Consumer Status and Tie-in Statutes Under the DTPA

Or A Claimant's Right to Sue Under the DTPA

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I. Preface

This article examines the relationship between The Texas Consumer Protection and Deceptive Trade Practices Act (The DTPA)[1] and independent Texas statutes that give rise to a claim under the DTPA known as "Tie-In Statutes."[2] It discusses the relatively recent case law holding that a tie-in statute plaintiff must also be a consumer under the DTPA. It is asserted that this notion is relatively recent, incorrect, and in contrast to the plain language of the DTPA as well as general rules of statutory construction.

II. Background of the DTPA

The DTPA[3] is a statutorily enacted response to the unfair playing field that was so prevalent prior to consumer protection laws. The DTPA is a consumer protection statute that arose in the 1960s riding on a wave of consumer oriented protections put in place

by both the federal government and state governments as a result of a perceived imbalance of power between consumers and merchants. The imbalance has been attributed to many factors such as disproportionate information, unequal bargaining power, repeat player, and general ignorance or naivety of consumers.[4] The rise of consumerism resulted in many Federal laws such as the Truth in Lending Act (1968), The Consumer Product Safety Commission Act (1972), Fair Credit Reporting Act (1974), The Magnuson-Moss Warranty Act (1975), FTC "Holder rule" (1975), and the Fair Debt Collection Practices Act (1977).[5] The legislative activism was mirrored in the state legislatures as well, and in Texas resulted in the DTPA, originally only actionable by the Attorney General.[6] In 1973, however, the DTPA was transformed by the legislature into a consumer protection statute with a private right of action.[78]

The maxim of *caveat emptor* or "Let the buyer beware" was replaced by a statute designed to require full and truthful disclosure. The DTPA remains Texas's most powerful consumer oriented statute despite the remarkable transformation it has undergone since its inception in 1973. Although the DTPA's consumer protection provisions have been lessened, the Act still offers consumers many advantages in court, including a statutory mandate that the Act:

> shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranties and to provide efficient and economical procedures to secure such protections.[9]

Although the recent past has shown a certain level of judicial activism that appears to be in contrast to the legislative mandate, the DTPA is still able to achieve its stated purpose by fostering a climate that favors a consumer. But in the mid 1990s public sentiment began to change sharply. No longer were the drums of consumerism pounded loudly; rather the harsh cries of lawsuit abuse began to reverberate throughout legislatures helped in part by stories of "runaway" juries such as the famous McDonald's cup of coffee.[10]

The most significant changes to the DTPA occurred in 1995. Under the guise of tort reform, the Texas legislature substantially amended the DTPA, generally weakening the statue with the passage of H.B. 668.[12] H.B. 668 did, however, made one significant change that has the potential to substantially help consumer—the enactment of subsection 17.50(h) providing for increased damages for a violation of a "tie-in" statutes. Having summarized the history of the DTPA, a detailed analysis of the tie-in provisions follows.

III. DTPA Grants of Power—Tie-in Statutes

The tie-in statute interplay with the DTPA is innovative and quite brilliant. It allows future legislatures to identify and protect groups that have unequal power, and incorporate them into the DTPA, without altering the Act itself. Tie-in provisions also allow additional laundry list type items to be incorporated into the DTPA under limited scenarios, thus giving the legislature a razor-sharp tool to fine-tune perceived inequities.

As is always the case, the statutory right to bring suit is specifically spelled out in the statute, and the DTPA is no exception to the rule. The DTPA has three distinct grants of authority to bring lawsuits:

1.The original grant is to the state through the Texas Attorney General – Consumer Protection Division;

2. A direct private grant is to consumers, which is the most used method of bringing a claim under the DTPA; and

3. A seldom-used tie-in grant to claimants who are authorized by other laws to bring claims through the DTPA.

A. Directly to the Consumer

The primary grant of power for bringing claims *directly* under the DTPA by a private litigant is section 17.50(a), which states "A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish..."[13] Section 17.50(a) is expressly limited to a "consumer," which is defined as more than just a person who buys something. A consumer is defined as "an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services."[14] Thus the DTPA provides for business consumers as well as individuals. Courts have broadened the definition of consumer by enlarging it in some cases such as by the use of "intended beneficiaries"[15] and significantly narrowed it, for example by holding that borrowing money in and of itself is not a good or service under the DTPA.[16] There are a number of other areas in which the common use of the word "consumer" does not satisfy the DTPA's definition of consumer such as the purchase of intangibles[17] like lottery tickets,[18] certificates of deposit,[19] and option contracts.[20]

B. To the State

The State can act in the capacity as a consumer according to the definition of consumer that includes "this state, or a subdivision or agency of this state" when it "seeks or acquires by purchase or lease, any goods or services."[21] The DTPA also gives broad powers exclusively to the State under sections 17.47, 17.48, 17.58, 17.60, and 17.61. The State, through the Attorney General – Consumer Protection Division, can seek injunctive relief despite lack of consumer standing when it has "reason to believe that any person is engaging in, has engaged in, or is about to engage in any act or practice declared to be unlawful by" the DTPA when such action would "be in the public interest."[22] Under this authority, the State can seek injunctive relief and may seek penalties of up to $20,000 per violation ($270,000 per violation when the practice was calculated to deprive money from senior citizens).[23] A district or County Attorney can also bring suit for injunctive relief with prior notice to the Attorney General – Consumer Protection Division.[24]

