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ANNUAL SURVEY OF Texas Insurance Law 2021

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A BUSINESS CONSUMER'S ADVANTAGE
The DTPA'S Role in Small Business Litigation

Recent Developments

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The editors welcome unsolicited lead articles written by practicing attorney, judges, professors, or other qualified individuals. Manuscript length should be approximately 15-30 typed, double-spaced pages. Endnotes should conform to the Sixteenth Edition of A Uniform System of Citation, published by the Harvard Law Review Association.

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Articles

Recent Developments

ANNUAL SURVEY OF TEXAS INSURANCE LAW

2021

By Suzette E. Selden* and Henry Moore**

I. INTRODUCTION

The Texas Supreme Court in *Hinojos v. State Farm Lloyds*, 619 S.W.3d 651 (Tex. 2021), further clarified the decisions in *Barbara Technologies Corp. v. State Farm Lloyds*, 589 S.W.3d 806 (Tex. 2019) and *Alvarez v. State Farm Lloyds*, 601 S.W.3d 781 (Tex. 2020), holding an insurer's acceptance and partial payment of a claim within the statutory deadline do not preclude liability for interest on amounts owed but unpaid when the statutory deadline expires. The Fifth Circuit along with several appellate courts applied the *Hinojos* ruling.[1]

The Fifth Circuit delved into the *Stowers* elements in holding that a primary carrier was required to pay back an excess carrier following a judgment outside of the primary carrier's limits.[2]

And the Texas Supreme Court held insureds must first try and win their underlying claim before proceeding to the extra-contractual damages under the Texas Insurance Code.[3] The insureds, relying on *USAA Texas Lloyds v. Menchaca*, 545 S.W.3d 479 (Tex. 2018), argued this step was unnecessary.

Finally, in *Allstate Ins. Co. v. Irwin*, 627 S.W.3d 263 (Tex. 2021), the Texas Supreme Court affirmed the appellate court's opinion, holding a declaratory judgment action was an appropriate vehicle for uninsured/underinsured motorist cases, and that the trial court had discretion to award attorney's fees.

II. FIRST PARTY INSURANCE POLICIES & PROVISIONS

A. Automobile

An insured driver was sued for allegedly failing to close a gate after he delivered cows. The cows got through the gate and escaped onto the road where one was struck by a car. The injured motorist sued the insured delivery driver. The insurer of the delivery driver intervened in the lawsuit between the motorist and the insured, seeking a declaration that it owed no duty to defend or indemnify under its commercial automobile policy. The court looked at the policy language that covered "use of a covered vehicle" in deciding the case. The court noted the broad interpretation of "use" in the auto insurance context but limited it to those found in *Mid–Century Ins. Co. of Tex. v. Lindsey*, 997 S.W.2d 153, 157 (Tex. 1999), e.g. (1) the accident must have arisen out of the inherent nature of the automobile; (2) the accident must have arisen within the natural territorial limits of an automobile, and the actual use must not have terminated; and (3) the automobile must not merely contribute to causing the condition which produces the injury, but must itself produce the injury. Failing to close a gate during a cow delivery was not considered "use." The court reversed summary judgment for the insured and rendered judgment for the insurer. *State Farm Mut. Auto. Ins. Co. v. Lopez*, No. 13-19-00605-CV, 2020 WL 6878734 (Tex. App.—Corpus Christi-Edinburg 2020, no pet.).

B. Homeowners

An insured sued her homeowner's insurer for failure to pay claims for roof damage, overflow from her washing machine, and a water leak from her air conditioner. There was conflicting evidence on the timing and cause of her loss. The insured argued that a fact dispute precluded summary judgment and that the insurer was limited to the allegations stated in its denial letters. The court did not reach the issue of the denial letters, holding that they encompassed the summary judgment allegations. The court further held the insured had the burden to show the loss was within the policy and failed to do so based on the timing of the loss. The court applied the rule outlined in *Don's Building Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008) to the policy, noting the similar language. The loss must occur during the policy period, not its manifestation. The court stated, "… the only reasonable interpretation of the policy is that it covers a loss that actually "occurs during the policy period," not an earlier loss that manifests during the policy period." The appellate court affirmed summary judgment for the insurer. *Powell v. USAA Cas. Ins. Co.*, 2021 WL 1414217 (Tex. App.—Houston [1st Dist.] April 15, 2021, pet. denied).

C. Commercial Property

A business sued its insurer to recover under an "all-risk" commercial property insurance policy for losses to three of its restaurants allegedly caused by the COVID-19 pandemic. The policy provided business interruption coverage for certain losses to the restaurants. Following the county judge's order that prohibited access to any dine-in restaurants, the insured restaurant company closed its three restaurants until authorities decided the danger from COVID-19 had passed. The insured restaurant provided notice of claim to its insurer the same day. Its insurer submitted a reservation of rights letter stating the COVID-19 pandemic, without more, was not a direct physical loss or damage to property sufficient to trigger policy coverage. The insured's first two complaints were dismissed for failure to state a claim. It filed a third amended complaint alleging breach of contract, breach of the duty of good faith and fair dealing, and violations of the Texas Insurance Code. The insurer moved to dismiss the third amended complaint for failure to state a claim. The policy provides coverage for all losses except those specifically excluded. A covered cause of loss in the policy is defined as a "direct loss" and "loss" is defined as an "accidental physical loss or accidental physical damage." The court noted that, "every district court within the circuit to address the issue has determined that a building's exposure to the coronavirus does not meet this requirement." The insured argued at least one member of its staff contracted COVID-19 while working on the covered property. However, the court stated COVID-19 could be removed from the surfaces by routine cleaning. Therefore, "the mere presence of the virus on Vandelay's property does 'not constitute the direct physical loss or damage required to trigger coverage under the Policy because the virus can be eliminated….'" The court held the insured failed to allege anything about COVID-19 itself that threatened the physical structures of its restaurants, resulting in the dismissal of its case with prejudice. *Vandelay Hospitality Grp., LP v. Cincinnati Ins. Co.*, No. 3:20-CV-1348-D, 2020 WL 5946863 (N.D. Tex. July 13, 2021).

The Texas Supreme Court held insureds must first try and win their underlying claim before proceeding to the extra-contractual damages under the Texas Insurance Code.

III. FIRST PARTY THEORIES OF LIABILITY

A. Breach of Contract

An employer allowed its employees to share in the ownership of the company through an employee stock ownership plan (ESOP). The employer appointed a third-party professional trustee to manage the ESOP's investments. To manage risk, the employer purchased a claims-made executive protection portfolio policy. The employees filed a class action against the trustee alleging that the employer improperly loaned money to the ESOP, which then, at the employer's request, used the funds to buy stock from the employer and its insiders at an inflated price. The employer was not named in the litigation. The trustee requested a defense from the employer who tendered the demands to its insurer. Initially, the insurer paid the defense costs, but subsequently it declined coverage and stopped payment of the defense. The employer filed suit against the insurer for breach of contract and multiple other violations, and the insurer moved for a motion to dismiss which was granted. The employer appealed. The insurer argued that the employer failed to allege it had a duty to provide coverage to the employer under the policy. The court held the demands from the trustee were facially insufficient to trigger the insuring clause, which required the assertion of a "Fiduciary Claim … made against [employer] … for a Wrongful Act committed … by [Martin.]" The insurer argued because the employer was not named in the suit, coverage was not required. The employer is first required to establish that a fiduciary claim against it is covered under the insuring clause. It failed to meet that requirement as there was no claim against the employer directly. However, the employer attempted to invoke an exception to the exclusion, when it first failed to establish coverage under the policy. Coverage must be established first. Therefore, the appeals court affirmed the dismissal of the breach of contract claim. *Martin Res. Mgmt. Corp. v. Fed. Ins. Co.*, No. 20-40571, 2021 WL 42695652021 (5th Cir. Sept. 20, 2021).

B. Unfair Insurance Practices, Deceptive Trade Practices & Unconscionable Conduct

In an underinsured motorist (UIM) case, the insured secured a judgment against the UIM carrier in excess of the combined liability and UIM limits. The insured then sued the insurer for breach of contract, common law bad faith, and insurance code violations. The insurer sought mandamus to block discovery on this second action, arguing that since it paid its UIM limits following the verdict, it was not liable for the causes of action asserted by the insured against it. The opinion goes into detail analyzing the prior case law and noting the sometimes-contradictory opinions. The court ultimately denied mandamus and allowed discovery to go forward, holding that the precedent set by *Arnold v. National County Mutual Fire Insurance*, 725 S.W.2d 165 (Tex. 1987) (modified by *Murray v. San Jacinto Agency*, 800 S.W.2d 826 (Tex. 1990)) controlled this issue. This opinion contains a rich and thorough history of contractual and extra contractual remedies in UM/UIM cases. *In re State Farm Mut. Auto. Ins. Co.*, 614 SW.3d 316 (Tex. App.—Fort Worth 2020, orig. proceeding).

C. Prompt Payment of Claims – Article 21.55

An insured reported damage to his home after a hailstorm. An adjuster inspected the home finding the damage was less than the deductible. The insured requested a second inspection where the adjuster found additional damage, and the insurer paid the amount less the deductible and depreciation. The insured sued the insurer and its adjuster, alleging the insurer violated Texas Insurance Code, chapter 542 by delaying payment of the claim. Almost two years after the insured submitted his claim and fifteen months after he filed suit, the insurer invoked the policy's appraisal clause. The appraiser valued the loss over six times what the second adjuster had determined. The insurer paid the loss, and moved for summary judgment contending that "timely tendering of the appraisal award precludes prompt payment damages under Chapter 542 of the Texas Insurance Code." The insured argued the insurer was subject to statutory liability because it failed to issue payment within the deadlines set out in section 542.057 of the Texas Insurance Code. The trial court granted summary judgment in favor of the insurer, and the appellate court affirmed. Following its decisions in *Barbara Technologies Corp. v. State Farm Lloyds*, 589 S.W.3d 806 (Tex. 2019) and *Alvarez v. State Farm Lloyds*, 601 S.W.3d 781 (Tex. 2020), the Texas Supreme Court held the insured's payment of the appraisal award outside the statutory deadline did not relieve it of Chapter 542 liability. An insurer's acceptance and partial payment of the claim within the statutory deadline does not preclude liability for interest on amounts owed but unpaid when the statutory deadline expires. Therefore, the Texas Supreme Court reversed the judgment of the appellate court and remanded the case to the trial court. *Hinojos v. State Farm Lloyds*, 619 S.W.3d 651 (Tex. 2021) (*dissenting* Justice Blacklock and Justice Guzman) (arguing that in *Barbara Tech.*, the insurer had rejected the full amount of the claim and paid nothing before the sixty-day window closed, whereas in *Hinojos* a timely payment was made but later required an additional payment. Because a payment was made, the insurer should not be liable for delaying payment of a claim, when the appraisal award is later a higher amount.)

In *Hyewon Shin v. Allstate Tex. Lloyd's*, 848 Fed. Appx. 173 (5th Cir. 2021), the district court granted summary judg-

ment in favor of the insurer, concluding that the insurer's pre-appraisal payment to the insured was timely and reasonable, notwithstanding the final appraisal amount was 5.6 times greater than the pre-appraisal amount. The insured appealed, and following the ruling in *Hinojos v. State Farm Lloyds*, 619 S.W.3d 651 (Tex. 2021), the Fifth Circuit vacated the judgment in *Shin* and remanded for further proceedings consistent with *Hinojos*, which held that an insurer's acceptance and partial payment of the claim within the statutory deadline does not preclude liability for interest on amounts owed but unpaid when the statutory deadline expires.

An insured church's property was damaged during a storm. The insured notified its insurer who inspected the property and paid a small amount. The insured requested a second inspection, and additional money was paid. The insured sued the insurer as it argued the damage amount was higher than what the insurer paid. Fifteen months after suit was filed, the insurer moved to compel an appraisal. The appraiser awarded an additional $24,692.10, which the insurer paid. Both parties filed motions for summary judgment on the Texas Prompt Payment of Claims Act (TPPCA), and the trial court granted the insurer's motion in its entirety. Following *Hinojos*, the appellate court reversed the trial court's judgment regarding the TPPCA claim and remanded to the trial court, noting the later payment of an appraisal award did not bar Chapter 542 liability. 619 S.W.3d 651 (Tex. 2021). Additionally, the court stated that because the insurer did not promptly pay the claim, the insured was entitled to interest and attorney's fees as set out by the TPPCA. *First United Methodist Church v. Church Mut. Ins. Co.*, No. 13-18-00048-CV, 2021 WL 3776728 (Tex. App.—Corpus Christi Aug. 26, 2021, no pet. h.).

