



Texas Deceptive Trade Practices Act Remedies

By Richard M. Alderman*

To recover damages a DTPA consumer must show that the defendant's conduct was "a producing cause of economic damages or damages for mental anguish."

Introduction

The Texas Deceptive Trade Practices Act¹ [DTPA] provides numerous avenues of relief for an aggrieved "consumer."² Through a laundry list of false, deceptive and misleading practices,³ a cause of action for unconscionable conduct,⁴ and enhanced remedies for breach of warranty,⁵ the Act offers a wide range of possible claims, most not requiring any culpable mental state. But when attorneys think of the DTPA, it usually is its remedies that provide the allure. The DTPA has always provided for liberal damages to an aggrieved consumer. This was done to ensure that consumers were fully compensated, to provide an incentive for attorneys to handle such cases, and to provide a deterrent to wrongful conduct.

As originally enacted, the DTPA provided for mandatory trebling of all actual damages, as well as attorneys' fees to a prevailing consumer.⁶ In 1979, the legislature recognized the potential for over-compensation from a mandatory trebling provision and amended section 17.50 to require trebling of only the first \$1,000 of damages. Damages in excess of \$1,000 were subject to trebling at the discretion of the jury, if the defendant was found to have acted "knowingly."⁷

Today, section 17.50(b) still provides significant relief for consumers who prevail under the Act. The 1995 amendments substantially reduced potential damages. The amendments, however, did not change the mandatory award of attorneys' fees to a prevailing plaintiff, nor did they eliminate the potential for additional damages based on "knowing" conduct by a defendant.⁸ Section 17.50(b)(1) now reads:

(b) In a suit filed under this section, each consumer who prevails may obtain:

(1) the amount of economic damages found by the trier of fact. If the trier of fact finds that the conduct of the defendant was committed knowingly, the consumer may also recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of economic damages; or if the trier of fact finds the conduct was committed intentionally, the consumer may recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of damages for mental anguish and economic damages.

It is fair to say that although DTPA damages have been reduced, they still provide a generous potential for recovery when compared to alternative causes of action. It should also be noted that the Act permits the award of attorneys' fees to defendants in cases where a consumer files a frivolous claim.

Causation

One of the most significant elements of recovery under the DTPA is the lower causation standard under section 17.50(a). To recover damages a DTPA consumer must show that the defendant's conduct was "a producing cause of economic damages or damages for mental anguish." Thus, the causation standard for recovery of damages under the Act is "producing cause." This is the lowest causation standard employed by the courts and has been defined to mean, "an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of."⁹ "A producing cause is a *substantial factor* which brings about the injury and without which the injury would not

have occurred."¹⁰ There may be more than one producing cause.¹¹ Note that this is a lower standard than "proximate cause," the standard for tort and most contract claims, which incorporates an element of foreseeability. Thus, it is possible to satisfy the producing cause standard, and not meet the foreseeability required for proximate cause.¹²

Damages in General

The current language of the DTPA provides that each consumer who prevails may obtain economic damages and, in an appropriate case, damages for mental anguish and additional damages of not more than three times the damages awarded.¹³ Each consumer who prevails under the Act is entitled to recover "economic damages."¹⁴ This is a new term that was added to the DTPA in 1995 to replace the former damage standard of "actual damages." Economic damages is defined to mean:

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.¹⁵

Economic damages may be computed by any appropriate formula including the benefit of the bargain rule, the out-of-pocket rule, or the cost of repairs.¹⁶ Consequential damages are also recoverable whenever appropriate under general principles of contract law.¹⁷

Although there have been many cases awarding economic damages, few discuss the term in detail. Economic damages should be broadly interpreted to include all compensatory damages, direct and consequential,¹⁸ and exclude all "soft" damages. For example,

Consumer purchased a toaster from seller. The toaster had a warranty defect. As a result it caught on fire. Consumer was burned, the toaster was destroyed and the kitchen was damaged. Consumer sued for breach of warranty under the DTPA and negligence. She sought damages for her medical expenses, the cost of the toaster, the cost to repair the kitchen, pain and suffering, and disfigurement. Under the DTPA, she may recover only "economic damages," including her medical expenses, the cost of the toaster and the cost to repair the kitchen.