C. To a Claimant When Authorized by Another Law

The DTPA provides a framework for other statutes to make their provisions enforceable under the DTPA, and this provision gives rise to the so-called "tie-in" statutes under section 17.50(h).[25] The tie-in provision results in a mosaic of interrelated laws that are actionable under the primary vehicle of the DTPA but with enhanced damage provisions. There are two basic features of the tie-in subsection. First is the claimant provision that allows a plaintiff to bring a claim from another statute through the DTPA. Second is the enhanced damage provision that substitutes actual damages for economic damages. The specific grant of authority in section 17.50(h) provides that:

> "[n]otwithstanding any other provision of this subchapter, if a claimant is granted the right to bring a cause of action under this subchapter by another law, the claimant is not limited to recovery of economic damages only, but may recover any actual damages incurred by the claimant, without regard to whether the conduct of the defendant was committed intentionally."[26]

IV. Tie-in Statute Specifics

There are a number of significant differences between a direct action under the DTPA through 17.50(a) and a tie-in action under 17.50(h). The most obvious and perhaps most significant difference is the difference between economic damages and actual damages. Under section 17.50(a), the general damage standard

is "economic damages;" to recover damages for mental anguish it must be shown the defendant acted "knowingly." On the other hand, when a claim is brought through section 17.50(h) pursuant to a tie in statute, the general damage standard is "actual damages." Economic damages are pecuniary and are defined under the DTPA as:

> compensatory damages for pecuniary loss, including costs of repair and replacement. The term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.[27]

The term "actual damages" is not defined by the DTPA but case law shows that they are those damages recoverable at common law[28] and are determined by the total loss sustained by a plaintiff.[29] Actual damages include all economic damages, as well as damages for mental anguish and pain and suffering. In other words, claims for "physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society" that are specifically excluded under the definition of economic damages are no longer excluded as they are included as part of actual damages. Significantly, mental anguish recovery under the actual damage standard for a tie-in statute does not require an elevated mental state of knowing or intentional conduct.

V. DTPA Standing Under a Tie-in Statute

Standing under the DTPA has always been an area of significant activity because it is one of the few defenses available to defendants. The question of who may maintain a claim under section 17.50(h) of the DTPA when brought through a tie-in statute has become a hot topic, and the focus of a number of court opinions. It has been argued that subsection 17.50(h) requires consumer standing under the DTPA. This argument has only recently surfaced, notwithstanding the fact that there does not appear to be a requirement that a tie-in plaintiff be a consumer, but rather only that any tie-in plaintiff or "claimant" is authorized to bring the action under another law.

A. Standing Under a Direct DTPA Claim

It is clear that under section 17.50(a), a "*consumer* may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish..."[30] Under the DTPA a consumer is defined as more than just a person who buys something. A consumer is defined as "an individual, partnership, corporation... who seeks or acquires, by purchase or lease, any goods or services."[31]

1. Seek or Acquire

The phrase "seek or acquire" is rather straightforward, but deserves some analysis to dispel common myths about the DTPA, for example that the DTPA requires a contract, a sale, or exchange of consideration. The focus is on a person's relation to the transaction rather than privity or contractual relationship.[32] When one seeks, but does not acquire, there will not be a contract or sale and thus no privity,[33] but the person will still be a DTPA consumer. Proving that a client acquired a good or service is an intuitive task, whereas, proving that a person sought a good or service is more challenging. The two-pronged test for "seek" is based on a common sense approach and requires 1) a good faith intention to purchase or lease coupled with 2) the ability to do so.[34]

2. By Purchase or Lease

To achieve consumer status under the DTPA, one must not only seek or acquire, but also purchase or lease. Although the terms "purchase" and "lease" are not defined by the DTPA, the definitions are intuitive. A purchase is defined as a voluntary transmission of property or services from a seller to a buyer with valuable consideration.[35] A lease is described under the U.C.C. as a transfer of the right to possession and use of goods for a term in return for consideration.[36] Gratuitous goods and services do not generally give rise to consumer status.[37]

3. Goods or Services

The third requirement for consumer status is that the transaction must be for goods or services. Both "goods" and "services" are defined by the DTPA. "Goods" is defined as tangible chattels or real property purchased or leased for use.[38] Determination of what is and what is not a good generally is an easy process. A number of items have been determined to be intangible, and not goods, such as money, lending money,[39] accounts receivable,[40] stocks,[41] option contract,[42] insurance policy,[43] certificate of deposit,[44] lottery tickets,[45] and intangible property rights.[46] However, intangible property that is merely incidental to a purchase or lease of goods or services does not disturb consumer status.[47]

B. Standing to Bring a Tie-in Claim Under the DTPA

Unlike bringing a claim pursuant 17.50(a), a tie-in claim under 17.50(h) has no requirement that it be brought by a consumer. Section 17.50(h) speaks in terms of a "claimant."[48] There is not a single use of the word "consumer" in subsection (h), but the word "claimant" is used three times. Contrast that with the fact that the word consumer is used over 100 times throughout the DTPA.

The Legislature knew what the term "consumer" meant because it was defined within the Act and used so many times, and yet it chose to use another term, "claimant," in granting the enhanced rights of section 17.50 (h). The scheme shows remarkable forethought by the Legislature in that by a change to the enabling language in the tie-in statute, the legislature can and did change who could bring an action and expand or diminish the claims that could be made while still maintaining a basic consumer protection law for the benefit of its citizens.

