

The Texas Deceptive Trade Practices Act 2005

STILL ALIVE AND WELL

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I. INTRODUCTION

Prior to 1973, Texas consumer law could be summed up in two words, *caveat emptor*.¹ In 1973, however, the Texas Legislature enacted the Texas Deceptive Trade Practices—Consumer Protection Law.² The DTPA, as it soon became known, was quickly recognized as one of the foremost consumer protection statutes in the country. Its broad applicability, no-fault liability, and attractive remedial provisions, encourage attorneys to represent consumers. Courts at all levels followed the mandate of section 17.44 to liberally interpret the DTPA consistent with its stated purpose, which was 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.”³ This mandate, coupled with the language of section 17.43 making it clear that the remedies provided by the DTPA are cumulative to any other procedures or remedies provided for in any other law,⁴ resulted in an extremely favorable climate for plaintiffs and plaintiffs’ attorneys.

But sometimes, too much of a good thing can turn bad. By the early 1990s, the DTPA had become a powerful tool, utilized successfully by consumer attorneys to combat nearly all forms of misrepresentation, deceit, and fraud in the marketplace. The DTPA was also successfully employed, however, in nearly all forms of civil litigation. Our state’s “consumer protection statute” was the preferred basis for litigation involving multi-million dollar commercial transactions,⁵ personal injury arising out of an assault in an apartment complex,⁶ professional malpractice,⁷ and even the traditional slip and fall liability suit.⁸ Actual damages often reached seven figures, additional damages were common, and attorneys’ fees were mandatory.⁹

At the same time attorneys and courts were



embracing the liberal provisions of the DTPA, the political climate in Texas was becoming much more conservative. Gradually, “tort reform” became the phrase of the day. The “tort reform” movement began in earnest in Texas in the mid-1980s.¹⁰ By the end of the 1980s, Texas had enacted substantial changes in the law, and had even attempted to reduce the damages recoverable under the DTPA in non-traditional consumer cases.¹¹ But the real “reform” would come in 1995, when

the Republican controlled legislature enacted a broad reform agenda that included wholesale amendments to the DTPA.¹² With the stated goal of “leveling the playing field,” the legislature substantially amended the Act in an attempt to limit the amount of damages, preclude application of the DTPA to traditional tort suits, exempt certain large transactions, and make it easier for defendants to force a settlement and recover attorneys’ fees for frivolous claims. The 1995 amendments clearly limited the scope of the DTPA and the amount of damages that may be recovered, and gave defendants additional opportunities to settle and a greater likelihood of recovering their attorneys’ fees for defending a DTPA claim. The 2003 session of the legislature saw a second major round of “tort reform” legislation that, although not directly dealing with the DTPA, placed limits on recovery against certain defendants, particularly those in the residential construction business.¹³

The goal of the reformers was to limit the applicability and effectiveness of the DTPA. No one can argue that they did not succeed. The extent of their success, however, is subject to debate. It is clear that the DTPA has been weakened. In absolute terms, the Act does not provide anywhere near the benefits it did for consumers. But an analysis in absolute terms is misleading. To truly evaluate the effectiveness of the DTPA as a tool for consumer attorneys, it must be measured in relative terms.

While the DTPA was being amended and its

application limited by the courts and legislature, other available causes of action were being similarly reviewed, and reduced. Tort claims have been subject to even greater “reform” than the DTPA. Available defendants in tort and contract suits are reduced, damages are limited, comparative responsibility is strengthened, and punitive damages are sharply limited in both availability and amount. In contrast to claims based in tort or contract, the DTPA still provides a no-fault standard of recovery, the lowest causation standard, the most liberal standard for the award of exemplary damages, and mandatory attorneys’ fees. In other words, relative to other available causes of action, the DTPA is still alive and well.

II. APPLICABILITY: PROPER PARTY PLAINTIFF–CONSUMER

Perhaps the most significant even in the past decade of DTPA reform is a change that was not made. The definition of “consumer” has not been changed since the 1983 amendment,¹⁴ which added the business consumer exception. Under section 17.45(4) a consumer is:

an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of \$25 million or more, or that is owned or controlled by a corporation or entity with assets of \$25 million or more.¹⁵

In other words, the DTPA still applies to a broad range of individuals and businesses. It includes any individual purchasing any thing, as well as the vast majority of businesses buying for a business purpose. More significantly, because the definition has remained the same for 21 years, there is a large body of case law interpreting it and upon which attorneys can rely.