Perhaps the easiest way to view economic damages is that the term includes all damages recoverable for breach of contract. Note that the term "economic damages" expressly excludes recovery for mental anguish. Damages for mental anguish, however, are expressly authorized by section 17.50(b)(1), upon a finding that the defendant acted "knowingly."

Mental anguish damages have always been recoverable under the DTPA. Prior to 1995, damages for mental anguish were included as part of "actual damages."¹⁹ In 1995, the legislature replaced the term actual damages with the term "economic damages." As noted above, the term "economic damages" expressly excludes recovery for mental anguish. The DTPA states, however, that: "If the trier of fact finds that the conduct of the defendant was committed knowingly, the consumer may also recover damages for mental anguish."²⁰ "Knowingly" is defined by the Act to mean:

actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness

Additionally, to deter frivolous lawsuits, the Act mandates the award of attorneys' fee to a defendant when the suit was "groundless and brought in bad faith, or brought for the purpose of harassment."

of the act or practices giving rise to the consumer's claim, or, in an action brought under Subdivision (2) of Subsection (a) of Section 17.50, actual awareness of the act, practice, condition, defect, or failure constituting the breach of warranty, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.²¹

Under this definition, actual awareness does not mean merely that the person knew what he or she was doing. It means that the person knows that what he or she is doing is false, deceptive, misleading, unfair, or a breach of warranty. For purposes of determining whether a person acted knowingly, knowledge of industry standards may be imputed to one who is in an industry. Note that "knowingly" is a question of fact to be determined by the trier of fact, and may be inferred from objective manifestations. Once it is determined that the defendant acted "knowingly," the jury is permitted to consider an award of damages for mental anguish.

The award of damages for mental anguish must be made based on the same standard that would be required to award such damages in any other cause of action. There is no requirement that the consumer be awarded economic damages or that there be an accompanying physical injury.²² The consumer must, however, show a relatively high degree of mental pain and distress, more than mere disappointment, anger, resentment, or embarrassment. Compensation can only be for mental anguish that causes a "substantial disruption in . . . daily routine" or "a high degree of mental pain and distress" that is "more than mere worry, anxiety, vexation, embarrassment or anger."²³ For example, recovery may be based upon mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair and/or public humiliation.²⁴

As noted above, under section 17.50(b), a DTPA consumer who prevails may recover all of the consumer's pecuniary loss as "economic damages." Although section 17.49(e) exempts certain claims for personal injury from the DTPA, this exemption is expressly made subject to section 17.50(b). Thus, a consumer may recover any economic damages arising out of an incident involving a personal injury, such as hospital bills or lost income, including direct and consequential damages. If the defendant acted "knowingly," the consumer may also recover damages for "mental anguish." The consumer may not, however, recover traditional "soft" tort damages such as pain and suffering, loss of consortium, or disfigurement.

Additional Damages

To achieve its objectives of deterring wrongful conduct, protecting consumers and providing an incentive for attorneys to bring a lawsuit, the DTPA permits the recovery of damages in addition to actual losses. As originally enacted, the DTPA automatically trebled all damages recovered by the consumer. Today, additional damages, up to a total of three times the amount awarded by the jury, may be awarded.

The DTPA authorizes the award of additional, or punitive damages, whenever the defendant has acted "knowingly" or "intentionally." Section 17.50(b) states in relevant part:

If the trier of fact finds that the conduct of the defendant was committed knowingly . . . the trier of fact may award not more than three times the amount of economic damages; or if the trier of fact finds that the con-

duct was committed intentionally . . . the trier of fact may award not more than three times the amount of damages for mental anguish and economic damages.²⁵

In other words, whenever the fact finder finds the defendant acted knowingly, it may award a total of *not more* than three times the consumer economic damages. A finding of intentional conduct entitles the consumer to a total of *not more* than three times economic damages and damages for mental anguish.²⁶ Two simple examples show how this provision should work.