C. Analysis of the term "Claimant"

To determine who is authorized to bring a tie-in claim, section 17.50(h) looks to the individual tie-in statutes rather than to any other language located in the DTPA. This is not only evinced by the use of the word claimant rather than consumer, but is bolstered by its opening language "[*n*]*otwithstanding any other provision of this subchapter*."[49] Such language is akin to a road sign announcing to the reader that the following will be in conflict with some other language in the subchapter, but that this language will control. In other words "claimant" trumps "consumer" for the purposes of section 17.50(h). Had the legislature wanted this provision to be read as "consumer," it could have very easily limited 17.50(h) to consumers, but it did not. It is improper to ignore the Legislature's choice of language and fail to harmonize the language so as to give every word meaning.[50]

To give the word "claimant" the same meaning as "consumer" strains the reading and is inconsistent with established rules of statutory construction. "It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose . . . [and] we believe every word excluded from a statute must also be presumed to have been excluded for a purpose."[51] "When the Legislature has employed a term in one section of a statute and excluded it in another, we presume that the Legislature had a reason for excluding it."[52] Any attempt by the courts to marginalize the Legislature's choice to use the term claimant instead of consumer (and thereby enable 17.50(h) to vary standing requirements under the DTPA based on the later intent expressed in the various tie-in statutes) is disingenuous.

D. Case Law That Gets it Wrong

This seems to be a case where one Court got it wrong and the others are reading head-notes or otherwise failing to make an independent analysis. The task of the courts is to analyze the law with an emphasis on proper principles of statutory construction. A critical examination of section subsection 17.50(h) is long overdue.

The plain language of the tie-in provision makes the DTPA available to plaintiffs other than just consumers, yet the clear intent of the legislature is under attack by a number of courts who have glossed over the direct and unambiguous language of the tie-in authority found in subsection 17.50(h) and have blindly followed the oversimplified mantra that the DTPA requires consumer status.[53]

If the stakes were not so very high, the inartful analysis that has lead to a number of Texas Federal Courts and a couple of State Courts to get this wrong would be comical. Unfortunately, each of the decisions has a plaintiff being denied some remedy that should be available and so rather than comical the entire movement is tragic. What started out as one Court misinterpreting a statute has snowballed into an unfortold trend that ignores the clear language of the statute.

The story begins in the Federal District Court for the Northern District of Texas with the decision in *Marketic v. U. S. Bank Nat'l Ass'n*. The *Marketic* Court stated:

> Plaintiff fails to recognize that Tex. Bus. & Com. Code § 17.50(h) does not exempt claimants from showing that they qualify as a "consumer" under Tex. Bus. & Com. Code § 17.45(4). *In all cases, a plaintiff must qualify as a "consumer" in order to have standing to bring an action under the DTPA.*[54]

Interestingly, section 17.45 is the definitions section of the DTPA. Section 17.45(4) simply supplies the definition of consumer. It places no requirement to be a consumer under the DTPA. The consumer requirement comes from section 17.50(a) which states that "A *consumer* may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish..."[55] This is the primary grant of authority to bring a direct action under the DTPA and it does require consumer status for direct claims, but this by no means limits other parts of the Act from allowing an action to be brought by persons other than a consumer under the DTPA where authorized. In other words, 17.50(a) does not preclude non-consumers from bringing actions, but rather grants authority for consumers to bring actions.

The cases that are cited to by the *Marketic* Court, including *Mendoza* and *Figueroa,* are both cases that involved direct claims under 17.50(a) and thus actually did require consumer status.[56] Tie-in statutes were not even involved in these cases. Tie-in statutes get their grant of authority to bring a cause of action under the DTPA from 17.50(h) not 17.50(a). Subsection "(h)", in a separate and distinct grant of authority dispenses with the "consumer" requirement found in subsection "(a)" and instead focuses on the intent as expressed in another law to allow claims for violations of that law to be brought through the DTPA. This does not prevent a consumer from seeking redress under subsection (h); it simply dispenses with the requirement of consumer status under the DTPA and substitutes the standing requirements as expressed in the enabling language of each tie-in statute. Such a reading of co-existent rights to bring an action is compatible with the language of the statute and apparent by the enabling language of the various tie-in statues.

The line of cases[57] following the *Marketic* case significantly limit the application of a tie-in statute, the Texas Debt Collections Act, yet when properly analyzed, the cited precedents do not stand for the propositions for which they are cited. Rather than making an independent analysis under the rules of construction, even the Fifth Circuit Court of Appeals has climbed on the bandwagon,[58] as has the San Antonio Court of Appeals.[59] There is a general proposition regarding DTPA standing and it is based upon the premise that a plaintiff must bring a claim under section 17.50(a). However, the broader language under section 17.50(h) unequivocally allows a "claimant" to bring an action under the DTPA for a violation of a tie-in statute. If a statute is unambiguous, we seek the intent of the legislature as found in the plain and common meaning of the words and terms used.[60] Section 17.50(h) provides that an "act or practice that is a violation of a provision of law other than this subchapter may be made the basis of an action under this subchapter if the act or practice is proscribed by a provision of this subchapter or is declared by such other law to be actionable under this subchapter."[61] Courts should simply apply this language.

The most logical way to read the language of 17.50(h) is to understand that the legislature intended for the DTPA provisions to be available to plaintiffs other than consumers when another law intends for violation to be actionable under the DTPA.

E. *Analysis of a 17.50(h) Claim*

1. "Claimant" is Defined by the Tie-In not the DTPA

The language of 17.50(h) states "if a claimant is granted the right to bring a cause of action under this subchapter by another law..." Nowhere in the *Marketic* decision does the Court recognize this language, yet *Marketic* and its progeny simply equate the word claimant with consumer, and fail to address or otherwise disclose why the legislature did not use the word consumer if that is what it meant. This reading completely ignores the fact that the legislature could have said consumer if that is what it meant, but it did not. Thus a claimant *must* be something different than a consumer.