1. Requirements

Basically, to be a consumer, a qualified entity must seek or acquire, by purchase or lease, goods or services.¹⁶ Note that there are three requirements that may be satisfied with alternatives in each category. For example, a consumer may seek by purchase goods; or, acquire by purchase services; or, acquire by purchase goods. Because of the significance of this definition (if you are not a consumer you may not use the Act), it has been one of the most litigated sections of the Act. The focus of the litigation has been the meaning of the terms “seek or acquire,” “purchase or lease,” and “goods or services.”

a. Seek or Acquire

Assuming that the party asserting a claim under the Act is an entity within the scope of the definition of consumer, the next question is did that entity “seek or acquire?” Note that it is only necessary that the entity claiming consumer status prove that it either sought or acquired. In most cases, it is simple to determine whether an entity has sought or acquired something. For example, if someone buys something he or she has acquired it. If someone is in the process of buying something, he or she is seeking it. There is no requirement, however, that there be a contractual relationship, a contract, or a payment. For example, in *Martin v. Lou Poliquin Enterprises, Inc.*,¹⁷ Martin

contacted a company to place an advertisement in the local yellow pages. The company failed to properly place the ad and violated the DTPA. The company defended by asserting that because Martin did not pay for its services, there was no consideration and, therefore, Martin was not a consumer. The court held that the DTPA does not require the transfer of consideration. An entity is a consumer if it seeks to purchase goods. The court found the test to be whether the consumer had a good faith intention to purchase, as well as the ability to purchase.¹⁸

As noted above, in most cases it is simple to determine if someone has acquired something. For example, anyone who buys something and takes possession of it has clearly “acquired” it. The courts, however, have held that a good may be “acquired” by someone who actually is not the owner of the good or has taken possession of it. The test is whether the objective of the transaction was to benefit the individual claiming consumer status. In *Wellborn v. Sears, Roebuck & Co.*,¹⁹ a mother brought a DTPA claim on behalf of her deceased son. The claim was based on a defective garage-door opener, bought by the mother for her home. The court held that although there was no contractual relationship between the son and the seller, the son acquired the garage door opener and the benefits it provided. The son acquired the garage door opener when it was purchased for his benefit.²⁰

To show that goods or services were purchased for someone else’s benefit, and confer upon that person consumer status, it is necessary to show more than mere use of, or benefit from, the goods. The person claiming consumer status must be an “intended” rather than an “incidental” beneficiary. For example, a tenant may be a consumer with respect to services purchased by a landlord; an employee may be a consumer with respect to goods purchased by an employer; and a purchaser of property may be a consumer with respect to an inspection paid for by the seller. On the other hand, courts have found that a passenger riding in a car is not a consumer with respect to the car; a friend who borrows goods is not a consumer with respect to the goods; an employee who occasionally uses goods is not a consumer with respect to the goods; and a fiancé of a consumer is not a consumer with respect to goods purchased by the consumer.

b. Purchase or Lease

To be a consumer under the DTPA, an entity must do more than merely seek or acquire goods or services. The goods or services must be sought or acquired by “purchase or lease.” An individual who receives services gratuitously is not a consumer for purposes of the Act. In *Exxon v. Dunn*,²¹ the court held that the plaintiff was not a consumer with respect to services performed on his car because he was not charged for the services, and, therefore, they were not acquired by purchase. Other cases have held that free games of chance, promotional contests, and free legal services are not “purchased” for purposes of the DTPA.

Goods received as a “gift” or that are paid for by another may still, however, be acquired by purchase. This conclusion is based on the Texas Supreme Court holding in *Kennedy v. Sale*.²² In *Kennedy*, an employee who acquired insurance paid for by the employer was held to be a “consumer” for purposes of the DTPA. The court made it clear that although a consumer must acquire goods or services by purchase, one other than the consumer may make the purchase. Thus courts have held that:

- i) a tenant is a consumer as to services purchased by the landlord;²³
- ii) a child is a consumer with respect to services paid for by the parent;²⁴
- iii) a person who receives legal services paid for by another is a consumer with respect to those services;²⁵
- iv) a wife is a consumer with respect to services purchased by the husband;²⁶ and
- v) a purchaser is a consumer with respect to accounting services paid for by the seller.²⁷

Under the same analysis, a person who receives a gift is a consumer provided the gift giver purchases the gift.²⁸ In DTPA parlance, the person who received the gift has “acquired by purchase goods.” The question to ask is: has the entity asserting consumer status either sought to purchase goods or services; or, has it acquired goods or services by a purchase?

c. Goods or Services

The final element in consumer status under the DTPA is that the purchase or lease be of “goods or services.” Note that both of these terms are defined by the Act. “Goods” is defined to mean “tangible chattels or real property purchased or leased for use.”²⁹ It is important to note that the definition of goods includes real estate. “Services” is defined to mean “work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods.”³⁰

In most cases it is not difficult to determine if something is a good. The term goods includes every tangible thing, including real estate and living creatures. Perhaps the best way to discuss this term is to explain what is held to be excluded from the definitions. The term “goods” has been held to include everything except “intangibles.”³¹ Thus, the Act has been held not to apply to money, accounts receivable, stock, options contracts, certificates of deposit, the proceeds of an insurance policy, trademarks, a limited partnership interest, or a lottery ticket.³²

Consistent with the mandate of section 17.44, the definition of the term services has been liberally interpreted by the courts to include repair or construction contracts, insurance contracts, and professional services, such as medical, legal, accounting, investment and architectural. The Texas Supreme Court, however, has held that money is not a good, and a person seeking to borrow money is not seeking a service.³³ Therefore, a person seeking to borrow, or merely borrowing money, is not a consumer under the Act. The purchaser of other banking services, however, may be a consumer. Banking services such as checking and savings accounts,³⁴ preparation of documents,³⁵ advice regarding certificates of deposit,³⁶ processing of title documents,³⁷ loan brokering,³⁸ and the sale of travelers’ checks,³⁹ have all been held to give rise to consumer status.

