A BUSINESS CONSUMER'S ADVANTAGE

THE DTPA'S ROLE IN SMALL BUSINESS LITIGATION

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I. Introduction - What is the DTPA

The Deceptive Trade Practices – Consumer Protection Act,[1] commonly known as the DTPA, is a statutorily enacted response to help balance the unfair advantage that merchants have historically enjoyed at the expense of consumers before the advent of modern consumer protection laws. Before the 1960's era reevaluation of the role of the government in private commerce, caveat emptor or, "let the buyer beware," was the long-standing rule in commerce. The DTPA was designed to address the imbalance of power in such situations and replace caveat emptor with a statute designed to require full disclosure of material information so consumers are able to realistically evaluate a transaction and make an informed decision. The DTPA remains the most powerful consumer-oriented statute despite the remarkable transformation it has undergone since its inception in 1973. Although Defendants now enjoy greater protections, the DTPA still offers consumers many advantages.[2]

The reality of today's environment is that in absolute terms the DTPA has somewhat waned in power from its heyday, yet in the context of tort reform and relative to other statutory and common law causes of action, the DTPA is as powerful as ever and is an indispensable tool for small firms and solo attorneys. A consumer attorney must carefully consider which cases to take and which to reject, and while there are no more "easy" DTPA cases, both Plaintiffs and Defendants need to understand the subtle complexity of the DTPA and the benefits it offers to not only consumers but also attorneys who represent consumers.

The statutory mandate of the DTPA is telling and states that the DTPA:

> "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."[3]

Significant judicial activism appears to contrast and be in conflict with the clear legislative mandate, yet despite such judicial restraints placed on it, the DTPA remains a viable and valuable tool for Texas consumers. A corollary to the DTPA's ability to benefit consumers is that the DTPA provides tools for lawyers to use in making their business profitable. As discussed below, the term "consumer" is not limited to individuals nor is it limited to purchases that are primarily for personal, family, or household purposes like so many other consumer-oriented statutes.[4] This article focuses on using the DTPA in business litigation after first giving a primer on the mechanics of the DTPA.

II. SCOPE OF ARTICLE

This article is written from the perspective of a small law firm representing both Plaintiffs and Defendants and attempts to highlight some of the areas of the DTPA that the authors find to be especially valuable when representing small businesses. It is not intended to be a treatise delineating the subtle nuances inherent in law and is not a substitute for the legal research that must necessarily be completed for proper representation of a client.

III. THE MECHANICS OF THE DTPA

To sustain an action under the DTPA, a Plaintiff must establish the following elements:

- The Plaintiff is a consumer;
- The Defendant can be sued under the DTPA;
- The Defendant committed an act that is actionable under the DTPA; and
- The Defendant's actions were a producing cause of damages.[5]

A. Consumer Status

Consumer status is a prerequisite for standing to bring claims under the DTPA. 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."[6] Thus the DTPA provides for business consumers as well as individuals.

1. Seek Or Acquire

The phrase "seek or acquire" is rather straight forward 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.[7] When one seeks, but does not acquire, there will not be a contract or sale and thus no privity.[8] 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 commonsense approach and requires 1) a good faith intention to purchase or lease coupled with 2) the ability to do so.[9]

The actual purchaser is not the only person who can maintain consumer status from a transaction. Consumer status can be conferred on others when a good or service is acquired for their benefit.[10] To confer consumer status on one who did not

directly seek or acquire, the person must have been an intended beneficiary rather than an incidental beneficiary.[11]

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.[12] 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.[13] What is very clear through case law is that gratuitous goods and services do not generally give rise to consumer status.[14] The exception to this general rule is when the gift was purchased by the giver. In such a scenario, if the purchaser and gift giver are the same, then the recipient was an intended beneficiary of the transaction and can thereby claim consumer status.

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.[15] Determination of what is and what is not a good is generally an easy process. "Tangible chattels are those items of personal property which may be seen, weighed, measured, felt, or touched."[16]

A number of items have been determined to be intangible such as money, lending money,[17] accounts receivable,[18] stocks,[19] option contract,[20] insurance policy,[21] certificate of deposit,[22] lottery tickets,[23] and intangible property rights.[24] However, intangible property that is incidental to a purchase or lease of goods or services does not disturb the analysis for consumer status.[25]

"Services" are defined as work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods.[26]

4. Business Consumers and the $25 Million in Assets Exclusion

The DTPA's definition of "consumer" does come with one exclusion that is of particular importance to business consumers and that is: "...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."[27] "Business consumer" is further defined as "an individual, partnership, or corporation who seeks or acquires by purchase or lease, any goods or services for commercial or business use."[28] "Although the DTPA does not define 'project,' the Court interprets that term in light of section 17.49(g)'s purpose of 'remov[ing] from the scope of the [DTPA]...litigation between big businesses.'"[29]

"Assets" for the purposes of § 17.45(4) means gross assets.[30] Under the pertinent time test, a business consumer's assets "at the time of the alleged violation of the DTPA and at the time that the lawsuit was brought" controls.[31]

Plaintiffs must prove their status as a consumer to prevail in an action under the DTPA.[32] However, it is the Defendant's burden to plead and prove the $25 million exception as an affirmative defense.[33] A Defendant's failure to both plead and prove this affirmative defense will result in waiver.[34]

Even if the Plaintiff has over $25 million or more in assets, if the Plaintiff is a corporation acting in a representative capacity, such as trustee or executor, and any compensation received for damages will not inure to the benefit of the representative, the court should look to the assets of the entity being represented and not the corporation.[35]

5. DTPA Claims are Generally Not Assignable

"The DTPA is primarily concerned with people—both the deceivers and the deceived" giving the DTPA "a personal aspect that cannot be squared with a rule that allows assignment of DTPA claims as if they were merely another piece of property." [36]

DTPA claims generally cannot be assigned by an aggrieved consumer to someone else.[37] This includes subrogors such as insurers.[38]

B. Defendant That Can Be Sued Under The DTPA

After establishing consumer status, one must next show that the Defendant is a proper Defendant under the DTPA.

1. Any Person – The General rule

The DTPA provides for a cause of action against "any person" who employs practices that are prohibited by the Act.[39] The Act defines "person" about as broadly as possible; as an "individual, partnership, corporation, association, or other group, however organized."[40] The requirement is not one of privity, but rather a connection with the transaction.[41]

2. Upstream Suppliers and Manufacturers – Must Reach Consumer

The DTPA applies only to those who have made misrepresentations to a consumer. Although the act itself does not require more than a misrepresentation to create liability, the Amstadt Court added the requirement of "in connection with."[42] The Amstadt court ruled that upstream suppliers or manufacturers are not proper parties unless misrepresentations are communicated to the consumer. This can happen when, for example, advertising from the upstream party has been marketed to a purchaser.

3. Professional Service Exemption – All About Opinion

The DTPA does not apply to "...damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill."[43] The exemption does not apply to the following 17.49 (c) exceptions:

(1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion;
(2) failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed;
(3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion;
(4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion; or
(5) selling, offering to sell, or illegally promoting an annuity contract under Chapter 22, Acts of the 57th Legislature, 3rd Called Session, 1962 (Article 6228a-5, Vernon's Texas Civil Statutes), with the intent that the annuity contract will be the subject of a salary reduction agreement, as defined by that Act, if the annuity contract is not an eligible qualified investment under that Act or is not registered with the Teacher Retirement System of Texas as required by Section 8A of that Act.[44]

The question of what exactly a professional service has yet to be answered by the Texas Supreme Court, begging the question: exactly what is a professional service that is intended to be excluded from liability under the DTPA? It is a trick question, because no group of professionals is exempt from liability under the DTPA. Rather, a two-step process is used to first determine whether the conduct arises from a professional and then determine if the conduct complained about "involved services that the essence of which is providing advice, judgment, or an opinion."[45]

The definition for a "professional" is whether the person: (1) engages in work involving mental or intellectual rather than physical labor, (2) requires special education to be used on behalf of others, and (3) earns profits dependent mainly on these considerations."[46] Once it is determined that the services were performed by a professional, the next step is to determine whether the "essence of those services was providing advice, judgment, or an opinion."[47] Using this calculus, the *Retherford* Court determined that the professional services exemption applied to the report at issue from a real-estate inspector:

> "Clearly the contents of the real estate inspection report constituted the inspector's opinion as to the condition of the house, as it has been statutorily defined as such. Further, the essence of an inspector's service is providing that opinion. We find that the professional services exemption applies to the report of professional real estate inspectors."[48]

Once it is determined that the professional services exemption otherwise applies, the final question is whether one of the five 17.49(c) exceptions precludes the application of the professional services exemption, such as an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion.

Doctors, lawyers, and accountants are professionals traditionally afforded the professional services exemption from liability under the DTPA,[49] but even those professionals are not immune from DTPA liability when one of the 17.49 exceptions applies.

