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## Real Estate Broker Found Liable to Home Buyers for Failing to Disclose Criminal Record of Previous Owner

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on Sunday because the National Bank Holiday Act preempted the Illinois Bank Holiday Act. Furthermore, they claimed that the contract entered into with plaintiff specified that Delaware law would govern. Delaware does not have a comparable Holiday Act. Finally, defendants claimed the contract expressly excluded the Holiday Act.

On March 23, 1993, the circuit court granted the defendants' motion to dismiss. It held that the National Bank Act preempted the Illinois Bank Holiday Act and that the contract excluded the effect of the Holiday Act. The court also ruled that Delaware law governed the contract.

#### ***The Holiday Act - Not Fundamental Illinois Public Policy***

In affirming the circuit court, the appellate court found the language of the Visa card agreement control-

ling. The credit card contract specifically required payments to be made in accordance with the terms of the contract. One of these terms specifically excluded the effect of the Holiday Act.

The court also found the language of the contract contrary to the Holiday Act and thus, the language of the contract superseded the Holiday Act. Additionally, Illinois courts have previously upheld similar time computation provisions and have found them consistent with public policy. The court similarly construed the Holiday Act as not embodying fundamental Illinois public policy.

#### ***Credit Card Agreement - Not a Contract of Adhesion***

Because there are so few credit card companies that award United Airlines frequent flier miles, plaintiff alleged that his credit card

was an unenforceable contract of adhesion. Contracts of adhesion are non-negotiable, standardized contracts given to a party for acceptance. However, the mere fact that a party has unequal bargaining power cannot alone render the contract, or a provision thereof, unenforceable.

In the immediate case, the appellate court held that the contract was not a contract of adhesion because the plaintiff was not forced to obtain this particular credit card. Instead, other credit card companies offered similar benefits. The existence of other companies offering frequent flier awards demonstrates that plaintiff did not lack meaningful choice: he freely chose to take a credit card from defendants. Finally, in view of the foregoing disposition, the court declined to decide the choice of law issue or the applicability of the National Bank Act.

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## ***Real estate broker found liable to home buyers for failing to disclose criminal record of previous owner***

*by Aimée D. Latimer*

In *Sanchez v. Guerrero*, 885 S.W.2d 487 (Tex.Ct.App. 1994), the Court of Appeals of Texas held that a real estate broker was liable for failing to tell potential buyers that the previous owner of the home had conducted criminal acts in the home. The court found that the broker violated the Texas Deceptive Trade Practices—Consumer Protection Act (DTPA) because he

knowingly failed to disclose this information. Furthermore, the court held that not only were the buyers entitled to actual damages for expenses paid in purchasing the home, but they were also entitled to compensation for the mental anguish they suffered as a result of the broker's deception.

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***Home Owners Purchase "Dream Home" Before Learning Previous Owner Conducted Criminal Activity On The Premises***

The plaintiffs, Ernesto and Norma Guerrero, purchased a home in El Paso with the help of Rosalinda Ruiz, a sales agent from Century 21 Casablanca Realty, and Angel Sanchez, a real estate broker at Casablanca. The Guerreros found the house while driving through a neighborhood in El Paso in December 1987. The Veterans Administration owned the property at that time.

The Guerreros testified at trial that they fell in love with the house as soon as they saw it and wanted to buy it immediately. On January 14, 1988, they placed a bid for the home, which the Veterans Administration accepted eleven days later. The parties completed the sale on March 23, and the Guerreros made an initial payment.

Before the closing date, the Guerreros testified that they repeatedly asked Sanchez and Ruiz about the identity of the previous owner of the home, but received only a promise that Sanchez would find out. Sanchez denied being asked such a question, and denied knowing the owner's identity before the closing of the sale. On the evening of March 23, the Guerreros learned from a television news program that Michelle Noble had been tried and acquitted of participating in criminal activities in the home that the Guerreros had just purchased. They instantly changed their mind about the home and called Sanchez the next day to cancel the sale. Sanchez then wrote a letter to the Veterans Administration, which refused to cancel the sale of the home. The Guerreros, however, refused to make any additional payments or move into the home. Eventually, the Veterans Administration foreclosed.