Jury awards \$10,000 in economic damages and finds the defendant acted "knowingly." Jury may now award additional damages for a total of up to three times the amount of economic damages, \$30,000. Therefore, additional damages may range between \$0 and \$20,000.

Assume jury also awards \$10,000 for mental anguish damages. Jury may now award additional damages for a total of up to three times the amount of economic damages and damages for mental anguish, \$60,000. Therefore, additional damages may range from \$0 to \$40,000.

In what may prove to be a very significant decision, however, the Texas Supreme Court seems to state that additional damages may be three times economic damages, for a total recovery of up to four times economic damages. In *Tony Gullo Motors v. Chapa*,²⁷ the court calculated additional damages as three times economic damages, and allowed a total recovery of four times economic damages.²⁸ The court stated, "Although the jury assessed exemplary damages for both fraud and deceptive acts at \$250,000, the DTPA caps those damages at \$21,639 (three times Chapa's economic loss of \$7,213)." Under this analysis, a consumer who incurred \$10,000 in economic loss, could recover a total of \$40,000 damages. (including \$30,000 additional damages). It is the author's view that the decision in *Tony Gullo Motors* is inconsistent with the legislative history and judicial interpretation of section 17.50(b) and will be subsequently clarified by the Texas Supreme Court.

Notwithstanding the decision in *Tony Gullo Motors*, it is important to note that this section authorizes the trier of fact to award a total of *not more* than three times economic damages or *not more* than three times economic damages and damages for mental anguish. As discussed above, this means that the maximum recovery is three times economic damages, or three times economic damages and damages for mental anguish. This section does not authorize the recovery of economic damages plus three times economic damages.²⁹ To fully understand the DTPA additional damages it is best to view it as authorizing the award of damages, plus up to an additional two-times damages, for a total of not more than three times damages.

Attorneys' Fees

In order to fully compensate the consumer, as well as encourage attorneys to represent consumers, the DTPA mandates the award of attorneys' fees to a prevailing consumer.³⁰ Additionally, to deter frivolous lawsuits, the Act mandates the award of attorneys' fees to a defendant when the suit was "groundless and brought in bad faith, or brought for the purpose of harassment." In all cases, DTPA attorneys' fees must be segregated to be recoverable.³¹

Consumers' Attorneys' Fees

The DTPA states that "Each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees."³² By using the word shall this section makes it clear that the award of attorneys' fees to a prevailing plaintiff is not optional. Attorneys' fees must be awarded to a successful consumer. Attorneys' fees are awarded even if the consumer's entire recovery of damages is offset by a claim of the defendant.³³

A consumer is entitled to recover attorneys' fees in an amount that is "reasonable and necessary." Although many attorneys will have a percentage contingency fee arrangement with his or her client, the Texas Supreme Court has held that although such an agreement is valid between the parties, the amount of the fees awarded by the fact finder must be determined in a dollar amount, not as a percentage of the recovery.³⁴

Defendants' Attorneys' Fees

Section 17.50(c) provides that "on a finding by the court that an action under this section was groundless in law or in fact or brought in bad faith, or brought for purpose of harassment, the court shall award to the defendant reasonable and necessary attorneys' fees and court costs."³⁵ Note that similar to the award of consumers' attorneys' fees, the award of defendants' attorneys' fees is mandatory once a court makes the requisite factual findings.

The determination of whether adequate facts exist to justify the award of defendants' attorneys' fees is a question of law for the court, not the fact finder.³⁶ If the court finds the consumer's claim was groundless or brought in bad faith it shall award attorneys' fees to the defendant.³⁷ Groundless should be defined as having "no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law."³⁸ Although the courts have not yet defined "bad faith" in the context of DTPA attorneys' fees, a finding of malice, ill will, spite, or reckless disregard should be sufficient. Note that the court must find the action to have been either brought in bad faith or groundless to justify the award of attorneys' fees.