The requirement that the "service" essentially be advice, judgment, opinion, or similar professional skill would seem to preclude the sale of goods forming the basis of the professional service exemption. In *Cole v. Central Valley Chemicals, Inc.,* Plaintiffs went to an agronomist to purchase herbicides for their corn crop.[50] After being informed of the benefits of a new herbicide that was sold by Defendant, Plaintiffs decided to purchase the herbicide brand touted by the Defendant instead of their usual herbicide. Plaintiffs based their decision on representations that the new herbicide would provide better weed control and cost less than the herbicides Plaintiffs had used in the past made by the agronomist who worked for Defendant. When the new product failed to control the weeds in their corn crop and the crop failed, Plaintiffs sued under the DTPA. Defendant argued that Plaintiffs' claims arose from the rendering of professional service because they sought and received the professional advice of the salesman/agronomist. The San Antonio Court of Appeals found that, when the sale of a product is involved, the simple rendering of advice or information by the salesman, despite his or her professional title, does not create a professional service qualifying for a professional services exemption.[51] As the Plaintiffs argued, "construing [the agronomist's] recommendation as a professional service would abolish the DTPA whenever a consumer purchased a product based on the advice of the salesman."[52]

BASED ON THE DTPA'S MANDATE FOR LIBERAL CONSTRUCTION, THE COURTS SHOULD GIVE THE PROFESSIONAL EXEMPTION THE NARROWEST APPLICATION.

There is a limit as to what type of professional services are exempted, as the DTPA exempts only those professional services where "...the essence of which is the providing of advice, judgment, opinion, or similar professional skills."[53] What does the term "similar professional skills" mean? What other types of professional services are not covered? There is still little guidance from the courts as to the limits of the words "professional service."

Based on the DTPA's mandate for liberal construction, the courts should give the professional exemption the narrowest application with the understanding that a liberal construction should be mindful of the DTPA's stated goals and that exemptions disenfranchise consumers who are otherwise members of the DTPA's target class.

4. The $500,000 Cap Exclusion.

The DTPA does not apply to a cause of action "arising from a transaction, project, or set of transactions relating to the same project, involving total consideration by the consumer of more than $500,000, other than...a consumer's residence."[54] "Total consideration" and "project" are not defined by the Act and there are no definite cases addressing the definitions of the terms. While the statute is silent as to who has the burden to plead and prove the exemptions, case law discloses that the exemptions are in the nature of affirmative defenses to be raised by the Defendants that assert them.[55]

Business consumers, by their very nature, do not own or occupy residences. The definition of "business consumer" is as follows:

> "an individual, partnership, or corporation who seeks or acquires by purchase or lease, any goods or services for commercial or business use. The term does not include this state or a subdivision or agency of this state."[56]

Thus, a business consumer under the DTPA requires the transactions to be for commercial or business use, which would necessarily exclude the purchase of a residence.

5. The $100,000.01 Contract With Lawyer Exemption.

The DTPA does not apply to claims "arising out of a written contract" if:

- the contract relates to the transaction or project, and
- involves more than $100,000, and
- an attorney for the consumer who was not identified, suggested, or selected by the Defendant, helped negotiate the contract, and
- it does not involve the consumer's residence.[57]

A prudent practice would be to inform your client that by consulting with you, they are essentially giving up their rights under the DTPA.

6. Bodily Injury and Death Exemption.

One of the bizarre aspects of the DTPA is that recovery for serious death and bodily injury damages is precluded under the DTPA unless brought through a tie-in statute.[58] This allows

for remarkable differences in recovery under the DTPA based solely upon the fortuitous fact that the conduct also violates a tie-in statute.

Imagine a scenario where a pest exterminator employs a dangerous chemical after telling the family it's perfectly safe, it can't harm you, and that you don't have to leave the house. Then, the chemical causes severe medical problems such as sterility or cancer and eventually the death of a child. The exterminator is insulated from damages under the DTPA, although he is still exposed to liability. None of the remarkable damages related to bodily injury or death are recoverable under the DTPA.

Using the same facts but adding the fortuitous fact that there was a home solicitation without the three-day notice of cancellation; and, after notice, the Defendant failed to return the property in the condition in which the pest control company found it (i.e., free from the damaging chemicals), there can be an award for bodily injury and death. This is because a violation of the Texas Home Solicitation Act is actionable under the DTPA.[59] The tie-in statute makes clear that all "actual damages" are recoverable including those for wrongful death, bodily injury, and arguably mental anguish pursuant to the plain words of Section 17.49(e) and Section 17.50(h).

7. Publisher's Exemption

Owners and employees of a regularly published newspaper, magazine, telephone directory, broadcast station, or billboard are exempted when an advertisement is in violation of the DTPA unless it is established that (a) they had knowledge that the conduct was unlawful or (b) they had direct or substantial financial interest in the sale or distribution of the unlawfully advertised good or service.[60]

8. Federal Trade Commission Exemption

The DTPA does not apply to:

> "acts or practices authorized under specific rules or regulations promulgated by the Federal Trade Commission under Section 5(a)(1) of the Federal Trade Commission Act. The provisions of this subchapter do apply to any act or practice prohibited or not specifically authorized by a rule or regulation of the Federal Trade Commission. An act or practice is not specifically authorized if no rule or regulation has been issued on the act or practice."[61]

C. Act In Violation Of DTPA

The third element of a DTPA claim requires proving that a Defendant committed a wrongful act. Section 17.50(a) delineates four actionable areas, including a "laundry list" violation, breach of warranty, unconscionable act, and violation of Chapter 541 of the Texas Insurance Code.[62]

1. "False, Misleading, Or Deceptive Act Or Practice"- Laundry List Violations

The use of a false, misleading, or deceptive act or practice that is specifically enumerated in Section 17.46 is known as a "Laundry List" violation. Unlike the other three actionable areas under the DTPA, an action for a Laundry List violation requires a showing of detrimental reliance.[63] Caution should be taken when reviewing pre-1995 case law because the previous version of the statute did not require a showing of reliance. The standard for "false, misleading, and deceptive" is set quite low; "an act is false, misleading, or deceptive if it has the capacity to deceive an 'ignorant, unthinking, or credulous person.'"[64]

There are currently 34 discreet acts contained in the Laundry List. They are:

(1) passing off goods or services as those of another;
(2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
(3) causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;
(4) using deceptive representations or designations of geographic origin in connection with goods or services;
(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which the person does not;
(6) representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or secondhand;
(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
(8) disparaging the goods, services, or business of another by false or misleading representation of facts;
(9) advertising goods or services with intent not to sell them as advertised;
(10) advertising goods or services with intent not to supply a reasonable expectable public demand, unless the advertisements disclosed a limitation of quantity;
(11) making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions;
(12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;
(13) knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service;
(14) misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction;
(15) basing a charge for the repair of any item in whole or in part on a guaranty or warranty instead of on the value of the actual repairs made or work to be performed on the item without stating separately the charges for the work and the charge for the warranty or guaranty, if any;
(16) disconnecting, turning back, or resetting the odometer of any motor vehicle so as to reduce the number of miles indicated on the odometer gauge;
(17) advertising of any sale by fraudulently representing that a person is going out of business;
(18) advertising, selling, or distributing a card which purports to be a prescription drug identification card issued under Section 4151.152, Insurance Code, in accordance with rules adopted by the commissioner of insurance, which offers a discount on the purchase of health care goods or services from a third-party provider, and which is not evidence of insurance coverage, unless:
    (A) the discount is authorized under an agreement between the seller of the card and the provider of those goods and services or the discount or card is offered to members of the seller;
    (B) the seller does not represent that the card provides insurance coverage of any kind; and

(C) the discount is not false, misleading, or deceptive;

(1) using or employing a chain referral sales plan in connection with the sale or offer to sell of goods, merchandise, or anything of value, which uses the sales technique, plan, arrangement, or agreement in which the buyer or prospective buyer is offered the opportunity to purchase merchandise or goods and in connection with the purchase receives the seller's promise or representation that the buyer shall have the right to receive compensation or consideration in any form for furnishing to the seller the names of other prospective buyers if receipt of the compensation or consideration is contingent upon the occurrence of an event subsequent to the time the buyer purchases the merchandise or goods;

(2) representing that a guaranty or warranty confers or involves rights or remedies which it does not have or involve, provided, however, that nothing in this subchapter shall be construed to expand the implied warranty of merchantability as defined in Sections 2.314 through 2.318 and Sections 2A.212 through 2A.216 to involve obligations in excess of those which are appropriate to the goods;

(3) promoting a pyramid promotional scheme, as defined by Section 17.461;

(4) representing that work or services have been performed on, or parts replaced in, goods when the work or services were not performed or the parts replaced;

(5) filing suit founded upon a written contractual obligation of and signed by the Defendant to pay money arising out of or based on a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household, or agricultural use in any county other than in the county in which the Defendant resides at the time of the commencement of the action or in the county in which the Defendant in fact signed the contract; provided, however, that a violation of this subsection shall not occur where it is shown by the person filing such suit that the person neither knew or had reason to know that the county in which such suit was filed was neither the county in which the Defendant resides at the commencement of the suit nor the county in which the Defendant in fact signed the contract;

(6) failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed;

(7) using the term "corporation," "incorporated," or an abbreviation of either of those terms in the name of a business entity that is not incorporated under the laws of this state or another jurisdiction;

(8) selling, offering to sell, or illegally promoting an annuity contract under Chapter 22, Acts of the 57th Legislature, 3rd Called Session, 1962 (Article 6228a-5, Vernon's Texas Civil Statutes), with the intent that the annuity contract will be the subject of a salary reduction agreement, as defined by that Act, if the annuity contract is not an eligible qualified investment under that Act;

