

CONTRACTS AND RECENT SUPREME COURT JURISPRUDENCE

**Texas Association of Defense Counsel, Inc.
Spring Meeting
April 21, 2005**

**This is an excerpt and update to a paper originally delivered to
The University of Texas School of Law
Construction Law Conference
October 21, 2004**

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Restriction [or Elimination] of Extra-Contractual Duties

By the late 1980's, the law of contract had become only one of the rules of decision in Texas contract disputes, and not necessarily the most significant one. Breach of contract actions were litigated as negligence, deceptive trade practice, fraud, breach of fiduciary duty or negligent misrepresentation claims. With the arrival of Chief Justice Phillips, however, and the wholesale replacement of the "60 Minutes Court," the Court began steadily to restrict or eliminate extra-contractual claims.

1. Negligence

The seminal decision was *Southwestern Bell Tel. Co. v. Delanney*, 809 S.W.2d 493 (Tex. 1991), in which the Chief Justice, writing for a then-divided court, held that "when the only loss or damage is to the subject matter of the contract, the plaintiff's action is ordinarily one of contract [as opposed to tort]." *Southwestern Bell, supra*, at 494. This introduced—or reaffirmed the existence of—the "contract economic loss rule" in Texas; that is, absent an "independent tort," contract disputes are to be decided under contract law, rather than under tort law.

2. DTPA

The scope of the DTPA, which originally applied to breach of any warranty, express or implied, and which was interpreted to apply to a wide range of commercial disputes, was steadily reduced by the legislature and by the Court, which has been very reluctant to imply warranties upon which a DTPA action could be premised. See *Rocky Mountain Helicopters, Inc. v. Lubbock County Hosp. Dist.*, 987 S.W.2d 50 (Tex. 1998); *Parkway Co. v. Woodruff*, 901 S.W.2d 434 (Tex. 1995), *Murphy v. Campbell*, 964 S.W.2d 265 (Tex. 1998); Cf. *Centex Homes v. Buecher*, 95 S.W.3d 266 (Tex. 2002).

The Court has held that a mere breach of contract is not a deceptive trade practice. *Crawford v. Ace Sign*, 917 S.W.2d 12 (Tex. 1996), and has emphasized the representational nature of the DTPA. Therefore, absent pre-contractual representations about the validity of a contract clause, the subsequently-determined invalidity of the clause [or its breach] is no evidence of a deceptive trade practice. *Ken Petroleum Corp. v. Questor Drilling Corp.*, 24 S.W.3d 344 (Tex. 2000).

Moreover, the Court has tended to limit its definition of "consumer"; *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644 (Tex. 1996) (downstream purchasers could not avail themselves of DTPA); *PPG Indus., Inc. v. JMB/Houston Centers Partners Ltd. P'ship*, 146 S.W.3d 79 (2004) (DTPA claim could not be assigned); *but see, Arthur Andersen &*

Co. v. Perry Equip. Corp., 945 S.W.2d 812 (Tex. 1997) (“consumer” includes intended beneficiary of goods or services).

3. Fraud

Texas of course recognizes that a contract can be induced by fraud, and that “...tort damages are recoverable for a fraudulent inducement claim, irrespective of whether the representations are later subsumed in a contract,” *Formosa Plastics Corp. U.S.A. v. Presidio Eng’rs & Contractors*, 960 S.W.2d 41 (Tex. 1998). The Court has, however, made it clear that parties may contractually disclaim reliance on representations, and that “...such a disclaimer, where the parties’ intent is clear and specific, should be effective to negate a fraudulent inducement claim.” *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 179 (Tex. 1997), citing *Prudential Ins. Co. v. Jefferson Assoc., Ltd.*, 896 S.W.2d 156, 161-62 (Tex. 1995).

