

**Recent Decision by Waco Court of Appeals Sheds Light on
DTPA “Professional Service” Exemption**

January 25, 2012

Richard E. Schellhammer
Heather M. Woods

In a case decided this month, the Waco Court of Appeals expanded the professional service exemption from liability under the Texas Deceptive Trade Practices Act (“**DTPA**”) to cover the inspection report of a professional real estate inspector. *See Retherford v. Castro*, No. 10-10-00298-CV, 2012 WL 28714 (Tex. App.— Waco Jan. 4, 2012, no. pet. h.).

I. *Retherford* Facts

Wesley Retherford, the plaintiff in that case, was a professional home inspector, licensed by the Texas Real Estate Commission (“**TREC**”). Terri and Frank Castro hired Retherford to inspect a home that the couple signed a contract to purchase. During the inspection, Retherford noticed some water damage in two (2) rooms and in the attic. He believed the damage was caused by condensation from the metal roof as a result of improper ventilation. In his inspection report, Retherford noted that the roof and attic were “Not Functioning or in Need of Repair” and included photos of the relevant areas but indicated that the water damage was not a serious issue. He also noted that he inspected the roof covering but did not observe any problems.

The Castros completed their purchase, buying the house “as is.” Seven (7) months after Retherford’s inspection, during the first big rainfall since their purchase, the Castros noticed water running down walls in the same areas where Retherford saw water damage. The Castros went up to the roof to look for problems and found multiple loose screws in the roofing, some of which were so loose they could be turned with a finger.

Thereafter, the Castros hired a second TREC-licensed home inspector to examine their roof issues and ultimately hired someone to repair the roof. These individuals found approximately two hundred (200) loose screws and observed black water damage stains, which they believed had been there at least one year. The inspector opined that if Retherford had properly inspected the roof, he would have discovered the leaks and would have known the damage was not a ventilation issue.

The Castros sued Retherford for negligent misrepresentation and violations of the DPTA.

II. **DTPA Professional Service Exemption**

Liability under the DTPA arises from “false, misleading, or deceptive acts or practices in the conduct of any trade or commerce.” Tex. Bus. & Com. Code Ann. § 17.46(a) (West 2010).

The statute carves out an exemption, however, for persons providing a professional service. This exemption was added to the DTPA in 1995 and reads, “Nothing in this subchapter

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.” *Id.* at § 17.49(c).

Although not statutorily defined, Texas Courts have interpreted “professional service” to mean that a professional must perform more than an ordinary task. *See Nast v. State Farm Fire & Cas. Co.*, 82 S.W.3d 114, 122 (Tex. App.— San Antonio 2002, no pet.); *see also Atlantic Lloyd's Ins. Co. v. Susman Godfrey, LLP*, 982 S.W.2d 472, 476-77 (Tex. App.—Dallas 1998, pet. denied). Rather, the task must arise out of acts particular to the individual’s specialized vocation, knowledge, or training. *See id.*

A. Who is a Professional?

There is no statutory definition of “professional” and no laundry list of covered occupations in the DTPA. “When the professional services exemption was enacted, the Legislature could not agree on a definition and therefore, did not include one and left the language vague.” *Retherford*, 2012 WL 28714, at *2 (citing David Skeels, *The DTPA Professional Services Exemption: Let ‘em be Doctors and Lawyers and Such*, 55 Baylor L.Rev. 783, 805 & n. 97 (2003) (discussing the legislative history of the exemption)).

However, courts have recognized that some professionals, such as lawyers, doctors, and accountants, clearly fit within the meaning of professional in the DTPA exemption. *See In re R & C Petroleum, Inc.*, 236 B.R. 355, 361 (Bankr. E.D. Tex. 1999) (“[T]he Texas Deceptive Trade Practices Act, as supported by the case law, clearly excludes professional service providers such as attorneys, doctors and accountants, among other licensed professionals.”).

In addition, since its adoption of the exemption in 1995, the Legislature has enacted specific statutes to protect certain licensed or registered professionals who provide “professional services,” such as architects, landscape architects, engineers, and surveyors. *See, e.g.*, Tex. Civ. Prac. & Rem. Code Ann. §§ 150.001, *et. seq.* (West 2010). These professionals are statutorily defined and easily recognized as professionals by most courts. *Id.*

In *Retherford*, the Appellate Court in Waco noted that beyond this narrow set of licensed professionals, neither the courts nor the Legislature have squarely decided what other careers are “professional” or agreed on a set of criteria to be used in making this determination. Addressing this issue head on, the *Retherford* Court stated that there are other causes of action requiring a determination of what constitutes a “professional service,” such as negligent misrepresentation and insurance coverage claims, that can be useful in the DTPA context. In particular, the *Retherford* Court examined a set of criteria used by the Eastland Court of Appeals to define a professional in an insurance policy exclusions case. *See* 2012 WL 28714, at *5 (citing *Duncanville Diagnostic Ctr., Inc. v. Atlantic Lloyd's Ins. Co.*, 875 S.W.2d 788, 790 (Tex. App.— Eastland 1994, writ denied) and *Md. Cas. Co. v. Crazy Water Co.*, 160 S.W.2d 102, 104–05 (Tex. Civ. App.— Eastland 1942, no writ)). The *Retherford* Court adopted that definition, agreeing that a professional: (1) engages in work involving mental or intellectual rather than physical labor, (2) requires special education to be used on behalf of others, and (3) earns profits dependent mainly on these considerations.

