practices Act due to a breach of express warranty.[8] The trial court reformed Alvarado's deed to include a one-half mineral ownership, and awarded him treble damages and attorney's fees.[9] The court of appeals reversed and rendered a take nothing judgment because the jury failed to find the existence of fraud or mutual mistake necessary to avoid the doctrine of merger.[10] The Texas Supreme Court granted Alvarado's appeal to decide whether a suit under the DTPA bars use of the merger doctrine to extinguish an express warranty within the earnest money contract upon delivery of the deed.[11] Held — *Reversed.* In a suit for damages under the Deceptive Trade Practices Act, the merger doctrine is no defense to a suit for breach of express warranty.[12]

In 1973, the Texas legislature enacted the Deceptive Trade Practices Act (the "DTPA") to protect consumers from deceptive trade practices in the sale or lease of goods or services.[13] The DTPA protects consumers by re-

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an exception for Bolton's mineral reservation as outlined in the deed. *See* Bolton v. Alvarado, 714 S.W.2d 119, 121 (Tex. App.—Houston [1st Dist.] 1986), *rev'd*, 749 S.W.2d 47 (Tex. 1988).

7. *See Alvarado*, 749 S.W.2d at 48.

8. *See id.* The court did not mention that a property owner, apparently not Alvarado, originally contacted Gulfland Title Company after the oil discovery. *See Bolton*, 714 S.W.2d at 121. After being contacted, Gulfland reviewed all of the owner's title policies and discovered they had failed to disclose Bolton's reservation of the mineral rights. *Id.* Gulfland informed the respective owners that they must either participate in a suit against Bolton over the mineral rights or waive any recourse they may have under their respective owner's title policies. *Id.*

9. *See* Alvarado v. Bolton, 749 S.W.2d 47, 47 (Tex. 1988). The treble damage award was calculated using the oil's production value. *See id.* Furthermore, the trial court disregarded the jury's failure to award attorney's fees and awarded Alvarado $20,000. *See Bolton*, 714 S.W.2d at 122.

10. *See Bolton*, 714 S.W.2d at 123. By trial amendment, Alvarado pleaded fraud and mutual mistake. *Id.* The special issues submitted to the jury were arranged in such a manner that if they found Bolton intended to sell the mineral rights, they would not answer the special issues concerning fraud or mutual mistake. *See id.* By finding that Bolton intended to sell the mineral rights, the jury found that there was no fraud or mistake on Bolton's part. *Id.* The court of appeals decided that, unless fraud or mutual mistake was present, the merger doctrine applied. *See id.* Furthermore, the jury failed to find fraud or mutual mistake when they found that Bolton intended to sell and not retain the mineral rights under the earnest money contract. *Id.*

11. *See Alvarado*, 749 S.W.2d at 47.

12. *Id.* at 48.

13. TEX. BUS. & COM. CODE ANN. §§ 17.41-17.63 (Vernon 1987). The express purpose of the Deceptive Trade Practices Act ("DTPA") is "to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty." *Id.* § 17.44; *see* Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980)(DTPA's purpose to protect consumer with cause of action for deceptive trade practices); *see also* Woods v. Littleton, 554 S.W.2d 662, 669 (Tex. 1977)(DTPA provides effective remedy for injured consumers in order

dressing injuries through causes of action which are unrestrained by the proof requirements of the traditional common-law defenses encountered in breach of warranty and fraud actions.[14] The DTPA also encourages the consumer to pursue DTPA suits by providing incentives in the form of awards of additional damages,[15] court costs,[16] and attorney's fees.[17] The prospect of additional damages, court costs, and attorney's fees, without the arduous proof requirements of traditional common-law actions, purports to stimulate pursuit of claims under the DTPA and be an effective restraint to individuals employing deceptive business practices.[18]

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to encourage lawsuits). *See generally* Curry, *The 1979 Amendments to the Deceptive Trade Practices—Consumer Protection Act*, 32 BAYLOR L. REV. 51, 51 (1980)(discussing legislative intent in promulgating DTPA); Krahmer, Lovell & McCormick, *Banks and the Texas Deceptive Trade Practices Act*, 18 TEX. TECH L. REV. 1, 2 (1987)(outlining design of DTPA as consumer protection tool).

14. *See, e.g.*, Weitzel v. Barnes, 691 S.W.2d 598, 600 (Tex. 1985)(traditional contractual principles such as parol evidence rule which bar admission of oral misrepresentations do not apply to DTPA suits); *Baldwin*, 611 S.W.2d at 616 (DTPA claim not burdened by common-law proof requirements and defenses); Joseph v. PPG Indus., Inc., 674 S.W.2d 862, 865 (Tex. App.—Austin 1984, writ ref'd n.r.e.)(common-law defenses such as failure of consideration cannot be employed to defeat DTPA claim). *See generally* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION 244 (2d ed. 1983)(discussing inability of common-law defenses to defeat DTPA claims); Watson, *Defending Deceptive Trade Practices Claims*, 18 TEX. TECH L. REV. 77, 92 (1987)(discussing exclusion of common-law defenses in DTPA actions).

15. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 1987). The DTPA provides for additional damages in excess of actual damages for the prevailing consumer. *See id.*; *see also, e.g.*, Pennington v. Singleton, 606 S.W.2d 682, 690 (Tex. 1980)(DTPA provision for treble damages encourages consumer litigation); Woods v. Littleton, 554 S.W.2d 662, 670 (Tex. 1977)(DTPA treble damages provision provides incentive for individuals to seek redress under DTPA). *See generally* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION 201-05 (2d ed. 1983)(discussing history of treble damages provision in DTPA); Comment, *UCC Warranty Disclaimers and the No Waiver Provision of the Deceptive Trade Practices and Consumer Protection Act: Can the Conflict be Resolved?*, 18 TEX. TECH L. REV. 211, 214-15 (1987)(discussing DTPA incentives for consumer suits).

16. TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon 1987)(recovery of court costs allowed for prevailing party); *see also* Doerfler v Espensen Co., 659 S.W.2d 929, 932 (Tex. App.—Fort Worth 1983, no writ)(DTPA allows prevailing party to recover court costs). *See generally* McCarthy, *An Analysis of the 1979 Texas Deceptive Trade Practices Act and Possible Ramifications of Recent Amendments: Is the Act Still Consumer Oriented?*, 11 ST. MARY'S L.J. 885, 904 (1980)(discussing award of court costs under DTPA).

17. TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon 1987)(DTPA allows prevailing party to recover attorney's fees); *see also* McKinley v. Drozd, 685 S.W.2d 7, 9 (Tex. 1985)(successful party allowed to recover attorney's fees even though no net recovery occurs). *But see* Cravens v. Skinner, 626 S.W.2d 173, 176 (Tex. App.—Fort Worth 1981, no writ)(award of attorney's fee requires judgment for actual damages). *See generally* Curry, *The 1979 Amendments to the Deceptive Trade Practices—Consumer Protection Act*, 32 BAYLOR L. REV. 51, 64 (1980)(discussing award of attorney's fees).