(9) subject to Section 17.4625, taking advantage of a disaster declared by the governor under Chapter 418, Government Code, or by the president of the United States by:

(A) selling or leasing fuel, food, medicine, lodging, building materials, construction tools, or another necessity at an exorbitant or excessive price; or

(B) demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, lodging, building materials, construction tools, or another necessity;

(10) using the translation into a foreign language of a title or other word, including "attorney," "immigration consultant," "immigration expert," "lawyer," "licensed," "notary," and "notary public," in any written or electronic material, including an advertisement, a business card, a letterhead, stationery, a website, or an online video, in reference to a person who is not an attorney in order to imply that the person is authorized to practice law in the United States;

(11) delivering or distributing a solicitation in connection with a good or service that:

(A) represents that the solicitation is sent on behalf of a governmental entity when it is not; or

(B) resembles a governmental notice or form that represents or implies that a criminal penalty may be imposed if the recipient does not remit payment for the good or service;

(1) delivering or distributing a solicitation in connection with a good or service that resembles a check or other negotiable instrument or invoice, unless the portion of the solicitation that resembles a check or other negotiable instrument or invoice includes the following notice, clearly and conspicuously printed in at least 18-point type:

"SPECIMEN-NON-NEGOTIABLE";

(2) in the production, sale, distribution, or promotion of a synthetic substance that produces and is intended to produce an effect when consumed or ingested similar to, or in excess of, the effect of a controlled substance or controlled substance analogue, as those terms are defined by Section 481.002, Health and Safety Code:

(A) making a deceptive representation or designation about the synthetic substance; or

(B) causing confusion or misunderstanding as to the effects the synthetic substance causes when consumed or ingested;

(3) a licensed public insurance adjuster directly or indirectly soliciting employment, as defined by Section 38.01, Penal Code, for an attorney, or a licensed public insurance adjuster entering into a contract with an insured for the primary purpose of referring the insured to an attorney without the intent to actually perform the services customarily provided by a licensed public insurance adjuster, provided that this subdivision may not be construed to prohibit a licensed public insurance adjuster from recommending a particular attorney to an insured;

(4) owning, operating, maintaining, or advertising a massage establishment, as defined by Section 455.001, Occupations Code, that:

(A) is not appropriately licensed under Chapter 455, Occupations Code, or is not in compliance with the applicable licensing and other requirements of that chapter; or

(B) is not in compliance with an applicable local ordinance relating to the licensing or regulation of massage establishments; or

(5) a warrantor of a vehicle protection product warranty using, in connection with the product, a name that includes "casualty," "surety," "insurance," "mutual," or any other word descriptive of an insurance business, including property or casualty insurance, or a surety business.[65]

2. Unconscionable Act Or Practice

The DTPA allows a claim to be maintained for unconscionable acts or practices.[66] The Act defines "unconscionable conduct" simply as an act that "to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree."[67] To prove an unconscionable action or course of action, a Plaintiff must show that the Defendant took advantage of his lack of knowledge and "that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated."[68] The unconscionable act does not have to take place at the time of the sale or lease, but must occur within the context of the transaction.[69] No intent, knowledge, or reliance need be shown.[70]

This is not to be confused with the common law test for unconscionability.

In Texas, however, unconscionability is both a statutory cause of action under the DTPA and an affirmative defense at common law. "While at common law unconscionability is a defense to contractual performance, the DTPA allows consumers to collect damages for unconscionable conduct by sellers."[71] It appears, however, that even so-called "common law unconscionability" can include statutory provisions, chiefly Tex. Bus. & Com. Code § 2.302, which permits a court as a matter of law to find a contract under the Uniform Commercial Code to be unconscionable. Courts have used the language and referred to the statute even in cases not involving the sale of goods.[72]

At least one Texas court has found that there are no cases or statutes that authorize a general action for unconscionable conduct in a non-contract or non-DTPA situation.[73]

And given that the DTPA doesn't represent a codification of common law,[74] it should be no surprise that common law unconscionability is dramatically different from DTPA unconscionability. Common law unconscionability is determined on a case-by-case basis by looking at the totality of the circumstances as of the time the contract was formed.[75] In Texas the unconscionability of a contract is a question of law, and the party asserting unconscionability of a contract bears the burden of proving both procedural as well as substantive unconscionability.[76]

Procedural unconscionability is concerned with assent and focuses on the facts surrounding the bargaining process. The second question, substantive unconscionability, is concerned with the fairness of the resulting agreement.[77] Put another way, "Substantive unconscionability refers to the fairness of the agreement itself, whereas procedural unconscionability refers to the circumstances surrounding the adoption of the agreement."[78]

Unfortunately, as several Texas courts have pointed out, common law unconscionability is not easily defined.[79] "The term defies a precise legal definition because 'it is not a concept, but a determination to be made in light of a variety of factors not unifiable into a formula.'"[80]

In determining whether a contract is unconscionable, a Texas court will look at five factors:

- the entire atmosphere in which the agreement was made;
- the alternatives, if any, available to the parties at the time the contract was made;
- the non-bargaining ability of one party;
- whether the contract was illegal or against public policy;
- whether the contract is oppressive or unreasonable.[81]

The totality of the circumstances is assessed as of the time the contract was formed. Other considerations include gross disparity in the value exchanged and a gross inequality of bargaining power together with terms unreasonably favorable to the stronger party.[82] Additional factors that may contribute to finding an agreement procedurally unconscionable include knowledge of the stronger party that the weaker party is unable to receive substantial benefits from the contract or is unable to reasonably protect its interests due to physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of the agreement.[83]

The grounds for substantive abuse must be sufficiently shocking or gross to compel the court to intercede.[84] A contract is substantively unconscionable where its inequity shocks the conscience.[85] Likewise for procedural abuse—the circumstances surrounding the negotiation must be shocking.[86]

THE DTPA ALLOWS A CLAIM TO BE MAINTAINED FOR UNCONSCIONABLE ACTS OR PRACTICES.

The test for substantive unconscionability is whether, given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract.[87] With respect to procedural unconscionability, which refers to the circumstances surrounding the agreement, a bargain will not be negated because one party to the agreement may have been in a less advantageous bargaining position. Instead, unconscionability principles are applied to prevent unfair surprise or suppression.[88] To determine procedural unconscionability, courts will examine the contract formation and the alleged lack of meaningful choice.[89]

3. Breach of Warranty

The DTPA provides a mechanism for bringing claims arising out of breach of warranty.[90] However, the DTPA does not create warranties.[91] Breach of warranty is a viable cause of action on its own. Bringing a breach of warranty claim under the DTPA entitles Plaintiffs to the favorable provisions afforded by the DTPA such as damages, attorney's fees, etc. Warranties may be implied or express and are either recognized by common law or created by statute, such as the U.C.C.

4. Violation of Chapter 541 Of the Texas Insurance Code

The fourth category of actions that can be maintained under the DTPA are violations of Chapter 541 of the Texas Insurance Code.[92] Chapter 541 is entitled "Unfair Methods of Competition and Unfair or Deceptive Acts or Practices" and its purpose is to regulate trade practices in the business of insurance by (1) defining or providing for the determination of trade practices in this state that are unfair methods of competition or unfair or deceptive acts or practices; and (2) prohibiting those trade practices.[93] A private action for damages is authorized for violating Subchapter B of chapter 541 or the Laundry List.[94]

5. Tie-In Statute Violations

Many Texas statutes specifically incorporate language identifying a violation of that statute is actionable under the DTPA. Such statutes are known as "tie-in" statutes and receive their grant of power under the DTPA from Section 17.50(h) rather than Section 17.50(a). Tie-in statutes provide for more favorable treatment than actions brought under Section 17.50(a). Tie-in statutes are discussed in greater detail below.

D. Damages

The last element that a DTPA Plaintiff needs to establish to maintain a viable DTPA claim is damages. "A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish…."[95] The DTPA provides for the recovery of economic damages and in some situations mental anguish, treble damages, and actual damages.

Economic damages are defined as "compensatory damages for pecuniary loss, including costs of repair and replacement."[96] The term specifically excludes exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.[97] Claims brought pursuant to a tie-in statute entitle a Plaintiff to recover actual damages rather than just economic damages.[98] The term actual damages has not been defined by the DTPA, but case law reveals that it is all damages available at common law.[99] Thus those damages specifically excluded by the definition of economic damages are recoverable under a tie-in statute.

1. Causation – Producing cause not proximate cause

The DTPA standard of causation is "producing cause" rather than "proximate cause."[100] A producing cause is a substantial factor that brings about the injury and without which the injury would not have occurred.[101] Unlike "proximate cause," a "producing cause" does not have an element of foreseeability making it a lower standard of causation.[102]

To establish producing cause, the Plaintiff must show the Defendant's DTPA violations were: (1) a substantial factor in bringing about the injury, and (2) a cause-in-fact of the Plaintiff's injuries, such that the injury would not have occurred but-for the Defendant's acts or omissions.[103]

Stated in another way, the cause must be a substantial cause of the event in issue and it must be a but-for cause, namely one without which the event would not have occurred.[104] There can be more than one producing cause.[105] The producing cause inquiry is conceptually identical to that of cause-in-fact.[106]

Producing cause and proximate cause both share the requirement for proof of actual causation in fact.[107] Proximate cause, however, also requires a showing of foreseeability while producing cause does not.[108] "To establish a DTPA violation, a Plaintiff does not have to meet the higher standard of proximate causation, which includes foreseeability as an element."[109]

Producing cause under the DTPA and cause in fact for negligence are defined the same. Additionally, cause in fact is not shown if the Defendant's deceptive trade practice did no more than furnish a condition which made the injury possible.