When evaluating a transaction to determine whether it is subject to the DTPA, it must be evaluated from the consumer’s perspective. For example, in *Flenniken v. Longview Bank & Trust Co.*,⁴⁰ the purchaser of a home sued the bank that provided financing for the builder. The bank, Longview, asserted that Flenniken was not a consumer because Longview only loaned money. The court held that from Flenniken’s perspective there was only one transaction, the purchase of a house. The bank’s financing of the transaction was merely Easterwood’s means of making the sale. Flenniken was a consumer as to anyone who sought to enjoy the benefits of

that transaction.⁴¹ In other words, a loan transaction is subject to the DTPA if, viewed from the consumer’s perspective, it is part of a transaction in goods or services.

Finally, note that goods or services must be purchased or leased “for use.” Purchasing or leasing for any purpose including resale, satisfies this requirement. In *Big H Auto Auctions v. Saenz Motors*,⁴² the court held that the ordinary meaning of “use” should be applied to the DTPA. Therefore, purchasing for any purpose is purchasing “for use.”

d. Business Consumer

Once an entity is a “consumer,” it is within the scope of the Act. The DTPA, however, excludes certain business consumers from the definition. A “business consumer” with assets of \$25 million or more, or one that is owned or controlled by a corporation or entity with assets of \$25 million or more, is not a consumer for purposes of the DTPA. Business consumer is defined by section 17.45(10) to mean “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. It is important to note that not all business consumers are excluded from the Act’s definition, only those business consumers with the required assets. For example,

X Corp. has assets of \$5 million. It recently purchased a widget from Y Corp. In the course of the transaction, Y violated the DTPA. X Corp is a consumer under the Act.

Assume, however, that X Corp is a wholly owned subsidiary of Z Corp. Z Corp has assets in excess of \$50 million. X Corp is not a consumer under the DTPA.

Note that an individual who seeks or acquires goods for personal use is a consumer regardless of the assets of the individual. For example, if Bill Gates buys an automobile for his family he is a consumer under the DTPA. Finally, it is important to note that the defendant has the burden to prove the business consumer exception as an affirmative defense.⁴³

2. Statutory Exemptions

Perhaps the most publicized provisions in the 1995 amendments to the DTPA were those amending section 17.49, exempting certain transactions from the scope of the Act. After passage of the amendments, there was a widely held belief that the DTPA no longer applied to claims against professionals, claims rising out of a personal injury, and most large transactions. As you will see, the scope of the new exemptions to the Act was misunderstood, and widely exaggerated.

Prior to 1995, the exemption provisions of the DTPA were of little consequence. The Act did not apply to newspapers that published advertisements without knowledge of the false, misleading or deceptive nature of the publication; and, nothing in the Act applied to an act or practice authorized by specific rules or regulations of the Federal Trade Commission.⁴⁴ Many believed these exemptions sounded a death knell for the DTPA. In fact, they simply make clear that the DTPA does not apply to a transaction unless its provisions have been violated.

a. Professional Services

Section 17.49(c) provides that nothing in the DTPA shall apply to “a claim for damages based on the rendering of a professional service, the essence of which is the providing

of advice, judgment, opinion, or similar professional skill.”⁴⁵ Note that this section does not exempt all “professional services,” rather it exempts only a service “the essence of which” is advice, judgment, opinion, or other professional skill. Thus, some professional services will be subject to the provisions of the Act, while others will not.⁴⁶ Additionally, because the focus of the exemption is the rendering of a service, not the occupation of the provider, a professional may render some services subject to the Act, while other services would be exempt. Two examples demonstrate this:

Stuart is a real estate broker. Casey hires Stuart to obtain a property evaluation and sales recommendation regarding some property he intends to sell. Stuart prepares a report indicating the potential value of the property based on several different growth scenarios. The services provided by Stuart involved advice, judgment, and opinion.

Stuart is also contacted by Carey. Carey hires Stuart to list his house with the listing service, to place advertisements for the sale and to show the home to potential purchasers. The essence of the service provided by Stuart is not advice, judgment or professional opinion.

Although most transactions will have to be individually evaluated to determine if their “essence” is advice, judgment or opinion, it is expected that most services provided by attorneys, physicians, and architects will be classified as “professional” within the scope of this exemption.

1) Exceptions to the Exemption

Section 17.49(c) of the DTPA exempts certain professional services. The significance of this exemption is substantially reduced, however, by virtue of subsections 17.49(c) (1)-(4) which provide that “This exemption does not apply to:

1. an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion;
2. a failure to disclose information in violation of Section 17.46(b)(23);
3. an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion; or
4. breach of an express warranty that cannot be characterized as advice, judgment, or opinion.⁴⁷

These “exceptions” to the exemption of section 17.49(c) substantially reduce the significance of the exemption. For example, an attorney who acts in an unconscionable manner is still subject to the DTPA.⁴⁸ Similarly, a physician who makes a misrepresentation of fact is not exempt from the Act.⁴⁹ Additionally, any claim based on the failure to disclose is still a viable claim under the DTPA, even if the defendant is a professional.⁵⁰

The DTPA professional services exemption is, in reality, very narrow, and does not constitute a significant change in the law.⁵¹ A general malpractice claim, based entirely on a professional’s failure to follow a reasonable standard of performance, is exempt from the scope of the DTPA. Claims based on a misrepresentation of fact, unconscionability, or failure to disclose, however, are still subject to the DTPA regardless of whether the actor is a professional.

b. Personal Injury Claims.