Under the present version of the DTPA, harassment alone is also sufficient to support the award of defendants' attorneys' fees. The suit, however, must be brought for the sole purpose of harassment.³⁹ Essentially, to establish harassment it is necessary to show the consumer would not be better off after the suit than he or she was before the suit.

A defendant is entitled to recover attorneys' fees in an amount that is "reasonable and necessary." The Texas Supreme Court has held that in the context of a consumer's attorneys' fees this requires that the amount of the fees be determined in a dollar amount not as a percentage of the recovery.⁴⁰ A similar standard should be applied with respect to defendants' attorneys' fees.

Tie-in Statutes: Actual Damages

Prior to 1995, the DTPA permitted a consumer who prevailed to recover all "actual damages." The term "actual damages" is generally defined to include all damages recoverable at common law, and includes damages for mental anguish, and the so-called "soft damages," such as pain and suffering and loss of consortium. As discussed above, this term has been replaced as the DTPA's general damage standard with the less inclusive term "economic damages." Actual damages, however, may still be recovered in cases brought through the so-called "tie-in statutes."

Since the enactment of the DTPA, the legislature has chosen to incorporate its provisions into many other statutes dealing with consumer-related issues. This is accomplished by making a violation of those statutes a violation of the DTPA,

actionable under the provisions of the DTPA. Because these statutes tie them to the DTPA, they are generally referred to as "tie-in statutes."

Section 17.50(h) of the DTPA provides that if the consumer brings a claim through another law, *i.e.*, a tie-in statute, the consumer may recover any "actual damages" incurred.⁴¹ For purposes of DTPA "additional damages" in an action brought through a tie-in statute, the term "economic damages" is replaced with the term "actual damages." A brief example demonstrates the significance of this provision.

Consumer went to a health club to discuss a possible membership. The salesperson misrepresented the qualification of the instructors and the terms of the membership agreement. As a result, Consumer was injured. If Consumer files a complaint under the laundry list she will recover economic damages. To recover mental anguish damages she must show the defendant acted knowingly. To recover treble economic damages she must show the defendant acted knowingly. To recover treble mental anguish damages she must show defendant acted intentionally.

If, however, Consumer filed her DTPA claim through the Health Spa Act, a tie-in statute, she would be authorized to recover all actual damages, which includes mental anguish as well as pain and suffering. To recover treble all actual damages, including mental anguish damages, she must show the defendant acted knowingly.⁴²



The term actual damages has been defined to include any damages recoverable at common law. The amount of damages recoverable is determined by the total loss of the consumer.⁴³ The term includes all compensatory damages, as well as damages for mental anguish and pain and suffering.

Perhaps the most significant change made by the 1995 amendments was the replacement of the term "actual damages" with "economic damages." Section 17.50(h), however, reinstates the former "actual damages" standard in any case brought through a tie-in statute. A consumer who brings a claim through a tie-in statute is entitled to recover damages under the more generous damage standard of "actual damages," and treble that amount upon a showing that the defendant acted "knowingly." It is in the interest of all consumer attorneys to carefully review the more than thirty tie-in statutes to see if a possible claim may be brought under the DTPA, in addition to the more standard laundry list unconscionability and warranty claims.

A consumer who brings a claim through a tie-in statute is entitled to recover damages under the more generous damage standard of “actual damages,” and treble that amount upon a showing that the defendant acted “knowingly.”

