Can Lawyers Still Be Sued Under the DTPA?

An Analysis of the New Professional Services Exemption

By Wayne Clawater
and Martin S. Schexnayder

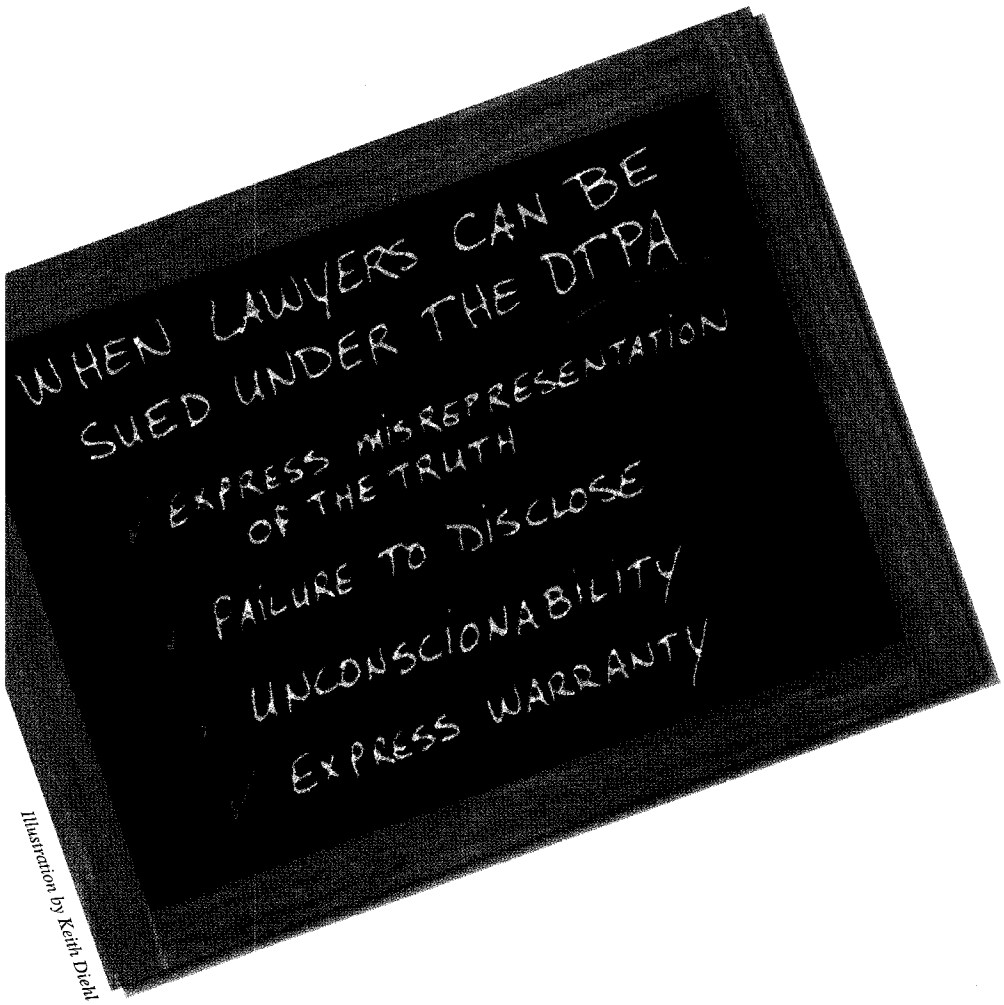

Illustration by Keith Diehl

Clients have been able to sue their attorneys for violations of the Texas Deceptive Trade Practices — Consumer Protection Act for many years. This has been true at least as far back as 1980, when the court in *DeBakey v. Staggs* held, for the first time, that legal services were actionable under the DTPA.[1] The *DeBakey* court, unswayed by the attorney's plea that the DTPA was not intended to apply to "intangible" services such as those rendered by a professional, observed that the DTPA applied to the attorney's services like any other for the simple reason that "[t]he attorney sells legal services and the client purchases them."[2] Also important to the *DeBakey* court, however, was the fact that the Texas Legislature expressly passed on the opportunity to exempt professional services from the DTPA.[3] Absent such an express exclusion, the *DeBakey* court said, "it is reasonable to conclude that the legislature intended legal services to be covered by the [DTPA]."[4]