DTPA § 17.49(e) states:

Except as specifically provided by Subsections (b) and (h), Section 17.50, nothing in this subchapter shall apply to a cause of action for bodily injury or death or the infliction of mental anguish.

Although some have suggested that this provision exempts all claims involving personal injury from the DTPA, this clearly is not the case. A plain reading of this provision makes it clear that a claim for personal injury is within the scope of the DTPA, as long as it is within the provisions of section 17.50(b) or (h). In other words, only those claims that are outside of section 17.50(b) and (h) are exempt from the Act. In light of the fact that sections 17.50(b) and (h) are the only remedial provisions in the DTPA, it is difficult to see what this exemption really applies to. In fact, the exemption serves just one important purpose. The exemption makes it clear that recoverable damages arising out of a personal injury claim are limited to those specifically authorized by the language of the Act.

Subsection 17.50(b), discussed below, is the general damage provision of the Act. Subsection 17.50(h), discussed below, is the damage provision for “tie-in statutes.” Together, these provisions allow for the recovery of most damages arising from a personal injury. For example:

Jane brought her car into Bob’s repair shop to have the breaks repaired. Bob improperly repaired the brakes, violating the DTPA. As a result, the car crashed, destroying the car and injuring Jane. Jane brought a claim under the DTPA seeking damages for the value of the car, reimbursement of medical bills, pain and suffering, mental anguish and loss of consortium. Under section 17.50(b) she may recover her “economic loss,” including the value of the car and her medical expenses, excluding pain and suffering and loss of consortium. She also may recover mental anguish damages if she establishes that Bob’s acted “knowingly.”

Pat went to a health club. The health club, in violation of the Health Spa Act, misrepresented the services it would provide and the nature of its program. As a result, Pat was injured using the equipment. He filed suit under the DTPA for violation of the Health Spa Act, a “tie-in” statute. He sought damages for medical expenses, pain and suffering, mental anguish, and loss of consortium. He is entitled to recover his “actual damages” including all elements of damages alleged.

Although some have suggested that this provision exempts all claims involving personal injury from the DTPA, this clearly is not the case.



c. Large Transactions

The DTPA also exempts certain large transactions from the scope of the Act. Section 17.49 provides two “large transaction” exemptions; one for transactions over \$100,000 and another for those in excess of \$500,000.

Under section 17.49(f), certain transactions in excess of \$100,000 are not subject to the Act. The DTPA does not apply to a claim arising out of a written contract if the contract relates to a “transaction, project, or set of transactions related to the same project” involving consideration by the consumer of more than \$100,000.⁵² This exemption for claims arising out of a written contract requires that the consideration must be more than \$100,000. Note, however, that it does not require one transaction. The exemption applies to a transaction, project, or set of transactions, as well. For example, the purchase of property for \$50,000 and improvements for \$75,000 would be sufficient to invoke this exemption. Note, however, that this exception applies only if the consumer is represented by an attorney, and if the attorney who represents the consumer is not directly or indirectly identified, suggested, or selected by the defendant or an agent of the defendant.⁵³

Significantly, the exemption of section 17.49(f) does not apply to a transaction involving the consumer’s residence.⁵⁴ Residence is defined by section 17.45(12) to mean a building

- (A) that is a single-family house, duplex, triplex, or quadruplex or a unit in a multiunit residential structure in which title to the individual units is transferred to the owners under a condominium or cooperative system; and
- (B) that is occupied or to be occupied as the consumer’s residence.

Section 17.49(g) provides a second exemption for large transactions. The DTPA does not apply to a cause of action arising out of a transaction, a project, or a set of transactions relating to the same project, involving a total consideration by the consumer of more than \$500,000.⁵⁵ Note that although the total consideration paid by the consumer must be in excess of \$500,000, there is no requirement there be just a single transaction. For purposes of determining the total consideration it is necessary to look at “a transaction, project, or set of transactions.” For example, if a developer purchases property with intent to develop it for \$300,000, and then spends \$300,000 improving it, all claims arising out of the project would be exempt.⁵⁶ As with the \$100,000 exemption, this exception does not apply to a transaction involving the consumer’s residence.⁵⁷

III. PROPER PARTY DEFENDANT: WHO MAY BE SUED

In addition to qualifying as a consumer, the courts have recognized that to maintain a claim under the Act the “goods or services” purchased must “form the basis of the consumer’s complaint.”⁵⁸ There is, however, no requirement of privity under the Act. In *Cameron v. Terrell & Garrett, Inc.*,⁵⁹ the court held that there is nothing in the Act that limits its application only to deceptive trade practices committed by persons who furnish goods or services on which the complaint is based. The court stated:

Consumer is defined in section 17.45(4) only in terms of a person’s relationship to a transaction in goods or services. It does not purport to define a consumer in terms of a person’s

relationship to the party he is suing. Section 17.45(4) does nothing more than describe the class of persons who can bring a suit for treble damages under section 17.50. It does not say who a consumer can sue under section 17.50 for a deceptive trade practice violation. With respect to whom a consumer can sue, section 17.50(a)(1), the subsection under which this suit was tried, expressly states that a consumer can bring a suit if he has been adversely affected by “the use or employment by any person of an act or practice declared to be unlawful in section 17.46.” Terrell & Garrett is a person under the Act. We, therefore, hold that a person need not seek or acquire goods or services furnished by the defendant to be a consumer as defined in the DTPA.⁶⁰

In other words, under the language of the DTPA, once an entity is a consumer, a claim may be brought against any person, regardless of that person’s relationship with the transaction, and notwithstanding the lack of privity.⁶¹ This rule of broad applicability was substantially modified, however, by the court’s decision in *Amstadt v. U.S. Brass*.⁶²

As discussed above, under Cameron, once consumer status is established, all the consumer must do to maintain a cause of action against a particular defendant is show that the goods or services form the basis of his complaint and that the defendant violated the Act. In *Amstadt*, however, the court noted that although the defendant does not have to be in privity with the consumer, the defendant’s wrongful conduct must be committed “in connection with” the consumer’s transaction. It stated:

Although the DTPA was designed to supplement common-law causes of action, we are not persuaded that the Legislature intended the DTPA to reach upstream manufacturers and suppliers when their misrepresentations are not communicated to the consumer. Despite its broad, overlapping prohibitions, we must keep in mind why the Legislature created this simple, non-technical cause of action: to protect consumers in consumer transactions. Consistent with that intent, we hold that the defendant’s deceptive conduct must occur in connection with a consumer transaction, as we explain below.⁶³

The “in connection with” language of *Amstadt* has not been discussed nor applied much since the decision, and the decision itself does not provide a great deal of insight into exactly what it means.⁶⁴ It is clear, however, that DTPA suits against a party with whom the consumer did not directly deal, such as a remote manufacturer, will be subject to an additional test. Did the defendant’s conduct occur “in connection with” the consumer’s transaction?⁶⁵ For example, in a misrepresentation claim under the DTPA, the misrepresentation probably must reach the consumer for a DTPA claim to lie.

A consumer may sue anyone who violates the Act, regardless of whether there is any privity between the consumer and the defendant. A consumer, however, may not maintain a DTPA action against an individual that does not have a direct involvement in the transaction that forms the basis of the consumer’s complaint, unless the consumer shows that the act or practice complained of occurred “in connection with” the consumer’s transaction.

IV. CLAIMS UNDER THE ACT

Section 17.50(a) of the DTPA provides that a consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish:

- (1) The use or employment by any person of a false, misleading, or deceptive act or practice that is:
 - (A) specifically enumerated in a subdivision of Subsection 17.46 of this subchapter; and
 - (B) relied on by a consumer to the consumer's detriment;
- (2) breach of an express or implied warranty;
- (3) any unconscionable action or course of action by any person; or
- (4) the use or employment by any person of an act or practice in violation of Article 21.21, Insurance Code.

It is important to note that there are four separate, yet cumulative, claims under section 17.50(a). Conduct may violate one or all of the four provisions. For example, a party may act in a manner that gives rise to a misrepresentation, a breach of warranty and be unconscionable. Consider the following example:

Carey brought her car into Bob's for repairs. Carey knew nothing about automobile engines and relied entirely on Bob's expertise. Bob, knowing that he had a "sucker" told Carey that she needed a complete engine overhaul, a statement that was untrue. He then performed a minor engine repair. The repair, however, was done improperly. Based on this conduct, Carey could establish a laundry list violation, a breach of the warranty of good and workmanlike performance, and unconscionability.

1. The Laundry List

Section 17.46(b) includes a list of twenty-seven acts or practices that are deemed to be false, deceptive, or misleading under the Act.⁶⁶ This list is generally referred to as "the laundry list." Each of these acts or practices is actionable under the DTPA. Note that the Act requires that in addition to establishing the act or practice, the consumer must show that the act was "relied on by a consumer to the consumer's detriment."⁶⁷ In most cases reliance will be by the consumer who is maintaining the action. For example, relying on a seller's misrepresentation, the consumer purchased the goods that form the basis of the complaint. It is not necessary, however, that the reliance always be by the consumer who filed the suit. In many cases, a purchase is made by someone other than the ultimate consumer. For example, a husband, in reliance on a salesperson's misrepresentation, may purchase a gift for his wife, or a father may rely on the manufacturer's advertisement when purchasing a product for his son. In such cases, there are two consumers: the purchaser as well as the party who receives the goods through the purchase. By using the words "a" consumer and "the" consumer, section 17.50(a) reaches the logical conclusion that reliance by "a" consumer is sufficient to give consumer standing to "the" consumer who is ultimately injured or stuck with the defective product. For example, in the above hypothetical, the husband's reliance would be sufficient to enable the wife to maintain a claim under the DTPA, as would the father's reliance for the son.⁶⁸