Here is a list of the current tie-in statutes:

Business Opportunity Act, Tex. Bus. & Com. Code § 51.302
Certain Sales of Homestead, Tex. Prop. Code § 41.006(b)
Child Support Enforcement Agencies, Tex. Fin. Code § 396.353(a)
Cigarette Tax, Enforcement of Tax, Tex. Tax Code § 154.4095
Coastal Public Lands Management Act of 1973, Tex. Nat. Res. Code § 33.135(d)
Consumer Rebate Response and Grace Period for Corrections, Tex. Bus. & Com. Code § 605.004
Contest and Gift Tex. Giveaway Act, Tex. Bus. & Com. Code § 621.252
Credit Service Organizations, Tex. Fin. Code § 393.504
Debt Collection Act, Tex. Fin. Code § 392.404(a)
Disclosure by Financial Institution that Deposits Are Not Insured, Tex. Ins. Code § 556.052
Disclosure to Purchaser of Property, Tex. Nat. Res. Code § 61.025(d)
Disposition of Insurance Proceeds, Tex. Prop. Code § 5.078(d), (e)
Executory Contract for Conveyance, Oral Agreements Prohibited, Tex. Prop. Code § 5.072(e)(1), (f)
Health Spa Act, Tex. Occ. Code § 702.403
Home Improvement Contracts Affecting Homestead, Tex. Prop. Code § 41.007
Home Solicitation, Tex. Bus. & Com. Code § 601.204
Identity Theft Enforcement and Protection Act, Tex. Bus. & Com. Code § 521.152
Interest in Land, Disclaimer and Disclosure Required, Tex. Prop. Code § 41.0051(c)
Labeling, Advertising and Sale of Kosher Foods Act, Tex. Bus. & Com. Code § 17.825
Licensing and Regulation of Speech-Language Pathologists & Audiologists, Tex. Occ. Code § 401.501
Medical, Liability, Arbitration Agreements, Tex. Civ. Prac. & Rem. Code § 74.451(c)
Motor Vehicle, Sale or Lease a/k/a Lemon Law, Tex. Occ. Code § 2301
Notary Public Act, Tex. Gov't Code § 406.017(d)
Occupational & Business Regulation, Tex. Bus. & Com. Code § 52.153
Personnel Employment Services, Tex. Occ. Code § 2501.204
Pricing During Abnormal Disruption of Market, Tex. Bus. & Com. Code § 51.002
Private Action for Damages Authorized, Tex. Ins. Code § 396.353(a)
Private Security Act, Tex. Occ. Code § 1702.3835
Regulation of Consumer Contracts Created by Endorsing a Check, Tex. Bus. & Com. Code § 603.101
Regulation of Invention Development Act, Tex. Bus. & Com. Code § 52.153
Regulation of Private Postsecondary Educational Institutions, Tex. Educ. Code § 61.320

Removal of Unauthorized Vehicles from Parking Facility, Tex. Occ. Code § 2308.406
Rental Purchase Agreements, Tex. Bus. & Com. Code § 92.202
Representation as Attorney, Tex. Gov't Code § 406.017(f)
Residential Service Company Act, Tex. Occ. Code § 1303.405
Sales of Certain Fuels, Tex. Agric. Code § 17.152
Self-Service Storage Facility Liens, Tex. Prop. Code § 59.005
Seller's Disclosure of Property Condition, Tex. Prop. Code § 5.069(d)(a), (e)
Seller's Disclosure of Tax Payments and Insurance Coverage, Tex. Prop. Code § 5.070(b)(1)
Talent Agency Registration Act, Tex. Occ. Code § 2105.251
Telephone Solicitation, Tex. Bus. & Com. Code § 302.303
Texas Manufactured Housing Standards Act, Tex. Occ. Code § 1201.603
Texas Membership Camping Resort Act, Tex. Prop. Code § 222.011(a)
Texas Motor Vehicle Commission Code, Tex. Occ. Code §§ 2303.054, 2302.053
Texas Optometry Act, Tex. Occ. Code § 351.604
Texas Structural Pest Control Act, Tex. Occ. Code § 1951.453
Texas Timeshare Act, Tex. Prop. Code § 221.071(a)
Transmission of Commercial Email, Tex. Bus. & Com. Code § 321.103
Treatment Facilities Marketing Practices Act, Tex. Health & Safety Code § 164.013
Unfair Claim Settlement Practices Act, Tex. Ins. Code § 542.004

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1 TEX. BUS. & COM. CODE § 17.41 *et seq.*

2 Note that the DTPA broadly defines the term consumer to include all individuals, as well as most businesses. Section 17.45(4) states: “Consumer” means 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, except that the term does not include a business consumer that has assets of \$25 million or more, or that is owned or controlled by a corporation or entity with assets of \$25 million or more. TEX. BUS. & COM. CODE § 17.45(4).