Homeowners filed a claim for property damage to their home caused by a fire. The insurer made some payments, but the damage amount was still in dispute. All parties agreed to an appraisal. The appraisal award came in closer to the insureds' amount, and the insurer paid the award. Before the appraisal award was issued, the insureds sued the insurer in state court for violation of the insurance policy, bad faith, and violations of the TPPCA. After removing the case to federal court, summary judgment was granted for the insurer on all claims. The insured appealed. The Fifth Circuit affirmed the breach of contract claim in favor of the insurer, as acceptance of the appraisal payment barred the insurers' breach claim seeking payment for the dwelling damage that the appraisal award covered. Additionally, the loss of use claim was not submitted to appraisal and was paid by the insurer. However, the Fifth Circuit reversed the district court's ruling on the TPPCA violation. The Texas Supreme Court in *Hinojos* held that even a pre-appraisal payment that seemed reasonable at the time does not bar a prompt-payment claim if it does not "roughly correspond" to the amount ultimately owed. 619 S.W.3d 651 (Tex. 2021). Therefore, to avoid prompt-payment liability, a pre-appraisal amount must "roughly correspond" to the amount ultimately owed. There is a substantial gap of $185,000 between the pre-appraisal dwelling and personal property payments and the appraisal award in this case. Following the recent clarification in the *Hinojos* case, the claim seeking interest for late-payment of dwelling coverage was remanded. *Randel v. Travelers Lloyds of Tex. Ins. Co.*, No. 20-20567, 2021 WL 3560910 (5th Cir. Aug. 12, 2021).

Insurer initially denied insured homeowner's claim but paid the appraisal award. Insured sued under the Texas Insurance Code, chapter 542 for failure to promptly pay the claim. The court held that it takes more than a simple disparity between the insured's initial evaluation of the claim and the appraisal award to trigger the penalties under chapter 542. Paying the appraisal award is not an "acceptance" of the claim. Otherwise, the prompt payment statute would force insurers to pay claims they had a basis for denying. The appellate court makes an exhaustive analysis of *Barbara Techs. Corp. v. State Farm Lloyds*, 589 S.W.3d 806 (Tex. 2019) in reaching its conclusions noting that the opinion, created "a host of questions." Then the court affirmed summary judgment for the insurer. *Crayton v. Homeowners of Am. Ins. Co.*, No. 02-20-00037-CV, 2020 WL 7639582 (Tex. App.—Fort Worth Dec. 23, 2020, no pet.). It appears the "host of questions" from *Barbara Techs. Corp.* was answered by the Texas Supreme Court in *Hinojos* after this decision was entered. Had *Hinojos* been decided prior to this case, the outcome in favor of the insurer most likely would have been reversed by the appellate court.

IV. DUTIES OF LIABILITY INSURERS

A. Duty to defend

A restaurant hired a payment processing company to handle its credit card payments made by customers. There was a data breach of customers' credit card information involving the unauthorized installation of a program on the restaurant's payment processing devices. The payment processing company owed millions to Visa and MasterCard associated with the breach. The restaurant had a contract with the payment processing company requiring it to indemnify the company for any assessments or fines stemming from the restaurant's failure to comply with the payment brand rules. The payment processing company alleged that the breach was caused by the restaurant's violation of the payment brand rules, and sued the restaurant for breaching their agreement. The restaurant turned to its insurer to provide a defense in the lawsuit and pay the damages. The insurer denied its duty to defend the restaurant arguing the payment processing litigation did not qualify for coverage, as it was not a "personal and advertising injury." The restaurant sued its insurer, and the parties filed cross-motions for summary judgment. The district court denied the restaurant's motion, granted the insurer's motion, and dismissed all the claims. The restaurant appealed. Under the policy, the insurer had a duty to defend if the complaint sought damages "arising out of … [the] [o]ral or written publication … of material that violates a person's right of privacy." Coverage is triggered from reading the eight corners of the policy by a "publication, *in any manner"* that is exposed to view. The complaint in this case alleges that the restaurant published its customers' credit-card information - that is, exposed it to view. Moreover, the policy does not simply extend to violations of privacy rights, the policy extends to all injuries that arise out of such violations. Therefore, the court held the plain text of the policy anticipated the insurer's duty to defend in this litigation. The court noted it does not matter that the payment processing company's legal theories sound in contract rather than tort, and it does not matter that the company rather than individual customers sued the restaurant. Under the eight-corners rule, the court held the insurer must defend the restaurant in the payment processing litigation, reversing the district court's judgment. *Landry's, Inc. v. Ins. Co. of the Pa.*, 4 F.4th 366 (5th Cir. 2021).

The Texas Supreme Court in *Hinojos* held that even a pre-appraisal payment that seemed reasonable at the time does not bar a prompt-payment claim.

A security guard was sitting post in his car when a thun-

derstorm passed through, causing a nearby stream to rise and flood. After his car became inundated, the security guard called for help but could not move to safety. As he escaped the car, floodwaters swept him and the car over an embankment, and his body was not found for two months. His estate sued his employer, who had an insurance policy that covered bodily injury and property damage, but not when such injuries arose out of or resulted from use of an automobile. The insurer bore the burden of establishing that the auto exclusion applied. The court held the insurer failed to show that the injuries resulted from use of the vehicle, and, therefore, affirmed the district court's granting of summary judgment to the employer on the duty to defend issue. Additionally, because the allegations stated that the floodwaters caused the death, not the vehicle, the insurer failed to establish that the vehicle was the producing cause of the injury. The court held the insurer must defend the employer in the underlying lawsuit. *Covington Specialty Ins. Co. v. USAI LP*, No. 21-10010, 2021 WL 4901485 (5th Cir. Oct. 20, 2021).

A lawsuit was brought against the insurer by the receiver for the insured for breach of contract, violations of the Tex. Deceptive Trade Practices Consumer Protection Act, violations of the Texas Insurance Code and breach of the common law duty of good faith and fair dealing. Insured was sued initially for dumping material on land where he mistakenly believed he had permission to dump. Insurer denied coverage asserting the act was intentional and not an "accident." After some discussion, the court agreed with the insurer holding there was no duty to defend or indemnify under these facts. *LaTray v. Colony Ins. Co.*, No. 07-19-00350-CV, 2021 WL 97204 (Tex. App.—Amarillo Jan. 11, 2021, no pet.).

An insured had four layers of liability coverage in a lawsuit with two plaintiffs. The first plaintiff settled and exhausted the first three layers of coverage. The second plaintiff went to trial and secured a judgment within the remaining fourth layer of coverage. The carrier insuring the fourth layer of coverage had a policy that gave the carrier the "right but not the duty" to defend. Insured argued that the fourth carrier assumed the defense so waived its right to decline a defense or alternatively modified the insuring agreement to require a defense. Insured also sued the first layer carrier for terminating its defense early. The Fifth Circuit looked strictly at the policy language, found no waiver or modification, and enforced the policy as written, affirming summary judgment in favor of the insurer. *Tex. Disposal Sys., Inc. v. FCCI Ins. Co*. 854 Fed. Appx. 576 (5th Cir. 2021).

A general contractor was sued for construction defects. The general contractor brought a third-party action against the insured, a subcontractor on the job. The issue in the case was the date of the "occurrence." And, based on that issue whether the insurer had a duty to defend. The insured's work began on December 21, 2015. A certificate of substantial completion was submitted on March 9, 2017. The policy in dispute was effective beginning on October 1, 2017. The "pre-existing injury of damage exclusion" was the issue. The court held that it was unclear from the petition that the loss was outside of the policy period and that the carrier had the burden to prove an exclusion. Therefore, summary judgment in favor of the insurance carrier was reversed. *Tejas Specialty Grp., Inc. v. United Specialty Ins. Co.*, No. 02-20-00085-CV, 2021 WL 2252742 (Tex. App.—Fort Worth, June 3, 2021, no pet. h.).

V. THIRD PARTY THEORIES OF LIABILITY

A. *Stowers* duty & negligent failure to settle

A man was killed after his road bike collided with a stopped truck. His survivors sued the truck's owner, an entity insured by two insurers. The underlying insurer rejected three settlement offers before and during the trial, and the jury awarded the survivors nearly $28 million. The parties eventually settled for nearly $10 million, of which the excess carrier paid nearly $8 million.

The insured had coverage with its primary insurer for $2 million and with its excess carrier for $8 million. Prior to trial, the survivors asked for $2 million, and the primary insurer countered for $500,000. This offer was rejected and the case went to trial. Before the jury reached a verdict, the survivors' counsel first orally offered a high/low of $1.9 million to $2 million with costs. The primary insurer believed this offer was outside of its settlement valuation, as the inclusion of "costs" would push the final settlement beyond $2 million, so it rejected the offer. Then the survivors' counsel sent an email offering to settle for the policy limits of $2 million. The evidence admitted during trial was in favor of the survivors, as evidence that the truck was legally parked was disallowed and testimony from the deceased's daughter about her psychological trauma was allowed. However, the primary insurer declined the offer, resulting in a verdict well outside policy limits.

The excess insurer sued the primary insurer for equitable subrogation, urging that the primary insurer violated its *Stowers* duty by rejecting the settlement offers. The district court held on dueling summary judgment motions that all three demands invoked the *Stowers* duty. Then, after a bench trial, the court held the first rejection was reasonable under *Stowers* but the last two were not, and therefore, the primary insurer was required to pay the excess carrier for its excess payment. The primary insurer appealed regarding whether the second two rejections were reasonable under *Stowers*, as the excess insurer did not cross-appeal the lower court's holding that the primary insurer fulfilled its *Stowers* duty for the first offer.

The Fifth Circuit held the second offer did not invoke *Stowers* as the record revealed confusion regarding the offer's terms, specifically the meaning of "costs." The primary insurer argued that the third offer did not invoke the *Stowers* duty because the spouse's claims were asserted along with her minor children, whom she represented as next of friend. The Fifth Circuit noted no Texas court had ruled on this issue in the *Stowers* context, stating "Texas courts have not explicitly determined whether any uncertainty about judicial and third-party approval necessarily creates an unacceptable "risk of further liability" that precludes a *Stowers* duty." The Fifth Circuit held there is no conflict and thus no "conditionality" precluding the *Stowers* duty, where a lump sum settlement offer is accepted on behalf of parents and children. The issue of fairly dividing the proceeds arises only after the settlement is agreed upon, and Texas courts have the duty to scrutinize apportionments. Therefore, the third offer did invoke the *Stowers* duty because it "proposed to release the insured fully" and it was not conditional. Given the facts turned in favor of the survivors during the trial, the Fifth Circuit held that when presented with the third offer, an ordinary, prudent insurer would have accepted it. The primary insurer violated its *Stowers* duty by failing to reevaluate the settlement value of the case and accept the reasonable offer. The district court's judgment in favor of the excess insurance carrier was affirmed. *Am. Guar. &*

The third offer did invoke the *Stowers* duty because it "proposed to release the insured fully" and it was not conditional.

Liab. Ins. Co. v. ACE Am. Ins. Co., 990 F.3d 842 (5th Cir. 2021).

B. Unfair insurance practices

Insureds' home was damaged in a hailstorm, and they contacted the insurer to review the damage. The adjuster told the insureds the storm only caused cosmetic damage to their metal roof that was not covered under the policy. The insureds later testified this was the first time they were told about the cosmetic damage exclusion. When the insureds purchased the policy, they asked the agent if hail damage to the roof would be covered like it was in their previous policy. The agent told them it would be covered. Shortly after the inspection, the insureds noticed interior leaks in the home. They contacted the insurer for another inspection. Without first inspecting the property, the second adjuster told them that he did not think he would find anything worse than the first adjuster found. The insureds asked to reschedule the second inspection, and two days later the insurer closed the file. The insureds sued the insurer and adjuster for breach of contract, fraud, and violations of the Tex. Ins. Code, and the jury found the insured knowingly engaged in deceptive acts or practices. The evidence showed that if an insured disagreed with an adjuster's finding of cosmetic damage, the insurer required the adjuster to request a report from a structural engineer, which the adjuster did not do. Additionally, the adjuster did not look inside the house for damage, which the insured's claims adjusting expert testified is unreasonable for an adjuster investigating hail damage to a roof. Therefore, the appellate court affirmed the trial court's ruling in favor of the insureds holding the evidence was legally sufficient to support the jury's finding that the insurer knowingly engaged in unfair or deceptive acts or practices. *Allstate Vehicle & Prop. Ins. Co. v. Reininger*, No. 04-19-00443-CV, 2021 WL 2445622 (Tex. App.—San Antonio June 16, 2021, pet. filed).

VI. DAMAGES & OTHER ELEMENTS OF RECOVERY

A. Attorney's fees

In an underinsured motorist claim, the insured filed suit against his insurer under the Uniform Declaratory Judgment Act (Tex. Civ. Prac. & Rem. Code, chapter 37) and the trial court awarded discretionary attorney's fees under the act. The insurer appealed citing *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2006) and arguing that attorney's fees which were denied in *Brainard* under Tex. Civ. Prac. & Rem. Code, chapter 38 were not allowed through any other cause of action. In a 5 – 4 opinion, the Texas Supreme Court held for the insured, affirming the trial court's discretion to award attorney's fees in a declaratory judgment action against an uninsured/underinsured motorist carrier. Several amicus briefs were filed and a motion for rehearing was denied. *Allstate Ins. Co v. Irwin*, No., 627 S.W.3d 263 (Tex. 2021, rehearing denied).