The most logical way to read the language of 17.50(h) is to understand that the legislature intended for the DTPA provisions to be available to plaintiffs other than consumers when another law intends for violation to be actionable under the DTPA. So to answer "what is a claimant" one must look to the referring statute and the answer will vary depending upon which statute ties into the DTPA. A "Claimant" is not specifically defined under the DTPA other than generally as one granted to bring a claim under the DTPA by another statute because it is not a static definition like consumer but rather a dynamic definition that will be different depending upon which tie-in statute is being referenced. The court is obligated to look to the enabling language of the specific tie-in statute to ascertain the Legislature's intent as to what group of persons is a claimant with respect to this tie-in statute. In those situations wherein a claimant under a tie-in is not a consumer under the DTPA, there are still many similarities between the groups such as unequal bargaining power, lack of knowledge and the perception of generally being the weak party. The greatest commonality is the apparent Legislative intent for both groups to be conferred standing under the DTPA. Thus the same justifications that lead to a need to level the playing field for consumers will apply to claimants under 17.50(h).

An evaluation of a number of typical tie-in statutes follows to demonstrate the analysis and emphasize the differences be-

tween a consumer under the DTPA and a claimant.

(a) Kosher Food Claimant

Some statutes are quite straightforward such as the Kosher Food Act[62], which has a tie-in that states "A consumer aggrieved by a violation of this chapter may maintain a cause of action for damages in accordance with section 17.50 of this code."[63] Therefore under the Kosher Food Act, a claimant would be a "consumer" and arguably it would be the same type of consumer as defined by the DTPA. This tie-in statute is mentioned first because it is the only tie-in statute that specifically limits the tie-in claimants to consumers by announcing the requirement in the enabling language.

(b) Unfair Claims Settlement Practices Act Claimant

The Insurance Code creates a tie-in to the DTPA for the very limited claim that occurs when an insurance company requires the production of a claimant's federal income tax return as a condition to settlement.[64] The statute states that such a violation is "a deceptive trade practice under Subchapter E, Chapter 17, Business & Commerce Code" and that a "*claimant* affected by a violation of this section is entitled to remedies under Subchapter E, Chapter 17, Business & Commerce Code."[65] *The only private remedy granted is through the tie-in to the DTPA.* The Act grants a right to claimants, making it clear that the Legislature intended to give a private cause of action to anyone making a claim under an insurance policy, not just a DTPA consumer.

When the flawed *Marketic* analysis is followed, claimants other than those falling into the narrow confines of a DTPA consumer would be denied any recourse. This result is obviously unintended and fails to follow the intent of the Legislature as expressed in the words of the Act.

(c) Rental Purchase Agreements Claimant

Some tie-in statutes are not as obvious but still require consumer status, yet the definition of consumer is much more restrictive than that under the DTPA. For example, the Rental Purchase Agreement statute[66] does not specifically require consumer status in its tie-in language, yet a reading of the act seems to limit the field of claimants to consumers, and the act defines consumer as "an individual who leases personal property under a rental-purchase agreement."[67]

(d) Home Solicitation Act Claimant

With some tie-in statutes the definition is somewhat murky, such as with the Home Solicitation Act,[68] which makes a violation of the act a "false, misleading, or deceptive act or practice as defined by section 17.46(b)."[69] The Act discusses who can be a claimant by implication and also expands what is actionable. The act defines a "consumer" as "an individual who seeks or acquires real property, money, or other personal property, services, or credit for personal, family, or household purposes."[70] This definition seems to exclude partnerships, corporations, and the state unlike the DTPA[71] while at the same time including individuals who seek or acquire loans, which DTPA case law has long held is not covered under the DTPA.[72]

(e) Contest and Gift Giveaway Act Claimant

With a tie-in statute such as the Contest and Gift Giveaway Act,[73] the act or practice may or may not be made in conjunction with the seeking or acquiring of goods or services because the contest or giveaway is being used to lure persons into watching a presentation that they would presumably not be interested in watching without the promise of a gift or potential prize. Thus if the sales presentation is persuasive, there may be a sale and consumer status under the DTPA will be had; However, when there is not a sale, it is doubtful that the attendee would qualify under the two- pronged test for "seeking."

Interestingly, the tie-in language, which states "[a] violation of this chapter is a deceptive trade practice in addition to the practices described by Subchapter E, Chapter 17, and is actionable under that subchapter"[74] makes a violation actionable...period. There is no requirement that one must be a consumer. Such limitation would have been very easy to make, but it is conspicuously absent. The clear and direct language says if this act is violated then the violation is actionable under the DTPA, thus a claimant is one who has been damaged by a violation of the Contest and Gift Giveaway Act.

(f) Private Child Support Enforcement Agencies Claimant

Private Child Support Enforcement Agencies[75] are agencies that seek to enforce child support obligations under a writ or order from a court.[76] The tie-in states that a "violation of this chapter **is** a deceptive trade practice under Subchapter E, Chapter 17, Business & Commerce Code, and is actionable under that subchapter.[77] Just as with a Contest and Gift Giveaway Act Claimant, the language makes a violation actionable without any qualifications. A large part of the chapter deals with conduct that is prohibited from use against the obligor, who could never be a consumer under the DTPA, yet is granted a standing as a claimant under 17.50(h). A claimant with respect to this chapter is one who has been damaged by a violation of the chapter, including those obligors that could not ever be considered a consumer.