4. Fiduciary Duty

The practice of casting breach of contract claims under the rubric of breach of fiduciary duty, through the device of claiming the existence of a “confidential relationship” on which a duty of good faith and fair dealing could be premised, has largely been arrested by the court. Beginning with *Crim Truck & Tractor Co. v. Navistar Int’l Transp. Corp.*, 823 S.W.2d 591 (Tex. 1992), the Court held that “absent a ‘special relationship,’ the duty to act in good faith is contractual in nature [if at all], and its breach does not amount to an independent tort.” *Id.* at 595, n. 5. The court went on to say that it “did not create this duty lightly... To impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence *must exist prior to, and apart from, the agreement made the basis of the suit.*” *Id.*, accord, *Associated Indemnity Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276 (Tex. 1998) (no ‘special relationship’ between surety and principal); *Great Am. Ins. Co. v. North Austin MUD No. 1*, 908 S.W.2d 415 (Tex. 1995).

Recently, the Court may have partially reopened the “good faith and fair dealing” door in its opinion in *Mustang Pipeline Co. Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195 (Tex. 2004). There, in determining whether a breach of contract was “material,” it cited the Restatement (2nd) of Contracts § 241 (1981) which, in turn, includes in its list of circumstances to be considered in determining whether or not a failure to perform is material “the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.” That clause was not a factor in the Court’s decision, but the approval of the Restatement position may, in time, provide a spring board for re-visiting this jurisprudence.

5. Negligent Misrepresentation

The tort of negligent misrepresentation, first recognized by the Supreme Court in *Fed. Land Bank Assoc. of Tyler v. Sloane*, 825 S.W.2d 439 (Tex. 1991), undoubtedly has application to some relationships between parties who are not in privity of contract, but there is considerable doubt as to whether it applies to parties who have contracts with each other. In *DSA, Inc. v. Hillsboro ISD*, 973 S.W.2d 662 (Tex. 1998), the Supreme Court seemed to indicate that it does not, holding that it was not an “independent injury” [i.e., separate from breach of contract], but the *per curiam* decision was less than crystal-clear. At least one court of appeal has been more certain. See, e.g., *Airborne Freight Corp., Inc. v. C.R. Lee Enterprises, Inc.*, 847 S.W.2d 289, 295 (Tex. App.—El Paso 1992, writ denied) (“...negligent misrepresentation is a cause of action recognized in lieu of a breach of contract claim, not usually available where a contract was actually in force between the parties”). Another court of appeals reached an opposite result in *Carousel’s Creamery v. Marble Slab*, 134 S.W.3d 385 (Tex. App.—Houston [1st Dist.] 2004, writ granted). The Court granted the writ, but oral argument has been postponed and the case may settle, thereby delaying an opportunity to resolve this uncertainty.

Enforcement of Contracts, as Written

“Generally, a court looks only to the written agreement to determine the obligations of the contracting parties.” *Universal Health Svcs., Inc. v. Renaissance Women’s Group, P.A.*, 121 S.W.3d 742, 747 (Tex. 2003), citing *Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 728 (Tex. 1981). During the 1980’s, however, this stricture was honored in the breach, as the Court increasingly read in additional terms and obligations, including particularly warranties and other implied terms. This trend was reversed in the 1990’s, however, both in the context of refusing to imply additional warranties, see, e.g., *Murphy v. Campbell*, 964 S.W.2d 269 (Tex. 1997) and *Parkway Co. v. Woodruff*, 901 S.W.2d 434 (Tex. 1995), and the Court has limited the resort to oral express warranties by insisting that they have been part of the basis of the bargain. *PPG Indus., supra*, 146 S.W.3d 79, 99 (“a statement cannot be a basis of the bargain if one of the parties does not know about it”). It has been similarly skeptical of implied covenants:

The Court cannot make contracts for the parties, and can declare implied covenants to exist only when there is a satisfactory basis in the express contracts of the parties which makes it necessary to imply certain duties and obligations in order to effect the purposes of the parties in the contracts made.

Universal Health Svcs., Inc. v. Renaissance Women’s Group, P.A., 121 S.W.3d 742, 747 (Tex. 2003).