18. *See* Chastain v. Koonce, 700 S.W.2d 579, 581 (Tex. 1985)(DTPA designed to pro-

The DTPA makes actionable the use of unfair business tactics which victimize consumers[19] who are seeking[20] goods[21] or services[22] for use.[23] To

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mote underlying purpose of preventing deceptive business practices and unconscionable acts); *see also* Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980)(DTPA provides cause of action without common-law proof requirement or defenses); Pennington v. Singleton, 606 S.W.2d 682, 690 (Tex. 1980)(purpose of excess actual damages to deter DTPA violations); Woods v. Littleton, 554 S.W.2d 662, 670 (Tex. 1977)(DTPA provides consumers with ability to deter dishonest practices). *See generally* Curry, *The 1979 Amendments to the Deceptive Trade Practices—Consumer Protection Act*, 32 BAYLOR L. REV. 51, 51-53 (1980)(discussing overview of DTPA's effect on consumer litigation); Comment, *UCC Warranty Disclaimers and the "No Waiver" Provision of the Deceptive Trade Practices and Consumer Protection Act: Can the Conflict Be Resolved?*, 18 TEX. TECH L. REV. 211, 214-15 (1987)(discussing DTPA's purpose of promotion of consumer litigation).

19. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987). The DTPA defines consumer as "an individual . . . who seeks or acquires by purchase or lease, any goods or services." *Id.*; *see also* Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 351-52 (Tex. 1987)(plaintiffs must seek goods or services to gain consumer status); *Chastain*, 700 S.W.2d at 581 (plaintiff must be consumer to recover under DTPA); Flenniken v. Longview Bank and Trust Co., 661 S.W.2d 705, 706 (Tex. 1983)(standing under DTPA predicated on party obtaining consumer status); Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 539 (Tex. 1981)(plaintiff must seek goods or services for consumer qualification); Riverside Nat'l Bank v. Lewis, 603 S.W.2d 169, 174 (Tex. 1980)(consumer must seek or acquire services to bring DTPA suit). *See generally* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION 18-19 (2d ed. 1983)(discussing consumer standing); Watson, *Defending Deceptive Trade Practices Claims*, 18 TEX. TECH L. REV. 77, 93-95 (1987)(discussing requirement for obtaining consumer status under DTPA).

20. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987)(consumer status results from seeking goods or services); *see also* Dickson Distrib. Co. v. Le June, 662 S.W.2d 693, 695 (Tex. App.—Houston [14th Dist.] 1983, no writ)(consumer status obtained even though transaction never consummated); Anderson v. Havins, 595 S.W.2d 147, 156 (Tex. Civ. App.—Amarillo 1980, no writ)(DTPA applies to real estate transaction whether or not purchase completed). *See generally* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION 19-20 (2d ed. 1983)(analysis of requirement for seeking goods or services).

21. TEX. BUS. & COM. CODE ANN. § 17.45(1) (Vernon 1987)(goods consist of tangible chattels and real property); *see also* Smith v. Baldwin, 611 S.W.2d 611, 615 (Tex. 1980)(definition of goods includes those to be manufactured in future); TEX. BUS. & COM. CODE ANN. § 2.105(a) (Tex. UCC)(Vernon 1968)(definition of goods). Goods are defined as "all things which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities and things in action." *Id.*; *see also* TEX. BUS. & COM. CODE ANN. § 9.105(a)(8) (Tex. UCC)(Vernon Supp. 1988)(definition of goods). Goods are defined to "include all things which are movable at the time the security interest attaches or which are fixtures, but does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like (including oil and gas) before extraction." *Id. See generally* Watson, *Defending Deceptive Trade Practices Claims*, 18 TEX. TECH L. REV. 77, 95 (1987)(discussing definition of goods).

22. TEX. BUS. & COM. CODE ANN. § 17.45(2) (Vernon 1987)(services consist of work, labor and services purchased); *see also* Riverside Nat'l Bank v. Lewis, 603 S.W.2d 169, 174 (Tex. 1980)(quoting *Van Zandt v. Fort Worth Press*, 359 S.W.2d 893, 895 (Tex. 1962)(defining services)). In *Riverside National Bank*, the court defines services as an "action or use that furthers some end or purpose: conduct or performance that assists or benefits someone or

attain consumer status under the DTPA, the plaintiff's complaint must allege the existence of a deceptive trade transaction in which he sought or acquired goods or services.[24] Because of the DTPA's coverage, individuals selling goods or services to consumers are subject to liability if they undertake a course of conduct which violates the DTPA's "laundry list,"[25] breaches any warranty,[26] is unconscionable,[27] or violates Texas Insurance

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something: deeds useful or instrumental towards some object." *Id. See generally* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION 24-27 (2d ed. 1983)(discussing requirements for qualification as services under DTPA).

23. TEX. BUS. & COM. CODE ANN. § 17.45(1) (Vernon 1987)(goods must be leased or purchased for use); *see also* Big H Auto Auction, Inc. v. Saenz Motors, 665 S.W.2d 756, 758-59 (Tex. 1984)(purchases made for resale qualify as "for use"); Otto, Inc. v. Cotton Salvage and Sales, Inc., 609 S.W.2d 590, 594 (Tex. Civ. App.—Corpus Christi 1980, writ dism'd)(defining "for use"). The court in *Otto* stated that the purchase of cotton for resale was contemplated within the definition of "for use." *Id. See generally* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION 27-33 (2d ed. 1983)(discussing concept of "for use").

24. *See, e.g.*, Chastain v. Koonce, 700 S.W.2d 579, 581 (Tex. 1985)(consumer must base complaint on transaction involving goods or services actually sought or acquired); Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 539 (Tex. 1981)(goods or services whether purchased or leased must be basis of complaint).

25. TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon 1987)(DTPA cause of action for deceptive acts). Section 17.46(a) declares "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce" to be unlawful. *Id.* Section 17.46(b) contains a non-exclusive list of 24 activities under which an individual will be held liable under the DTPA. *Id.*; *see also* Spradling v. Williams, 566 S.W.2d 561, 562-63 (Tex. 1978). In *Spradling*, the Texas Supreme Court approved that portion of the trial court's jury instruction which stated "the term false, misleading or deceptive acts or practices means an act or series of acts which has the capacity or tendency to deceive an average or ordinary person, even though that person may have been ignorant, unthinking or credulous." *Id.*; *see also* Nagy v. First Nat'l Gun Banque Corp., 684 S.W.2d 114, 116 (Tex. App.—Dallas 1984, writ ref'd n.r.e.). In *Nagy*, the court of appeals determined that a deceptive statement is one which tends to deceive "the ignorant, the unthinking, and the credulous" who rely upon the general appearances and impressions of the statement. *Id. See generally* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION 73-77 (2d ed. 1983)(discussing application of section 17.46(a)-(b)); Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices—Consumer Protection Act*, 8 ST. MARY'S L.J. 617, 625-34 (1977)(discussing DTPA laundry list violations).

26. TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon 1987)(DTPA cause of action for breach of warranty). The DTPA provides consumers with a cause of action for "breach of an express or implied warranty." *Id.*; *see also* Ralston Oil and Gas Co. v. Gensco, Inc., 706 F.2d 685, 692 (5th Cir. 1983)(non-compliance with express or implied warranties provides consumers with cause of action); Bunting v. Fodor, 586 S.W.2d 144, 145 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ)(adversely affected consumer has cause of action for breach of express or implied warranties). *See generally* Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices—Consumer Protection Act*, 8 ST. MARY'S L.J. 617, 658-61 (1977)(breach of warranty actionable under DTPA).

27. TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (Vernon 1987)(DTPA cause of action for unconscionable acts). The DTPA provides consumers a cause of action against "any un-

Code article 21.21.[28]

Texas courts have consistently held that an individual accused of using deceptive business tactics cannot rely upon common-law doctrines to defend the DTPA suit.[29] In maintaining this position, the courts have relied upon the basic premises that the DTPA is not a codification of common-law defenses[30] and that the DTPA mandates liberal construction of its provisions.[31] Texas courts confronted with common-law defenses in DTPA suits

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conscionable action or course of action by any person." *Id.* The DTPA defines "an unconscionable action or course of action" to mean "an act or practice which, to a person's detriment takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or results in gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration." *Id.* § 17.45(5)(A)-(B); *see also* Chastain v. Koonce, 700 S.W.2d 579, 582 (Tex. 1985)(taking unfair advantage of consumer insufficient to establish unconscionable act unless advantage grossly unfair); Bel-Go Assocs.—Mula Road v. Vitale, 723 S.W.2d 182, 188 (Tex. App.—Houston [1st Dist.] 1986, no writ)(DTPA suit for unconscionable acts). In *Bel-Go*, the court of appeals found that the 80 year-old seller of the land did not take advantage of the plaintiff in light of plaintiff's experience as a real estate developer. *Id. See generally* Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices—Consumer Protection Act*, 8 ST. MARY'S L.J. 617, 661-64 (1977)(discussing unconscionable acts under DTPA).

28. TEX. BUS. & COM. CODE ANN. § 17.50(a)(4) (Vernon 1987)(violation of Texas Insurance Code actionable under DTPA). The DTPA provides consumers with a cause of action for "the use or employment by any person of an act or practice in violation of Article 21.21, Texas Insurance Code, as amended, or rules or regulations issued by the State Board of Insurance under Article 21.21, Texas Insurance Code, as amended." *Id.*; *see also* McNeil v. McDavid Ins. Agency, 594 S.W.2d 198, 202 (Tex. Civ. App.—Fort Worth 1980, no writ)(failure to explain insurance application form and coverage not deceptive practice or act). *See generally* Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices—Consumer Protection Act*, 8 ST. MARY'S L.J. 617, 664-70 (1977)(discussing cause of action under article 21.21 of Texas Insurance Code).

29. *See* Weitzel v. Barnes, 691 S.W.2d 598, 599-600 (Tex. 1985)(parol evidence rule no defense to oral representations actionable under DTPA); *see also* Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980)(section 17.46 suit cannot be defended with common-law defenses); Joseph v. PPG Indus., Inc., 674 S.W.2d 862, 865 (Tex. App.—Austin 1984, writ ref'd n.r.e.)(common-law defenses unavailable to defeat DTPA claims). In *Joseph*, the court apparently deemed that *Smith v. Baldwin* stood for the proposition that common-law defenses were absolutely barred from use in DTPA suits. *Id.* However, a logical argument can be made that *Smith v. Baldwin* stands solely for the proposition that common-law defenses are only barred from use in section 17.46 suits. *See Baldwin*, 611 S.W.2d at 616. Therefore, common-law defenses are available to defend DTPA suits under section 17.50. *See id. See generally* Watson, *Defending Deceptive Trade Practices Claims*, 18 TEX. TECH L. REV. 77, 92-93 (1987)(discussing common-law defenses inapplicable to DTPA suit).

30. *See, e.g.*, *Baldwin*, 611 S.W.2d at 616 (DTPA does not codify common law); *Joseph*, 674 S.W.2d at 865 (DTPA not designed to codify common law).

31. TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 1987)(legislature intended liberal construction of DTPA); *see* Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 355 (Tex. 1987)(DTPA should be construed liberally for promotion of underlying purpose of consumer protection); *see also* Chastain v. Koonce, 700 S.W.2d 579, 581 (Tex. 1985)(DTPA's underlying purpose of consumer protection promoted by liberal construction); Woods v. Littleton, 554

have held that defenses such as the parol evidence rule, substantial performance, and the merger doctrine are unavailable to defeat the DTPA claim.[32]

Under the DTPA, a consumer injured by a breach of warranty can bring suit against the breaching party without confronting common-law defenses which would bar the suit.[33] However, because the DTPA does not contain specific warranties, DTPA suits seeking damages for a breach of warranty must allege the existence of an independently created warranty.[34] These independent warranties are generally created under statutes enacted by the legislature,[35] and from implied[36] or express warranties provided by contract

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S.W.2d 662, 665 (Tex. 1977)(DTPA mandates liberal construction of its provisions); Krahmer, Lovell & McCormick, *Banks and the Texas Deceptive Trade Practices Act*, 18 TEX. TECH L. REV. 1, 2 (1987)(DTPA mandates liberal construction to facilitate underlying purpose of consumer protection).

32. *See, e.g.*, Alvarado v. Bolton, 749 S.W.2d 47, 48 (Tex. 1988)(common-law doctrine of merger unavailable in DTPA breach of warranty suit); *Weitzel*, 691 S.W.2d at 600 (parol evidence admissible in DTPA suit in spite of common-law prohibitions); Smith v. Baldwin, 611 S.W.2d 611, 614 (Tex. 1980)(common-law defense of substantial performance rejected in section 17.46 suit). *See generally* Watson, *Defending Deceptive Trade Practices Claims*, 18 TEX. TECH L. REV. 77, 92 (1987)(discussing inapplicability of common-law defenses).

33. TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon 1987)(providing DTPA cause of action for breach of warranty); *see, e.g.*, Ralston Oil and Gas Co. v. Gensco, Inc., 706 F.2d 685, 692 (5th Cir. 1983)(DTPA provides cause of action for failure to comply with warranties); Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 354 (Tex. 1987)(DTPA suit available for breach of implied warranty); La Sara Grain Co. v. First Nat'l Bank of Mercedes, 673 S.W.2d 558, 564 (Tex. 1984)(injuries from breach of express or implied warranties actionable under DTPA). *See generally* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION 133-50 (2d ed. 1983)(discussing DTPA warranty actions); Comment, *UCC Warranty Disclaimers and the "No Waiver" Provision of the Deceptive Trade Practices and Consumer Protection Act: Can the Conflict Be Resolved?*, 18 TEX. TECH L. REV. 211, 231-35 (1987)(discussing warranties and waivers of warranties in relation to DTPA).

34. *See, e.g.*, *La Sara Grain*, 673 S.W.2d at 565 (DTPA does not contain warranties which give rise to DTPA cause of action); Miller v. Spencer, 732 S.W.2d 758, 759-60 (Tex. App.—Dallas 1987, no writ)(warranty must be created independent of DTPA by statute, contract, or common law); Cheney v. Parks, 605 S.W.2d 640, 642 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.)(enforcement of warranties requires creation independent of DTPA provisions); Bunting v. Fodor, 586 S.W.2d 144, 145 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ)(because no warranties contained in DTPA, consumer must establish implied warranty's existence before enforcement will result under DTPA); D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION 133-35 (2d ed. 1983)(discussing allowable sources of warranties enforceable under DTPA).