(g) Texas Debt Collection Act Claimant

All of the case law from *Marketic* and its progeny deal with the Texas Debt Collection Act (TDCA).[78] The Act has the same mandatory tie-in language, "A violation of this chapter is a deceptive trade practice under Subchapter E, Chapter 17, Business & Commerce Code, and is actionable under that subchapter."[79] Under its clear and direct language the statute says that a violation of the TDCA is actionable... it doesn't say might be actionable or may be actionable nor is there any other limiting language.

But as to who may be a claimant under the TDCA, that is quite different than a "consumer" as defined by the DTPA. In fact, the claimant may not have any consumer-like qualities depending on the circumstances. The answer to the question of who is a claimant for TDCA purposes under the DTPA is an easy one to answer. The TDCA provides that, "A *person* may sue" § 392.403 Consumer status is not required to be a claimant under the DTPA by the unambiguous words of the Act. Under the TDCA, the focus is on the type of debt not the person seeking relief. The Act requires a certain type of debt, which is defined as "an obligation, or an alleged obligation, primarily for personal, family, or household purposes and arising from a transaction or alleged transaction."[80] Significantly, it is the collection of that debt that triggers coverage under the TDCA.[81]

Thus *any person* who is damaged by the collection of a consumer debt is a claimant under the DTPA with respect to the TDCA.[82] This would include the consumer debtor, their spouse, kids, neighbors, co-workers, parents and literally anyone else who has been improperly harassed by an overzealous debt collector. It is these persons whom the Legislature has determined need to be protected and it is these persons who have been conferred claimant status under the DTPA with respect to the TDCA.

As with the Home Solicitation Act, a claimant under the TDCA is both narrower than a DTPA consumer in that it is limited to individuals and broader than a DTPA consumer in that it would also include those individuals who just borrowed money and the borrowing was not in conjunction with some other good or service and would additionally cover any other persons damaged by a violation of the TDCA. It is noteworthy that the abusive debt collections practices set forth in the TDCA rises to the level of criminal conduct.[83]

(h) Identity Theft Enforcement and Protection Act Claimant

This identity theft statute does not require a merchant/con-

sumer relationship, but rather makes it actionable under the DTPA to "obtain, possess, transfer, or use personal identifying information of another person without the other person's consent and with intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value in the other person's name."[84] The tie-in states "[a] violation of Section 521.051 is a deceptive trade practice actionable under Subchapter E, Chapter 17."[85]

A claimant with respect to the Identity Theft Enforcement and Protection Act is one who has had their identity taken without their consent and with intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value in the other person's name. There is no need for any type of consumer/merchant relationship pursuant to the plain language of this Act.

(i) The Regulation of Certain Electronic Mail Claimant

This chapter of the Business and Commerce Code makes actionable certain unsolicited commercial emails.[86] Interestingly an established business relationship (such as a merchant/consumer relationship) precludes a commercial email from being unsolicited.[87] This chapter generally addresses emailed solicitations that are not authorized by the recipient. Thus not only is there no need for a consumer/merchant relationship under this chapter, the existence of one may well undermine a claim brought under this chapter. To argue that only a "DTPA consumer" is a proper claimant when the tie-in statue itself precludes "DTPA consumer" status leads to an absurd result. This is contrary to established rules of statutory construction that state "we must not construe statutes in a way that would lead to an absurd result."[88]

2. Flaws in Reasoning by the *Marketic* Court and its Progeny

The cases that follow *Marketic* suffer from a number of serious flaws. The following is a brief summary of some of these points.

(a) "Claimant" Rather than "Consumer"

Neither *Marketic* nor its progeny explain why the legislature used claimant rather than consumer. The language used in section 17.50(h) provides:

> [n]otwithstanding any other provision of this subchapter, if a **c***laimant* is granted the right to bring a cause of action under this subchapter by another law, the *claimant* is not limited to recovery of economic damages only, but may recover any actual damages incurred by the *claimant*, without regard to whether the conduct of the defendant was committed intentionally.

The Legislature could have said:

> [n]otwithstanding any other provision of this subchapter, if a *consumer* is granted the right to bring a cause of action under this subchapter by another law, the **consumer** is not limited to recovery of economic damages only, but may recover any actual damages incurred by the *consumer*, without regard to whether the conduct of the defendant was committed intentionally.

Section 17.50(h) of the DTPA is the only section of the Act that uses the word "claimant," and it is used repeatedly. The legislature was clear and unambiguous when it said that a claimant is entitled to bring a claim under the DTPA and can recover up to three times actual damages. This is plain on the face of subsection 17.50(h). "[A] cardinal rule of statutory construction is that each sentence, clause and word is to be given effect if reasonable and possible."[89] When, as here, "the statute unambiguously demonstrates the Legislature's intent and thus the statute's meaning, the Court must not resort to extrinsic aids to hypothesize about an intent the statute does not express."[90]

Substituting the word consumer for the word claimant also violates another general statutory construction principle that courts should not insert words in a statute except to give effect to clear legislative intent.[91]

(b) Pre Tie-In Case Law

The tie-in statute, section 17.50(h), was enacted in 1995. References to cases that predate the 1995 amendment or that use the old law are improper. Prior to the 1995 enactments, the only private cause of action under the DTPA was for a consumer. Thus quotes from cases such as *Melody Home Mfg. Co. v. Barnes*,[92] *Mendoza v. American Nat'l Ins. Co.*,[93] and *Figueroa v. West*,[94] are improper in that they reference a prior version of the DTPA, requiring consumer status. That is not the case after the enactment of subsection 17.50(h).