While a Plaintiff need not establish that harm was foreseeable, it is not enough to show that a Defendant's conduct furnished an attenuated condition that made the injury possible.[110] "In other words, even if the injury would not have happened but for the Defendant's conduct, the connection between the Defendant and the Plaintiff's injuries simply may be too attenuated to constitute a legal cause."[111]

Texas courts have held when a Defendant can demonstrate that a new and independent basis for the Plaintiff's cause of action exists, that proof may negate that the Defendant's acts were the producing cause of the Plaintiff's injury.[112] For example, an independent inspection of real property can constitute a new and independent basis for the purchase of the property, which intervenes and supersedes the seller's wrongful act.[113]

2. Knowing Conduct

When there is a finding of knowing conduct, the damage model increases by providing for mental anguish and allowing additional damages of up to two times economic damages.[114] The DTPA defines "knowingly" to mean "actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim"[115] It is hard to believe that there has ever been confusion with juries who have been asked to determine whether there has been "knowing conduct," as the definition makes it clear.

It is a rare DTPA case wherein direct evidence such as an email or journal entry establishes a mental state with direct proof. The DTPA drafters tacitly recognized this by including as part of the definition "actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness."[116]

Caution should be taken when reviewing old DTPA cases regarding additional damages as the provision has changed remarkably over time. Today the additional damages provision is discretionary, but in years past it was automatic.

3. Intentional Conduct

When there is a finding of intentional conduct, the damage model increases further by providing for mental anguish and allowing additional damages of up to two times economic damages plus mental anguish.[117] The DTPA defines "intentionally" as "actual awareness of the falsity, deception, or unfairness of the act or practice, or the condition, defect, or failure constituting a breach of warranty giving rise to the consumer's claim, coupled with the specific intent that the consumer act in detrimental reliance on the falsity or deception or in detrimental ignorance of the unfairness."[118] The definition goes on to provide that "Intention may be inferred from objective manifestations that indicate that the person acted intentionally or from facts showing that a Defendant acted with flagrant disregard of prudent and fair business practices to the extent that the Defendant should be treated as having acted intentionally."

IV. PROHIBITION AGAINST WAIVER

Waivers of the DTPA are disfavored but allowed as the DTPA now allows written waivers under specific circumstances.

A. Mechanics of a DTPA Waiver – A waiver of the provisions of the DTPA by a consumer is "contrary to public policy and is unenforceable and void" unless it complies with all of the following:

a. the waiver is in writing and is signed by the consumer;
b. the consumer is not in a significantly disparate bargaining position; and
c. the consumer is represented by legal counsel in seeking or acquiring the goods or services.[119]

A waiver is not effective if the consumer's legal counsel was directly or indirectly identified, suggested, or selected by a Defendant or an agent of the Defendant.[120] A waiver must also be:

1. conspicuous and in bold-face type of at least 10 points in size;

2. identified by the heading "Waiver of Consumer Rights," or words of similar meaning; and
3. in substantially the following form state "I waive my rights under the Deceptive Trade Practices- Consumer Protection Act, Section 17.41 et seq., Business & Commerce Code, a law that gives consumers special rights and protections. After consultation with an attorney of my own selection, I voluntarily consent to this waiver."[121]

An attorney's signature is not required and, at least in theory, a consumer can "lie" or otherwise misrepresent that he has actually spoken with an attorney. How much inquiry a business needs to make with regard to his actual talking with an attorney is uncertain. The plain words of the statute require the consumer to actually be represented by counsel. The misrepresentations or "lies" of a consumer may not be enough to show a waiver of the DTPA but may rise to a "breach of contract" level, which may allow a counter claim for damages, attorneys' fees, and rescission.[122]

Businesses would be well served to ensure that the consumer is actually represented by counsel before the waiver provision is sought. In a true arm's length transaction, the parties will know if counsel is present. The waiver does not exempt or offer a defense to an action brought by the Attorney General's Office.

B. *Forum Selection and Arbitration Clauses Are Excluded from DTPA's Anti-Waiver Policy* - An exception to the DTPA's anti-waiver provision is for forum selection clauses.[123] Likewise, mandatory arbitration provisions under the Federal Arbitration Act are excepted from application of the DTPA anti-waiver provision.[124] The Texas Supreme Court held in Jack B. Anglin Co. v. Tipps, "We likewise are of the opinion that federal law preempts application of the nonwaiver provision of the DTPA to prevent or restrict enforcement of this arbitration agreement."[125]

C. *Warranties Can Be Waived* – The DTPA's anti-waiver provision, by its terms, applies only to "the provisions of this subchapter."[126] Since warranties are not created by the DTPA the courts have reasoned that the warranty is not a provision of the subchapter.[127]

V. BUSINESS CONSUMER ADVANTAGES UNDER THE DTPA

1. Limited Defenses –

The DTPA is a product of the legislature and represents a radical shift from the common law rather than a codification of it. In *Smith v. Baldwin*, the Texas Supreme Court stated:

> "The DTPA does not represent a codification of the common law. A primary purpose of the enactment of the DTPA was to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit."[128]

The lens through which to view the DTPA is focused by its mandate, which provides that the DTPA "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 warranty and to provide efficient and economical procedures to secure such protection."[129]

Several cases have applied *Baldwin* and its progeny to disallow the use of common law defenses in DTPA claims.

a. Parol Evidence Rule - No Bar to Evidence for DTPA Claims

As every practicing attorney should know, the parol evidence rule is the cornerstone of contract law. Parol evidence is defined as:

> "Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
> (1) by course of performance, course of dealing, or usage of trade (Section 1.303); and
> (2) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement."[130]

It makes sense in a contractual setting where the parties have equal bargaining power to require all material terms to be included in the agreement. However, the DTPA mandate recognizes that it shall be liberally construed to protect consumers from deceptive business practices and further provides that DTPA remedies are cumulative.[131]

THE DTPA IS A PRODUCT OF THE LEGISLATURE AND REPRESENTS A RADICAL SHIFT FROM THE COMMON LAW RATHER THAN A CODIFICATION OF IT.

In 1985, the Texas Supreme Court recognized that lower courts were characterizing alleged and seeming parol rule violations as not "seeking to change or contradict the terms of the contract but were relying upon deceptive oral representations as the basis of their suit."[132] The *Weitzel* court found that because of the clear mandate of the DTPA, and by following such clear guidelines as contained in the statute, that "oral representations are not only admissible but can serve as the basis of a DTPA action."[133] The *Weitzel* court found that "oral misrepresentations, which were made both before and after the execution of the agreement, constitute the basis of this cause of action, so traditional contractual notions do not apply."[134]

"To apply the parol evidence rule in DTPA cases would frustrate the legislature's purpose in passing the statute without furthering the objectives of the parol evidence rule."[135] The holding in *Weitzel* is huge, and cannot be understated. *Weitzel* is still the law in Texas.

b. Limiting Liability – It's Hard to Waive the DTPA

As discussed above, contractual attempts to limit liability are not new to Texas law but are disfavored under the DTPA. The DTPA addresses such attempts in its anti-waiver provision, as discussed above. [136] "Although a limitation-of-liability clause may waive a party's right to recover under the common-law theory of breach of contract, such clause does not waive the consumer's alternative right to sue under the DTPA because of the legislative mandate expressed in § 17.42."[137]

c. Liquidated Damages Provision Ineffective

The DTPA's anti-waiver provision also precludes a contractual liquidated damages disclaimer while recognizing the DT-

PA's broad mandate by finding that the legislature disapproves of "efforts or ruses designed to avoid liability under the DTPA."[138] The *Hycel* Court speaks in bold terms of the consequences of not enforcing the anti-waiver provision of the DTPA when it stated "To allow *Hycel* to insulate itself from a violation of section 17.46(b)(5) through such a disclaimer would only emasculate the DTPA and serve to encourage deceptive trade practices."[139]

d. Doctrine of Substantial Performance - Not a Defense to the DTPA

Common law defenses are routinely asserted by Defendants even though such are not proper under the DTPA as the DTPA does not represent a codification of the common law.[140] "A primary purpose of the enactment of the DTPA was to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit."[141] The doctrine of substantial performance is not relevant to a statutory cause of action under the DTPA.[142]

e. Doctrine of Merger – Not Applicable to the DTPA

The doctrine of merger generally applies when a deed is delivered and accepted as performance of a contract to convey, the contract is merged in the deed.[143] Though the terms of the deed may vary from those contained in the contract, under the doctrine of merger, the deed alone controls the rights of the parties.