The Guerreros sued Ruiz and Sanchez individually, as well as Casablanca, asserting that the parties violated the DTPA. The Guerreros alleged that the parties knew that Noble had lived in the home, and withheld such information in an attempt to induce the Guerreros into completing the purchase of the home. The trial court directed a verdict in favor of Ruiz. The jury found that Sanchez "knowingly engaged in false, misleading, or deceptive acts or practices and that he knowingly engaged in an unconscionable action or course of

action." The jury awarded the Guerreros \$120,000 — \$20,000 for closing costs paid by the Guerreros, and \$100,000 for their mental anguish. The court reformed the actual damages, resulting in a total award of \$117,880. Sanchez and Casablanca appealed to the Court of Appeals of Texas.

***Broker Violated the DPTA When He Failed to Disclose Information to the Buyers***

The issue before the court was whether the seller's failure to disclose crucial information to the buyer about the home's previous owner constituted a deceptive trade practice. Before deciding this issue, however, the appeals court first articulated a standard of review to be used when deciding deceptive trade practice cases. The court stated that the defendants could prevail on appeal only if they showed that insufficient evidence existed to support the jury's verdict. The court found that if there was "more than a scintilla of evidence to support" the verdict, the defendants could not prevail. Additionally, the court noted, if the parties presented conflicting evidence to the jury, the jury's verdict regarding such evidence would be regarded as conclusive.

The court then considered the scope of the DTPA, and interpreted the provisions of the DTPA to require the plaintiff to prove that:

- (1) the defendant knew the information at the time of the transaction;
- (2) the defendant failed to disclose the information;
- (3) the failure to disclose was intended to induce the plaintiff into a transaction;
- (4) the plaintiff would not otherwise have entered into the transaction; and
- (5) the failure to disclose the information was a producing cause of damages.

The court found that sufficient evidence existed for the jury to find that Sanchez knew the identity of the previous owner of the home and failed to disclose that identity to the Guerreros. The court noted that Sanchez not only waited several days before contacting the Veterans Administration to request that the transaction be canceled, but also cashed his commission check

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during that time knowing that the Guerreros wanted to cancel the sale. The court also cited testimony by the Guerreros that they repeatedly asked Sanchez for information about the previous owner, and that they proceeded with the closing without obtaining this information because they trusted Sanchez. The court noted that while Sanchez denied that such requests were ever made, the court would not disturb the jury's finding that the Guerreros, and not Sanchez, were telling the truth.

***Broker Acted Unconscionably and Knowingly***

The court also determined that sufficient evidence existed for the jury to find that by failing to disclose information about the previous owner, Sanchez induced the Guerreros into purchasing the home, and that the Guerreros would not have bought the home if they knew that an accused child molester once lived there. In doing so, the court held Sanchez acted unconscionably and therefore violated the DTPA.

The court noted that the DTPA provides for a cause of action when a party acts unconscionably, causing damage to a consumer. The DTPA defines an unconscionable action as an act which "takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree."

The *Sanchez* court noted the rule of law in Texas that in making a determination of unconscionability, a court must examine the entire transaction. The court found that in the present case, the Guerreros were first-time home buyers and had no experience with any part of the process of buying a home. Additionally, the court cited testimony by the Guerreros that they relied on Sanchez' expertise in real estate to "guide them through the process." Furthermore, the court noted testimony by Sanchez admitting that he had a duty to disclose facts known to him that might in any way influence the sale,

"including allegations of child molestation in the house."

The court held that sufficient evidence was presented for the jury to find that by failing to disclose information about the previous owner, Sanchez took advantage of the Guerreros' lack of knowledge of real estate "to a grossly unfair degree" and therefore acted unconscionably, resulting in damage to the plaintiffs.

***Buyers Entitled to Damages for Mental Anguish Under Consumer Protection Law***

The court examined the DTPA and found that the Act authorized the recovery of mental anguish damages when the plaintiff proved that the defendant knowingly committed deceptive or unconscionable actions. The court held that since the Guerreros proved that Sanchez acted in such a manner, the Guerreros were entitled to such damages as long as they provided evidence of their anguish. Additionally, the court noted that because losses due to mental anguish are non-pecuniary, the jury has broad discretion in determining the amount of mental anguish damages.

The court found that the Guerreros provided ample evidence of their mental anguish. Both plaintiffs suffered shock and agony when they learned that an accused child molester had lived in their "dream home." Moreover, the Guerreros suffered grief, severe disappointment, sleepless nights, and despair as a result of losing the home. Both parties missed work and eventually had to go to counseling to deal with their disappointment. The court therefore upheld the jury's award of \$100,000 in damages from mental anguish.

In concluding that the plaintiffs satisfied their burden of proof under the DTPA, entitling the jury to find in their favor, the court upheld the award of actual damages and mental anguish damages and overruled the defendants' arguments on appeal.

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