(c) "Notwithstanding" Language

As with the use of claimant rather than consumer, the use of "[n]otwithstanding any other provision of this subchapter" language at the beginning of subsection (h) demonstrates the legislatures intent that the provisions of subsection (h) are to control in the event that there are any inconsistences between it and any other provisions in the subchapter.[95] The requirement of consumer status for standing under the DTPA as provided under subsection 17.50(a) is, therefore, inferior to the specific language of subsection (h). Because subsection (h) was enacted in 1996 and the consumer requirement was enacted in 1973, the subsection (h) language should control as being drafted later in time under the rules of statutory construction.[96]

VI. THE BOTTOM LINE

The language of subsection 17.50(h) is either ambiguous or it is not. In this author's opinion it is not, and clearly gives a claimant standing to maintain a claim under the DTPA when authorized by another statute. But even if it is ambigious, there is a mandate to construe the legislature's use of the word "claimant" as something other than "consumer." The only interpretation that harmonizes the legislature's choice of "claimant" rather than "consumer" is the one that provides an alternative to consumer status by piggybacking a claim onto the DTPA through subsection (h). All that a tie-in plaintiff should have to allege to maintain an action as a claimant under subsection 17.50(h) is that he or she is authorized to do so by another statute.

Standing under the DTPA's subsection 17.50(h) should be determined by looking at the individual tie-in statue to determine what group of plaintiff's were intended by the legislature to bring those claims under the DTPA and through that specific tie-in statute. This construction is the only one that gives meaning to the legislature's specific choice of language and is consistent with the controlling language at the beginning of subsection (h).

Any other interpretation not only strains the language of section 17.50, but also results in arbitrary and apparently unintended

results based on the language of each of the various tie-in statutes. An interpretation as in the *Marketic* case would render some of the tie-ins as meaningless or at the very least give rise to what seem to be unintended results.

Section 17.50(h) should be read as creating a third class of persons with standing to maintain claims under the DTPA, so that in addition to the state and direct claims by consumers, the DTPA allows claimants to maintain actions under the DTPA when specifically authorized to do so by the tie-in statute upon which they rely. This will allow, for example, a debt collection violation to be brought under the DTPA even when the plaintiff is not, technically speaking, a consumer under the DTPA but does have a consumer loan under the Debt Collection Act. Likewise, it will allow a person who is a consumer under the Home Solicitation Act but not under the DTPA to maintain a DTPA claim. This interpretation comports with the plain language of 17.50 and complies with the legislative intent as disclosed in each tie-in statute.

VII. CONCLUSION

The Texas legislature showed rare foresight in enacting the tie-in language under subsection 17.50(h). It allowed future legislatures to identify groups of persons needing DTPA-like protections without disrupting the established scheme of the DTPA, and without having to reinvent the wheel. There is only one interpretation that does justice to the specific language granting a claimant a right of action rather than simply a consumer. Whether one is a claimant for purposes of tying-in to the DTPA is determined by the language contained in the various tie-in statutes as each of them seeks to protect a different subset of persons. Any other interpretation is contrary to established rules of statutory construction and disenfranchises many of those persons intended to benefit from the DTPA tie-in.

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1 Tex. Bus. & Com. Code, § 17.41, et seq.

2 Tex. Bus. & Com. Code, § 17.50(h)(tie-in grant of power under the DTPA).

3 The DTPA is found in Chapter 17, Subchapter E of the Tex. Bus.& Com. C.

4 The justifications for the perceived inequalities of power and knowledge between merchants and consumers is beyond the scope of this paper; However, what is important is an understanding that such imbalances are not exclusive to consumers and merchants but exist in other relationships that may not fit into the narrow definition of consumer/merchant as it exists under the DTPA.

5 Ralph J. Rohner, *Multiple Sources of Consumer Law and Enforcement (Ro: "Still in Search of a Uniform Policy")*, 9 Ga. St. U. L. Rev. 881, 885 (1992).

6 The DTPA was originally passed in 1967 as chapter 10 to the Consumer Credit Code but lacked a private right of action. *See*, Act of May 23, 1967, 60th Leg., R.S., ch. 274, §2, 1967 Tex. Gen. Laws 608, 658.

7 Act of May 21, 1973, 63rd Leg., R.S. ch. 143, § 1, 1973 Tex. Gen. Laws 322.

8 For a more complete background on the creation of the DTPA *See*, Philip K. Maxwell & Joe K. Longley, *History of Article 21.21 and Deceptive Trade Practices Act*, located at http://www.joelongley.com/historya21.htm#_ftnref81

9 Tex. Bus.& Com. C. § 17.44.

10 Stories like the McDonald's coffee were often incomplete and unfairly portrayed a system of justice that, although sometimes may reach too far, is necessary to protect the interests of the public. An excellent article on the McDonald's coffee written by Kevin G. Cain was printed in the Journal of Consumer & Commercial Law. It is located at http://www.jtexconsumerlaw.com/V11N1/Coffee.pdf.

11 Act of May 19, 1995, 74th Leg., R.S., ch. 414, 1995 Tex. Gen. Laws 2988.

12 Act of May 19, 1995, 74th Leg., R.S., ch. 414, 1995 Tex. Gen. Laws 2988.

13 Tex. Bus. & Com. Code § 17.50(a).

14 Tex. Bus. & Com. C. § 17.45(4).

15 *Wellborn v. Sears, Robuck & Co.*, 970 F.2d 1420, 1426-27 (5th Cir. 1992)(Citing to *Kennedy v. Sale*, 689 S.W.2d 890, 892 (Tex. 1985) and *Birchfield v. Texarkana Mem. Hosp.*, 747 S.W.2d 361, 368 (Tex. 1987) for the proposition that even if one does not directly purchase or lease, he may still be a consumer if he was an intended beneficiary of the lease or purchase.)