3 Section 17.46 lists 27 acts and practices that are deemed false, deceptive or misleading. TEX. BUS. & COM. CODE § 17.46(b).

4 Unconscionability is defined by section 17.45(5) as “an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.” *See generally* Chapter 6, RICHARD M.

ALDERMAN, *THE LAWYER'S GUIDE TO THE TEXAS DECEPTIVE TRADE PRACTICES ACT* (2d ed. 2010).

5 The DTPA does not create any warranties. Section 17.50(a)(2) provides that a consumer may maintain a claim through the DTPA for breach of any express or implied warranty. *See* SW Bell Tel. Co. v. FDP, 811 S.W.2d 572 (1991) (warranty waiver or damage limitation is not affected by DTPA); La Sara Grain Co. v. First Nat'l Bank of Mercedes, 673 S.W.2d 558 (Tex. 1984) (DTPA does not create warranties).

6 *See* Woods v. Littleton, 554 S.W.2d 662 (1977).

7 Subsection 17.50(b)(1) provided that a consumer who prevailed may recover:

the amount of actual damages found by the trier of fact. In addition the court shall award two times that portion of the actual damages that does not exceed \$1,000. If the trier of fact finds that the conduct of the defendant was committed knowingly, the trier of fact may award not more than three times the amount of actual damages in excess of \$1,000.

8 Note that this is a substantially lower standard than that required in a tort case. *See generally*, Chapter 41 of the Texas Civil Practice and Remedies Code, which requires a finding of fraud, malice or gross negligence to support an award of exemplary damages.

9 *See* Rourke v. Garza, 530 S.W.2d 794, 801 (Tex. 1975). *See generally* Page Keeton, *Causation*, 28 S. TEX. L. REV. 231 (1986).

10 Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 481 (Tex. 1995). *See also* S&I Mgmt., Inc. v. Choi, 331 S.W.3d 849 (Tex. App.—Dallas 2011, no pet.); Finger v. Ray, 326 S.W.3d 285 (Tex. App.—Houston [1st Dist.] 2010, no pet.); Rice v. Metro. Life Ins. Co., 324 S.W.3d 660 (Tex. App.—Ft. Worth 2010, no pet.).

11 *See, e.g.*, Mewhinney v. London Wineman, Inc., 339 S.W.3d 177 (Tex. App.—Dallas 2011, pet. filed).

12 For example, in *Archibald v. Act III Arabians*, 755 S.W.2d 84 (Tex. 1988), the jury found conduct sufficient to satisfy the producing cause standard, but not proximate cause. *See, e.g.*, Otis Spunkmeyer, Inc. v. Blakely, 30 S.W.3d 678 (Tex. App.—Dallas 2000, no pet.).

13 TEX. BUS. & COM. CODE § 17.50(b)(1). Note that the general damage standard was changed in 1995 from “actual damages,” to “economic damages.” Actual damages, however, remains the damage standard under section 17.50(h) for violation of “tie-in” statutes.

14 Section 17.50(b) also allows the recovery of equitable relief or restitution. Subsection (2) and (3) state that a consumer may recover:

(2) an order enjoining such acts or failure to act;

(3) orders necessary to restore to any party to the suit any money or property, real or personal, which may have been acquired in violation of this subchapter;

In the event a court orders restitution, the consumer will be required to surrender any benefits received to the defendant. *See, e.g.*, Chubb Lloyds Ins. Co. v. Andrew's Restoration, Inc., 323 S.W.3d 564 (Tex. App.—Dallas 2010, pet. granted). *See also* Rivers v. Charlie Thomas Ford, Ltd., 289 S.W.3d 353 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (to obtain injunction consumer must show act sought to be enjoined was a producing cause of damage to other consumers).