VII. DEFENSES & COUNTERCLAIMS

A. Limitations

An insured homeowner filed a claim with its insurer for damage to his property after a hurricane. On October 13, 2017, the insurer sent a letter accepting the loss, detailing the amount owed under the policy, and enclosing a check for payment of the loss. The insured believed the insurer undervalued his loss. However, no other activity occurred on the claim until January 28, 2019, when the insurer received a letter of representation from the insured's attorney filing a notice of claim. The insurer responded on March 14, 2019, stating it paid the loss in 2017. The insurer invoked the policy's appraisal process, but reserved its rights under the policy. On the same day, the insured's counsel also invoked the appraisal process and sent a demand letter. On December 3, 2019, the insured's counsel filed a declaration for umpire, as the parties' appraisers were at an impasse, and an umpire was appointed on December 9, 2019. On December 30, 2019, after the umpire attempted to talk with both parties to resolve the dispute, the insurer informed the umpire it would no longer participate in the appraisal because limitations passed on October 14, 2019, which was two years and one day from the date it accepted and paid the claim in accordance with the contractual limitations provision in the policy. The insured filed suit for the first time on December 30, 2019. The insured filed a motion for summary judgment alleging the contractual limitations had run, and the trial court granted the motion. Although the general statute of limitations for a breach of contract case is four years, the appellate court held the contractual limitations provision shortening the statute of limitations in the insurance policy did not violate Tex. Civ. Prac. & Rem. Code section 16.070. Additionally, on October 13, 2017, the insured knew that facts came into existence authorizing him to seek judicial remedy because he suffered an injury when the insurer allegedly failed to pay the full value of the claim under the policy. The parties' decision to participate in the appraisal process did not toll or restate limitations under these facts. Therefore, the appellate court affirmed the trial court's summary judgment ruling in favor of the insurer as the statute of limitations ran on October 14, 2019. *Abedinia v. Lighthouse Prop. Ins. Co.*, No. 12-20-00183-CV, 2021 WL 4898456 (Tex. App.—Tyler Oct. 20, 2021, no pet. h.).

B. Res judicata & collateral estoppel

The insured sued both the tortfeasor (with a minimum limits policy) and his underinsured motorist carrier. The UIM claim was severed from the underlying case by the tortfeasor to keep insurance out of his case. Although the verdict in the underlying case exceeded the minimum limits, the liability carrier paid it. After the verdict, but before judgment, the insurer agreed to be bound by the underlying case and moved for judgment based on its agreement to be bound and collateral estoppel from the underlying verdict. The Texas Supreme Court held that since the case settled before judgment was entered, collateral estoppel did not apply. In denying the insurer's motion for judgment based on its agreement to be bound, the court did not reach the timeliness of the agreement, but held that absent a final judgment there was nothing to bind the insurer. The court noted the damages to which the insured is legally entitled remain to be determined in the UIM lawsuit. *In re USAA Gen. Indem. Co.*, No. 20-0075, 2021 WL 1822944 (Tex. May 7, 2021).

VIII. PRACTICE & PROCEDURE

A. Discovery

An insured movie theater sued its insurer after it failed to provide coverage for business interruption losses during the COVID-19 pandemic. The insured in initial disclosures asked to receive categories of documents including: "(1) The drafting of the disputed policy wording and underwriting of the Policy; (2) Factory Mutual's investigation and handling of the claim; (3) Governing procedure manuals (claims and underwriting); (4) Representations to state regulators that inform the meaning of the policy wording; (5) Factory Mutual's knowledge of COVID-19 and Cinemark's loss; (6) Information about other similar COVID-19 claims." The insurer argued the requests were irrelevant and unduly burdensome. The court found the requested information was relevant because it related to the central insurance coverage dispute. If a party fails to make initial disclosures, the evidence cannot be used in their case unless the failure is found

to be harmless. The court held that although the insurer did not produce all relevant information, the insured was not harmed by the delay and ordered the insurer to supplement its initial disclosures within thirty days. *Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.*, No. 4:21-CV-00011, 500 F.Supp.3d 565 (E.D. Tex. 2021, no pet. h.).

The insured sued for uninsured motorist benefits and sought to take the insurer's corporate representative's deposition. The insurer sought mandamus after the trial court ordered the deposition. The Texas Supreme Court allowed the deposition but limited the topics. The Texas Supreme Court noted that the insurer took the "unusual" position that the insured "is not entitled to depose the only party defendant in this suit." In holding that the deposition is allowed, the Court restricted the topics, based on the insurer's stipulations, to 1) any facts supporting the insurer's legal theories and defenses; 2) whether the tortfeasor was an uninsured/underinsured motorist at the time of the collision; and 3) insurer's claims and defenses regarding insured's assertions in this lawsuit. The Texas Supreme Court disallowed any discovery of the underlying claim's handling by the insurer as that part of the case was severed. Finally, the court did not close the door on ever disallowing a corporate representative's deposition. *In re USAA Gen. Indem. Co.*, 624 S.W.3d 782 (Tex. 2021).

The Texas Supreme Court disallowed any discovery of the underlying claim's handling by the insurer as that part of the case was severed.

After a car accident, the injured party collected insurance from the party at fault in a settlement and then filed a lawsuit against his underinsured motorist carrier for the remainder of the damage. His insurer answered with a general denial. The insured noticed the deposition of the insurer's corporate representative on twelve topics: (1) facts surrounding the plaintiff's claims; (2) validity and specifics of the insurance policy sold to plaintiff; (3) plaintiff's rights under the insurance policy at issue; (4) requirements for coverage and payment under the policy; (5) investigation of plaintiff's claims; (6) reasons for denying or limiting plaintiff's claims; (7) defendant's investigation of the tortfeasor; (8) defenses raised in any of the defendant's pleadings; (9) possible defenses not yet raised in defendant's live pleadings; (10) damage model proposed by defendant; (11) process of determining liability and amount of damages in this claim; and (12) settlement negotiations in this case. The insured filed a motion to quash, which the trial court denied. The insurer filed a petition for writ of mandamus, which was granted. The appellate court noted that the relevant issues in the case were the alleged underinsured driver's liability for the underlying accident, the existence and amount of the plaintiff's damages, and whether the other driver was underinsured. The appellate court held the insured is entitled to discover the insurer's defensive contentions raised by its pleadings and the evidence to support them, such as requested by topics 1, 8, & 10. However, the insured did not plead any extra-contractual claims, so topics 5, 6, 7, 11, and 12 addressing the handling of the claim were outside the scope of permissible discovery related to pending claim defenses. Additionally, topics 2, 3, and 4 address the specifics of the policy sold to the insured and his rights under the policy. The court held that because the insurer conceded the policy's validity, compelling corporate representative testimony on these topics was an abuse of discretion. Topic 9 requested possible defenses not yet raised in the insurer's pleadings, and the court found this to be protected work product. Therefore, the court concluded the trial court did not abuse its discretion in compelling a corporate representative's deposition on topics 1, 8, and 10. However, the trial court did abuse its discretion in refusing to narrowly focus the deposition's scope to the facts the insured must prove and the insurer's contentions in defense to those facts. The appellate court ordered the trial court to issue a new order granting part of the insured's motion to compel and part of the insurer's motion to quash in accordance with its opinion. *In re Allstate Fire & Cas. Ins. Co.*, 617 S.W.3d 635 (Tex. App.—Houston [14th Dist.] 2021, no pet.).

B. Appraisal

Several cases involved appraisals and their relation to violations of the Texas Prompt Payment of Claims Act. *See* Section III. C. of this article.

C. Motions for summary judgment

A condo association suffered property damage during a hurricane. The association insured its boat dock, which was destroyed during the hurricane when the governing authority released water from the dam to prevent it from failing. The insured condo association submitted a demand to its insurer who denied coverage. The association sued the insurer, and was granted summary judgment on the coverage issue. The parties submitted a jointly agreed stipulation that the association incurred $190,827.50 in damages and $50,000 in attorney's fees, which was approved and entered by the court. The insured moved for entry of final judgment, which was entered. However, the insurer then claimed that by agreeing to the stipulation, the insured admitted the loss fell within the policy's exclusion for "acts or decisions, including the failure to act or decide, of any person, organization or governmental body." The district court denied the motion, and the insurer appealed. The Fifth Circuit held the floodwater exclusion did not apply because testimony from the association's president confirmed the boat dock was not destroyed by flood waters but rather by a powerful suction effect that pulled debris from the lake and violently whipped it around. The Fifth Circuit also held that if the insurer wanted to rely on the governmental-body exclusion, it was obligated to raise it at the latest at summary judgment which it did not do. Therefore, judgment in favor of the insured by the district court was affirmed. *Playa Vista Conroe v. Ins. Co. of the W.*, 989 F.3d 411 (5th Cir. 2021).

D. Severance & separate trials

The Texas Supreme Court consolidated two appeals where the insureds sought insurance code remedies in uninsured motorist claims. The insurer complained that before the insureds could seek remedies under the insurance code, they must first prove their entitlement to damages by proving liability and damages against the tortfeasor and asked the trial court to bifurcate the case. The insureds, relying on *USAA Texas Lloyds v. Menchaca*, 545 S.W.3d 479 (Tex. 2018), argued this step was unnecessary. The Texas Supreme Court agreed with the insurer, holding that the insureds must first try and win the underlying claim before proceeding to the extra-contractual damages under the insurance code. *In re State Farm*, 629 S.W.3d 866 (Tex. 2021).

IX. OTHER ISSUES

A. Multiple insurers

An insured employee sued two insurers who provided long-term disability (LTD) coverage at his company. One insurer, Standard Ins. Co., provided coverage for the 2016 calen-

dar year, while another insurer, MetLife Ins. Co., provided coverage for the 2017 calendar year. The insured became disabled on November 9, 2016, and received short-term disability benefits. On December 22, 2016, the insured went back to work full-time. Standard's policy terminated on December 31, 2016, and MetLife's policy became effective on January 1, 2017. On January 12, 2017, the insured employee stopped working and became disabled. Standard denied the insured's LTD claim on the basis that it was not covered, and MetLife did not respond to the claim. The insured filed suit against Standard and MetLife. The district court granted summary judgment in favor of MetLife, concluding that a reading of the two policies showed that MetLife owed no benefits to the insured. The Fifth Circuit reviewed the granting of summary judgment de novo. The court noted the Standard policy excluded LTD benefits once benefits become payable to an insured under any other disability insurance plan under which you became insured during a period of temporary recovery. Because the insured in this case became insured under MetLife's policy during his temporary recovery, the Standard exclusion applied, and MetLife must provide LTD benefits coverage. Therefore, the Fifth Circuit reversed and remanded the lower court's ruling. *Talamantes v. Metro. Life Ins. Co.*, 3 F.4th 166 (5th Cir. 2021).

B. Excess & primary coverage

An employee ran a truck into a bridge causing it to collapse, injuring a mother and killing her daughter. The siblings witnessed the accident but were not injured. A lawsuit was brought by the mother, the surviving children, the deceased child's estate and her father. The employer had four insurance policies. All of the claimants, except the father, agreed to settle for an amount that would exhaust all of the first three insurance policies. After payment of the policies, the first insurer notified the other insurers and the insured that it would cease its defense after paying the coverage limits. The last insurer, the only one that had not exhausted its coverage, had a policy that said it had the "right but not the duty," to defend covered claims after the exhaustion of the other three policies. It declined its right to assume the employer's defense, so the employer paid its own defense in the case with the father, which yielded a $1.1 million judgment, which was less than the total policy limits of the four policies. The employer sued the first insurer for withdrawing its defense after payment of the claim. The Fifth Circuit affirmed the lower court's ruling that the first insurer tendered payment after the settlement with the minor children was finalized by the court. The fact that the deceased child's estate settlement was not approved until later, did not prohibit the first insurer from withdrawing its defense after the minor children's settlement was approved, as the minor children's settlement was in excess of the first insurer's policy limits. Therefore, summary judgment was appropriate for the first insurer. Additionally, the Fifth Circuit held the fourth insurer did not waive its condition on its right to defend, and following *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018), the employer did not identify any harms stemming from the fourth insurer's alleged extra-contractual violations beyond the loss of policy benefits, meaning that the employer's extra-contractual claims were barred under *Menchaca*. *Tex. Disposal Sys., Inc. v. FCCI Ins. Co.*, 854 Fed. Appx. 576 (5th Cir. 2021).

> An excess carrier sued the primary carrier for negligently failing to settle the underlying case within its policy limits in a quasi-*Stowers* action. The primary carrier argued that since a minor's claim was involved in the underlying case, the offer of settlement was of necessity conditional. Until a guardian ad litem was appointed and the settlement approved, the offer of settlement remained conditional. The Fifth Circuit rejected that argument and held that the *Stowers* elements were still applicable, affirming the trial court's judgment against the primary carrier. *Am. Guarantee and Liab. Ins. Co. v. ACE Am. Ins. Co.*, 990 F.3d 842 (5th Cir. 2021).