35. *See* TEX. BUS. & COM. CODE ANN. §§ 2.313, 2.314, 2.315 (Tex. UCC)(Vernon 1968)(Uniform Commercial Code warranties); *see also La Sara Grain*, 673 S.W.2d at 565 (Uniform Commercial Code provides source of implied warranties); Bormaster v. Henderson, 624 S.W.2d 655, 660 (Tex. App.—Houston [14th Dist.] 1981, no writ)(express warranties found within Texas Business and Commerce Code). *See generally* Comment, *UCC Warranty Disclaimers and the "No Waiver" Provision of the Deceptive Trade Practices and Consumer Protection Act: Can the Conflict Be Resolved?*, 18 TEX. TECH L. REV. 211, 231-35 (1987)(discussing Uniform Commercial Code warranties).

or the common law.[37] However, prior to enforcement of any warranty, the courts look to both the source of the warranty's creation as well as the parties' subsequent agreement to limit, modify, or exclude the warranty.[38]

Texas courts have generally followed the common-law merger doctrine to determine the parties' rights in land conveyances which, by its design, includes a determination of the existence of any warranties.[39] The doctrine, in

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36. *See, e.g.*, Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 353 (Tex. 1987)(public policy mandates that warranties arise through operation of law); *La Sara Grain*, 673 S.W.2d at 565 (implied warranties created based primarily on tort rather than contract through operation of law); Donelson v. Fairmont Foods Co., 252 S.W.2d 796, 799 (Tex. Civ. App.—Waco 1952, writ ref'd n.r.e.)(discussing common-law implied warranties). In *Donelson*, the court of civil appeals identified an implied warranty as a seller's representation or promise involving the property's quality or suitability which the law provides for incorporation into the terms of the contract and requires compliance therewith. *Id. See generally* Krahmer, Lovell & McCormick, *Banks and the Texas Deceptive Trade Practices Act*, 18 TEX. TECH L. REV. 1, 3 n.21 (1987)(outlining several common-law implied warranties).

37. *See La Sara Grain*, 673 S.W.2d at 565 (agreement of parties imposes express warranties within contract); *see also* McCrea v. Cubilla Condominium Corp., N.V., 685 S.W.2d 755, 757 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.)(defining express warranty). In *McCrea*, the court of appeals stated a seller creates an express warranty when he "makes an affirmation of fact or a promise to the purchaser, which relates to the sale and warrants a conformity to the affirmation as promised." *Id. See generally* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION 133, 134 (2d ed. 1983)(discussing express warranties); S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 970 (3d ed. 1964)(defining conditions required to impose express warranty).

38. *See* TEX. BUS. & COM. CODE ANN. § 2.316 (Tex. UCC)(Vernon 1968)(providing for exclusion or modification of warranties). Section 2.316 allows the seller, under certain conditions, to exclude or modify a previously made express warranty as well as the implied warranty of merchantability and warranty of fitness for a particular use in the sale of goods. *Id.*; *see also* Two Rivers Co. v. Curtiss Breeding Serv., 624 F.2d 1242, 1252 (5th Cir.)(disclaimer of implied warranty of merchantability allowed where disclaimer is conspicuous and mentions merchantability), *cert. denied*, 450 U.S. 920 (1980); Singleton v. LaCoure, 712 S.W.2d 757, 760 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.)(DTPA breach of warranty action inappropriate where implied warranty properly disclaimed under section 2.316); McCrea v. Cubilla Condominium Corp., N.V., 685 S.W.2d 755, 758 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.)(contract which specifically excludes express or implied warranties constitutes waiver of DTPA breach of warranty suit unless against public policy or statute); Rinehart v. Sonitrol of Dallas, Inc., 620 S.W.2d 660, 663 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.)(provisions limiting contracted liability are effective in DTPA breach of warranty suits). *See generally* Weintraub, *Disclaimer of Warranties and Limitation of Damages for Breach of Warranty Under the UCC*, 53 TEX. L. REV. 60, 65-70 (1974)(discussing exclusion and modification of express and implied warranties under Uniform Commercial Code).

39. *See* Union Producing Co. v. Sanborn, 194 F. Supp. 121, 126 (E.D. Tex. 1961)(outlining requirements of merger doctrine). In *Sanborn*, the court stated that Texas follows the well settled principle that all oral or written agreements of the parties are presumed to merge into the deed unless the plaintiff alleges and proves mistake, accident, or fraud. *Id.* Upon a deed's delivery and acceptance as performance of an earnest money contract, the deed is deemed to be "the final expression of the agreement of the parties and the sole repository of the terms on which they have agreed." *Id.*; *see also* Baker v. Baker, 207 S.W.2d 244, 249-50 (Tex. Civ.

its most basic form, provides that all prior negotiations, as well as oral or written agreements, are presumed merged into the deed upon its delivery and acceptance.[40] The deed is thereafter deemed to be conclusive as to the rights, duties, and obligations of its parties, and must be looked to exclusively for a determination of their rights.[41] Exceptions to the doctrine exist which allow the admission of extrinsic evidence to determine the parties' rights where the plaintiff alleges that the defendant committed fraud, accident, or mistake in the conveyance,[42] or where the plaintiff alleges the exist-

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App.—San Antonio 1947, writ ref'd n.r.e.)(contract merges into deed upon delivery and acceptance). In *Baker*, the court outlined the merger doctrine which provides for merger of the contract into the deed upon delivery and acceptance. *Id.* at 249. After merger, the deed alone determines the parties' rights. *Id.*; *see also* Wells v. Burroughs, 65 S.W.2d 396, 397 (Tex. Civ. App.—Texarkana 1933, no writ)(contract merges into deed which expresses parties' agreements). The merger doctrine prevents a party from raising a claim that the title which was passed from the seller to the purchaser is different than the title recited in the deed. *See* Goldman & Berghel, *Common Law Doctrine of Merger: The Exceptions Are the Rule*, 13 U. BALT. L. REV. 19, 20 (1983)(discussing merger doctrine). The doctrine's purpose is to maximize "security or safety in [deeds] or in titles held under them." *Id.* In other words, the doctrine is designed to prevent swearing matches between the parties to a deed after delivery and acceptance. *Id. See generally* R. DEVLIN, THE LAW OF REAL PROPERTY AND DEEDS 1570-71 (3d ed. 1911)(discussing principle of merger of contract and deed); S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 926 (3d ed. 1964)(discussing requirements of merger doctrine).

40. *See, e.g.*, *Union Producing Co.*, 194 F. Supp. at 126 (all prior agreements presumed merged into deed); *Baker*, 207 S.W.2d at 249 (contract merges into deed upon delivery and acceptance); *Wells*, 65 S.W.2d at 397 (all prior contracts presumed merged into deed). *But see* Harris v. Rowe, 593 S.W.2d 303, 306-07 (Tex. 1979)(merger does not occur where deed represents partial performance of contract). A deed which only partially performs the contract does not contain those provisions which are deemed collateral. *Id.* For example, a contract which contains a provision requiring completion of construction is not totally merged into the deed. *Id.* The completion provision will survive merger if construction is incomplete at the time of the deed's delivery and acceptance. *Id.*; *see also* Catalfimo, *Merger of Land Contract in Deed*, 25 ALB. L. REV. 122, 123 (1961)(discussing collateral covenants). A contract provision which the merger doctrine does not merge into the deed is referred to as a collateral covenant or agreement. *See id.*; Goldman & Berghel, *Common Law Doctrine of Merger: The Exceptions Are the Rule*, 13 U. BALT. L. REV. 19, 21 (1983)(discussing collateral agreements). Collateral agreements, in order to survive the doctrine's application, must involve some aspect of the transaction other than the terms of the purchase or sale of the land. *Id.* Those provisions of the contract which are conclusively presumed to be merged into the deed typically involve "title, possession, quantity, or emblements, even though the contract and deed vary." *Id.* at 21 & n.10. *See generally* R. DEVLIN, THE LAW OF REAL PROPERTY AND DEEDS 1570-71 (3d ed. 1911)(discussing merger of contract and deed).