"Whether described as a rule of evidence or as a substantive defense, the doctrine of merger was used here as a substantive defense. However, it is not necessary to resolve that issue as we have previously held that under the broad guidelines of the DTPA, the parol evidence rule will not prevent admissibility of oral misrepresentations which may also serve as the basis of a DTPA action."[144]

Following the same reasoning as discussed in *Weitzel,* the Alvarado Court determined that the doctrine of merger does not apply to DTPA cases.

f. New and Independent Cause – Producing Cause Is the Relevant Standard

New and independent cause is a common law defense that asserts as a defense a "new and independent basis" which "intervened and superseded" the DTPA violations and "became the sole and efficient cause of their damages."[145] The *O'Hern* court determined that such defenses are precluded by the DTPA and that "the appropriate inquiry is whether the sellers' failure to disclose was a producing cause of the purchasers' damages."[146]

g. Waiver and Estoppel – Invalid DTPA Defense

Building on the ideas presented in *Weitzel*, the Texas Supreme Court found that traditional contractual theories are not controlling in a statutory DTPA action.[147] The Defendants asserted that since the Plaintiffs accepted defective performance, they are estopped from asserting claims from defects; However, the court found that:

> "The remedies under the [DTPA] are available to any consumer, and they are not waived merely because the consumer accepts the allegedly defective performance. Nothing in the language or policy of the Act requires the consumers to withhold performance themselves in order to allege violations against the other party. Such a policy would discourage the resolution of disputes and the settlement of claims without any corresponding benefits. In the absence of an express settlement or other express waiver, therefore, the [Plaintiffs] had every right to proceed with their case."[148]

h. Failure to Read – Does Not Affect Misrepresentations

Failure to read is a common law defense that seeks to sever causation. The logic behind the rule is summarized as when a misrepresentation is made regarding a policy and the purchaser is under a legal duty to read the policy, the defense asserts that reliance is negated. The *Shindler* court stated it as "[a] claim for misrepresentation cannot stand when the party asserting the claim is legally charged with knowledge of the true facts."[149]

The *Wyly* court reviewed the DTPA line of cases from *Baldwin* through *Wietzel* and determined that "we decline to hold the defense of "failure to read" is applicable to alleged violations under the DTPA or the Insurance Code for an affirmative misrepresentation of coverage."[150]

2. Prohibition Against Waiver – Boilerplate Language Be Damned

When is a consumer better off without first seeking an independent legal opinion? The answer is never, unless of course an attorney's advice precludes an action under the DTPA.[151] One of the most powerful tools of the DTPA is its anti-waiver provisions. Simply stated, boilerplate language in contracts that waive any provisions of the DTPA (except of course forum selection clauses and arbitration clauses as discussed above) are applicable to DTPA claims.

3. Treble Damages Without a Showing of Gross Negligence, Malice, or Fraud

Exemplary damages are intended to penalize a Defendant for outrageous, malicious, or otherwise morally culpable conduct and to deter the future use of such conduct.[152] Exemplary damages are not compensatory and include punitive damages.[153] The DTPA allows for recovery of up to treble damages for knowing or intentional violations of the act.[154] Recovery of exemplary damages in other areas of law requires a showing of gross negligence, malice, or fraud.[155]

4. Attorney's Fees –

Attorney's fees shifting is a huge component of what makes the DTPA such a tremendous asset to consumers, but it is far from the only aspect that makes the DTPA stand apart from many other statutory fee-shifting mechanisms. However, as fee-shifting is near and dear to the heart of consumer attorneys, it is the place to start.

a. Attorney's Fee Shifting Under the DTPA – More Than the Average Shift

As any practicing attorney in Texas knows, attorney's fees are not available unless contracted for except for specific statutory grants. Under the American Rule, litigants' attorney's fees are recoverable only if authorized by statute or by a contract between the parties.[156] One of the most common fee-shifting statutes is chapter 38 of the Civil Practice & Remedies Code, which provides that attorney's fees "may" be awarded in some actions such as breach of contract. Compare this language to the grant from the DTPA, which states "Each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees."[157] The "shall" language makes clear that the award of reasonable and necessary attorney's fees is not discretionary.

The mandatory fee award language is wholly consistent with the DTPA mandate. The legislature has specifically recognized in the DTPA mandate that all of the DTPA is to be "liber-

ally 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."[158]

b. Net Recovery Not Required for Recovery of Attorney's Fees

Attorney's fees under the DTPA are mandatory for a "prevailing" Plaintiff.[159] What makes a Plaintiff prevailing? Certainly, in situations where a Plaintiff is awarded economic damages under the DTPA and with no successful counterclaims, the Plaintiff prevails and is therefore entitled to an award of reasonable and necessary attorney's fees.[160] However, the situation wherein a Plaintiff prevails and is awarded damages but a counterclaim is also successful making the Plaintiff's recovery a net zero or negative recovery, has the Plaintiff "prevailed" for the purposes of an award of attorney's fees? The short answer is yes. Successful Plaintiffs are entitled to attorney's fees even if their recovery is completely offset by the Defendants' claims.[161]

c. Fees Under the DTPA and Remedies for Other Actionable Conduct

The object of awarding a Plaintiff recovery is to compensate for the actual loss sustained as a result of the Defendant's conduct.[162] The DTPA embraces this concept by permitting an injured consumer to recover the greatest amount of actual damages alleged and factually established to have been caused by the deceptive practice, including related and reasonably necessary expenses.[163] "The Act itself states in section 17.43 that the remedies provided therein 'are in addition to any other procedures or remedies provided for in any other law." Section 17.44 provides that the Act shall be "liberally construed and applied to promote its underlying purposes," which are to protect consumers from the false, misleading, and deceptive business practices it condemns.[164]

RECOVERY UNDER THE DTPA IS, AS A GENERAL RULE, CUMULATIVE RATHER THAN MUTUALLY EXCLUSIVE OF OTHER AVAILABLE REMEDIES.

Recovery under the DTPA is, as a general rule, cumulative rather than mutually exclusive of other available remedies. "Because of the remedial policies underlying the DTPA, a party is entitled to recover attorney's fees for the successful prosecution of a DTPA claim, even if recovery is on another theory."[165] Simultaneous recovery under the DTPA and the Texas Consumer Credit Code is allowed.[166] Likewise, under Texas law, in a situation where common law and a statute both provide remedies, the statutory remedy is cumulative of the common law remedy unless the statute expressly or impliedly negatives or denies the right to the common law remedy.[167]

d. Mandatory Fees – Sometimes

Most fee-shifting statutes provide for the discretionary award of attorney's fees. Such statutes afford the trial Court with discretion to award fees to the prevailing party, but do not require an award.[168] Statutes providing that a party "may recover," "shall be awarded," or "is entitled to" attorney fees are not discretionary.[169]

"When the testimony concerning the reasonableness and the amount of attorney's fees is not contravened and is not contradicted by other witnesses or not contradicted in the record, and the amount of attorney's fees is established by clear, direct, and positive evidence free from contradictions, inaccuracies, and circumstances; then the amount of attorney's fees is taken as true and established as a matter of law."[170] This is particularly true when "the opposing lawyer has the means and opportunity of either disproving or discrediting the testimony or the evidence which establishes the attorney's fees; but nevertheless, fails to do so…"[171] In such cases the uncontroverted, unimpeached testimony concerning attorney's fees is taken as true and the attorney's fees issue is established as a matter of law under Texas Supreme Court decisional precedents.[172]

Case law makes clear that an award of $0 in attorney's fees for a prevailing Plaintiff is error so long as the fees are proved up with competent evidence.[173] In other words, the court has no discretion to award $0 in fees to a successful Plaintiff, but the court does not have to award the full amount proved.

The DTPA's "shall" attorney's fee language can also come into play if, upon appeal, it is determined that there is no evidence to support an award of attorney's fees as happened in the *Spalding* case.[174] In *Spalding*, the court noted that the trial court took judicial notice of the usual and customary fees associated with such claim, apparently following the language in chapter 38 of the Civil Practice and Remedies Code. However, the judgment entered was not for breach of contract or any other claims listed under Chapter 38, but rather the judgment was under the DTPA. The Court of Appeals determined that judicial notice of fees was limited to claims brought under chapter 38 and consequently found that there is no evidence to support the award of fees.[175]

The court remanded rather than reverse and render, stating the following:

> "Normally, when we find that there is no evidence to support a finding, the remedy is to reverse and render on the point. However, the award of attorney's fees under the DTPA presents a unique situation. This is so because an award of attorney's fees is mandated. The trial court shall award reasonable and necessary attorney›s fees. *Id.* Therefore, here, the proper action is to remand the issue of attorney's fees to the trial court for a determination of the reasonable and necessary attorney's fees to be awarded."[176]

5. Lower Standard of Causation

As stated above, the DTPA uses "producing cause" rather than "proximate cause" as the standard of causation.[177] No *Palsgraf v. Long Island R.R.,* no foreseeability, and just a straight-forward causation test.