C. Worker's Compensation

An administrative appeal arose out of a medical fee dispute between a medical center and a worker's compensation insurer over the proper amount of reimbursement for services given to a patient. The issue was whether the Administrative Law Judge (ALJ) who heard the case at the State Office of Administrative Hearings (SOAH) erred in placing the burden of proof on the insurance carrier at the hearing. The medical center requested preauthorization from a worker's compensation insurer to perform surgery on a covered patient. The insurer issued a preauthorization letter, and the surgery was performed. After the bill was received, the insurer determined it was responsible for only a very small portion, arguing that most of the bill exceeded the scope of the preauthorization. The medical center submitted a request for medical fee dispute resolution to the Division of Workers' Compensation. The officer found the services rendered were not subject to a contractual fee agreement and found the insurer owed additional money to the medical center. The insurer appealed to SOAH, who concluded that the insurer failed to carry its burden of proving that the medical center was not entitled to additional reimbursement. The insurer filed a petition for judicial review of SOAH's decision. The trial court affirmed, holding the ALJ's order was supported by substantial evidence. The court of appeals addressed one issue that the ALJ erred in placing the burden of proof on the insurer at the SOAH hearing and that this error prejudiced the insurer's substantial rights, thus, reversing the trial

court's judgment and remanding the case to the Division for further proceedings.

The Texas Supreme Court granted the medical center's petition for review, and held that the ALJ's determination regarding the burden of proof was correct. The Division's administrative rules place the burden of proof in a SOAH hearing on the party seeking relief. The party that requested the hearing to challenge the Division's medical fee dispute resolution (MFDR) decision bore the burden of proof at the hearing. The Division decided the proper reimbursement amount in this medical fee dispute, and the medical center was satisfied with the outcome, but the insurer was not and sought review of the decision by requesting a contested case hearing. However, the insurer was the party seeking relief. The ALJ ultimately determined that the insurer failed to meet its burden showing that the medical center was not entitled to the additional reimbursement amount ordered by the Division. The Texas Supreme Court held in a worker's compensation medical fee dispute resolution proceeding, the burden of proof in a contested case hearing before SOAH is on the party seeking review of the Division's initial MFDR decision. Thus, the appellate court erred in holding that the burden always and necessarily remains on the provider. The Texas Supreme Court reversed the court of appeals' judgment and remanded the case. *Patients Med. Ctr. v. Facility Ins. Corp.*, 623 S.W.3d 336 (Tex. 2021).

The burden of proof in a contested case hearing before SOAH is on the party seeking review of the Division's initial MFDR decision.

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1 *Randel v. Travelers Lloyds of Tex. Ins. Co.*, No. 20-20567, 2021 WL 3560910 (5th Cir. Aug. 12, 2021); *Hyewon Shin v. Allstate Tex. Lloyd's*, 848 Fed. Appx. 173 (5th Cir. 2021); *First United Methodist Church v. Church Mut. Ins. Co.*, No. 13-18-00048-CV, 2021 WL 3776728 (Tex. App.—Corpus Christi Aug. 26, 2021, no pet. h.).

2 *Am. Guar. & Liab. Ins. Co. v. ACE Am. Ins. Co.*, 990 F.3d 842 (5th Cir. 2021).

3 *In re State Farm*, 629 S.W.3d 866 (Tex. 2021).

A BUSINESS CONSUMER'S ADVANTAGE

THE DTPA'S ROLE IN SMALL BUSINESS LITIGATION

By Andrew E. Sattler* and Jeffrey D. Sattler**

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).

CFPB'S New-and-Improved Reg F Provides Opportunities for Lenders to Protect Down-The-Line Debt Purchasers

By Amy L. Hanna Keeney* and Joshua Lesser**

The Consumer Financial Protection Bureau ("CFPB") recently rolled out a comprehensive set of provisions to the new-and-improved Reg F.

Regulation F, 12 CFR part 1006 ("Reg F"), implements the Fair Debt Collection Practices Act ("FDCPA") and has, until recently, largely been devoid of guidance to lenders and debt collectors in their efforts—when utilizing newer methods of communication. No longer. The Consumer Financial Protection Bureau ("CFPB") recently rolled out a comprehensive set of provisions to the new-and-improved Reg F, which went into effect November 30, 2021.

As it stands, Reg F will significantly alter best practices for both originating and collecting loans. The *new* Reg F's most notable changes will offer guidelines for modern modes of communication, namely text message and email communications with a borrower, and, provide a safe harbor for inadvertent prohibited third-party disclosures.

I. A Shift to Newer Communication Methods

In the past, debt collectors have avoided the use of email and text message communications because of legal uncertainty amidst statutory silence. In the new Reg F, the CFPB seeks to provide clarity to debt collectors when utilizing these newer communication methods. At the same time, Reg F limits the number of phone calls a debt collector may place to a consumer but creates a presumption of compliance within that limit. Thus, we may see debt collectors shifting away from traditional methods (calling) to newer methods of communication (emails and text messages) in their debt collection efforts.

Reg F clarifies the definition of "harassing, oppressive, or abusive" telephone communications and now includes placing a call to a consumer either (1) more than seven times within seven consecutive days; and (2) within a period of seven consecutive days after having had a telephone conversation with the consumer in connection with collection of a debt (including the date of the conversation as day "1").[1] However, within this limit, the debt collector has presumptively complied.

Additionally, we may see lenders getting more involved in protecting down-the-line debt collectors at the origination phase. Reg F provides broad categories of safe harbors for debt collectors that made an inadvertent prohibited third-party disclosure. **Importantly, this safe harbor can be based on prior "reasonable procedures" by the debt collector *or* the lender.** This will almost certainly give rise to new demand in the debt market for (and with a premium upon) loans that come with the safe harbor protections prepackaged.

II. Safe Harbor for Inadvertent Third-Party Disclosures

The FDCPA generally prohibits third-party disclosures of debt collections to non-debtors.[2] Reg F, as written, will provide a safe harbor from liability for such disclosures over email or text message if it is determined, after the disclosure that the debt collector or, in some cases, the lender followed certain "reasonable procedures" to avoid inadvertent disclosures before they happen.[3]

For email communications, the safe harbor can be based on past acts ("reasonable procedures") by the lender if:

> 1) the lender obtained the email address from the consumer;
> (2) the lender used the email address to communicate with the consumer "about the account" (i.e., not general solicitations) *or* the consumer consented to use of the email address;
> (3) the consumer did not opt out;
> (4) the lender sent the consumer a written or electronic notice that "clearly and conspicuously" made certain disclosures before the debt collector used the email address (such as that the debt will be transferred to a debt collector); (5) the lender provided a "reasonable and simple" opt-out procedure; and
> (6) the consumer was given 35 days to opt out.

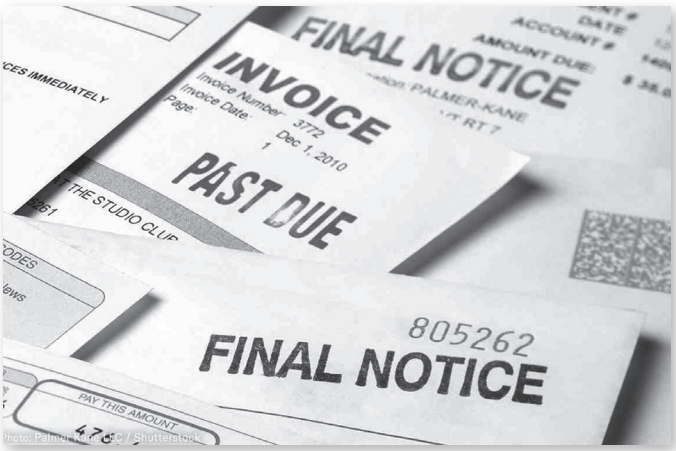
The CFPB's Official Interpretation of Reg F provides that prior communications by the lender "about the account" may include, for example, required disclosures, bills, invoices, periodic statements, payment reminders, and payment confirmations but does not include, for example, marketing or advertising materials unrelated to the consumer's account.

If the lender has not met all of the procedures listed in Reg F, then the debt collector's reliance on the safe harbor must be based on its own "reasonable procedures," which means the debt collector must have "received directly from the consumer" prior consent to use the email address to communicate with the consumer about the debt.

Unlike safe harbor for email communications, the safe harbor for text message communications cannot be based on prior acts by the lender, but only on the debt collector's own "reasonable procedures." A debt collector utilizes reasonable procedures in text message communications if the consumer consents, or, if the debt collector confirms that the telephone number belongs to the consumer and has not been reassigned. Reg F also provides certain procedures for confirming a consumer's telephone number, such as receiving a text message from the consumer, or searching a complete and accurate database of telephone numbers.

The Official Interpretation further provides that "prior consent" to communications may be obtained when a consumer provides an email address or phone number to a lender **or** debt collector, including by registering on the lender's **or** debt collector's website if the website discloses clearly and conspicuously that the lender **or** debt collector may use the email address or phone number to communicate with the consumer about the debt. Under this standard, lenders should consider obtaining prior consent in the loan origination documents.

Finally, all electronic communications must be accompanied by a "clear and conspicuous statement" describing "reasonable and simple" opt-out procedures. The CFPB's Official Interpretation provides samples of reasonable and simple opt-out procedures,



such as a link in an email address or responding "STOP" to a text message. The Official Interpretation likewise provides, by way of example, unreasonable opt-out procedures, such as requiring opt-out by postal mail, telephone, or visiting a website without providing a link.

III. Limited Content Messages

As a threshold matter, the FDCPA generally only regulates "communications," defined in Reg F as the "conveying of information regarding a debt directly or indirectly to any person through any medium." Limited content messages are excluded from this definition.[4]

A limited content message is a voicemail message that must contain:

(i) a business name for the debt collector that does not indicate that it is a debt collector or engaged in the collection of debt (e.g. not "Debt Collectors Inc." or John Smith with the "credit card receivables group");
(ii) a request that the consumer reply;
(iii) the name or one or more natural persons whom the consumer may contact; and
(iv) a telephone number that the consumer can use to reply.

A limited content message may, but is not required to contain:

(i) a salutation;
(ii) a date and time of the limited content message;
(iii) a preferred date and time for the consumer to reply; and/or
(iv) a statement that if the consumer replies, the consumer may speak to any of the company's representatives or associates.[5]

IV. Conclusion

Reg F has provided some clarity and guidance as to how lenders and debt collectors can, by instituting reasonable procedures to avoid the inadvertent disclosure of debt collection efforts to third-parties, avail themselves of the safe harbor provision of 12 CFR 1006.6(d). It is also important for lenders to take note as they will likely see a quick demand from the debt market for debt that comes with the safe-harbor protections prepackaged. And this issue is likely to be of increasing importance as the new CFPB indicates plans to hold lenders and debt collectors more accountable than we've seen in the recent past.

Reg F is not a panacea for all questions FDCPA, however, and lenders and debt collectors will still be left relying on counsel to guide them through *ad hoc* and court-made definitions and tests for when communications are "in connection with the collection of a debt," or when a message is "false, deceptive, or misleading."

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1 12 CFR part 1006.14(a)(2).

2 15 U.S.C. § 805(b).

3 12 CFR part 1006.6(d).

4 12 CFR part 1006.2(d).

5 12 CFR part 1006.2(j).

DECEPTIVE TRADE PRACTICES AND WARRANTY

DTPA REQUIRES GOODS OR SERVICES ARE AN OBJECTIVE OF A QUALIFYING TRANSACTION OR NOT MERELY INCIDENTAL TO IT

PUBLIC RESTROOM SERVICE IS MERELY INCIDENTAL TO CUSTOMERS' GOODS PURCHASES

Campbell v. RaceTrac Petroleum, Inc., ___ F. Supp. 3d ___ (N.D. Tex. 2021).
https://www.leagle.com/decision/infdco20211007983

FACTS: Plaintiffs, David and Kori Campbell, stopped to buy gas, and David went into Defendant RaceTrac gas station to purchase cigarettes and use the restroom. The RaceTrac clerk told David the restrooms were closed. When David asked why the restrooms were closed, the clerk became confrontational and threatened the Campbells with two screwdrivers and a box cutter. After David called the police, the police arrested and charged the clerk with aggravated assault.

The Campbells sued RaceTrac in Texas District Court for Deceptive Trade Practices Consumer Protection Act ("DTPA") violations and various other claims. RaceTrac removed the case to Federal District Court and filed a Motion to Dismiss for Failure to State a Claim under Rule 12(b)(6).

HOLDING: Motion granted.

REASONING: The Campbells argue that they were injured under the DTPA because they relied on RaceTrac's "false, misleading, and deceptive" representations and statements regarding its goods and services, specifically that RaceTrac misrepresented to maintain clean public restrooms and friendly customer service—among other things. Campbells also argued David's desire to use the RaceTrac's bathrooms was an objective of their visit.

The court rejected these arguments stating that a "service" under the DTPA requires either (1) the customer sought or acquired the service by purchase or lease, or (2) that the service was furnished in connection with the sale of goods. The court held the first prong does not apply because the Campbells did not lease or purchase the use of the restrooms nor purchased or leased a larger service package that included the use of the restrooms. The second prong includes collateral services that directly relate to the specific sale and might enter into a consumer's consideration when buying a good. The court found that DTPA services do not include a superior shopping experience or friendly employees. The court held the use of restrooms was merely incidental to customers' goods purchases and not directly related to a specific sale, and that the Campbells are not consumers under the DTPA and dismissed their DTPA claims with prejudice.