41. *See, e.g.*, *Union Producing*, 194 F. Supp. at 126 (deed is final expression of parties' agreement); *Baker*, 207 S.W.2d at 249 (deed alone determines parties' rights); *Wells*, 65 S.W.2d at 397 (deed expresses all of parties' agreements); S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 926 (3d ed. 1964)(deed is sole repository of parties' agreement).

42. *See* Perry v. Stewart Title Co., 756 F.2d 1197, 1204 (5th Cir. 1985)(merger occurs unless fraud, accident or mistake present); *see also* Grohn v. Marquardt, 657 S.W.2d 851, 855

ence of an ambiguity within the deed.[43] Extrinsic evidence which would tend to contradict the language of the deed, however, is inadmissible in the absence of an exception to the merger doctrine.[44] Therefore, the doctrine presents an obstacle to extrinsic evidence which would vary the deed's terms.[45] Based upon the doctrine's operation and absent any exception, a properly delivered and accepted deed generally binds the parties to the terms and conditions which it contains.[46]

(Tex. App.—San Antonio 1983, writ ref'd n.r.e.)(defining fraud). In *Grohn*, the court stated that in order to prove fraud, the plaintiff must establish that the defendant falsely represented a material fact, he believed the representation was true, and he relied on the representation. *Id.*; *see also* Turberville v. Upper Valley Farms, Inc., 616 S.W.2d 676, 678 (Tex. Civ. App.—Corpus Christi 1981, no writ)(discussing mutual mistake). In *Turberville*, the court stated that in order to establish a mutual mistake, all parties to the transaction must believe that a material fact existed which in fact did not exist or become part of the transaction. *Id.*; *see also* Wells v. Burroughs, 65 S.W.2d 396, 397 (Tex. Civ. App.—Texarkana 1933, no writ). In *Wells*, the evidence did not show that the contract provision was omitted from the deed through mistake, accident or fraud which was required to prohibit application of the doctrine. *Id. See generally* Goldman & Berghel, *Common Law Doctrine of Merger: The Exceptions Are the Rule*, 13 U. BALT. L. REV. 19, 26 (1983)(discussing exceptions to merger). The Maryland Consumer Protection Act also impliedly provides exceptions to the doctrine of merger in consumer real estate sales such as home purchases. *See id.* at 26-30.

43. *See* Davis v. Davis, 175 S.W.2d 226, 229 (Tex. 1943)(extrinsic evidence admissible where fraud, accident or mistake alleged); *see also* Murphy v. Dilworth, 151 S.W.2d 1004, 1005 (Tex. 1941)(parol evidence admissible where deed ambiguous); Grohn v. Marquardt, 657 S.W.2d 851, 856 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.)(fraud allegation provides exception to parol evidence rule); Anderson v. Havins, 595 S.W.2d 147, 153 (Tex. Civ. App.—Amarillo 1980, writ dism'd)(pleading fraud allows introduction of parol evidence).

44. *See Perry*, 756 F.2d at 1205 (proof of fraud required to avoid merger doctrine). In *Perry*, the jury failed to find the existence of fraud, and therefore the merger doctrine was applied to the contract and deed. *Id.*; *see also Davis*, 175 S.W.2d at 229 (allegation of fraud required to admit extrinsic evidence to vary deed's legal effect); *Murphy*, 151 S.W.2d at 1005-06 (discussing ambiguity). Ambiguity is typically alleged when the parties' intent underlying a specific provision of the deed is indeterminable. *See id.* If intent is ambiguous, then parol evidence is admissible to explain, but not contradict, the deed. *Id.*; Peterson v. Barron, 401 S.W.2d 680, 685 (Tex. Civ. App.—Dallas 1966, no writ)(unambiguous deed prevents admission of extrinsic evidence to vary terms of deed). *See generally* R. DEVLIN, THE LAW OF REAL PROPERTY AND DEEDS 1572 (3d ed. 1911)(discussing requirement of fraud and mistake to avoid conclusive effect of deed); R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 1641(a) (1980)(discussing parol evidence rule as applied to deeds).

45. *See, e.g.*, Peveto v. Starkey, 645 S.W.2d 770, 772 (Tex. 1982)(unambiguous deed prevents looking beyond four corners of deed); *Davis*, 175 S.W.2d at 229 (absence of ambiguity prevents admission of extrinsic evidence to explain deed); *Murphy*, 151 S.W.2d at 1005-06 (ambiguity allows admission of extrinsic evidence to explain deed's terms); *see also Peterson*, 401 S.W.2d at 685 (parties cannot vary terms of contract with extrinsic evidence). *See generally* R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 1641(a) (1980)(discussing prohibition of admission of extrinsic evidence where deed unambiguous).

46. *See* Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 908 (Tex. 1982)(discussing deed's binding effect on parties). In *Westland Oil*, the court stated that purchasers are bound by the deed's contents including recitals, references, and reservations. *Id.*; *see also*

In *Alvarado v. Bolton*,[47] the Texas Supreme Court held that a DTPA suit premised upon a breach of express warranty contained in an earnest money contract could not be defeated by applying the merger doctrine.[48] Justice Ray, writing for the majority, outlined four reasons to bar the doctrine's use.[49] First, the merger doctrine prohibits introduction of any warranties created in the earnest money contract which contradict the language contained within the deed.[50] Second, the parol evidence rule excludes admission of evidence of any warranties.[51] Third, the DTPA does not codify the requirements of the common law.[52] Fourth, the jury found that under the earnest money contract, Bolton intended and included an express warranty to deliver the mineral rights that was breached by delivery of the deed.[53]

Even though the court recognized that delivery and acceptance of the deed typically results in merger of the deed and contract, the court held that the doctrine was not applicable to a breach of warranty suit under the DTPA.[54] The court restated its decisions in *Smith v. Baldwin*[55] and *Weitzel*

Greene v. White, 153 S.W.2d 575, 583 (Tex. 1941)(purchaser's acceptance of deed binds him to recitals and reservations therein); Bradford v. Thompson, 460 S.W.2d 932, 936 (Tex. Civ. App.—Tyler 1970)(accepted deed binds purchaser to all recitals it contains), *aff'd in part and rev'd in part*, 470 S.W.2d 633 (Tex. 1971), *cert. denied*, 405 U.S. 955 (1972); R. DEVLIN, THE LAW OF REAL PROPERTY AND DEEDS 1572 (3d ed. 1911)(deed is conclusive of parties' agreement).

47. 749 S.W.2d 47 (Tex. 1988).