Turning to the issue at hand, the *Retherford* Court analyzed whether a licensed home inspector qualifies as a professional for the DTPA exemption. The Court took note of the definition of real estate inspection in the Texas Occupations Code as “a written or oral opinion as to the condition of the improvements to real property, including structural items, electrical items, mechanical systems, plumbing systems, or equipment” and carefully examined the requirements for qualifying as a professional in the field. The Court also analyzed the statutory scheme creating three levels of home inspectors in Texas and found that by amending the Occupations Code to change the title of the highest level of real estate inspector to “professional real estate inspector,” the Legislature acknowledged the higher degree of specialization involved. The Court stated that this new title is similar to that of a “licensed professional engineer” or a “registered professional land surveyor.” The Court also reasoned that the Legislature placed significance on the role of home inspector as evidenced by imposing a minimum limit of liability insurance, establishing a recovery fund for the purpose of collecting claims against inspectors for statute or rules violations, and outlining discipline procedures and administrative and criminal penalties for prohibited acts of inspectors. Finally, finding that a professional real estate inspector meets the three (3) prongs of the Eastland Court of Appeals’ definition of professional, the *Retherford* Court concluded that a professional real estate inspector is a “professional” for purposes of the DTPA exemption.

B. What Services Were Provided?

Determining whether an individual is a professional is only step one. Pursuant to the DTPA statute, not all “professional services” are exempted, only those that the *essence* of which is advice, judgment, or opinion. Tex. Bus. & Com. Code § 17.49(c).

The Court in *Retherford* had no problem deciding that the essence of the home inspector’s report was providing his opinion because the statutory definition of real estate inspection stated as much. “Clearly the contents of the real estate inspection report constituted the inspector’s opinion as to the condition of the house, as it has been statutorily defined as such.” 2012 WL 28714, at *5 (citing Tex. Occ. Code Ann. § 1102.001(9) (West 2010) (“Real estate inspection’ means a written or oral *opinion*...”) (emphasis added)). Ultimately, the Court concluded that the DTPA professional service exemption applies to inspection reports of professional real estate inspectors.

Although the *Retherford* Court did not spend much time analyzing the service aspect of the DTPA exemption, many other courts do. First, not many professionals have a statutory definition of their work that clearly includes the word “advice” “judgment,” or “opinion,” as the definition of real estate inspection did in *Retherford*. Second, not many professionals generate one, easily identifiable service, such as Retherford’s single inspection report. Because the focus of the exemption is the rendering of a service, not the professional occupation of the provider, a professional may provide some services that are exempt from the DTPA and some that are not. For example, engineers and architects offer a variety of services to their clients, some of which the Courts may be less willing to automatically qualify as advice, judgment, or opinion.

C. Does an Exception Apply?

Even if the professional service exemption applies, there are some exceptions to it. The 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 concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed;
- (3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion;
- (4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion; or
- (5) selling, offering to sell, or illegally promoting certain annuity contracts.

Tex. Bus. & Com. Code § 17.49(c).

In *Retherford*, the Castros contended that, even if Retherford provided a professional service, the DTPA exemption did not apply due to exception 17.49(c)(1) above. The Castros claimed that Retherford made representations of fact that his services had characteristics, uses, and benefits that they did not have and were of a particular quality when they were not. The trial Court below agreed that these were misrepresentations of material facts that cannot be characterized as advice, judgment, or opinion. However, looking to the analysis of a similar case by the Fort Worth Court of Appeals, the *Retherford* Appellate Court disagreed and found that the conclusions in Retherford's inspection report were his opinions, not assertions of fact. 2012 WL 28714, at *6 (citing *Head v. U.S. Inspect DFW, Inc.*, 159 S.W.3d 731, 742 (Tex. App.— Fort Worth 2005, no pet.)).

III. Retherford Holding

The Appellate Court in *Retherford* ultimately found that the professional service exemption in the DTPA applied to Retherford's professional real estate inspection report. It concluded that the report only contained his opinions, not any misrepresentations of fact, and found that any claims by the Castros that Retherford was unqualified and did not properly perform the inspection were breach of contract claims, under which theory the Castros did not sue. As such, the Court reversed the trial Court's finding of DTPA liability for Retherford and, because there were no findings of fact, remanded the case for a new trial on the negligent misrepresentation claim.

IV. Conclusion

Determining whether an individual is exempt from DTPA liability pursuant to the professional service exemption is a multiple step process. First, you must determine whether the individual is a “professional.” This may be a near forgone conclusion for some, such as lawyers, doctors, and accountants. Other licensed professionals, like engineers, architects, and surveyors, can point to other statutory language that defines them as professionals. *See, e.g.*, Tex. Civ. Prac. & Rem. Code § 150.001. Still, those who have no such protection should look to the definition of professional adopted by the Court in *Retherford*, which is that a professional: (1) engages in work involving mental or intellectual rather than physical labor, (2) requires special education to be used on behalf of others, and (3) earns profits dependent mainly on these considerations.

Second, you must decide whether the professional service provided is considered advice, judgment, or opinion. Remember that not all professional services are exempted from the DTPA, only those the *essence* of which is advice, judgment, or opinion. *See* Tex. Bus. & Com. Code § 17.49(c).

Third, you should determine whether any exception to the professional service exemption applies. The 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 concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed;
- (3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion;
- (4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion; or
- (5) selling, offering to sell, or illegally promoting certain annuity contracts.

Id.

If a professional provides a service that is his/her advice, judgment, or opinion and none the above-listed exceptions apply, the professional service exemption is a complete defense to DTPA liability in Texas.

If you have any questions concerning the Court’s decision or other matters concerning construction, please call Richard E. Schellhammer at 214.253.4013 or e-mail him at res@gucl.com or call Heather M. Woods at 241.969.5454 or e-mail her at heatherw@gucl.com.