6. Post-Judgement Presumptions

The DTPA provides post-judgment relief to prevailing consumers in the form of presumptions. The presumptions arise when 1) a money judgment entered under the DTPA is unsatisfied 30 days after it becomes final, and 2) only if the prevailing party has made a good faith attempt to obtain satisfaction of the judgment.[178] Once the two conditions are met, the following presumptions come into existence:

> (1) that the Defendant is insolvent or in danger of becoming insolvent; and
>
> (2) that the Defendant's property is in danger of being lost, removed, or otherwise exempted from collection on the judgment; and
>
> (3) that the prevailing party will be materially injured

unless a receiver is appointed over the Defendant's business; and
(4) that there is no adequate remedy other than receivership available to the prevailing party.[179]

These presumptions allow a prevailing consumer to petition the court for the appointment of a receiver for the business.[180]

Generally, the appointment of receivers has been held to be within the sound discretion of the trial court, but "the language of section 17.59(b) is mandatory, i.e., 'Upon adequate notice and hearing, the court shall appoint a receiver over the Defendant's business unless the Defendant proves that all of the presumptions…are not applicable.'"[181]

VI. CONCLUSION

The DTPA continues to be an effective tool for bringing claims by consumers regarding the sale or lease of goods or services. Whether representing an individual or a business consumer, understanding the advantages offered by the DTPA can mean the difference between winning and losing. Provisions routinely employed in DTPA cases such as the introduction of evidence that under other circumstances would constitute a violation of the parol evidence rule or recognizing when improper boilerplate terms seek to waive or limit remedies under the DTPA often fly in the face of traditional notions of contract law. Attorneys not familiar with such provisions can be blindsided or miss opportunities for their clients. Don't be one of those.

WHETHER REPRESENTING AN INDIVIDUAL OR A BUSINESS CONSUMER, UNDERSTANDING THE ADVANTAGES OFFERED BY THE DTPA CAN MEAN THE DIFFERENCE BETWEEN WINNING AND LOSING.

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1 The DTPA is found in Tex. Bus. & Comm. Code § 17.41 et. seq.
2 *See*, Richard M. Alderman, The Lawyer's Guide to the Texas Deceptive Trade Practices Act (2nd ed. 2020) for a comprehensive and in-depth analysis of the DTPA and its evolution over time.
3 Tex. Bus. & Com. Code § 17.44(a).
4 Compare the DTPA's definition of consumer, Tex. Bus. & Com. Code § 17.45(4) ("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…") with Cancellation of Certain Consumer Transactions a/k/a The Home Solicitation Act's definition of consumer, Tex. Bus. & Com. Code § 601.001(1) ("an individual who seeks or acquires real property, money, or other personal property, services, or credit *for personal, family, or household purposes*.")(emphasis added) and the Texas Debt Collection Act's (T.D.C.A.) definition of consumer, Tex. Fin. C. § 392.001 (Consumer is "an individual who has a consumer debt;" while Consumer Debt under the T.D.C.A. is defined as "an obligation, or an alleged obligation, *primarily for personal, family, or household purposes* and arising from a transaction or alleged transaction.")(emphasis added).
5 Amstadt v. U.S. Brass Corp., 919 S.W.2d 644, 649 (Tex. 1996).
6 Tex. Bus. & Com. Code § 17.45(4).
7 Amstadt, 919 S.W.2d at 649.
8 *See*, Nast v. State Farm Fire & Cas. Co., 82 S.W.3d 114,122 (Tex. App.– San Antonio 2002, no pet.).
9 *See,* Martin v. Lou Poliquin Enterprises, Inc.*,* 696 S.W.2d 180,184-85 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).
10 *See,* Wellborn v. Sears, Robuck & Co., 970 F.2d 1420, 1426 -27 (5th Cir. 1992).
11 *See, Id.* (Child was intended beneficiary of garage door opener purchase); Kennedy v. Sale, 689, S.W.2d 890, 892-93 (Tex. 1985)(employee beneficiary of insurance policy purchased by employer); Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 815 (Tex. 1997)(buyer of business was consumer with respect to accounting services required to be purchased for sale); HOW Ins. Co. v. Patriot Fin. Serv., 786 S.W.2d 533 (Tex. App.– Austin 1990, writ denied)(tenant is consumer with respect to services purchased by landlord); Parker v. Carnahan, 772 S.W.2d 151 (Tex. App.–Texarkana 1989, writ denied)(wife is consumer with respect to legal services purchased by husband); But see, Vinson & Elkins v. Moran, 946 S.W.2d 381, 408 (Tex. App.– Houston [14th Dist.] 1997, writ dism'd)(Estate beneficiaries were not consumers with respect to legal services).
12 *See,* Houston Livestock Show & Rodeo, Inc. v. Hamrick, 125 S.W.3d 555, 572 (Tex.App.– Austin 2003, no pet.).
13 Tex. Bus & Com. Code § 2A. 103(11).
14 *See*, Exxon v. Dunn, 581 S.W.2d 500 (Tex. Civ. App.– Dallas 1979, no writ)(gratuitous services on car did not confer consumer status); See also, 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).
15 Tex. Bus. & Com. Code § 17.45(1).
16 Hand v. Dean Witter Reynolds Inc., 889 S.W.2d 483, 497 (Tex.App.-Houston [14th Dist.] 1994, writ denied).
17 *See,* Riverside Nat'l Bank v. Lewis*,* 603 S.W.2d 169, 175 (Tex. 1980).
18 *See,* Snyders Smart Shop, Inc. v. Santi, Inc., 590 S.W.2d 167, 170 (Tex. Civ. App.— Corpus Christi 1979, no writ).
19 *See,* Swenson v. Engelstad, 626 F.2d 421, 428 (5th Cir. 1980).
20 *See,* Hand, 889 S.W.2d at 497.