Most of the laundry list provisions are self-explanatory. If any of the above provisions has been found

to happen, it is by law an unlawful event actionable under the DTPA. Violations of the laundry list are actionable without regard to privity and may occur prior to, simultaneously with, or after a contract has been formed. It is also significant to note that knowledge or intent is not an element of a laundry list violation, unless required by the particular subdivision.⁶⁹ This is a substantial change from common law fraud. For example, in *Pennington v. Singleton*,⁷⁰ Singleton sold his boat to Pennington. Singleton had never sold a boat before and was not in the business of selling boats. Singleton made oral statements to Pennington that the boat and motor had just had \$500 worth of work and was in "excellent condition," "perfect condition," and "just like new." These statements were made as statements of fact. The statements were false because the mechanic had not adequately repaired the motor. Singleton did not know the statements were false, did not intend to mislead Pennington, and acted in good faith. The court found that Singleton violated subsection 17.46(b)(5) and (7). These subsections do not require proof of knowledge or intent.⁷¹

a. General Misrepresentations

Although the laundry list consists of twenty-five provisions, most reported decisions are based on just four, subsection (5), (7), (12), and (23). This is because these are the most general provisions, and the easiest to establish. Basically, subsections (5) and (7) apply to any misrepresentation regarding goods or services, subsection (12) applies to any misrepresentation regarding agreements or legal rights and remedies, and subsection (23) applies to the failure to disclose. Note that subsection (23) is one of the provisions of the laundry list that require proof of intent.

To constitute a violation of subsection (5) or (7), it is only necessary that the actor make a representation of fact regarding goods or services that is inaccurate or false. Statements may be oral or written. Note, however, that it must be a statement of fact and not merely opinion. Statements that constitute mere opinion, puffing, or vague generalizations, are not actionable under the DTPA.⁷² Misrepresentations are actionable under the DTPA regardless of the intent of the party making the representation or his or her knowledge of the falsity.⁷³ Here are some examples of conduct that has been found to violate subsection (5) or (7):

1. Misrepresentation regarding coverage of title insurance policy.⁷⁴
2. Misrepresentation that property is "properly drained."⁷⁵
3. Implied misrepresentation that services had been performed.⁷⁶
4. Oral misrepresentation that house complied with housing code.⁷⁷
5. Doctor's misrepresentation regarding benefits of drug.⁷⁸
6. Builder's misrepresentation regarding quality of house.⁷⁹
7. Car dealer's misrepresentation regarding rebate.⁸⁰

As noted above, oral representations may form the basis of a DTPA claim under the laundry list. The parol evidence rule and the statute of frauds, prohibiting the introduction of oral statements when a written agreement exists, do not apply to DTPA misrepresentations, even if the subject matter is land.⁸¹

b. Misrepresentations Regarding Legal Rights

There is a violation of the laundry list whenever a

seller of goods or services misrepresents the nature of the agreement or the rights and remedies available under an agreement.⁸² This provision, however, does not turn all breach of contract actions into DTPA claims. A statement that is merely an interpretation of a contract that subsequently proves to be incorrect is not a violation of this subsection.⁸³ Here are some examples of conduct that has been found to violate subsection (b)(12):

- (i) Misrepresentation that layaway agreement gave seller the right to retain all monies deposited by buyer.⁸⁴
- (ii) Landlord's misrepresentation of right to enter and take equipment.⁸⁵
- (iii) Misrepresentation regarding right to repossess.⁸⁶
- (iv) Implicit misrepresentation regarding legal right to tow car from condominium complex.⁸⁷

c. Failure to Disclose

In addition to imposing liability based on affirmative misrepresentations, the DTPA recognizes that silence may also be false, deceptive or misleading. Subsection (24) makes the failure to disclose actionable under the Act, however, it adds a requirement that the defendant intend that his or her silence induce the consumer into the transaction.

To establish a claim under section 17.46(b)(23) the consumer must establish four elements:

- (i) the defendant knew information regarding the goods or services;
- (ii) the information was not disclosed;
- (iii) there was an intent to induce the consumer to enter into the transaction; and
- (iv) the consumer would not have entered into the transaction on the same terms had the information been disclosed.

The first element should be an obvious requirement. A party cannot be held responsible for failing to disclose that which he or she does not know.⁸⁸ The second and third requirements should be considered together. There must be a failure to disclose and it must be with the intent to induce the consumer into the transaction. A presumption of intent should arise whenever it is shown that the information was material. At that point, the burden should shift to the defendant to establish why the information was not disclosed.

Finally, the consumer must establish that he or she would not have entered into the transaction, or would not have entered into it on the same terms had the information been disclosed. Note that a seller has no obligation to disclose what the consumer already knows. For example, if the consumer knows that a foundation is defective, there can be no liability upon the seller for failing to disclose this fact. Notice, however, must be actual notice. Constructive notice, for example that provided by filing statutes, is not sufficient to relieve a defendant of its obligation to disclose.⁸⁹

2. Unconscionability

Under section 17.50(a), a consumer may maintain a claim for any unconscionable act or practice. For purposes of the DTPA, unconscionability is defined as "an act or practice, which to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree."⁹⁰ Although the 1995 amendments substantially limited the definition of unconscionability by deleting subsection (B), permitting pure

"price unconscionability," this provision still provides relief for those situations where a consumer of limited education, sophistication, experience, or ability, is taken advantage of.