15 TEX. BUS. & COM. CODE § 17.45(11). *See, e.g.*, Tyre v. Yawn, 2011 Tex. App. LEXIS 1219 (Tex. App.—Houston [1st Dist.] Feb. 17, 2011, no pet. h.) (lost profits is an economic loss); Zurich Fin. Ltd. v. Davis, 2010 Tex. App. LEXIS 8098 (Tex. App.—Beaumont Oct. 7, 2010, pet. denied) (cost of repairs is an economic loss).

16 *See, e.g.*, Mewhinney v. London Wineman, Inc., 339 S.W.3d 177 (Tex. App.—Dallas 2011, pet. filed) (out of pocket damages).

17 Economic damages includes lost profit. *See, e.g.*, Glattly v. Air Starter Components, 332 S.W.3d 620 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). On the other hand, “sweat equity” is not included. Drury Sw., Inc. v. Louie Ledeaux #1, Inc., 2011 Tex. App. LEXIS 5047 (Tex. App.—San Antonio July 6, 2011).

18 For example, “loss of use,” is an economic loss. *See, e.g.*, Rutledge v. Isley, 2010 Tex. App. LEXIS 7678 (Tex. App.—Amarillo Sept. 17, 2010, no pet. h.); Dinn v. Hooking Bull Boatyard, Inc., 2010 U.S. Dist. LEXIS 104814 (S.D. Tex. Sept. 30, 2010).

19 Note this is still the applicable standard for a tie-in statute. *See* TEX. BUS. & COM. CODE § 17.50(h).

20 TEX. BUS. & COM. CODE § 17.50(b)(1).

21 *Id.* at § 17.45(9). *See, e.g.*, Lyall v. Bermudez, 2011 Tex. App. LEXIS 530 (Tex. App.—Houston [1st Dist.] Jan. 20, 2011, no pet. h.).

22 *See, e.g.*, Latham v. Castillo, 972 S.W.2d 66 (Tex. 1998) (Pre-1995 version of Act). In *Latham*, because the claim was under the DTPA and not legal malpractice, the consumer was able to recover damages for the attorney's misconduct without proving a “case in a case.” That will not, however, always be the case. For example, in *Finger v. Ray*, 326 S.W.3d 285 (Tex. App.—Houston [1st Dist.] 2010, no pet. h.), the court required “case in a case” proof to establish DTPA damages.

23 *See, e.g.*, Parkway Co. v. Woodruff, 901 S.W.2d 434 (Tex. 1995). *See also* Barnett v. Home of Texas, 2011 Tex. App. LEXIS 1347 (Tex. App.—Houston [14th Dist.] Feb. 24, 2011, no pet.) (evidence insufficient to establish damages for mental anguish); CA Partners v. Spears, 274 S.W.3d 51 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (evidence of a claimant's physical and emotional state, coupled with an inability to eat and sleep, constitutes legally and factually sufficient evidence to support the award of mental anguish damages).

24 *See, e.g.*, Norris v. Jackson, 2010 Tex. App. LEXIS 8688 (Tex. App.—Fort Worth Oct. 28, 2010, no pet. h.).

25 TEX. BUS. & COM. CODE § 17.50(b)(1).

26 *See, e.g.*, Barnett v. Home of Texas, 2011 Tex. App. LEXIS 1347 (Tex. App.—Houston [14th Dist.] Feb. 24, 2011, no pet. h.).

27 212 S.W.3d 299 (Tex. 2006).