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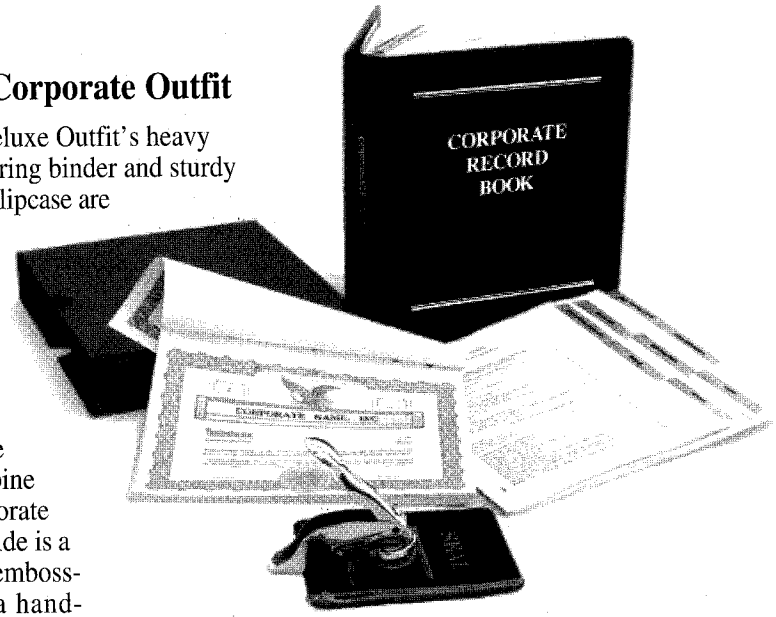

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Not any longer. During the last session, the legislature passed an exemption for professional service providers.[5] The new exemption, which applies to all DTPA claims against attorneys and other professionals filed after Sept. 1, 1996 reads as follows:

> (c) Nothing in [the DTPA] shall apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill. This exemption does not apply to:
>
> (1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment or opinion;
>
> (2) a failure to disclose information in violation of Section 17.46(b)(23);
>
> (3) an unconscionable action or course of action that cannot be characterized as advice, judgment or opinion; or
>
> (4) breach of an express warranty that cannot be characterized as advice, judgment or opinion.[6]

Texas lawyers may well wonder how this new exemption affects them. Does this exemption spell the end of lawyer liability under the DTPA? Or do the four exceptions to the exemption undo what the exemption is intended to accomplish? This article examines the exemption, and some of the decisions that have formulated lawyer liability under the old DTPA, in an attempt to answer these questions.

The General Exemption: A Return to the Reasonably Prudent Attorney Standard

In Texas, attorney malpractice lawsuits are traditionally based on negligence.[7] In such cases, the central question is whether the attorney acted according to that standard of care which would be exercised by a reasonably prudent attorney.[8]

Since *DeBakey*, however, clients have also been able to sue their lawyers for malpractice under the provisions of the DTPA.[9] This has led to the question of whether the "reasonably prudent attorney" standard applies in such cases, a question which has been answered differently and inconsistently by Texas courts. In *Wilson v. Rice*, for example, a client sued his attorney for allowing a lawsuit to be dismissed for want of prosecution, alleging violations of the DTPA.[10] In that case, the court held that, because no claim of negligence was made, "no expert testimony regarding the appropriate standard of care was required."[11] In *Johnson v. DeLay*, however, the court affirmed a directed verdict against a plaintiff who failed to present expert testimony in support of her DTPA claims, at least insofar as those DTPA claims called into question the attorney's use of professional judgment.[12] The court reasoned that "[a]ny action taken by [the attorney] involving the use of his professional judgment would require expert testimony on the standard of care, so that the jury could determine whether he acted as a reasonable, prudent attorney in this instance."[13]