16 *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 174 (Tex.1980) (Holding that an attempt to borrow money is not an attempt to acquire either work or labor as contemplated in the DTPA.)

17 *Hendricks v. Thorton*, 973 S.W.2d 348, 356 (Tex.App.– Beaumont 1998, pet. denied).

18 *Kinnard v. Circle K Stores*, 966 S.W.2d 613, 617-18 (Tex. App.– San Antonio 1998, no pet.).

19 *Canfield v. Bank One*, 51 S.W.3d 828, 838-39 (Tex.App.– Texarkana 2001, pet. denied).

20 *Hand v. Dean Witter Reynolds Inc.*, 889 S.W.2d 483, 500 (Tex. App.– Houston [14th] 1994, pet. denied).

21 Tex. Bus. & Com. C. § 17.45(4).

22 Tex. Bus. & Com. C. § 17.47.

23 *Id.*

24 Tex. Bus. & Com. C. § 17.48.

25 Tex. Bus. & Com. C. § 17.50(h).

26 Tex. Bus. & Com. Code § 17.50(h).

27 Tex. Bus. & Com. Code § 17.45(11).

28 *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 939 (Tex. 1908).

29 *Smith v. Baldwin*, 611 S.W.2d 611, 617 (Tex. 1980).

30 Tex. Bus. & Com. Code § 17.50(a)(Emphasis mine).

31 Tex. Bus. & Com. C. § 17.45(4).

32 *Amstadt v. U.S. Brass Corp.,* 919 S.W.2d 644, 649 (Tex.1996).

33 *Nast v. State Farm Fire & Cas. Co.*, 82 S.W.3d 114,122 (Tex. App.– San Antonio 2002, no pet.).

34 *Martin v. Lou Poliquin Enterprises, Inc.*,696 S.W.2d 180,184-85 (Tex. App.– Houston [14th Dist.] 1985).

35 *Houston Livestock Show & Rodeo, Inc. v. Hamrick*, 125 S.W.3d 555, 572 (Tex.App.– Austin 2003, no pet.).

36 Tex. Bus & Com. C. § 2A. 103(11).

37 *Exxon v. Dunn*, 581 S.W.2d 500 (Tex. Civ. App.– Dallas 1979, no writ)(gratuitous services on car did not confer consumer status); *Rayford v. Maselli*, 73 S.W.3d 410, 411(Tex.App.– Houston [1st Dist.] 2002, no pet.)(Gratuitous legal services did not confer consumer status).

38 Tex. Bus. & Com. C. § 17.45(1)

39 *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 175 (Tex. 1980).

40 *Snyders Smart Shop, Inc. v. Santi, Inc.*, 590 S.W.2d 167, 170 (Tex. Civ. App.– Corpus Christi 1979).

41 *Swenson v. Engelstad*, 626 F.2d 421, 428 (5th Cir. 1980).

42 *Hand v. Dean Witter Reynolds Inc.*, 889 S.W.2d 483, 497 (Tex. App.– Houston [14th Dist.] 1994).

43 *English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983).

44 *First State Bank v. Chesshir*, 634 S.W.2d 742, 747 (Tex. App.– Amarillo 1982).