28 It should be noted that the decision in *Chapa* was cited favorably in *Lin v. Metro Allied Ins. Agency, Inc.*, 305 S.W.3d 1 (Tex. App.—Houston [1st Dist.] 2007), *rev'd on other grounds and remanded*, 304 S.W.3d 830 (Tex. 2009), wherein the court awarded economic damages of \$175,000 and then stated that the jury “could have awarded up to \$525,000 for the knowing violation . . .” *But see* Tex. Mut. Ins. Co. v. Morris, 287 S.W.3d 401 (Tex. App.—Houston [14th Dist.] 2009, pet. filed) (“These statements from *Chapa*, however, were not necessary to the decision in the case; nor do they appear to have been made deliberately and for future guidance in the conduct of litigation.”) and *Ramsey v. Spray*, 2009 Tex. App. LEXIS 9737 (Tex. App.—Fort Worth 2009, pet. denied) (mem. op.) (wherein the court made it clear that the total permissible recovery under the DTPA is three times economic damages).

29 *See, e.g.*, Jim Walter Homes, Inc. v. Valencia, 690 S.W.2d 239 (Tex. 1985) (decided under pre-1995 DTPA).

30 The amount of fees is discretionary; the award of fees is mandatory. *See, e.g.*, Left Gate Prop. Holdings, Inc. v. Scott, 2011 Tex. App. LEXIS 2574 (Tex. App.—Houston [1st Dist.] Apr. 7, 2011, pet. filed).

31 Tony Gullo Motors v. Chapa, 212 S.W.3d 299 (Tex. 2006). *See also* Tyre v. Yawn, 2011 Tex. App. LEXIS 1219 (Tex. App.—

Houston [1st Dist.] Feb. 17, 2011, no pet. h.) (case remanded for segregation of fees).

32 TEX. BUS. & COM. CODE § 17.50(d).

33 See *McKinley v. Drozd*, 685 S.W.2d 7 (Tex. 1985). The consumer, however, must prevail to recover attorneys' fees. See, e.g., *Gulf States Utils. v. Low*, 79 S.W.3d 561 (Tex. 2002); *Haden v. Sacks*, 332 S.W.3d 503 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *Chubb Lloyds Ins. Co. v. Andrew's Restoration, Inc.*, 323 S.W.3d 564 (Tex. App.—Dallas 2010, pet. granted).

34 See *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812 (Tex. 1997). See also *Norris v. Jackson*, 2010 Tex. App. LEXIS 8688 (Tex. App.—Fort Worth Oct. 28, 2010, no pet. h.) (attorneys' fees may exceed damage award); *Iniekpo v. Avstar Int'l Corp.*, 2010 U.S. Dist. LEXIS 104619 (W.D. Tex. Sept. 30, 2010) (hourly rate reduced to reasonable rate).

35 TEX. BUS. & COM. CODE § 17.50(c).

36 *Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634 (Tex. 1989).

37 Note that the term "or" was added in 1995 replacing the term "and." This would appear to create a more generous standard for the award of defendants' attorneys' fees.

38 See *Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634 (Tex. 1989).

39 *Id.*

40 See *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812 (Tex. 1997).

41 Note that to maintain a claim through a tie-in statute, the claimant must be a consumer, as that term is defined in the DTPA. See, e.g., *Biggers v. BAC Home Loans Servicing*, 767 F. Supp. 2d 725 (N.D. Tex. 2011); *Cushman v. GC Servs., LP*, 657 F. Supp. 2d 834 (S.D. Tex. 2009); *Marketic v. U.S. Bank Nat'l Assoc.*, 436 F. Supp. 2d 842 (N.D. Tex. 2006); *Burnette v. Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 24686 (E.D. Tex. 2010); *Hansberger v. EMC Mortg. Corp.*, 2009 Tex. App. LEXIS 5792 (Tex. App.—San Antonio July 29, 2009, pet. denied) (mem. op.).

42 See, e.g., *In re Melchor*, 2011 Bankr. LEXIS 1531 (Bankr. S.D. Tex. Apr. 27, 2011)

43 See, e.g., *Kish v. Van Note*, 692 S.W.2d 463 (Tex. 1985).