The new "professional services" exemption puts an end to this confusion regarding the applicability of the "reasonably prudent attorney" standard of care by simply excluding malpractice claims — that is, claims challenging the attorney's rendition of a professional service, "the essence of which is the providing of advice, judgment or opinion, or other similar professional skill" — from the DTPA altogether.[14] If a malpractice claim is going to be actionable, it will have to be actionable the "old-fashioned way," by pleading and proving negligence.[15] In such cases, courts will have little choice but to insist upon the "reasonably prudent attorney" standard (and its incidental requirement of expert testimony).[16]

The foregoing clarification notwithstanding, clients will still be able to sue attorneys for violating the DTPA under four distinct circumstances, identified as the "exceptions" to the exemption.[17] The question naturally follows: do the exceptions swallow the rule? The answer, in the opinions of these authors, is no, if they are properly and narrowly applied. Each exception is discussed below.

Express Misrepresentations of Fact

Texas attorneys can still be sued under the DTPA for express misrepresentations of material fact, but only insofar as those misrepresentations "cannot be characterized as advice, judgment or opinion."[18] This exception, perhaps more than the others, defines the whole point of the new professional services exemption. This exception, by drawing a bright line between those claims based on expressions of "advice, judgment or opinion" and those based on "misrepresentations of fact," reinforces the purpose of the DTPA — to penalize misrepresentation, deceipt, fraud — while eliminating its applicability to those types of claims, such as professional malpractice, for which remedies already existed at common law.

If this division is to be effective, however, courts must be diligent in making the threshold determination of whether the DTPA claim truly rests on statements of fact or simply expressions of advice, judgment, or opinion. This can be a tricky task in the context of legal services. In *Johnson v. DeLay*, for example, the court, after determining that some of the DTPA claims did not require expert testimony, attempted to winnow out those DTPA "misrepresentations" which were separate and apart from the attorney's rendition of legal services for purposes of remanding those claims for evaluation by a lay jury.[19] In that case, in

which the attorney represented both buyer and seller in the sale of a business, the court determined that "there was evidence that [the attorney] misrepresented facts to induce [the seller] to finalize the sale" which "did not concern the rendition of legal services. ..."[20] One example was the attorney's representation to the seller that she had retained a security interest in her business when, in fact, she had not.[21] On the one hand, this could have been a misrepresentation of fact; on the other hand, it could have been the attorney's misjudgment, or poor advice. Under the new exemption, this type of indeterminate statement would appear to be resolved in favor of the attorney, because the statement was not one that *could not* be characterized as "advice, judgment or opinion."[22]

Failure to Disclose

The second exception permits claims based on an attorney's "failure to disclose information concerning goods and services which was known at the time of the transaction if such failure to disclose such information was intended to induce the [client] into a transaction into which the [client] would not have entered had the information been disclosed."[23] This is the exception of which attorneys should be wary. Unlike the other exceptions, the "failure to disclose" exception does not require that the actionable conduct be distinguished from the rendition of "advice, judgment or opinion." For this reason, this provision may still creep its way into malpractice lawsuits. To take *Johnson* again as an example, it is not hard to see how the claim, instead of being based on the attorney's alleged misrepresentation of the existence of a security interest, could simply be reformulated as one based on the attorney's alleged *failure to disclose* that no security interest was retained in the sale.

However, this provision may still not be applicable in most malpractice claims. It is not sufficient, after all, to show simply that there was a failure to disclose; the plaintiff must also show that the failure to disclose was *intended to induce the client into a transaction that the client would not have otherwise have entered.*[24] This means that there must be a demonstrable "motive or reason" for the attorney to hide certain information.[25] Additionally, if it was not already self-evident, there must also be a showing that the attorney *actually knew* whatever it was that he is alleged to have failed to disclose, because an attorney cannot be liable under this provision for failing to disclose information about which he or she has no knowledge.[26]