21 *See,* English v. Fischer, 660 S.W.2d 521, 524 (Tex. 1983).
22 *See,* First State Bank v. Chesshir, 634 S.W.2d 742, 747 (Tex. App.– Amarillo 1982, writ ref'd n.r.e.).
23 *See,* Kinnard v. Circle K Stores, 966 S.W.2d 613-617-18 (Tex. App.– San Antonio 1998, no pet.).
24 *See,* Hendricks v. Thorton, 973 S.W.2d 348, 356 (Tex.App.– Beaumont 1998, pet. denied).
25 *See,* Knight v. International Harvester Credit Corp., 627 S.W.2d 382, 389 (Tex. 1982).
26 Tex. Bus. & Com. Code §17.45(2).
27 Tex. Bus. & Com. Code § 17.45(3).
28 Tex. Bus. & Com. Code § 17.45(10).
29 Spraj Props. LLC v. Regions Bank, No. 3:13-CV-3472-N, 2015 U.S. Dist. LEXIS 182417, *21-22 (N.D. Tex. May 12, 2015, no writ)(Citing Citizens Nat'l Bank v. Allen Rae Invs., Inc. 142 S.W.3d 459, 473 (Tex. App.—Fort Worth 2004, no pet.;) See also, Fid. Telealarm, L.L.C. v. Silver Res., Inc., 2004 U.S. Dist. LEXIS 8591, *7 (E.D. Pa. 2004, no writ)(In applying the Texas DTPA, court defined "project" as a "planned undertaking," and held that a long running distribution relationship between two parties constituted a project.)
30 Hugh Symons Group v. Motorola, Inc., 292 F.3d 466 (5th Cir. 2002), *writ denied*, 537 U.S. 90 (2002)(citing Eckman v. Centennial Sav. Bank, 784 S.W.2d 672, 673 n.3, 674 (Tex. 1990)).
31 IDEV Techs., Inc. v. Fed. Ins. Co., No. H-09-3679 2010 U.S. Dist. LEXIS 98282, *6-7 (S.D. Tex. Sept. 2010, no writ) (citing Hugh Symons Group v. Motorola, Inc. 292 F.3d at 469).
32 Restrepo v. Alliance Riggers & Constructors, Ltd., 538 S.W.3d 724, (Tex. App.—El Paso 2017, no pet.),(citing Kennedy v. Sale, 689 S.W.2d 890, 892-93 (Tex. 1985)).
33 Eckman v. Centennial Sav. Bank, 784 S.W.2d 672, 674 (Tex. 1990).
34 Restrepo v. Alliance Riggers & Constructors, Ltd., 538 S.W.3d at 737. See, Hybrid Energy Servs. v. Magness Oilfield Brokerage*, LLC*, No. 5:16-CV-090-, 2016 U.S. Lexis 199415, *7 (N.D. Tex. Jul. 25, 2018, no writ)(Even though Plaintiff is a large Canadian corporation, Plaintiff failed to plead and prove affirmative defense. "Therefore, Plaintiff is a consumer under the DTPA.")
35 Nationsbank, N.A. v. Akin, Gump, Hauer & Feld, L.L.P., 979 S.W.2d 385 (Tex. App.—Corpus Christi 1998, pet. denied).
36 PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship, 146 S.W.3d 79, 91 (Tex. 2004).
37 *Id.* at 92.
38 *See, e.g.,* Trimble v. Itz, 898 S.W.2d 370, 372 (Tex. App.—San Antonio 1995, writ denied per curiam, 906 S.W.2d 481 (Tex. 1995))(Insurance company was not permitted to assume the consumer status of its subrogee for purposes of bringing a claim under the DTPA); Dewayne Rogers Logging, Inc. v. Propac Indus., 299 S.W.3d 374 (Tex. App.—Tyler 2009, pet. denied); But see, Henderson v. Central Power & Light Co., 977 S.W.2d 439, 444 (Tex. App.—Corpus Christi 1998, pet. denied)("Nevertheless, even assuming that Itz is correct, the present case may be distinguished by the fact that the original consumers...are Plaintiffs in this lawsuit, seeking their damages...Even Itz recognized the right of an insurer to pursue a valid subrogation claim in a DTPA lawsuit brought by its insured/obligor."); Graco, Inc. v. CRC, Inc., 47 S.W.3d 742, 746 (Tex. App.—Dallas 2001, pet. denied) (Plaintiff's insurer intervened in DTPA to recover legal fees and expenses incurred on pPaintiff's behalf; although insurer's intervention was dismissed with prejudice, legal fees and expenses were awarded to the Plaintiff. "A claim for attorney's fees belongs to the litigant, not to his attorney.").
39 Tex. Bus. & Com. Code. § 17.50 (a)(1).
40 Tex. Bus. & Com. Code. § 17.45 (3).
41 *See*, Cameron v. Terrell & Garrett, 618 S.W.2d 535, 540-41 (Tex. 1981).
42 *See*, Amstadt, 919 S.W.2d at 650.
43 Tex. Bus. & Com. Code §17.49(c).
44 *Id.*
45 Retherford v. Castro, 378 S.W.3d 29, 36 (Tex. App.—Waco 2012, pet. denied).
46 *Id.* (Citing to Duncanville Diagnostic Ctr., Inc. v. Atlantic Lloyd's Ins. Co*.,* 875 S.W.2d 788, 790 (Tex. App.-Eastland 1994, writ denied).
47 *Id.*
48 *Id.* (Citing to Tex. Occ. Code Ann. § 1102.001(9) (2004) (internal citation omitted).
49 In re R&C Petroleum, In., 236 B.R. 355, 361 (Tyler Bankr. Ct. 1999).
50 Cole v. Central Valley Chemicals, Inc., 9 S.W.3d 207 (Tex. App. – San Antonio, 1999, pet. denied).
51 *Id.* at 210
52 *Id.*
53 Tex. Bus. & Com. Code § 17.49(c).
54 Tex. Bus. & Com. Code § 17.49(g).
55 Head v. U.S. Inspect DFW, Inc., 159 S.W.3d 731, 740 (Tex. App.– Fort Worth 2005, no pet.).
56 Tex. Bus. & Com. Code § 17.45(10).
57 Tex. Bus. & Com. Code § 17.49(f).
58 *See*, Lopez v. Osuna, 453 S.W.3d 60, 70 (Tex. App.—San Antonio 2014, no pet.)(Discussing tie-in statutes under Tex. Bus. & Com. Code § 17.50(h)).
59 Tex. Bus. & Com. Code Ch. 601(The Cancellation of Certain Transactions).
60 Tex. Bus. & Com. Code § 17.49(a).
61 Tex. Bus. & Com. Code § 17.49(b) (Citing to 15 U.S.C.A. 45(a)(1)) (Internal citations omitted).
62 Tex. Bus. & Com. Code. § 17.50 (a).
63 Tex. Bus. & Com. Code § 17.50 (a)(1)(B).
64 Doe v. Boys Clubs, 907 S.W.2d 472, 479-480 (Tex. 1995) (Quoting Spradling v. Williams, 566 S.W.2d 561, 562 (Tex. 1978)).
65 Tex. Bus. & Com. Code § 17.46(b).
66 Tex. Bus. & Com. Code § 17.50(a)(3).
67 Tex. Bus. & Com. Code § 17.45(5).
68 Bradford v. Vento, 48 S.W.3d 749, 760 (Tex. 2001)(quoting Chastain v. Koonce, 700 S.W.2d 579, 583 (Tex. 1985)).
69 *See*, Flenniken v. Longview Bank & Trust Co*.,* 661 S.W.2d 705, 707 (Tex. 1983).
70 *See,* Chastain v. Koonce, 700 S.W. 579, 583 (Tex. 1985); Mays v. Pierce, 203 S.W.3d 564, 572 (Tex. App.– Houston [14th Dist.] 2006, pet denied).
71 *Id.* at *31 n.35 (quoting 49 Tex. Prac., Contract Law § 3.10).
72 *See, e.g.,* Hoover Slovacek LLP v. Walton, 206 S.W.3d 557 (Tex. 2006).
73 Curry v. Lone Star Steel Co., 676 S.W.2d 205 (Tex. App.—Fort Worth, 1984, no writ).
74 Smith v. Baldwin, 611 S.W.2d 611 (Tex. 1980).
75 Coonly v. Gables, No. 04-12-00702-CV, 2013 Tex. App. LEXIS 13862 (Tex. App.—San Antonio Nov. 13, 2013, no pet.).
76 Leblanc v. Lange, 365 S.W.3d 70, 88 (Tex. App.—Houston [1st Dist.] 2011, no pet.).
77 Pony Express Courier Corp. v. Morris, 921 S.W.2d 817, 821 (Tex. App—San Antonio 1996, no writ).
78 In re Palm Harbor Homes, Inc., 195 S.W.3d 672, 677 (Tex. 2006).

79 Venture Cotton Coop. v. Freeman, 435 S.W.3d 222, 228 (Tex. 2014).
80 *Id.* (Quoting 27 Stephen Cochran, Texas Practice Series: Consumer Rights and Remedies § 4.2 at 394).
81 Ski River Dev., Inc. v. McCalla, 167 S.W.3d 121, 136 (Tex. App.—Waco 2005, pet. denied).
82 *Id.*
83 Phila. Indem. Ins. Co. v. SSR Hospitality, Inc., 459 Fed. Appx. 308, 314 (5th Cir. Jan 2012).
84 Delfingen v. Valenzuela, 407 S.W.3d 791, 798 (Tex. App.—El Paso 2013, no pet.).
85 Ridge Natural Resources, LLC v. Double Eagle Royalty, L.P., 564 S.W.3d 105, 131 (Tex. App.—El Paso 2018, no pet.).
86 Ski River Dev., Inc., 167 S.W.3d at 136.
87 In re Palm Harbor Homes, Inc., 195 S.W.3d 672, 678 (Tex. 2006).
88 Miller v. Citicorp Credit Servs., 2019 U.S. Dist LEXIS 205255 (S.D. Tex. Nov. 8, 2019) (Citing In re Palm Harbor Homes, Inc., 195 S.W.3d at 679).
89 *See,* In re Palm Harbor Homes, Inc., 195 S.W.3d at 679.
90 Tex. Bus. & Com. Code § 17.50(a)(2).
91 Parkway Co. v. Woodruff, 901 S.W.2d 434, 438 (Tex. 1995).
92 Tex. Bus. & Com. Code § 17.50(a)(4).
93 Tex. Ins. Code § 541.001.
94 Tex. Ins. Code § 541.151.
95 Tex. Bus. & Com. Code § 17.50(a)(1) (emphasis added).
96 Tex. Bus. & Com. Code § 17.45(11).
97 *Id.*
98 Tex. Bus. & Com. Code § 17.50(h).
99 Arthur Andersen & Co. v. Perry Equipment Corp., 945 S.W.2d 812, 816 (Tex. 1997).
100 Prudential Ins. Co. of Am. v. Jefferson Assocs., 896 S.W.2d 156, 160-61 (Tex. 1995)
101 Doe v. Boys Clubs, 907 S.W.2d at 481.
102 *Id.*
103 Wallace Roofing, Inc. v. Benson, No. 03-11-00055-CV, 2013 Tex. App. LEXIS 14453 (Tex. App.—Austin Nov. 27, 2013, pet. denied).
104 Ford Motor Co. v. Ledesma, 242 S.W.3d 32, 46 (Tex. 2007).
105 *Id.* at 45.
106 Transcontinental. Ins. Co. v. Crump, 330 S.W.3d 211, 223 (Tex. 2010).
107 General Motors Corp. v. Saenz ex. rel. Saenz, 873 S.W.2d 353, 357 (Tex. 1993).
108 *Id.*
109 Bryant v. S.A.S., 416 S.W.3d 52, 65 (Tex. App—Houston [1st Dist.] 2013, pet. denied).
110 Cox, Chanez & Williams v. Howroyd-Wright Empl. Agency, 611 Fed. Appx. 191, (5th Cir. 2015)(quoting *Doe*, 907 S.W.2d at 481).
111 Doe, 907 S.W.2d at 481.
112 *See*, Bartlett v. Schmidt, 33 S.W.3d 35, 39 (Tex. App.—Corpus Christi 2000, pet. denied), but See, Warehouse Assocs. Corp. Ctr. II, Inc. v. Celotex Corp., 192 S.W.3d 225, 244–45 (Tex. App.—Houston [14th] 2006, pet. denied) (Citing to Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171,* 179–81 *(Tex. 1997)*; and *Prudential Ins. Co. of Am.,* 896 S.W.2d at 162–63, "To the extent that Bartlett, Marcus, or the cases cited therein hold that a buyer's independent investigation, without more, is sufficient as a matter of law to defeat an assertion that the seller fraudulently induced the buyer to enter into the contract, these cases are contrary to Prudential, Schlumberger, and the cases cited therein motion.")
113 Dubow v. Dragon, 746 S.W.2d 857, 860 (Tex. App.—Dallas 1988, no writ).
114 Tex. Bus. & Com. Code § 17.50(b)(1).
115 Tex. Bus. & Com. Code § 17.45(9).
116 *Id.*
117 Tex. Bus. & Com. Code § 17.50(b)(1).
118 Tex. Bus. & Com. Code §17.49(c).
119 Tex. Bus. & Com. Code § 17.42(a).
120 Tex. Bus. & Com. Code § 17.42(b).
121 Tex. Bus. & Com. Code § 17.42(b).
122 *See, e.g.*, Stewart Title Guarantee Co. v. Aiello, 941 S.W.2d 68 (Tex. 1997).
123 *See*, Accelerated Christian Education, Inc. v. Oracle Corp., 925 S.W.2d 66, 74 (Tex.App.-Dallas 1996, no pet.) (Concluding that forum-selection clause specifying that parties would litigate in a forum other than Texas did not constitute an impermissible waiver of rights under the DTPA), overruled in part on other grounds by In re Tyco Electronics Power Systems, Inc., No. 05–04–01808–CV, 2005 WL 237232 (Tex.App.-Dallas Feb., 2005, orig. proceeding) (mem.op.).
124 Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 271 (Tex. 1992)
125 *Id.* (Citing to Commerce Park v. Mardian Construction Co., 729 F.2d 334, 338 (5th Cir. 1984)).
126 Tex. Bus. & Com. Code § 17.42(a).
127 *See*, ADT Sec. Servs., Inc. v. Van Peterson Fine Jewelers, 583 S.W.3d 162, 167 (Tex. App.--Dallas 2016, no pet.)
128 Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980).
129 Autohaus, Inc. v. Aguilar, 794 S.W.2d 459, 461 (Tex. App.--Dallas 1990, writ denied) (Quoting Tex. Bus. & Com. Code § 17.44 (1987).
130 Tex. Bus. & Com. Code § 2.202.
131 Tex. Bus. & Com. Code § 17.43 – 17.44.
132 Weitzel v. Barnes, 691 S.W.2d 598, 599–600 (Tex. 1985) (Emphasis added).
133 *Id.*
134 *Id.*
135 Honeywell, Inc. v. Imperial Condo. Ass'n, Inc., 716 S.W.2d 75, 78 (Tex. App.--Dallas 1986 no pet.).
136 Tex. Bus. & Com. Code § 17.42.
137 Sw. Bell Tel. Co. v. FDP Corp., 811 S.W.2d 572, 576 (Tex. 1991) (Citing Martin v. Lou Poliquin Enterprises, Inc., 696 S.W.2d 180, 186 (Tex. App.—Houston [14th] 1985),writ refused n.r.e.)); See, also, Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys., 997 S.W.2d 803, 811 (Tex. App.—Dallas 1999, no pet.).
138 Hycel, Inc. v. Wittstruck, 690 S.W.2d 914, 922 (Tex. App.—1985, writ dism'd).
139 *Id.*
140 Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980).
141 *Id.* (Citing Woo v. Great Southwestern Acceptance Corp., 565 S.W.2d 290, 298 (Tex.Civ.App.--Waco 1978, writ ref'd n.r.e.)).
142 *Id.*
143 See, Baker v. Baker, 207 S.W.2d 244 (Tex.Civ.App.—San Antonio 1947, writ ref'd n.r.e.).
144 Alvarado v. Bolton, 749 S.W.2d 47, 48 (Tex. 1988)(Citing Weitzel, 691 S.W.2d at 600).
145 O'Hern v. Hogard, 841 S.W.2d 135, 137 (Tex. App.—Houston [14th] 1992, no writ).
146 *Id.*
147 Kennemore v. Bennett, 755 S.W.2d 89, 91 (Tex. 1988).
148 *Id.*
149 Wyly v. Integrity Ins. Sols., 502 S.W.3d 901, 911 (Tex. App.—Houston[14th] 2016, no writ))(Quoting Shindler v. Mid–Continent Life Ins. Co., 768 S.W.2d 331, 334 (Tex. App.–Houston [14th Dist.] 1989, no writ)).