Whether an act or practice is unconscionable is determined at the time of the sale or contract.⁹¹ The process of establishing unconscionability involves reviewing the facts of the case, in light of the education, experience and ability of the consumer. Whether an act or practice takes advantage to a grossly unfair degree is based on an objective review of the facts. The consumer is not required to show that the defendant acted with any form of culpable mental state, such as acting intentionally, knowingly, or with conscious indifference.⁹² To be unconscionable, an act or practice simply must take advantage of the consumer's lack of knowledge, ability, experience, or capacity to a "grossly" unfair degree. The supreme court has defined "grossly" to mean "glaringly noticeable, flagrant, complete, and unmitigated."⁹³

Unconscionability under the DTPA requires that the consumer establish two elements. First, there must be a showing of a lack of knowledge, ability, experience, or capacity on the part of the consumer. Second, the consumer must establish that the defendant took advantage of this lack to a grossly unfair degree. As noted above, there is no need to show any knowledge, intent, or ill motive on the part of the defendant. In other words, whether the defendant acted intentionally or innocently is of no relevance with respect to a determination of unconscionability.

3. Breach of Warranty

The DTPA is both an independent basis for a cause of action and a vehicle through which to bring an otherwise existing claim. Subsection 17.50(a)(2) makes this clear by providing that a consumer may maintain an action under the DTPA for any breach of warranty.⁹⁴ Thus, warranty law in Texas takes on an added dimension — the enhanced damages provided by the DTPA.⁹⁵

Section 17.50(a)(2) provides that a consumer may maintain an action under the Act for breach of an express or implied warranty. Unlike the laundry list and unconscionability, however, the DTPA does not define or establish any warranties. All it does is provide a vehicle through which a breach of warranty claim may be brought. To establish the warranty, law outside of the DTPA must be consulted.⁹⁶

Warranties may be express or implied, and may arise by statute or common law. For example, the Texas Business and Commerce Code creates express and implied warranties in the sale of goods,⁹⁷ and the Texas Supreme Court has created an implied warranty of good and workmanlike performance in service contracts,⁹⁸ suitability in commercial leases,⁹⁹ and good and workmanlike performance and habitability in the sale of a new home.¹⁰⁰ Regardless of how the warranty is created, however, a breach of that warranty is actionable through the DTPA.¹⁰¹

Because the DTPA does not create any warranties, they must be established independent of the Act. This means that all questions regarding the existence of a warranty, including whether a warranty has been disclaimed or limited, are a matter of non-DTPA law. Disclaimers, modifications or limitations of warranties are all valid and enforceable in a claim under the DTPA, if they are valid and enforceable outside of the Act.¹⁰²

To bring a breach of warranty claim through the DTPA the consumer must prove that a warranty exists, that the warranty applies to the consumer, and that the warranty has been breached. The DTPA incorporates all existing warranty law and makes a breach of warranty actionable through

the Act. This does not change whether a warranty exists, the scope of the warranty, or whether the warranty has been disclaimed or modified. All of these questions are answered by general principles of law outside of the DTPA. Once a breach is established, a consumer may maintain an action under the Act and recover enhanced remedies under the DTPA.

4. Article 21.21

The fourth claim that may be brought under the DTPA is the use or employment of an act or practice in violation of Article 21.21 of the Texas Insurance Code. A discussion of Article 21.21 is beyond the scope of this paper, however, suffice it to say that any violation of article 21.21 is actionable through the DTPA by a consumer.

V. DEFENSES

One of the greatest benefits of the DTPA has always been the limited defenses available to defendants. That continues to be the case, even after the recent amendments. The DTPA provides little in the way of statutory defenses, and those that do exist are very limited. For example, one of the few statutory defenses is reliance on written information provided to the defendant by another. To use this defense the defendant must also show he gave the consumer reasonable and timely written notice of the defendant's reliance.¹⁰³

It also is significant to note that common law defenses, applicable to a breach of contract or tort claim, essentially are inapplicable to a claim under the DTPA. The DTPA does not represent a codification of the common law and, therefore, common law defenses do not apply. For example, the doctrine of "substantial performance" has been held not to apply to the DTPA,¹⁰⁴ as has the "parol evidence rule."¹⁰⁵ Waiver and estoppel are also inapplicable to a claim under the Act.¹⁰⁶ Recent decisions, however, have provided for defenses based on contract language negating causation.

As discussed below, a consumer must prove that the wrongful act of the defendant was a producing cause of the consumer's damages. It is a defense to damages under the DTPA to show that the act or practice was not a producing cause of the consumer's damages. For example, it is not unusual for a consumer to purchase goods or services "as is," with a contract stating he or she is not relying on any representation of the seller. If a consumer knowingly and voluntarily signs a contract containing such provisions, the consumer has negated "producing cause" and is not entitled to any damages.¹⁰⁷ In *Prudential Insurance Company of America v. Jefferson Associates, Ltd.*,¹⁰⁸ Goldman, a sophisticated businessperson, agreed to purchase property from Prudential Insurance. Goldman signed a contract that stated the purchase was as is, "with any and all latent and patent defects." Goldman also stated that he was not relying upon any representation of the seller. Goldman sued the seller under the DTPA after discovering that the seller misrepresented the condition of the building. The court held that the agreement signed by Goldman negated any producing cause and precluded any recovery under the DTPA.¹⁰⁹