DTPA DOES NOT WAIVE GOVERNMENTAL IMMUNITY, WHICH NECESSARILY MEANS A CLAIM UNDER THE DTPA IS A TORT

Owens v. City of Tyler, ___ S.W.3d ___ (Tex. App. 2021).
https://www.leagle.com/decision/intxco20211007418

FACTS: Defendant City of Tyler ("the City") constructed a lake of which they owned the land underneath the lake and the land surrounding the lake. The City had leased three contiguous lots surrounding the lake to Plaintiffs, Owenses, Chatelains, and Terrys (collectively the "Lessees"), which were the subject of this suit. The leaseholds do not extend into the lakebed. However, the City generally allows the Lessees to construct piers and boathouses subject to city approval. In September of 2015, Chatelains' requested to construct a new pier and boathouse. Shortly after, the City denied Terrys' request to construct a pier because it essentially would have prevented Chatelains' access to the lake. Around this time, Owens expressed their discontent with Chatelains' proposed plan because they believed the new boathouse would affect their view of the lake and the value of their property. Chatelains resubmitted a different plan to try and reconcile with Owenses concerns and the City issued a construction permit in February 2017. Subsequently, Owenses and Terrys filed suit against the City and Chatelains for various claims.

Eventually, the City filed motions for summary judgment, and the Lessees dropped their tort claims in conformity with prior representations that they would not be pursuing tort claims against the City. However, the Lessees later amended their pleading to assert new claims of statutory fraud and violations of the DTPA. The trial court granted the City's motion for summary judgment on the tort claims, and the Lessees appealed.

HOLDING: Affirmed.

REASONING: The Lessees argued that their new causes of action were not torts because they were "statutory," and for that reason, they were not estopped. The court disagreed with this argument and held that statutory claims under the DTPA can classify as a tort.

The court reasoned that the Texas Supreme Court has recognized that statutory torts do exist. Furthermore, several courts have held that the DTPA does not waive governmental immunity, which necessarily means a claim under the DTPA is a tort. Lastly, the court reasoned that the statutory fraud act does not waive governmental immunity and is considered a tort.

The Texas Supreme Court has recognized that statutory torts do exist.

Since the claims under the DTPA and statutory fraud act are torts and the Lessees represented they would not be pursuing tort claims against the City, the Lessees were estopped from bringing these actions.

DTPA DOES NOT APPLY TO THE CITY OR ITS SUBDIVISIONS BECAUSE THEY ARE NOT "PERSONS" AS DEFINED BY THE ACT

Payne v. Midcrown Pavilion Apartments, ___ F. Supp. 3d___ (W.D. Tex. 2021).
https://www.casemine.com/judgement/us/612e1c1b4653d03c20da49a7

FACTS: Plaintiff Don Payne signed a lease with Defendant, Midcrown Pavilion Apartments ("Midcrown") and agent Amy Carril-

lo of the San Antonio Housing Authority (SAHA). They contractually agreed to subsidize their rent under the Section 8 Program run by the U.S. Department of Housing and Urban Development (HUD). Payne claimed that they satisfied every payment obligation under the lease, but were nonetheless evicted in retaliation for their request for a reasonable accommodation for a disability.

"Person" means an individual, partnership, corporation, association, or other group, however organized.

Payne sued Defendants for violation of the DTPA. Carrillo moved for dismissal.

HOLDING: Dismissed.

REASONING: Plaintiffs argued that Carrillo violated the DTPA by making misrepresentations about Payne's Facebook page.

The court rejected that argument because the DTPA does not apply to the City or its subdivisions because they are not "persons" defined by the Act. Section 17.45(3) states, "Person" means an individual, partnership, corporation, association, or other group, however organized. The court concluded that SAHA is not subject to the DTPA, and Carrillo acted as an official agent of SAHA. Therefore, Carrillo is entitled to the dismissal of Plaintiffs' DTPA claim.

DTPA AND INSURANCE CODE CLAIMS DID NOT SATISFY THE HEIGHTENED PLEADING REQUIREMENTS UNDER RULE 9(B) BECAUSE THEY DID NOT ALLEGE WITH SUFFICIENT SPECIFICITY THE "WHO, WHAT, WHEN, AND WHERE" OF THE ALLEGED REPRESENTATION

Polinard v. Covington Specialty Ins. Co., ___ F.Supp.3d___ (W.D. Tex. 2021).
https://casetext.com/case/polinard-v-covington-specialty-ins-co

FACTS: Plaintiff Herbert Polinard Jr. leased his property to Club Essence under an agreement requiring the latter to insure the property and listing Polinard as an additional insured. Club Essence contracted insurance with Defendant Covington Specialty Insurance Company ("Covington").

In the middle of the supposed insurance coverage period, the property was damaged by a fire. Polinard submitted and was denied a claim by Covington because the policy was cancelled due to lack of payment from Club Essence.

Polinard sued Covington and the insurance agents for violations of the Texas Deceptive Trade Practices Act for misrepresentation of material facts. Covington removed the case to federal court based on diversity jurisdiction. Polinard moved to remand the case to state court.

HOLDING: Motion denied.

REASONING: Polinard asserted that the insurance agents misrepresented material facts about the policy and thus violated Texas Insurance Code and DTPA.

The court rejected the claims because they did not satisfy the heightened pleading requirements under Rule 9(b) on two grounds. First, Polinard failed to allege sufficient evidence to establish privity with the insurance agents. Polinard needed to show that he was entitled to recover from the policy despite not being the primary insured. Second, Polinard failed to identify in his complaint who of the insurance agents made the promise and how, when, or where it was made. His statutory claims did not allege the misrepresentation with sufficient specificity, and therefore failed to meet the heightened pleading requirement in Rule 9(b).

COUNSEL IS NOT A DTPA CONSUMER AS TO COURT REPORTER HIRED BY OPPOSING COUNSEL

OPPOSING COUNSEL IS NOT THIRD-PARTY BENEFICIARY OF COURT REPORTING SERVICES

Miller v. Kim Tindall & Assocs., LLC, ___S.W.3d___ (Tex. App. 2021).
https://casetext.com/case/miller-v-kim-tindall-assocs-2

FACTS: Defendant-Appellee Kim Tindall & Associates ("KTA") contracted with a defense attorney to provide court reporting services for the depositions of two plaintiffs. Plaintiff-Appellant Kevin Miller, the plaintiff's attorney, requested a copy of the depositions but never received the copy. Miller later learned that KTA had provided final copies to the defense counsel and represented to the court that Miller waived his right to review the transcripts.

Miller sued KTA, alleging DTPA claims based on the KTA's services. KTA filed a plea, arguing that Miller was not a "consumer" under the DTPA. The trial court granted KTA's plea and dismissed Miller's claims. Miller appealed.

HOLDING: Affirmed.

REASONING: Miller argued that he had consumer status under the DTPA, because KTA refused to send him a copy of the deposition transcripts without payment and sent him invoices. Miller also argued that a plaintiff without a direct contractual relationship with the defendant may still be a consumer under the DTPA.

The court rejected Miller's arguments, holding that a person qualifies as a DTPA consumer when he searches or procures goods or services through purchase or lease and the goods or services form the basis of the complaint. Because Miller never received the transcripts and refused to pay the invoices because he had never agreed to purchase them, he had no DTPA consumer status through any direct transaction with KTA.

In limited situations third party beneficiary may be a consumer as long as the transaction was intended for the third party's benefit, required by the third party, and actually found to benefit the third party. Miller did not specifically require KTA's services. Additionally, opposing counsel's procurement of court reporting services for the deposition of Miller's clients was not for Miller's benefit. Because Miller didn't require KTA's services and because they weren't for Miller's benefit, he was not a third-party beneficiary of KTA's services.

DTPA CONSUMER IS REQUIRED TO SHOW EVIDENCE THAT SHE IS A CONSUMER UNDER § 17.46(B) (12).

Elizondo v. U.S. Bank, N.A., ___ S.W.3d.___ (Tex. App. 2021).
https://casetext.com/case/elizondo-v-us-bank

FACTS: Plaintiff-Appellant Ada Elizondo obtained a loan to purchase her home, which Defendant-Appellee U.S. Bank eventually became the final entity to purchase the promissory note and deed of trust. Elizondo later received notice that payment was past due and that she needed to pay $4,207.29 within a month to cure the default and avoid acceleration of the loan. At an unspecified time, Elizondo made a payment of $4,500.00 that the Bank acknowledged would be applied as periodic payments.

Shortly after Elizondo received notice of acceleration, Elizondo filed suit alleging wrongful foreclosure, breach of contract, unfair debt collection practices, and eventually DTPA violations. U.S. Bank filed a traditional and a no-evidence motion for summary judgment, and the trial court granted both of them. Elizondo's motion for new trial was denied. Elizondo appealed.
HOLDING: Affirmed.
REASONING: U.S. Bank argued that Elizondo as a mortgagor was not a "consumer" under the DTPA. Elizondo admitted to her non-consumer status under the DTPA but argued that suing upon §17.46(b) (12) of the DTPA did not require proving consumer status following the holding in *Webb v. Int'l Trucking Co., Inc.*, 909 S.W.2d 220.

The court held that Elizondo's interpretation of *Webb* was misguided, and Elizondo had to prove her consumer status to succeed on her DTPA claim. In *Webb*, the court ruled that the plaintiff did not need to prove their status as a consumer because the plaintiff also brought a claim under the Texas Insurance Code, which was much broader than the DTPA, and thus the plaintiff did not need to prove their status as a consumer.

Here, Elizondo did not bring forth an insurance code action. Rather, her cause of action was a stand-alone DTPA claim. Thus, Elizondo was required to show evidence that she was a consumer under § 17.46(b) (12). Since she conceded her non-consumer status, the court affirmed the trial court's ruling that granted U.S. Bank's no-evidence motion for summary judgment on this claim.

THONG SANDAL REPRESENTED AS A "SHOWER SHOE" DOES NOT VIOLATE DTPA

English v. Aramark Corp., ___ F.4th ___ (5th Cir. 2021).
https://www.govinfo.gov/content/pkg/USCOURTS-ca5-19-20412/pdf/USCOURTS-ca5-19-20412-1.pdf

FACTS: Appellant Jake Anthony English, a Texas inmate, purchased from Appellees Aramark Corporation and Aramark Collective Services, L.L.C. (collectively, "Aramark") a pair of "thong sandals" that were represented in the jail commissary menu as "shower shoe V-Strap XL" (the "product"). The product was a spongy shoe with a strap affixed to the sole but not permanently fixed. English used it in the shower and fell after the strap popped out of the shoe while attempting to dislodge the product from the shower surface.

English sued Aramark seeking damages for his slip and fall, claiming that Aramark violated the DTPA §17.46(b)(5), (7), (9), and (24). After removing the suit to federal district court, Aramark moved for summary judgment. The court granted Aramark's summary judgment and dismissed the case with prejudice. English moved to alter or amend the judgment, but the court denied the motion. English appealed.
HOLDING: Affirmed.
REASONING: English maintained that he would not have purchased the product had it been listed in the commissary menu as "thong sandals." English argued Aramark falsely represented and advertised the product on the commissary menu as a "shower shoe" that could be safe for use in the shower when it was actually "thong sandals," as identified in the purchase order receipt and the new kiosk system for purchasing commissary items.

English argued Aramark falsely represented and advertised the product on the commissary menu as a "shower shoe" that could be safe for use in the shower.

The court upheld the district court's grant of summary judgment to Aramark. It determined that English fell short of meeting the burden of raising a genuine material fact issue on Aramark's material misrepresentation of the product. Specifically, the court explained that English had not alleged, or offered an argument on, what qualities were required for a shoe to serve as a "shower shoe" and why "thong sandals" did not meet that standard. The court recognized that, by listing the product as a "shower shoe," Aramark impliedly represented the product was safe to use in the shower. However, English failed to fully explain why an actual shower shoe would not get lodged on a shower surface and why his injury occurred because he was in a "shower environment." Because English did not raise a fact issue that demonstrated the significance of a shower shoe and how a true shower shoe would have prevented his injury, the court held that a "thong sandal" represented as a "shower shoe" did not violate DTPA.

MORTGAGOR CHALLENGING HOW AN EXISTING MORTGAGE IS SERVICED IS NOT A DTPA CONSUMER BECAUSE THE BASIS OF THE CLAIM IS THE SUBSEQUENT LOAN SERVICING RATHER THAN THE GOODS OR SERVICES ACQUIRED

AN ACTIVITY RELATED TO A LOAN TRANSACTION IS A SERVICE FOR DTPA PURPOSES ONLY IF THE ACTIVITY AT ISSUE IS, FROM THE PLAINTIFF'S POINT OF VIEW, AN OBJECTIVE OF THE TRANSACTION, NOT MERELY INCIDENTAL TO IT

HHH Farms, L.L.C. v. Fannin Bank, ___ S.W.3d ___ (Tex. App. 2021).
https://www.leagle.com/decision/intxco20211112614

FACTS: Appellee Fannin Bank executed a loan agreement with Appellant HHH Farms, L.L.C. ("H. Farms") in which it loaned $750,000 to H. Farms, conditioned on a security agreement in all

of the property described in the promissory note ("Note One"). Fannin and H. Farms later entered into a second loan but made no payments. Both promissory notes contained language saying that H. Farms could not use the collateral to grant further security interests without Fannin's consent. At the time of these two loans, H. Farms also had loans from American Bank. The loans from American predated the Fannin loans. Still, American's branch manager reached out to Fannin to notify it about its own lending relationship with H. Farms. H. Farms paid off the American loans, and American accepted loans without the knowledge that those proceeds were supposed to be used to pay off the Fannin loans.