150 *Id.*
151 Tex. Bus. & Com. Code § 17.49(f).
152 Transportation Ins. v. Moriel, 879 S.W.2d 10, 16 (Tex. 1994); See also, Tex. Civ. Prac. & Rem. Code §41.001(5) (Defining exemplary damages as "any damages awarded as a penalty or by way of punishment but not for compensatory purposes.").
153 *Id.*
154 Tex. Bus. & Com. Code § 17.50(b)(1).
155 Tex. Civ. Prac. & Rem. Code §41.003(a) (Standards for Recovery of Exemplary Damages under the Damages Act, formerly known as the Exemplary Damages Act.).
156 *See,* Intercontinental Grp. P'ship v. KB Home Lone Star L.P., 295 S.W.3d 650, 653 (Tex. 2009).
157 Tex. Bus. & Com. Code § 17.50(d)(emphasis added).
158 Tex. Bus. & Com. Code § 17.44.
159 Tex. Bus. & Com. Code § 17.50(d).
160 *See,* Bocquet v. Herring, 972 S.W.2d 19, 20–21 (Tex. 1998).
161 *See,* Buccaneer Homes of Ala., Inc v. Pelis, 43 S.W.3d 586, 591 (Tex.App.– Houston [1st Dist.] 2001, no pet.).
162 *See*, Kish v. Van Note, 692 S.W.2d 463, 466 (Tex. 1985).
163 *Id.* (citing to Building Concepts, Inc. v. Duncan, 667 S.W.2d 897, 901 (Tex.Civ.App.–Houston [14th Dist.] 1984, writ ref'd n.r.e.) and Woo v. Great Southwestern Acceptance Corp., 565 S.W.2d 290, 298 (Tex.Civ.App.—Waco 1978, writ ref'd n.r.e.)).
164 *Id.* (Quoting Tex. Bus. & Com. Code § 17.43).
165 Standard Fire Ins. Co. v. Stephenson, 963 S.W.2d 81, 92 (Tex. App.--Beaumont 1997, no writ)(Citing to Orkin Exterminating Co. v. Williamson, 785 S.W.2d 905, 913 (Tex.App.—Austin 1990, writ denied).
166 *See,* Jim Walter Homes, Inc. v. White, 617 S.W.2d 767, 773 (Tex.Civ.App.—Beaumont 1981, writ ref'd n.r.e.)(Allowing recovery under the DTPA and Texas Consumer Code); See also, Kish, 692 S.W.2d at 466(Allowing recovery under DTPA for damages and under The Texas Credit Code for statutory damages allowed).
167 *See,* Byler v. Garcia, 685 S.W.2d 116, 119 (Tex. App.—Austin 1985, writ ref'd n.r.e.)(Citing to Gulf, Code & S.F. Ry. Co. v. Woods, 262 S.W. 229 (Tex.Civ.App.—Austin 1924, no writ)).
168 *See, e.g.,* Commissioners Court v. Agan, 940 S.W.2d 77, 81 (Tex. 1997)(Court has discretion whether to award fees in a Declaratory action); See, also, City of Sherman v. Henry, 928 S.W.2d 464, 474 (Tex. 1996) (Court has discretion whether to award fees under Tex. Loc. Gov't Code § 143.015(c)); and see, Bruni v. Bruni, 924 S.W.2d 366, 368 (Tex. 1996) (Court has discretion whether to award fees in suits affecting the parent-child relationship under Tex. Fam. Code § 106.002).
169 Bocquet v. Herring, 972 S.W.2d 19, 20–21 (Tex. 1998) (Citing to D.F.W. Christian Television, Inc. v. Thornton, 933 S.W.2d 488, 490 (Tex. 1996)); (Tex. Civ. Prac. & Rem. Code § 38.001(8)); See, also, Arthur Andersen & Co. v. Perry Equipment Corp., 945 S.W.2d 812, 818 (Tex. 1997)(Discussing "reasonable and necessary attorneys' fees" under DTPA); Ragsdale v. Progressive Voters League, 790 S.W.2d 77, 86 (Tex.App.—Dallas 1990),aff'd in part and rev'd in part on other grounds, 801 S.W.2d 880 (Tex. 1990) (Applying former Texas Election Code).
170 Ragsdale v. Progressive Voters League, 801 S.W.2d 880 (Tex. 1990).
171 *Id.*
172 *See,* Van Waters & Rogers, Inc. v. Quality Freezers, Inc., 873 S.W.2d 460, 464 (Tex. App.—Beaumont 1994, writ denied)(Citing to Ragsdale, 801 S.W.2d 880).
173 See, Midland W. Bldg. L.L.C. v. First Serv. Air Conditioning Contractors, Inc., 300 S.W.3d 738, 739 (Tex. 2009); See also, Smith v. Patrick W.Y. Tam Tr., 296 S.W.3d 545, 548 (Tex. 2009).
174 Scott v. Spalding, No. 11-07-00264-CV, 2009 WL 223459, at *6 (Tex. App.—Eastland Jan. 30, 2009, no pet.).
175 *Id.*
176 *Id.* (Citing to Tex. Bus. & Com. Code § 17.50(d) (2008) and Leggett v. Brinson, 817 S.W.2d 154, 159 (Tex.App.-El Paso 1991, no writ)).
177 *See,* Arthur Andersen & Co., 945 S.W.2d at 816.
178 Tex. Bus. & Com. Code § 17.59.
179 *Id.*
180 *Id.*
181 Dudley v. E.W. Hable & Sons, Inc., 683 S.W.2d 102, 103–04 (Tex. App.—Tyler 1984, no writ).