Unconscionability

Under the old statute, "unconscionability" was a popular theory by which plaintiffs attempted to use the DTPA to prosecute malpractice. Under the old definition of "unconscionability," any action which "took advantage" of the client to a "grossly unfair degree," or which resulted in a "gross disparity between consideration paid and value received," qualified.[27] Therefore, in any case in which the attorney charged a fee, and then allegedly committed malpractice, this provision was likely to be invoked. In *DeBakey*, for example, the single claim against the attorney, who failed to perform a legal name change for which he was paid $250, was that the attorney acted "unconscionably."[28] In *Barnard v. Mecom*, a client successfully sued his attorney for "unconscionability" after the attorney agreed to perform legal services for the client "and wholly failed to do so."[29] In *Wilson*, the court agreed that the attorney's "repeated nonfeasance" in the handling of a litigation matter was unconscionable, and precisely "the type of conduct that the DTPA was intended to proscribe."[30]

The recent amendments to the DTPA are likely to change all that. First, the definition of "unconscionable action or course of action" has been amended to exclude claims based on an alleged "gross disparity between the consideration paid and the value received."[31] This change, alone, should substantially reduce claims against attorneys which amount to allegations, such as in *Barnard*, that the client paid for services "and got nothing in return."[32] Second, and more significantly, a claim of "unconscionable conduct," which now is defined only as a practice which "takes advantage of the knowledge, ability, experience, or capacity of a person to a grossly unfair degree,"[33] must now be predicated on conduct which cannot be characterized as "advice, judgment or opinion."[34] While plaintiffs invoking this provision will attempt to allege that it was precisely the attorney's *failure* to render advice, judgment, or opinion which forms the basis of their "unconscionability" claims, such claims fly in the face of the legislature's clear intent to eliminate DTPA claims which are simply rephrased legal malpractice claims.

Express Warranty

Finally, attorneys can still be liable for breach of express warranty, but, like the exceptions for misrepresentation of fact and unconscionability, the "express warranty" must arise from something other than the rendition of "advice, judgment or opinion."[35] As discussed below, there are two reasons to conclude that this new "express warranty" provision may have spelled the end of breach of warranty claims against attorneys.

First, to the extent that lawyers were ever going to be liable for breach of "express warranty," it was likely to be for an expression of opinion. Simpler affirmations, such as announcing "ready" in open court, have been

resoundingly rejected by Texas courts as express warranties.[36] On the other hand, opinions had the potential to bloom into express warranties because, under Texas law, opinions by those with superior knowledge of the subject matter, a trait often (but not always) present with attorneys advising clients, could constitute express warranties.[37] However, under the new "express warranty" provision, opinions can never form the basis of a DTPA express warranty claim.[38]

Second, the "express warranty" provision finally makes clear that attorneys cannot be sued for breach of *implied* warranty under the DTPA. For some time, it has been unclear whether attorneys could be sued for breach of implied warranty.[39] The issue was almost decided when the Supreme Court rejected an implied warranty cause of action for physician services in 1985;[40] however, the Supreme Court then proceeded to expressly sidestep the same question with regard to lawyers on two subsequent occasions.[41] In the absence of direction from the Supreme Court, one Texas court simply rejected an implied warranty cause of action against attorneys.[42] Now, because implied warranties are not included in the limited exceptions to the professional services exemption to the DTPA, the matter should be settled.

Conclusion

The new professional services exemption represents a significant reversal of the increasing tendency to use the DTPA to punish what is essentially attorney malpractice. Now, such claims must be tried according to the more traditional and objective standards of negligence and the "reasonably prudent attorney" standard. As now limited, the DTPA should only apply to that attorney conduct for which the DTPA was designed to remedy, such as overt misrepresentations or intentional failures to disclose information to a client. As a result of the new exemption, attorneys benefit by the reinstitution of a more uniform standard of care for claims arising from the rendition of legal services. Clients benefit by still having access to the user-friendly terms of the DTPA. The net result should be a clearer application of lawyer liability under the DTPA.