45 *Kinnard v. Circle K Stores*, 966 S.W.2d 613-617-18 (Tex. App.– San Antonio 1998, no pet.)
46 *Hendricks v. Thorton*, 973 S.W.2d 348, 356 (Tex.App.– Beaumont 1998, pet. denied).
47 *Knight v. International Harvester Credit Corp*., 627 S.W.2d 382, 389 (Tex. 1982).
48 Tex. Bus. & Com. Code § 17.50(h).
49 *Id.* (Emphasis mine).
50 *Rodriguez v. Service Lloyds Ins. Co*., 997 S.W.2d 248, 257 (Tex. 1999).
51 *Ojo v. Farmers Group, Inc*., 356 S.W.3d 421, 427 (Tex. 2011) (Quoting *Cameron v. Terrell & Garrett, Inc*., 618 S.W.2d 535, 540 (Tex. 1981).
52 *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 629 (Tex. 2011)(Quoting *Fireman's Fund Cnty. Mut. Ins. Co. v. Hidi*, 13 S.W.3d 767, 769 (Tex. 2000)).
53 *See, Marketic v. U. S. Bank Nat'l Ass'n*, 436 F. Supp. 2d 842, 854-855 (N.D. Tex. 2006).
54 *Id.* (Citing to *Mendoza v. American Nat'l Ins. Co.*, 932 S.W.2d 605, 608 (Tex.App.– San Antonio 1996, no writ)(emphasis mine).
55 Tex. Bus. & Com. Code § 17.50(a)(emphasis mine).
56 *Marketic*, 436 F. Supp. 2d at 854-855 (citing to *Mendoza*, 932 S.W.2d at 608 (Citing to *Figueroa v. West*, 902 S.W.2d 701, 707 (Tex. App.--El Paso 1995, no writ))).
57 A number of cases have followed this flawed reasoning and include *Hanna v. RFC Deutsche Bank Nat'l Trust Co.*, 2012 U.S. Dist. LEXIS 76314, 8-9 (N.D. Tex. May 31, 2012); *Sanghera v. Wells Fargo Bank, N.A.*, 2012 U.S. Dist. LEXIS 21399, 25-26 (N.D. Tex. Feb. 21, 2012); *Swim v. Bank of Am., N.A.*, 2012 U.S. Dist. LEXIS 6846 (N.D. Tex. Jan. 20, 2012); *Foster v. Ocwen Loan Servicing, LLC*, 2011 U.S. Dist. LEXIS 154107, 30-32 (N.D. Tex. July 26, 2011); *Bray v. Cadle Co.*, 2010 U.S. Dist. LEXIS 109470, 24-30 (S.D. Tex. Oct. 12, 2010); *Burnette v. Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 24686 (E.D. Tex. Feb. 16, 2010); and *Eads v. Wolpoff & Abramson, LLP*, 538 F. Supp. 2d 981, 989 (W.D. Tex. 2008).
58 *Cushman v. GC Servs., L.P.*, 397 Fed. Appx. 24, 27-28 (5th Cir. Tex. 2010)
59 *Dodeka, L.L.C. v. Garcia*, 2011 Tex. App. LEXIS 8101, 6-7 (Tex. App.– San Antonio Oct. 12, 2011)("Garcia's causes of action under the DTPA 'tie-in' provision necessarily fail because she did not establish her consumer status under the DTPA."); and *Hansberger v. EMC Mortg. Corp*., 2009 Tex. App. LEXIS 5792, 7-8 (Tex. App.– San Antonio July 29, 2009 pet. denied) ("the party bringing a claim under the DTPA for a violation of a tie-in statute must still satisfy the requirement of being a "consumer.") .
60 *Moreno v. Sterling Drug, Inc*., 787 S.W.2d 348, 352 (Tex. 1990).
61 Tex. Bus. & Com. Code § 17.43.
62 Tex. Bus. & Com. Code §§ 17.821- 17.826.
63 Tex. Bus. & Com. Code § 17.825.
64 Tex. Ins. Code § 542.004. Not to be confused with Unfair Methods of Competition and Unfair or Deceptive Acts or Practice in Tex. Ins. Code Ch. 541, which does have a private right of action and is actionable by consumers under section 17.50(a)(4) rather than as a tie-in.
65 *Id* (emphasis mine).
66 Tex. Bus. & Com. Code Ch. 92.
67 Tex. Bus. & Com. Code § 92.001 (3).
68 The Home Solicitation Act is officially known as the "Cancellation of Certain Consumer Transactions" and is found in Chapter 601 of the Tex. Bus. & Com. Code.
69 Tex. Bus. & Com. Code § 601.204.
70 Tex. Bus. & Com. Code § 601.001(1).
71 Tex. Bus. & Com. Code § 17.45(4).
72 *See, e.g.*, *Riverside Nat'l Bank v. Lewis*, 603, S.W.2d 169, 174 (Tex.1980).
73 Tex. Bus. & Com. Code Ch. 621.
74 Tex. Bus. & Com. Code § 621.252 (emphasis mine).
75 Tex. Fin. Code Ch. 396.
76 Tex. Fin. Code § 396.001.
77 Tex. Fin. Code § 396.353.
78 Tex. Fin. Code Ch. 392.
79 Tex. Fin. Code § 392.404 (emphasis mine).
80 Tex. Fin. Code § 392.001(2).
81 Tex. Fin. Code § 392.403.
82 Id.
83 Tex. Fin. Code § 392.402.
84 Tex. Bus. & Com. Code § 521.051.
85 Tex. Bus. & Com. Code § 521.152
86 Tex. Bus. & Com. Code Ch. 321
87 Tex. Bus. & Com. Code § 321.001 (8) "Unsolicited commercial electronic mail message" means a commercial electronic mail message transmitted without the consent of the recipient **by a person with whom the recipient does not have an established business relationship**." (Emphasis mine)
88 *See, Utts v. Short*, 81 S.W.3d 822, 832 (Tex. 2002)(Citing to *C&H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 322 n.5 (Tex. 1994)
89 *Rodriguez v. Service Lloyds Ins. Co*., 997 S.W.2d 248, 257 (Tex. 1999).
90 *Rocor Int'l v. Nat'l Union Fire Ins. Co.*, 77 S.W.3d 253, 269 (Tex. 2002).
91 *Laidlaw Waste Sys., Inc. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995).
92 *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349 (Tex. 1987) ("DTPA plaintiffs must qualify as consumers . . . to maintain a private cause of action under section 17.50 of the DTPA") cited by *Cushman v. GC Servs., L.P.*, 397 Fed. Appx. 24, 27-28 (5th Cir. Tex. 2010) and *Figueroa v. West*, 902 S.W.2d 701, 706-707 (Tex. App.– El Paso 1995).
93 *Mendoza v. American Nat'l Ins. Co.*, 932 S.W.2d 605, 608 (Tex. App.– San Antonio 1996)(using pre-1994 law) cited by *Marketic v. U. S. Bank Nat'l Ass'n*, 436 F. Supp. 2d 842, 854-855 (N.D. Tex. 2006); *Dodeka, L.L.C. v. Garcia*, 2011 Tex. App. LEXIS 8101, 6-7 (Tex. App.--San Antonio Oct. 12, 2011).
94 *Figueroa*, 902 S.W.2d at 707 cited by *Mendoza*, 932 S.W.2d at 608.
95 Tex. Bus. & Com. Code §17.50(h).
96 *See,* Tex. Gov't Code § 311.025 (When two statutes conflict, the later-enacted provision controls.)