Fannin filed suit and H. Farms filed a counterclaim alleging violations of the DTPA. The trial court granted summary judgment in favor of Fannin and ordered that Fannin recover the loan amounts from H. Farms. H. Farms appealed.

HOLDING: Affirmed.

REASONING: H. Farms claimed that they were consumers under the DTPA because this transaction was "inextricably intertwined" with the loan evidenced by Note One.

There was no evidence that the loan was made for the purpose of buying a good or service or that their complaint concerned the good or service they purchased.

The court disagreed with H. Farms, stating the loan acquired by H. Farms was simply a loan; there was no evidence that the loan was made for the purpose of buying a good or service or that their complaint concerned the good or service they purchased. The court further stated that the Farm Service Agency (FSA) guaranty and corresponding charges were incidental activities to making the loan, and such incidental activities did not equate to a service under the DTPA. H. Farms' complaint that Fannin violated the DTPA by requiring H. Farms to spend money to acquire an FSA guaranty was a complaint about an act incidental to making the loan. Therefore, the trial court's summary judgment motion in favor of Fannin with regard to the DTPA claim was proper.

DTPA CLAIMS FAIL UNDER FEDERAL RULES OF CIVIL PROCEDURE 9(b) AND 8(a)

Smiley Team II, Inc. v. Gen. Star Ins. Co., ___ F. Supp. 3d___ (S.D. Tex. 2021).
https://casetext.com/case/smiley-team-ii-inc-v-gen-star-ins-co

FACTS: Plaintiff Smiley Team purchased commercial property insurance from General Star Indemnity Company. After the purchase, a vehicle crashed into Plaintiff's building. Plaintiff alleged that when it tried to file an insurance claim with Defendant, the claim was improperly adjusted to issue a lower payment than the actual value of the damage.

Plaintiff sued for violations of the Texas Deceptive Trade Practices Act (DTPA. Defendant moved to dismiss the case.

HOLDING: Dismissed.

REASONING: Plaintiff alleged that Defendant violated DTPA in both fraud and non-fraud-related ways.

The court rejected this argument because Plaintiff's complaint did not provide any supporting details on these violations. The court stated that under Federal Rules of Civil Procedure Rule 9(b), plaintiffs must meet the "who, what, when, where, and how" heightened pleading requirements to state fraud-related DTPA claims. Here, Plaintiff failed to identify any false or misleading statements made by Defendant. Plaintiff also failed to identify the alleged speaker, when the false statements were made, and where. Therefore, the heightened pleading requirements of 9(b) were not met, and the fraud claims were not properly pleaded.

The court also held that there was a more relaxed standard in Rule 8(a) of the FRCP applying to non-fraud-related DTPA claims. In general, Rule 8(a) requires a short statement of the claim showing that the pleader is entitled to relief. Plaintiff's complaint alleged that Defendant violated the DTPA in several ways, but these allegations were nothing more than Plaintiff taking the DTPA's statutory text and pasting it into a complaint. A conclusory statement that there has been a statutory violation is insufficient for the purposes of Rule 8(a).

Since Plaintiff's DTPA claims were conclusory and didn't include any factual support, they were pleaded improperly and could not survive a motion to dismiss.

A "PROJECT" UNDER SECTION 17.49(g) ENCOMPASSES "PLANNED UNDERTAKING[S]" BETWEEN PARTIES

McCoy v. Valvoline, LLC, ___ F. Supp. 3d ___ (N.D. Tex. 2021).
https://www.govinfo.gov/content/pkg/USCOURTS-txnd-3_20-cv-03062/pdf/USCOURTS-txnd-3_20-cv-03062-0.pdf

FACTS: Plaintiffs Tommy McCoy and Tommy McCoy, Inc. contracted under two agreements with Defendant, Valvoline, LLC. Under the agreements, McCoy Inc. purchased approximately $1,300,000 Valvoline's products. After McCoy made three public racist social media posts and caused negative media attention to Valvoline, Valvoline terminated the agreements.

Plaintiffs sued under DTPA in Texas state court. Valvoline removed the case to the federal district court and filed a motion for summary judgment.

HOLDING: Granted.

REASONING: Valvoline argued that Plaintiffs' claims against Valvoline were exempted from the DTPA by §17.49(g) of the Texas Business and Commerce Code and should be dismissed, in light of McCoy's admissions that McCoy Inc. paid approximately $1,300,000 to Valvoline under the agreements. In response, Plaintiffs argued that Valvoline impermissibly totaled all of McCoy's purchases of product from Valvoline to invoke the §17.49(g) exemption and that the correct statutory interpretation only applied the exemption to a transaction or a set of transactions to the same project over $500,000.

The court agreed with Valvoline, stating that Plaintiffs' claims against Valvoline were exempted from the DTPA. The DTPA §17.49 does not apply to a "project" of less than $500,000 where the cost is construed cumulatively when there are a series of transactions. The DTPA does not define "project," but the courts have held that under §17.49(g), it was properly defined as a "planned undertaking" such as financial services, manufacturing, or distribution relationships.

In this case, a "planned undertaking" had occurred between McCoy Inc. and Valvoline through their purchase of various Valvoline products over the course of multiple transactions. Section 17.49(g) however exempted this "planned undertaking" because their total value over the course of multiple transactions surpassed the statutory limit of $500,000. DTPA §17.49(g) is meant to protect transactions smaller than the one at issue here.

DTPA CLAIM SUBJECT TO ARBITRATION AND CHOICE OF LAW CLAUSE

Tex. Star Nut & Food Co. v. Barrington Packaging Sys. Grp., Inc., ___ F. Supp. 3d ___ (W.D. Tex. 2021).
https://www.govinfo.gov/content/pkg/USCOURTS-txwd-5_21-cv-00444/pdf/USCOURTS-txwd-5_21-cv-00444-0.pdf

FACTS: Plaintiff, Texas Star Nut and Food Co. d/b/a Nature's Eats ("Nature's Eats"), entered into a contract with Defendant, Barrington Packaging Systems Group, Inc. ("Barrington"), to purchase a customized bagging machine. The contract required Barrington to deliver the bagging machine within 75 days of receiving a monetary deposit. After Nature's Eats paid the deposit, Barrington failed to deliver the machine within 75 days as promised.

Nature's Eats could not rely on the anti-waiver provisions of the DTPA to avoid the choice-of-law provision.

Nature's Eats filed suit, alleging DTPA violations, breach of contract, fraud and negligent misrepresentation. Barrington moved to compel arbitration, or alternatively, to transfer venue to the Northern District of Illinois for that court to make the arbitration decision.

HOLDING: Motion granted.

REASONING: Barrington argued that the parties entered into an agreement containing an arbitration clause and choice of law clause, and the agreement was enforceable. Nature's Eats argued, if compelled, the clauses would deprive them of their rights and remedies under the DTPA.

The court agreed with Barrington's argument, holding that the DTPA claim was subject to the arbitration and choice of law clauses. Applying state-law contract principles, the court held the parties entered into an enforceable arbitration agreement. First, the court reasoned that if Nature's Eats was challenging the contract as a whole, not just the arbitration provision, then the case would go before the arbitrator. Second, if Nature's Eats was challenging just the choice-of-law provision, then it was binding unless countervailing public policy demands otherwise. Nature's Eats could not rely on the anti-waiver provisions of the DTPA to avoid the choice-of-law provision. Third, if Nature's Eats was just challenging the arbitration provision, the case would go before the arbitrator because the DTPA claim was intertwined and related to the breach of contract claim.

INSURANCE

DTPA AND INSURANCE CODE CLAIMS DID NOT SATISFY THE HEIGHTENED PLEADING REQUIREMENTS UNDER RULE 9(B)

Polinard v. Covington Specialty Ins. Co., ___ F.Supp.3d___ (W.D. Tex. 2021).
https://casetext.com/case/polinard-v-covington-specialty-ins-co

FACTS: Plaintiff Herbert Polinard Jr. leased his property to Club Essence under an agreement requiring the latter to insure the property and listing Polinard as an additional insured. Club Essence contracted insurance with Defendant Covington Specialty Insurance Company ("Covington").

In the middle of the supposed insurance coverage period, the property was damaged by a fire. Polinard submitted and was denied a claim by Covington because the policy was cancelled due to lack of payment from Club Essence.

His statutory claims did not allege the misrepresentation with sufficient specificity, and therefore failed to meet the heightened pleading requirement in Rule 9(b).

Polinard sued Covington and the insurance agents for violations of the Texas Deceptive Trade Practices Act for misrepresentation of material facts. Covington removed the case to federal court based on diversity jurisdiction. Polinard moved to remand the case to state court.

HOLDING: Motion denied.

REASONING: Polinard asserted that the insurance agents misrepresented material facts about the policy and thus violated Texas Insurance Code and DTPA.

The court rejected the claims because they did not satisfy the heightened pleading requirements under Rule 9(b) on two grounds. First, Polinard failed to allege sufficient evidence to establish privity with the insurance agents. Polinard needed to show that he was entitled to recover from the policy despite not being the primary insured. Second, Polinard failed to identify in his complaint who of the insurance agents made the promise and how, when, or where it was made. His statutory claims did not allege the misrepresentation with sufficient specificity, and therefore failed to meet the heightened pleading requirement in Rule 9(b).

DEBT COLLECTION

FDCPA SUIT REVERSED BASED ON *SPOKEO* STANDING REQUIREMENT

Wadsworth v. Kross, Lieberman & Stone, Inc., ___ F.3d ___ (7th Cir. 2021).
https://casetext.com/case/wadsworth-v-kross-lieberman-stone-inc

FACTS: Plaintiff Audrey Wadsworth received a signing bonuses upon hiring on with a company. In the employment agreement, it stated that if the employee voluntarily ended her employment or the company fired the employee for cause within 18 months of the second payment, the employee would be obligated to repay the full bonus. Wadsworth signed the employment agreement and collected both signing bonuses. Wadsworth was fired after completing one year of employment, and the company hired Defendant, Kross, Lieberman & Stone, Inc. ("Kross"), to collect the bonus payments. Wadsworth received a letter and four calls from Kross and subsequently sued them claiming FDCPA violations. The district court entered summary judgment for Wadsworth. Kross appealed.
HOLDING: Reversed.
REASONING: *Spokeo* requires a concrete harm caused by the Defendant in order to adjudicate an FDCPA violation. Concrete harm satisfies the injury-in-fact requirement of standing under the FDCPA only if it impedes the debtor from using that information for a substantive and statutorily supported purpose, such as paying money not truly owed or would have disputed.

Spokeo requires a concrete harm caused by the Defendant in order to adjudicate an FDCPA violation.

Wadsworth alleged that Kross caused her various emotional harms. The court found that emotional harms comprised of anxiety, embarrassment, stress, annoyance, intimidation, infuriation, disgust, indignation, or confusion were not concrete injuries. Wadsworth did not establish that Kross's communications caused her any injury-in-fact. Due to the lack of injury-in-fact in her claim, the court held that Wadsworth did not have standing to file suit.

A VIOLATION OF §1692F CANNOT BE BASED ON CONDUCT THAT CONSTITUTES A VIOLATION OF ANOTHER PROVISION OF THE FDCPA

Vazzano v. Receivable Mgmt. Servs., LLC, ___ F. Supp. 3d ___ (N.D. Tex. 2021). https://law.justia.com/cases/federal/district-courts/texas/txndce/3:2021cv00825/346648/19/

FACTS: Plaintiff Aprile Vazzano was a debtor of Progressive Advanced Insurance Company ("Progressive"). Progressive transferred Vazzano to Receivable Management Services, LLC (RMS) for debt collection. Vazzano sent a letter to RMS informing them that she would be disputing the debt and therefore refused to pay. The letter also indicated that all further communication should be in writing. RMS subsequently sent Vazzano a collection letter regarding the Progressive debt.

Vazzano sued RMS alleging their collection letter violated §§1692c(c), 1692d, and 1692f of the FDCPA and unspecified sections of the TDCPA. RMS moved for judgment on the pleadings under Rule 12(c).
HOLDING: Motion granted.
REASONING: RMS argued that Vazzano's complaint only alleged one instance of potential misconduct and that this act was insufficient to establish conduct that natural consequence of which was to harass, oppress, or abuse any person in connection with the collection of a debt under §1692d, or unfair or unconscionable means under §1692f. Further, RMS argued that §1692f did not apply because it did not cover instances of misconduct that were addressed by another section of the FDCPA.

The court held that because there was no Fifth Circuit decision on whether conduct could violate one part of the FDCPA and §1692f, the court looked to the district courts for guidance. The district courts have assumed that a violation of §1692f cannot be based on conduct that amounts to violations of other FDCPA provisions. Because RMS's conduct, if proven by Vazzano, would constitute a §1692c(c) violation, and she had alleged no other misconduct, she had failed to plead a plausible claim under §1692f.