48. *See id.* at 48. Bolton apparently attempted to establish that the warranty had been extinguished by the merger of the deed and contract under the doctrine of merger. *Id.* The court decided that the doctrine of merger was a common-law defense and, therefore, unavailable to defeat a DTPA claim. *Id.*

49. *See id.* The court utilized a syllogism premised upon the jury's finding, the requirements of the doctrine, and the DTPA's purpose to support its holding that a DTPA claim cannot be defeated by the doctrine of merger. *Id.*

50. *See id.* The court recognized that the merger doctrine would extinguish any contract warranties if applied to the facts and circumstances of *Alvarado*. *Id.*

51. *See id.* The court recognized that the parol evidence rule would prevent admission of the earnest money contract into evidence to establish the alleged warranty. *Id.*

52. *See* Alvarado v. Bolton, 749 S.W.2d 47, 48 (Tex. 1988). The court restated its position that the DTPA was not a common-law codification, but was a consumer protection statute without the proof and defense burdens of the common law. *Id.*

53. *See id.* The court outlined that the jury had found an express warranty as required to maintain a breach of warranty claim under the DTPA. *Id.*

54. *See id.* The court outlined the requirement of the merger doctrine as stated in *Baker v. Baker*, 207 S.W.2d 244 (Tex. Civ. App.—San Antonio 1947, writ ref'd n.r.e.). *See Alvarado*, 749 S.W.2d at 48. The merger doctrine provides for consolidation of the contract and deed upon delivery and acceptance of the deed as performance of the contract. *Id.*

55. 611 S.W.2d 611, 616 (Tex. 1980). DTPA causes of action do not have the rigorous proof requirements and are not subject to the numerous defenses of common-law actions. *Id.* In *Baldwin*, the court decided that the defense of substantial performance of a construction contract could not bar a section 17.46 DTPA claim when the builder's representations remained unfulfilled. *See id.* at 614.

v. Barnes[56] which restricted the application of common-law doctrines in DTPA cases.[57] As a result, the court continued its policy of barring the use of common-law doctrines to defeat DTPA suits.[58]

In his dissent, Justice Wallace, joined by Chief Justice Phillips and Justices Gonzalez and Culver, argued that Bolton did not commit a breach of express warranty as a matter of law.[59] Justice Wallace applied the merger doctrine and contended that any warranty created by the earnest money contract was extinguished upon Alvarado's acceptance of the deed.[60] Justice Wallace concluded that the majority erred in stating that the deed, which did not comply with the requirements of the earnest money contract, breached the express warranty created therein because at the time the purported breach occurred, the contract and deed had merged and extinguished the warranty.[61]

Justice Wallace conceded that if Alvarado had alleged Bolton misrepresented some aspect of the transaction, the doctrine would not bar parol evidence from establishing the misrepresentation.[62] He contended, however, that the court's prior holding in *Weitzel*[63] which allowed admission of parol evidence for a "laundry list" violation did not allow establishment of an express warranty by parol evidence where a fully integrated deed existed.[64] Justice Wallace concluded that Alvarado's suit was brought under the

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56. 691 S.W.2d 598, 600 (Tex. 1985). The parol evidence rule does not bar admission of oral representations to support a consumer's claim in a DTPA suit. *Id.*

57. *See* Alvarado v. Bolton, 749 S.W.2d 47, 48 (Tex. 1988)(merger doctrine does not bar enforcement of express warranties in earnest money contract under DTPA); *see also Weitzel*, 691 S.W.2d at 600 (parol evidence rule does not bar admission of oral representations in DTPA suit); *Baldwin*, 611 S.W.2d at 616 (common-law defenses unavailable in section 17.46 suit).

58. *See Alvarado*, 749 S.W.2d at 48. The court held that the merger doctrine was not applicable to a DTPA suit involving the breach of an express warranty. *Id.*

59. *See Alvarado*, 749 S.W.2d at 48 (Wallace, J., dissenting). Justice Wallace contended that as a rule of law, the doctrine of merger stated in *Baker v. Baker* extinguished any warranty. *See id.* Merger of the contract into the deed extinguished any warranty contained in the earnest money contract. *Id.* at 48-49 (Wallace, J., dissenting). His dissent stated that the doctrine merges the terms of the contract into the deed, and the deed then determines the parties' rights. *Id.*

60. *See id.* at 49. Justice Wallace stated that Alvarado's acceptance of the deed extinguished any warranty which the contract contained. *Id.*

61. *See* Alvarado v. Bolton, 749 S.W.2d 47, 49 (Tex. 1988)(Wallace, J., dissenting) (discussing absence of warranty). Justice Wallace determined that the simultaneous acts of acceptance and merger of the contract into the deed precluded the breach of any warranty because no warranty existed. *Id.* at 49-50.

62. *See id.* Because oral representations cannot be barred by the parol evidence rule in a DTPA suit, Justice Wallace agreed that any representations made outside the deed were admissible to establish a DTPA cause of action. *Id.*

63. 691 S.W.2d 598 (Tex. 1985).

64. *See Alvarado*, 749 S.W.2d at 49 (Wallace, J., dissenting). Justice Wallace interpreted

DTPA in an attempt to create a warranty for recovery purposes which could not be found within the language of the deed.[65]

In *Alvarado v. Bolton*, the Texas Supreme Court expanded the DTPA's coverage by precluding use of the merger doctrine as a defense to a breach of express warranty action.[66] The court in *Alvarado* relied on the *Baldwin* and *Weitzel* decisions wherein the court held that the DTPA does not codify common-law principles[67] and that common-law defenses are unavailable in a DTPA suit.[68] As a consequence of the *Alvarado* decision, a seller of land may no longer rely upon the accepted deed to conclusively establish his rights, duties, and obligations to the purchaser.[69] Thus, titles in land conveyances are now affected by the DTPA, subjecting the seller to sanctions where the terms of the earnest money contract and the deed vary in a manner adverse to the purchaser.[70]

In upholding the jury's findings, the court decided that Bolton expressly warranted delivery of his mineral ownership to Alvarado by failing to reserve the mineral interests within the earnest money contract.[71] The major-

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the court's holding in *Weitzel v. Barnes* to allow admission of parol evidence only in those circumstances where it would not vary or contradict the terms of a written agreement. *Id.*

65. *See id.* Justice Wallace maintained that because no warranty existed in the deed, Alvarado brought the suit under the DTPA to create the warranty which was allegedly breached. *Id.*

66. *See* Alvarado v. Bolton, 749 S.W.2d 47, 47 (Tex. 1988). The doctrine of merger is unavailable in a DTPA breach of warranty suit. *Id.* A DTPA cause of action arises upon "breach of an express or implied warranty." TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon 1987); *see also* Ralston Oil and Gas Co. v. Gensco, Inc., 706 F.2d 685, 692 (5th Cir. 1983)(DTPA provides cause of action for failure to comply with warranties); Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 355 (Tex. 1987)(DTPA violation for breach of implied warranty actionable); La Sara Grain Co. v. First Nat'l Bank of Mercedes, 673 S.W.2d 558, 564 (Tex. 1984)(injuries from breach of express or implied warranties provide consumers with cause of action).