1. 605 S.W.2d 631 (Tex. Civ. App. — 1980), *writ ref'd n.r.e. per curiam*, 612 S.W.2d 924 (1981).
2. 605 S.W.2d at 633.
3. *Id.*
4. *Id.*
5. Tex. Bus. & Com. Code Ann. § 17.49(c) (Vernon 1995).
6. *Id.* This exemption can apply to lawsuits filed after Sept. 1, 1995, but only to the extent that those claims accrued after Sept. 1, 1995.
7. *Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989).
8. *Id.*
9. *See, e.g., Sample v. Freeman*, 873 S.W.2d 470, 475 (Tex. App. — Beaumont 1994, writ denied)("settled law" that attorney malpractice actionable under DTPA); *Wilson v. Rice*, 807 S.W.2d 836, 839 (Tex. App. — Waco 1991, writ denied)(attorney's "repeated nonfeasance" was type of conduct DTPA intended to proscribe).
10. 807 S.W.2d at 837 (client alleged causes of action for "false, misleading or deceptive acts or practices" and "unconscionable course of action" under DTPA).
11. *Id.* (since claim against attorney was under DTPA, not negligence, no expert testimony required).
12. 809 S.W.2d 552, 554-55 (Tex. App. — Corpus Christi 1991, writ denied).
13. *Id.* at 555.
14. Tex. Bus. & Com. Code Ann. § 17.49(c).
15. *Cosgrove*, 774 S.W.2d at 664.
16. *Id.*
17. Tex. Bus. & Com. Code Ann. § 17.49(c)(1)-(4)
18. Tex. Bus. & Com. Code Ann. § 17.49(c)(1).
19. 809 S.W.2d at 555-56.
20. *Id.* at 555.
21. *Id.*
22. Tex. Bus. & Com. Code Ann. § 17.49(c)(1).
23. *Id.*, § 17.49(c)(2); § 17.46(b)(23).
24. *Id.*, § 17.49(c)(2).
25. *See, e.g., Parker v. Carnahan*, 772 S.W.2d 151, 159 (Tex. App. — Texarkana 1989, writ denied)(claim failed because plaintiff failed to show "motive or reason" why attorney would have wished to induce client into signing tax documents).
26. *Wright v. Lewis*, 777 S.W.2d 520, 522-23 (Tex. App. — Corpus Christi 1989, writ denied).
27. Tex. Bus. & Com. Code Ann. § 17.45(5)(Vernon 1987).
28. 605 S.W.2d at 632.
29. 650 S.W.2d 123, 125-26 (Tex. App. — Corpus Christi 1983, writ ref'd n.r.e.). However, less than three months later, the same court of appeals found that there was no evidence to support a jury's finding of "unconscionable" conduct where an attorney charged a client in a divorce proceeding four times the amount the attorney testified in that same proceeding was the value of his services. *Lucas v. Nesbitt*, 653 S.W.2d 883, 885-86 (Tex. App. — Corpus Christi 1983, writ ref'd n.r.e.).
30. 807 S.W.2d at 839.
31. Tex. Bus. & Com. Code Ann. § 17.45(5)(Vernon 1995).
32. 650 S.W.2d at 126.
33. Tex. Bus. & Com. Code Ann. §17.45(5).
34. *Id.*, § 17.49(c)(3).
35. *Id.*, § 17.49(c)(4).
36. *Heath v. Herron*, 732 S.W.2d 748, 754 (Tex. App. — Houston [14th Dist.] 1987, writ denied).
37. *Valley Datsun v. Martinez*, 578 S.W.2d 485, 490 (Tex. Civ. App. — Corpus Christi 1979, no writ).
38. Tex. Bus. & Com. Code Ann. § 17.49(c)(4).
39. *See, e.g., Melody Home Mnftg. Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987); *Willis v. Maverick*, 760 S.W.2d 642, 648 (Tex. 1988).
40. *Dennis v. Nelson*, 698 S.W.2d 94 (Tex. 1985).
41. *Melody Home*, 741 S.W.2d at 354; *Willis*, 760 S.W.2d 642, 648 (Tex. 1988).
42. *Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc.*, 779 S.W.2d 474, 479 (Tex. App. — El Paso 1989, writ denied).

Wayne Clawater *is a shareholder in the Houston firm of Weinstein & Clawater, P.C. He received his undergraduate degree from The University of Texas in 1977, graduated with highest honors from South Texas College of Law in 1981, and served as a briefing attorney for Texas Supreme Court Justice Sears McGee.*

Martin Schexnayder *is a shareholder in the Houston firm of Weinstein & Clawater, P.C. He graduated from The University of Texas Plan II honors program in 1988 and from U.T. School of Law in 1991.*