IN A SUIT FOR DAMAGES UNDER THE FDCPA, THE MERE RISK OF FUTURE HARM, STANDING ALONE, CANNOT QUALIFY AS A CONCRETE HARM

Ward v. Nat'l Patient Account Servs. Sols. Inc., ___ F.3d___ (6th Cir. 2021).
https://law.justia.com/cases/federal/appellate-courts/ca6/20-5902/20-5902-2021-08-16.html

FACTS: Plaintiff Carl Ward incurred medical debt serviced by Defendant National Patient Account Services Solutions, Inc. (NPAS). NPAS sent Ward billing statements and left him voice messages about this debt. The billing statements identified NPAS by its full legal name, but the voice messages referred to NPAS as "NPAS." Eventually, Ward sent a cease-and-desist letter to "NPAS Solutions, LLC," a company entirely unrelated to NPAS; Ward later stated that NPAS's voice messages caused the confusion. Two months after NPAS's last call to Ward, he sued NPAS, alleging three FDCPA violations based on NPAS's voice messages.

The trial court granted summary judgment for NPAS at the close of discovery. Ward appealed.
HOLDING: Vacated and Remanded.
REASONING: Ward asserted two possible varieties of concrete injury. First, the violation of his procedural rights under the FDCPA alone constituted a concrete injury; second, the confusion he suffered, the expense of counsel, and the phone call that he received from NPAS qualified as independent concrete injuries. NPAS argued that Ward lacked Article III standing.

The court agreed with NPAS's argument and, citing *Spokeo* and *TransUnion*, concluded that Ward did not automatically have standing just because Congress authorized a plaintiff

to sue a debt collector for failing to comply with the FDCPA. The Supreme Court in those two cases required the harm to be independent and concrete and more than just a mere risk of harm. When Ward alleged confusion as to NPAS's name due to the voicemails, the court stated that confusion is not a concrete injury under Article III.

The court dismissed the case because Ward failed to show more than a bare procedural violation of FDCPA and did not establish an independent concrete injury.

NO INJURY UNDER *SPOKEO* FOR PARTIAL REVEAL OF ACCOUNT NUMBER IN DEBT COLLECTOR'S LETTER

Brewer v. Law Offices of Mitchell D. Blum & Assocs., LLC, ___ F. Supp. 3d ___ (N.D. Ill. 2021).
https://casetext.com/case/brewer-v-the-law-offices-of-mitchell-d-blum-assocs

FACTS: Plaintiff Tyrone Brewer received a debt collection letter from Defendants, The Law Offices of Mitchell D. Blum & Associates, LLC and CF Medical LLC. Brewer's account number was partially visible through the envelope. Brewer sued under FDCPA. Defendants moved to dismiss for lack of subject matter jurisdiction.

Prospective harm is sufficient to seek prospective relief; but a claim for damages must be accompanied by an allegation of a "concrete harm" that has already occurred.

HOLDING: Dismissed.

REASONING: Brewer argued that partially revealing his account number was an actionable harm because even if nobody deciphered the meaning of the account number, its public display created a real risk that the consumer's private information will be exposed. Under *Spokeo v. Robins*, this exposure was enough for Article III standing.

The court rejected Brewer's argument, holding that prospective harm is sufficient to seek prospective relief; but a claim for damages must be accompanied by an allegation of a "concrete harm" that has already occurred. Brewer was not seeking injunctive relief and had also not plausibly alleged that the disclosure of a partial account number was a concrete harm. Therefore, Defendants' motion to dismiss was granted.

ARBITRATION

AMERICAN EXPRESS WAIVES ARBITRATION BY FILING STATE COURT ACTION

Barnett v. Am. Express Nat'l Bank, ___ F. Supp. 3d ___ (S.D. Miss. 2021).
https://casetext.com/case/barnett-v-am-express-natl-bank

FACTS: Plaintiff, Michelle Barnett, disputed multiple fraudulent charges on her account with Defendant American Express National Bank ("Defendant"). Allegedly, despite knowing the charges were fraudulent, Defendant still reported the account as being charged off to Credit Bureaus and damaged Barnett's credit. The parties executed a valid arbitration agreement in 2013. In September and October 2018, Barnett, on three different occasions, in writing, sent letters to American Express expressing her desire to exercise her right to arbitrate the claim that she owed the "fraudulent" charges. Defendant nevertheless filed a collections suit against Barnett for the charged-off account in May 2019 in Mississippi state court.

In August 2020, Barnett sued Defendant for violations of Fair Credit Reporting Act, and Defendant removed the case to the federal district court. Defendant then filed a Motion to Compel Arbitration in accordance with the 2013 arbitration agreement.

HOLDING: Motion Denied.

REASONING: Barnett argued that Defendant waived its right to arbitration because it substantially invoked the judicial process by filing its state court collections action against her.

The court agreed with Barnett, finding that American Express waived arbitration by filing a state court action against Barnett and failure to respond to Barnett's requests for arbitration despite Barnett's multiple attempts. The court thus denied American Express' Motion to Compel Arbitration.

WAIVER OF RIGHT TO COMPEL ARBITRATION IS CLAIM SPECIFIC AS TO STATE CLAIMS AND DID NOT EXTEND TO LATER-PLED FEDERAL CLAIMS

Forby v. One Techs., L.P., ___ F.4th ___ (5th Cir. 2021).
https://www.lenderlawwatch.com/wp-content/uploads/sites/9/2021/09/Forby-v-One-Technologies-LP.pdf

FACTS: Plaintiff Vickie Forby brought claims against Defendant, One Technologies Capital ("One Tech"), for violating Illinois's Deceptive Trade Practices Act ("ICFA") and for unjust enrichment, claiming that One Tech tricked consumers into signing up for "free" credit reports that were not free, due to a month-to-month subscription that consumers would have to opt-out of once they received their credit reports. The district court denied One Tech's motion to dismiss the ICFA claim. One Tech then motioned to compel arbitration, and the district court granted the motion.

On appeal, the Fifth Circuit Court of Appeals ruled that One Tech had waived its right to arbitration because it sought dismissal of the claims at the district court, and would prejudice Forby, who would have to re-litigate her claims in front of an arbitrator after One Tech already tested its arguments with a district court judge. On remand, Forby filed additional claims under the Credit Repair Organizations Act ("CROA"). One Tech moved to compel arbitration for the amended complaint, and the district court denied the motion. One Tech appealed.

HOLDING: Reversed and Remanded.

REASONING: One Tech argued that its prior waiver of arbitral rights did not extend to the federal claims Forby raised for the first time in her second amended complaint.

The court agreed with One Tech, stating that there is a strong presumption against finding a waiver of arbitration. A waiver is evaluated under a two-step test: 1) whether a party substantially invoked the judicial process, and 2) whether this caused the other party prejudice. For waiver purposes, "a party only invokes the judicial process to the extent it litigates a specific claim it subsequently seeks to arbitrate."

In this case, One Tech never invoked the judicial process for the CROA claim because it was a claim later added by the amended complaint, and One Tech immediately moved to compel arbitration.

RIGHT TO COMPEL ARBITRATION WAIVED BY WAITING TOO LONG

Marino Performance, Inc. v. Zuniga, ___ So. 3d ___ (Fla. Dist. Ct. App. 2021).
https://law.justia.com/cases/florida/fourth-district-court-of-appeal/2021/20-1463.html

FACTS: Plaintiffs filed a class action complaint, alleging that Defendant Marino Performance ("Marino") engaged in deceptive practice. Marino answered the complaint, and each party engaged in discovery and other pretrial matters. Days before the class certification hearing, Marino filed its motion to compel arbitration, raising the issue of arbitration for the first time. Circuit court entered an order on the motion for class certification, finding that Marino waived the right to compel arbitration for the unnamed class members. Marino appealed.

In order to find arbitration waived, the trial court must find that the party attempting to arbitrate act inconsistently with the arbitration right.

HOLDING: Affirmed.

REASONING: Marino argued that its pre-certification conduct could not operate to waive its right to arbitrate since the right didn't exist at that time. Plaintiffs argued that Marino acted inconsistently with its arbitration rights by not asserting its intent to arbitrate before engaging in extensive discovery.

The court agreed with the Plaintiffs, stating that in order to find arbitration waived, the trial court must find that the party attempting to arbitrate act inconsistently with the arbitration right. A key factor in deciding this is whether a party has

substantially invoked the litigation machinery prior to demanding arbitration.

The court found that since Marino did nothing to signal that it was preserving its arbitration right in the event of class certification prior to filing its motion to compel on the eve of the certification hearing and did not raise the arbitration right when filing its answer or responding to discovery requests, it engaged in a litigation strategy of "outcome-oriented gamesmanship." Therefore, Marino waived its right to arbitration as to unnamed class members.

ARBITRATION AGREEMENT UNENFORCEABLE UNDER TAA AND FAA

Nationwide Coin & Bullion Reserve, Inc. v. Thomas, 625 S.W.3d 498 (Tex. App. 2020).
https://casetext.com/case/nationwide-coin-bullion-reserve-inc-v-thomas

FACTS: Plaintiff June Thomas made nine collectible coin purchases from Defendant Nationwide Coin & Bullion Reserve, Inc. ("Nationwide"), each for under $50,000. While Thomas was trying to resell the Chinese Gold Panda Coin back to Nationwide, Nationwide sent Thomas an invoice containing Terms and Conditions with arbitration provision included. Thomas refused to sign.

Thomas sued Nationwide for DTPA violations. Nationwide responded with a motion to compel arbitration. The trial court denied Nationwide's motion, entitling Thomas actual and treble damages under the DPTA. Nationwide appealed.
HOLDING: Affirmed.
REASONING: Nationwide argued that there was a valid arbitration agreement under both Texas Arbitration Act and the Federal Arbitration Act. The court disagreed with Nationwide by holding no enforceable arbitration agreement existed under either TAA or FAA.

The TAA does not apply to agreements for purchases under $50,000, unless the arbitration agreement is in writing, signed by each party, and signed by each party's attorney. Since Thomas's purchases were each less than $50,000 and Thomas refused to sign the arbitration agreement, TAA could not apply.

The FAA also requires the arbitration agreement to be signed by parties in order to be enforceable. The court dismissed the idea that Thomas, a non-signatory, could be bound to the arbitration agreement because Nationwide expressed its intent to have her signature on the invoice upon their repurchase of the Gold Panda Coin. Therefore, neither TAA nor FAA could apply to the agreement between the parties.

DTPA CLAIM SUBJECT TO ARBITRATION AND CHOICE OF LAW CLAUSE

Tex. Star Nut & Food Co. v. Barrington Packaging Sys. Grp., Inc., ___ F. Supp. 3d ___ (W.D. Tex. 2021).
https://www.govinfo.gov/content/pkg/USCOURTS-txwd-5_21-cv-00444/pdf/USCOURTS-txwd-5_21-cv-00444-0.pdf

FACTS: Plaintiff, Texas Star Nut and Food Co. d/b/a Nature's Eats ("Nature's Eats"), entered into a contract with Defendant, Barrington Packaging Systems Group, Inc. ("Barrington"), to purchase a customized bagging machine. The contract required Barrington to deliver the bagging machine within 75 days of receiving a monetary deposit. After Nature's Eats paid the deposit, Barrington failed to deliver the machine within 75 days as promised.

Nature's Eats filed suit, alleging DTPA violations, breach of contract, fraud and negligent misrepresentation. Barrington moved to compel arbitration, or alternatively, to transfer venue to the Northern District of Illinois for that court to make the arbitration decision.

Applying state-law contract principles, the court held the parties entered into an enforceable arbitration agreement.

HOLDING: Motion granted.
REASONING: Barrington argued that the parties entered into an agreement containing an arbitration clause and choice of law clause, and the agreement was enforceable. Nature's Eats argued, if compelled, the clauses would deprive them of their rights and remedies under the DTPA.

The court agreed with Barrington's argument, holding that the DTPA claim was subject to the arbitration and choice of law clauses. Applying state-law contract principles, the court held the parties entered into an enforceable arbitration agreement. First, the court reasoned that if Nature's Eats was challenging the contract as a whole, not just the arbitration provision, then the case would go before the arbitrator. Second, if Nature's Eats was challenging just the choice-of-law provision, then it was binding unless countervailing public policy demands otherwise. Nature's Eats could not rely on the anti-waiver provisions of the DTPA to avoid the choice-of-law provision. Third, if Nature's Eats was just challenging the arbitration provision, the case would go before the arbitrator because the DTPA claim was intertwined and related to the breach of contract claim.

MISCELLANEOUS

USDA PREEMPTION APPLIES TO PRODUCT LABELS ONLY IF USDA HAD ACTUALLY APPROVED THE LABELS

USDA LABEL PREEMPTION DOES NOT APPLY TO WEBSITES

Cohen v. ConAgra Brands, Inc., ___F.4th ___ (9th Cir. 2021). https://pubcit.typepad.com/files/cohen-v-conagra-opinion-102621-1.pdf

FACTS: In 2015, Plaintiff Robert Cohen began purchasing various frozen chicken products produced by Defendant ConAgra Brands, Inc. that were labeled as having no preservatives, no artificial colors, no added hormones, and being made with 100% natural white meat chicken. Cohen later discovered that the products contained three synthetic ingredients used as colorants, preservatives, and thickening agents. He then visited the website, and it contained similar language to the labels.