67. *See, e.g.*, Alvarado v. Bolton, 749 S.W.2d 47, 48 (Tex. 1988)(DTPA does not codify common-law rules, requirements or defenses); Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980)(DTPA not common-law codification and section 17.46 suits do not include common-law proof requirements or common-law defenses).

68. *See Weitzel*, 691 S.W.2d at 600 (parol evidence rule does not bar admission of oral representations in DTPA suit); *see also Baldwin*, 611 S.W.2d at 616 (section 17.46 suits are unburdened by common-law defenses); Joseph v. PPG Indus., Inc., 674 S.W.2d 862, 865 (Tex. App.—Austin 1984, writ ref'd n.r.e.)(common-law defenses cannot defeat DTPA claims).

69. *See* Alvarado v. Bolton, 749 S.W.2d 47, 48 (Tex. 1988). The *Alvarado* court held that the earnest money contract alone can be used to establish express warranties even though the warranty contradicts the language of the deed previously delivered and accepted. *Id.* at 47-48.

70. *See id.* Even though the deed and earnest money contract contradicted each other, the majority allowed the earnest money contract alone to establish an express warranty to deliver the mineral rights for which the seller upon non-delivery was held strictly liable under the DTPA. *Id.*

71. *See id.* (jury found Bolton expressly warranted delivery of mineral rights in earnest money contract).

ity was correct in ascertaining the existence of an express warranty within the earnest money contract because Bolton's omission of a mineral reservation created an agreement with Alvarado that delivery of the mineral ownership would follow in the deed.[72]

The majority supported its admission of the earnest money contract into evidence based upon the holding in *Weitzel* which allowed the introduction of parol evidence in a suit under the DTPA.[73] By analogy, Alvarado alleged fraud and mutual mistake which under the court's prior precedent allowed admission of the contract into evidence to establish the existence of the alleged warranty.[74] The dissent, however, correctly noted that the decision in *La Sara Grain Co. v. First National Bank of Mercedes*[75] requires Alvarado to establish the existence of that warranty independent of the DTPA's provisions before it could be enforced under the DTPA.[76]

In *La Sara Grain*, the court established the rule that because warranties are not contained within the DTPA, warranties enforceable under its provisions must be created independently of the DTPA.[77] However, the court cannot accomplish a proper analysis of the existence or scope of a warranty without first considering the parties' subsequent agreement(s) to limit, mod-

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72. *See id.* at 47 (fact of Bolton's failure to reserve minerals in contract created agreement to deliver minerals); *see also* La Sara Grain Co. v. First Nat'l Bank of Mercedes, 673 S.W.2d 558, 565 (Tex. 1984)(parties' agreement under contract will impose express warranty); McCrea v. Cubilla Condominium Corp., N.V., 685 S.W.2d 755, 757 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.)(seller's promise or affirmation of fact regarding sale creates express warranty of performance). *See generally* S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 970 (3d ed. 1964)(providing definition of express warranty).

73. *See* Weitzel v. Barnes, 691 S.W.2d 598, 600 (Tex. 1985). In *Weitzel*, the court stated that "oral representations are not only admissible but can serve as the basis of a DTPA action." *Id.*

74. *See* Bolton v. Alvarado, 714 S.W.2d 119, 123 (Tex. App.—Houston [1st Dist.] 1986)(Alvarado alleged fraud and mutual mistake by trial amendment), *rev'd*, 749 S.W.2d 47 (Tex. 1988); *see also* Davis v. Davis, 175 S.W.2d 226, 229 (Tex. 1943)(allegations of fraud and mistake allow introduction of extrinsic evidence); Grohn v. Marquardt, 657 S.W.2d 851, 856 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.)(allegation of fraud provides exception to prohibition against introduction of parol evidence); Anderson v. Havings, 595 S.W.2d 147, 153 (Tex. Civ. App.—Amarillo 1980, writ dism'd)(pleading fraud allows introduction of parol evidence).

75. 673 S.W.2d 558 (Tex. 1984).

76. *See id.* at 565 (DTPA does not define or create warranties); *see also* Cheney v. Parks, 605 S.W.2d 640, 642 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.)(implied warranties not created by DTPA).

77. *See La Sara Grain*, 673 S.W.2d at 565. In *La Sara Grain*, the court stated that any warranty upon which a DTPA action is predicated "must be established independently of the Act." *Id.*; *see also Cheney*, 605 S.W.2d at 642 (DTPA enforcement requires independent creation of warranties); Bunting v. Fodor, 586 S.W.2d 144, 145-46 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ)(under DTPA, only independently created warranties enforceable upon plaintiff's proof of existence and breach).

ify, or even exclude the warranty.[78] Furthermore, while the court's holding in *Baldwin* and *Weitzel* limit the use of common-law doctrines to defend DTPA suits, neither case limits the *La Sara Grain* holding involving the establishment of express warranties nor abolishes any common-law doctrines governing the creation or elimination of warranties which are enforceable under the DTPA.[79] *La Sara Grain* outlines the various sources of warranties created independent of the DTPA which are enforceable under the DTPA; however, it does not indicate that establishment of enforceable warranties requires selective use of common-law rules to only create and not extinguish an enforceable common-law warranty.[80] Therefore, when determining the existence of a warranty which is enforceable under the DTPA, the courts must consider all relevant agreements between the parties[81] and

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78. *See* Singleton v. LaCoure, 712 S.W.2d 757, 760 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.)(proper disclaimer of implied warranty prevents enforcement under DTPA); *see also* McCrea v. Cubilla Condominium Corp., N.V., 685 S.W.2d 755, 758 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.)(specific exclusion of express or implied warranties in contract constitutes waiver of DTPA breach of warranty suit unless against public policy or statute); Rinehart v. Sonitrol of Dallas, Inc., 620 S.W.2d 660, 663 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.)(contractual limitations of liability are effective in DTPA breach of warranty suit).

79. *See Weitzel*, 691 S.W.2d at 600 (discussing admission of oral representations). In *Weitzel*, the court allowed admission of oral representations to establish a DTPA cause of action. *Id.* The court held that the common-law parol evidence rule could not bar establishment of a DTPA claim. *Id.* The court did not hold that the parol evidence rule was abolished entirely, but that it could not be used to defend a DTPA claim. *Id.*; *see also Baldwin*, 611 S.W.2d at 616. In *Baldwin*, the court established that the DTPA was not a common-law codification. *Id.* Also, the court noted that the DTPA was established to provide consumers redress for injuries resulting from deceptive acts without the arduous proof requirements and defenses of the common law. *Id.* The court, however, did not limit the case of *La Sara Grain* or abolish or limit any common-law doctrines which would create warranties and provide a DTPA cause of action. *Id.* For example, the court's holding does not state or imply that courts hearing DTPA warranty actions should not consider all applicable common-law doctrines under which a warranty may be created or extinguished before enforcing the warranty. *See id.* Furthermore, a logical argument can be made that the court in *Baldwin* intended to limit the prohibition of common-law defenses in DTPA suits to only section 17.46 actions. *See id.*