The Court has also become adamant in refusing to find ambiguities where none existed, thereby making it much more difficult to supply terms through parol evidence:

Whether a contract is ambiguous is a question of law that must be decided by examining the contract as a whole in light of the circumstances present when the contract was entered. *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996). If contract language can be given a certain or definite meaning, then it is not ambiguous; it should be interpreted by a court as a matter of law. *DeWitt County Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999). Lack of clarity does not create an ambiguity, and '[n]ot every difference in the interpretation of a contract ... amounts to an ambiguity.' *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 134 (Tex. 1994). Rather, an ambiguity arises when an agreement is susceptible to more than one reasonable meaning after application of established rules of construction. *DeWitt County Elec. Coop., Inc.*, 1 S.W.3d at 100.

Universal, supra, 121 S.W.3d at 746. *See also, Enterprise Leasing Co. of Houston*, 156 S.W.3d 547 (Tex. 2004) (unambiguous obligation to pay to replace and/or repair all losses to rented car included replacement for theft).

Including Recitals

The Court recently is giving effect to contractual recitals. *See, e.g., 1464-Eight, Ltd. v. Joppich*, 154 S.W.3d 101 (Tex. 2004) (failure to pay the recited consideration in an option contract immaterial, even in the face of a verified denial that the consideration had not been paid); *Mustang Pipeline Co. Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195 (Tex. 2004) (recital that "time was of the essence" was material, as a matter of law).

Even if the terms are harsh

"...[a] covenant will not be implied simply to make a contract fair, wise, or just."

Universal, supra, at 748, citing *Danciger Oil & Refining Co. of Texas v. Powell*, 154 S.W. 2d 632, 635 (Tex. 1941).

Similarly, the Court has been willing to hold the parties to their contractual disclaimers and releases. *See, e.g. Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997) ("release" meant "release"); *Centex Homes v. Buecher*, 95 S.W.3d 266 (Tex. 2002) (implied warranty of workmanship could be disclaimed, at least in some instances).

To its Logical Culmination

In re Prudential Ins. Co. of Am., 148 S.W.3d 124 (Tex. 2004) involved a fairly straightforward lease between one of the largest landowners in America, Prudential, and two Italian immigrants, Francisco Secchi and his wife, both of whom had eighth grade educations and limited English language skills. Although they were represented by counsel, the Secchis discussed with him only the business aspects of the lease, which Prudential required them personally to guarantee.

Nine months after signing the lease, the Secchi's filed suit against Prudential on the grounds that the persistent odor of sewage kept them from doing business at the location. They paid a jury fee, but Prudential pointed out to them a clause in the lease, entitled "Jury Trial," which waived their right to a jury trial. The Court, noting that "as a rule, parties have the right to contract as they see fit as long as their agreement does not violate the law or public policy," held that the clause was enforceable, even in the face of a fraud allegation, "as long as the specific clauses were not themselves the product of fraud or coercion." *Id* at 129. Significantly, the Court held that there was no public policy against a jury trial waiver, any more than there was one against arbitration [as recognized in *In re Firstmerit Bank, N.A.*, 52 S.W.3d 749 (Tex. 2001)], and that indeed allowing a waiver would tend to stem the tide of dispute resolution out of the courts.

If the Court will enforce a waiver this significant, under these circumstances, by mandamus, it is hard to conceive of any clause that it would not enforce. Indeed, two months later, the Court enforced, through mandamus, a forum selection clause in an insurance policy requiring all litigation or arbitration to be conducted in New York, holding that it "was incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *In re AIU Ins. Co.*, 148 S.W.3d 109 (Tex. 2004). *See also, In re Automated Collection Tech., Inc.*, 156 S.W.3d 557 (Tex. 2004)(per curiam decision enforcing forum selection clause, even though relator had answered and propounded discovery in Texas).

Summary

Texas now looks primarily to the law of contract for the resolution of contract disputes, and our Supreme Court's interpretation and enforcement of contracts has become rigorous. Consequently, rules of contract interpretation, enforcement and damages will be much more important than they may heretofore have been, and Texas lawyers whose careers have largely involved tort law may find themselves "re-tooling" to address this new reality.

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