Cohen brought suit, alleging that ConAgra falsely advertised its frozen chicken products as natural and preservative-free even though they contained synthetic ingredients. The district court dismissed Cohen's claims as preempted by the Poultry Products Inspection Act and found no reason to distinguish between the packaging itself and an image of the packaging viewed over the internet. Cohen appealed.

HOLDING: Reversed and remanded.

REASONING: Cohen argued that there was not enough evidence in the record to support the district court's finding that ConAgra's labels were reviewed and approved by FSIS and that the only evidence presented was the label itself.

The court agreed with Cohen and found that the mere existence of the label was insufficient to establish that it was reviewed and approved by FSIS. Preemption is an affirmative defense, so the defendant bears the burden of pleading and supporting its preemption argument. The court reversed and remanded the district court's holding for the parties to produce the requisite evidence needed to find whether ConAgra's label was approved by FSIS, and therefore whether Cohen's claims would be preempted.

Regarding representations on websites, it has been held that even though these were not labels, if the state law claims were premised upon advertising related to inadequacy of a product label, then it would be treated the same as a claim about the label itself and preempted. *Pure-Gro,* 54 F.3d at 561 (1995). Here though, the label and website were not materially identical because the website had different language: the website claimed that the chicken products as whole were made without preservatives, artificial flavors, or artificial colors, while the label did not. Because of this difference, Cohen's state law claims challenging the website representations were not preempted, whether or not the product labels were reviewed and approved by the FSIS, because they were not premised on the label itself.

RECOVERY FOR MEDICAL EXPENSES FROM A TORTFEASOR LIMITED TO AMOUNT ACTUALLY PAID OR INCURRED AND MUST BE REASONABLE

In re K & L Auto Crushers, LLC, 627 S.W.3d 239 (Tex. 2021). https://law.justia.com/cases/texas/supreme-court/2021/19-1022.html

FACTS: Plaintiff Kevin Walker alleged injuries from a motor vehicle collision with a tractor-trailer rig driven by an employee of K & L Auto. After the accident, Walker received medical treatment and surgeries billed at $1.2 million. Walker's attorneys sent the medical providers "letters of protection" promising to protect the providers' interests "for any reasonable and necessary medical charges." Walker then sued the driver and K & L Auto for recovery.

In response, K & L Auto served subpoenas on Walker's healthcare providers and moved to compel discovery of documents about the reasonableness of the medical expenses and amounts the providers paid for the devices and equipment billed to Walker. These subpoenas, along with a subsequent narrowed request, were quashed without explanation after the providers questioned their breadth and usefulness. K & L Auto petitioned for a writ of mandamus from the Texas Supreme Court after being denied relief in the court of appeals.

HOLDING: Mandamus relief granted.

REASONING: K & L Auto argued they were only required to pay Walker's medical expenses up to a reasonable amount. The trial court's refusal to allow narrowed discovery of the requested documents compromised K & L Auto's reasonable opportunity to defend that unreasonable charges were not recoverable.

In Texas, recovery for medical expenses is limited to amounts actually "paid or incurred" in addition to "any other limitations under law."

The Texas Supreme Court accepted K & L Auto's argument, noting that in Texas, recovery for medical expenses is limited to amounts actually "paid or incurred" in addition to "any other limitations under law." One such additional requirement under common law is that the billed amount be reasonable, and it is well settled in Texas that recovery of medical expenses will be denied unless the party seeking expenses can show evidence to prove the charges were reasonable. A simple showing that the amount desired was billed does not by itself constitute reasonableness.

Note: Effective June 2021 an amendment to section 3.8.001 substituted "organization other than a quasi-governmental entity authorized to perform a function by state law, a religious organization, a charitable organization, or a charitable trust" for the term "corporation," greatly expanding the scope of who may be ordered to pay attorney's fees. Section 1.002 (62) provides:

"Organization" means a corporation, limited or general partnership, limited liability company, business trust, real estate invest-

ment trust, joint venture, joint stock company, cooperative, association, bank, insurance company, credit union, savings and loan association, or other organization, regardless of whether the organization is for-profit, nonprofit, domestic, or foreign.

TRIAL COURT CANNOT ORDER LIMITED LIABILITY PARTNERSHIPS, LIMITED LIABILITY COMPANIES, OR LIMITED PARTNERSHIPS TO PAY ATTORNEY'S FEES

Benge Gen. Contracting, LLC v. Hertz Elec., LLC, ___ S.W.3d___ (Tex. App. 2021).
https://casetext.com/case/benge-gen-contracting-llc-v-hertz-elec-1

FACTS: Appellant, Benge General Contracting, LLC ("BGC"), hired appellees, Hertz Electrical, LLC ("Hertz") and HTJ Global Electric, LLC ("HTJ") to perform electrical work on several commercial sites in North Texas. Hertz and HTJ submitted single page bids and BGC's owner, James Benge, accepted the contracts. Appellees completed all the work required under the contracts and the work passed inspections as required by the city. BGC contended that it later learned that appellees had failed to perform the work competently and hired new electrical contractors to repair the work.

BGC filed suit alleging that appellees failed to perform their duties in a good and workmanlike manner and brought claims for breach of contract and fraud. BGC also sought attorney's fees. The parties moved to trial and the jury returned a verdict for appellees and found for appellees on their breach of contract, fraud claims, and their request for attorney's fees. Importantly, the jury found that Benge was using BGC as his alter ego in perpetrating a fraud on appellees. BGC's motion for a new trial was denied. BGC appealed.

HOLDING: Reversed.

REASONING: BGC argued that the trial court erred in making both BGC and the owner, James Benge, liable for attorney's fees because BGC is an LLC. Further BGC argued that if BGC could not be liable for attorney's fees, and BGC were Benge's alter ego, then, by extension, Benge also could not be liable for attorney's fees. Appellees argued that it would be unfair to allow Benge to get the benefit of an LLC that was a mere corporate fiction and illusory for liability purposes.

The court agreed with BGC. Texas follows the American Rule that litigants may recover attorney's fees only if specifically allowed by statute or contract. Section 38.001 of the Texas Civil Practice and Remedies Code states that a trial court cannot order limited liability partnerships, limited liability companies, or limited partnerships to pay attorney's fees. Here, appellees cited dicta from one federal case and authority establishing that the alter-ego theory permits piercing of the corporate veil of an LLC to hold members liable for an LLC's debts, but they did not cite to any authority applying this doctrine to attorney's fees. The court held that absent mandatory, or at least persuasive, authority applying the alter ego theory to hold an LLC's members liable for attorney's fees that could not be incurred by the LLC, the court must abide by the plain statutory language. Therefore, the court concluded that the trial court abused its discretion in awarding attorney's fees.

NOTE: Effective June 2021 an amendment to section 3.8.001 substituted "organization other than a quasi-governmental entity authorized to perform a function by state law, a religious organization, a charitable organization, or a charitable trust" for the term "corporation," greatly expanding the scope of who may be ordered to pay attorney's fees. Section 1.002 (62) provides:
Organization" means a corporation, limited or general partnership, limited liability company, business trust, real estate investment trust, joint venture, joint stock company, cooperative, association, bank, insurance company, credit union, savings and loan association, or other organization, regardless of whether the organization is for-profit, nonprofit, domestic, or foreign.

SUCCESSFUL PARTY IS REQUIRED TO SEGREGATE ATTORNEY'S FEES, AND IF HE FAILs TO DO SO SHOULD BE GIVEN THE OPPORTUNITY TO SEGREGATE

Wease v. Ocwen Loan Servicing, LLC, ___ F. Supp. 3d ___ (N.D. Tex. 2021).
https://www.govinfo.gov/content/pkg/USCOURTS-txnd-3_13-cv-04107/pdf/USCOURTS-txnd-3_13-cv-04107-2.pdf

FACTS: Plaintiff Michael Wease obtained a home equity loan that was assigned to Defendant Wells Fargo Bank, N.A., and Defendant Ocwen Loan Servicing, LLC (collectively "Ocwen") was the servicing agent for Wease's loan. Ocwen attempted to collect loan payments and foreclose on the Wease's property.

Wease filed suit asserting breach of contract, unclean hands, and violations of RESPA and TDCA. Ocwen answered and counterclaimed for foreclosure. The court entered judgment in Ocwen's favor. Wease appealed and was partially successful when the Fifth Circuit reversed judgment regarding his breach of contract claim and Ocwen's foreclosure counterclaim. On remand, the jury verdict found in Ocwen's favor. Ocwen filed a motion for attorney's fees, and Wease objected to the attorneys' fees related to his partially successful appeal.

HOLDING: Motion partially granted.

REASONING: Ocwen argued that the facts and circumstances were the same or nearly identical as to each cause of action on appeal, and segregating fees incurred in prosecuting each separate claim was impossible. Wease did not assert an argument regarding segregating fees but asserted none of the fees related to the appeal were recoverable.

There must be an attempt to identify the amount of fees attributable to the recoverable claims.

The court held that Ocwen was required to segregate its fees and could recover fees related only to Wease's unsuccessful appeal. In Texas, an appellee may not recover attorneys' fees for work performed on any appealed issue where the appellant was successful. The court reasoned intertwined facts alone were not enough to avoid the general duty to segregate. And even if the claims were dependent upon the same set of facts or circumstances, that did not mean they all required the same research, discovery, proof, or legal expertise. The court recognized some work would not be wholly attributable to a recoverable or unrecoverable claim, and this would not bar recovery. However, there must be an attempt to identify the amount of fees attributable to the

recoverable claims. Because Ocwen did not segregate its fees, the court held it would grant Ocwen the opportunity to segregate.

COURT FINDS THE "SUBSTANTIAL SIMILARITY" TEST APPROPRIATE TO DETERMINE WHETHER NAMED PLAINTIFF HAS STANDING FOR A CLASS

Franklin v. Apple Inc., ___ F. Supp.3d ___ (E.D. Tex. 2021). https://www.leagle.com/decision/infdco20211101a75

FACTS: Plaintiff Robert Franklin purchased an iPhone 6 manufactured by Defendant Apple Inc. The iPhone 6 suddenly exploded and caught fire, causing Franklin to suffer eye and wrist injuries. Franklin alleged that the defective battery caused his iPhone to be unsafe to operate.

Franklin started a class action against Apple Inc. in the United States District Court for the Eastern District of Texas and filed an amended complaint that included a Texas Deceptive Trade Practices Act claim, a design defect claim, manufacturing defect claim, failure to warn claim, and a negligence claim. Apple Inc. moved to dismiss the amended complaint pursuant to 12(b)(6) and 12(b)(1).

HOLDING: Motion denied.

REASONING: Apple argued that the court must dismiss Franklin's class claim with respect to other iPhone 6 series models he did not purchase for lack of subject-matter jurisdiction, and that Franklin lacked standing to bring claims based on products he did not buy.

Franklin countered by stating that he had established standing and that the issue of whether he could bring claims based on products he did not purchase should be addressed at the class certification stage. The court had analyzed this this question in the past, holding that a Plaintiff might assert the claims as long as the products and alleged misrepresentations were substantially similar. Apple argued that even under the substantial similarity approach, Franklin failed to allege that iPhone 6 series models were substantially similar.

Franklin failed to allege that iPhone 6 series models were substantially similar.

The court disagreed with Apple, finding that because the purchased model and unpurchased models were alleged to have the same defect and Apple's alleged wrongful conduct applied to all of the models, Franklin had pleaded substantial similarity between the products at this stage to overcome Apple's motion to dismiss. The "substantially similar" test requires that 1) the products be similar and 2) the alleged misrepresentations at issue are substantially similar. Using the test, the court concluded that Franklin had standing to bring the claims on behalf of the proposed class.

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Happy New Year!

As has become a regular feature of the Winter volume of the *Journal*, this issue includes one of our post popular features, the *"Annual Survey of Texas Insurance Law."* As usual, nearly every one of 2021's reported cases are discussed in the article. A must for all consumer attorneys. A big thank you to the authors, Suzette E. Selden and Henry Moore.

This issue also includes an outstanding article on the DTPA's role in business litigation, *"A Business Consumer's Advantage: The DTPA's Role in Small Business Litigation."* As the authors point out, many business attorneys are not aware that for purposes of the DTPA, many of their business clients are DTPA "consumers." And, *"CFPB's New-and-Improved Reg F Provides Opportunities for Lenders to Protect Down-The-Line Debt Purchasers,"* discusses a comprehensive set of provisions to the new Reg F that went into effect November 30, 2021.

Finally, it would not the *Journal* if it didn't include the *"Recent Developments"* section. This time it discusses more than twenty recent opinions, many focusing on the DTPA.

I hope you enjoy this issue of the Journal. I look forward to a great and healthy 2022.

Richard M. Alderman
Editor-in-Chief