80. *See* La Sara Grain Co. v. First Nat'l Bank of Mercedes, 673 S.W.2d 558, 565 (Tex. 1984). In *La Sara Grain*, the court stated that "the DTPA does not define the term warranty." *Id.* Because the DTPA does not establish any warranties, their enforcement requires independent creation. *Id.* The court also noted that an agreement by the parties to some aspect of the contract creates an express warranty. *Id.* In other words, the court in *La Sara Grain* recognized that express warranties are dependent upon an agreement between the parties for their creation based upon the facts and circumstances of the case. *Id.* Furthermore, the court did not limit creation of express warranties to a single agreement simply because the agreement is in the singular, but identified the requirement that all agreements between the parties under the facts and circumstances provide the basis for identifying the existence and scope of any express warranties. *See id.*

81. *See* Alvarado v. Bolton, 749 S.W.2d 47, 47-48 (Tex. 1988). The agreement of the

apply all applicable common-law doctrines which may create or extinguish that warranty including but not limited to the merger doctrine.[82] Based upon the court's prior precedent, the dissent correctly concluded that any warranty created in the contract was extinguished by delivery and acceptance of the deed because the deed is an agreement between the parties and the merger doctrine extinguishes any warranties contained in the earnest money contract by merger.[83]

At the trial court level, Alvarado attempted to establish the existence of the warranty by pleading that fraud and mutual mistake occurred which allowed introduction of the earnest money contract into evidence.[84] If Alvarado had proven fraud or mutual mistake, he would have established the existence of the express warranty within the earnest money contract.[85] However, the jury's answers concerning the special issues failed to find fraud or mutual mistake as required to allow the earnest money contract to establish an express warranty which is not contained in the deed.[86] Therefore, the majority should have applied the merger doctrine to the transaction and looked solely to the deed for the existence of any warranty to deliver the mineral rights.[87] By failing to apply the merger doctrine in the absence of a

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parties to deliver Bolton's mineral ownership was initially represented by the earnest money contract. *Id.* Alvarado and Bolton changed their agreement when the deed was accepted as performance of the contract which reserved Bolton's mineral ownership. *Id.*

82. *See id.* at 48-50 (Wallace, J., dissenting). The dissent properly included an appraisal of all applicable common-law doctrines including the doctrine of merger, DTPA causes of action, the parol evidence rule, and the rules governing creation of warranties as established in *La Sara Grain*. *Id.*

83. *See* Union Producing Co. v. Sanborn, 194 F. Supp. 121, 126 (E.D. Tex. 1961)(all prior agreements merge into deed); *Alvarado*, 749 S.W.2d at 48-49 (Wallace, J., dissenting). The dissent applied the doctrine of merger to the contract and deed, and concluded that any warranty which the contract contained was extinguished upon Alvarado's acceptance of "the deed as performance of the earnest money contract." *Id.* The contract and deed merged upon the deed's delivery and acceptance, and the deed did not contain any warranty for delivery of the mineral rights. *Id.*; *see also La Sara Grain*, 673 S.W.2d at 565 (express warranty created by parties' agreement); Baker v. Baker, 207 S.W.2d 244, 249 (Tex. Civ. App.—San Antonio 1947, no writ)(contract merges into deed upon acceptance and delivery).

84. Bolton v. Alvarado, 714 S.W.2d 119, 123 (Tex. App.—Houston [1st Dist.] 1986), *rev'd*, 749 S.W.2d 47 (Tex. 1988).

85. *See* Davis v. Davis, 175 S.W.2d 226, 229 (Tex. 1943)(extrinsic evidence will be admitted if fraud, accident or mistake alleged); *see also* Grohn v. Marquardt, 657 S.W.2d 851, 856 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.)(fraud provides exception to parol evidence rule).

86. *Bolton*, 714 S.W.2d at 123.

87. *See* Perry v. Stewart Title Co., 756 F.2d 1197, 1205 (5th Cir. 1985)(proof of fraud required to avoid merger doctrine); *see also* Union Producing Co. v. Sanborn, 194 F. Supp. 121, 126 (E.D. Tex. 1961)(absent fraud or mistake, merger of contract and deed occurs making deed dispositive of parties' rights); Baker v. Baker, 207 S.W.2d 244, 250 (Tex. Civ. App.—San Antonio 1947, no writ)(fraud or mistake required to avoid merger of contract and deed and

finding of fraud or mutual mistake, the majority ignored Texas' common-law precedent and selectively allowed the contract to establish the warranty, thereby penalizing Bolton for the breach of a fictitious warranty.[88]

Applying the doctrine of merger, the dissent correctly concluded that Bolton's delivery and Alvarado's acceptance of the deed extinguished any warranty that existed under the contract.[89] Therefore, the deed was conclusively binding upon both parties as to the mineral ownership reservation.[90] The dissent's correct analysis would have required the court to render a judgment that Alvarado take nothing.[91]

Because the *Alvarado* court selectively chose to ignore the merger doctrine by classifying it as a defense to Alvarado's DTPA breach of warranty claim, it enforced a fictitious express warranty by prohibiting the application of the doctrine, thereby causing injury to an innocent seller. The injury was precipitated by the court's failure to follow its decision in *La Sara Grain Co. v. First National Bank of Mercedes*, which states that express warranties enforceable under the DTPA are determined by considering the agreement of the parties. As such, *La Sara Grain* required the court to consider the deed between Bolton and Alvarado because it represented the parties' agreement to exclude the previously made express warranty in the earnest money contract from the deed. The proper analysis would require the court to apply the merger doctrine, whereby the contract and deed merged to formulate the basis of the parties' agreement in the deed which excluded the express warranty to delivery the mineral rights. Thereafter, the deed which reserved Bolton's mineral ownership governed the parties' rights and precluded enforcement of any warranty contained within the earnest money contract requiring delivery of Bolton's mineral ownership to Alvarado. The court's failure to follow its own precedent when determining the existence of an express warranty enforceable under the DTPA caused unnecessary injury to an innocent seller. However, punishment of an innocent seller is minor compared to the Pandora's box which the court opened because, under *Alvarado*

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preclude deed from governing parties' rights); Wells v. Burroughs, 65 S.W.2d 396, 397 (Tex. Civ. App.—Texarkana 1933, no writ)(failure to establish fraud or mistake requires application of merger doctrine).

88. *See* Alvarado v. Bolton, 749 S.W.2d 47, 48 (Tex. 1988). In *Alvarado*, the court held that the doctrine of merger was not applicable to a DTPA suit. *Id.*; *see also Bolton*, 714 S.W.2d at 123. Because the jury failed to find fraud or mutual mistake, the merger doctrine was applicable to the contract and deed. *Id.*

89. *See Alvarado*, 749 S.W.2d at 48-49 (Wallace, J., dissenting) (merger of contract and deed extinguished warranty).

90. *See* Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 908 (Tex. 1982)(purchaser bound by deed reservations); *see also* Greene v. White, 153 S.W.2d 575, 583 (Tex. 1941)(purchaser's acceptance of deed binds him to all reservations therein).

91. *See* Bolton v. Alvarado, 714 S.W.2d 119, 123 (Tex. App.—Houston [1st Dist.] 1986)(take nothing judgment against Alvarado), *rev'd*, 749 S.W.2d 47 (Tex. 1988).

v. Bolton, the deed is no longer dispositive of the parties' rights or titles with respect to property in Texas. Hereafter, rights and titles to property will be subject to whichever common-law doctrine the court selectively chooses to apply in DTPA suits involving express warranties contained in the earnest money contract but not the deed.

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