The court in *Prudential*, however, made it clear that its holding did not apply to all such contractual provisions. Producing cause will be negated only when the agreement is bargained for at arms length and freely, knowingly, and intelligently negotiated.¹¹⁰ For example, in a one-sided transaction, between an unsophisticated consumer and a knowledgeable businessperson, such a clause may not have the same effect.¹¹¹

1. Mediation

Although it is not a "defense," either party to a DTPA case has the right to attempt to settle the matter by compelling mediation. Under the 1995 amendments to the DTPA, either side may file a motion to compel mediation.¹¹² The motion must be filed within 90 days after service of a pleading seeking relief under the Act. Both sides must share the costs of the mediation, unless the amount of economic damages sought is less than \$15,000. In that case, the party requesting mediation must pay the costs. Mediation generally must be held within 30 days of the request.¹¹³

2. Arbitration

Contract provisions requiring arbitration of DTPA claims are enforceable in the same manner as with respect to any other claim and do not constitute a waiver of the Act.¹¹⁴

3. Pre-Suit Notice

Perhaps the most misunderstood, and least used of the DTPA provisions are its notice and settlement provisions. When properly used, these provisions encourage reasonable settlement and preclude frivolous litigation. The 1995 amendments to the DTPA strengthen these provisions providing even greater incentives for both sides to carefully consider the contents of their notice and settlement letters.

Section 17.505(a) provides that as a prerequisite to filing suit, a consumer must give the defendant written notice at least 60 days before filing the suit.¹¹⁵ The notice must advise the person in reasonable detail of the consumer's specific complaint and the amount of economic damages, damages for mental anguish, and expenses including attorneys' fees, if any, reasonably incurred by the consumer in asserting the claim.¹¹⁶

If the consumer fails to give notice as required, the defendant may file a plea in abatement not later than the thirtieth day after the date the person files an original answer. The suit will then be abated to permit the consumer to give proper notice.¹¹⁷

4. Settlement

Once a plaintiff has given proper notice, the defendant has four options.¹¹⁸ First, the defendant may pay the amount requested and settle the matter.¹¹⁹ Second, he may ignore the notice and do nothing. Third, he may propose a settlement¹²⁰ and forward it to the plaintiff within 60 days after receipt of the notice.¹²¹ And, finally, he may wait until suit is filed and then file a settlement proposal during the period beginning on the date an original answer is filed and ending on the 90th day after that date. If mediation is held, a person may tender settlement during the period beginning on the date that the mediation ends and ending on the 20th day after that date.¹²²

Under section 17.5052(d), a settlement offer must include an offer to pay the following amounts of money, separately stated:

- (i) an amount of money or other consideration reduced to its cash value (settlement in kind), as settlement of the consumer's damages; and
- (ii) an amount of money to compensate the consumer for the consumer's reasonable attorneys' fees incurred as of the date of the offer.

An example best demonstrates how the notice and settlement provisions of the DTPA work.

Assume consumer sends written notice to

defendant advising him of a claim under the DTPA. Consumer states that defendant misled him with respect to the extent of repairs necessary to repair his car. Consumer requests \$2,000 for overcharges, and \$1,300 to restore the car to its original condition. He also demands \$300 for a rental car. Finally, consumer requests \$500 for attorneys' fees. Defendant tenders a settlement offer including \$1,000 for overcharges, a promise to restore the car to its original condition, valued at \$1,000, and the use of a loaner car, valued at \$300. He also offers to pay \$500 for attorneys' fees.

If the consumer rejects the defendant's tender of settlement, it may be filed with the court together with an affidavit certifying its rejection.¹²³ Rejection of a reasonable settlement offer limits a consumer's recovery of damages. If the court finds that the Defendant's settlement offer is the same, substantially the same as, or more than, the damages found by the trier of fact, the consumer may not recover as damages an amount in excess of the lesser of:

- (i) the amount of damages tendered in the settlement offer; or
- (ii) the amount of damages found by the trier of fact.¹²⁴

Assume in the above example that the consumer rejects the defendant's offer and the matter proceeds to trial. The jury awards the consumer damages in the amount of \$1,100 for overcharges, \$900 to restore the car, \$300 for a rental car and \$15,000 for attorneys' fees. Because the Defendant's settlement offer was "substantially the same" as the amount of damages the consumer would be limited to \$1,000 for overcharges (the lesser amount), \$900 to restore the car (the lesser amount) and \$300 for a loaner car. In other words, the defendant's reasonable offer has the potential to substantially limit damages, and preclude additional damages.

5. Attorneys' Fees

Perhaps even more significantly than limiting damages, the rejection of a reasonable settlement offer substantially limits the recovery of the consumer's attorney's fees. In many DTPA cases, a substantial part of the plaintiff's recovery consists of the consumer's attorneys' fees. Section 17.5052 as amended in 1995 provides an opportunity for the defendant to limit its exposure through a reasonable offer of attorneys fees, at the time the offer was made.¹²⁵ If the court finds that the defendant's tender of settlement was the same, substantially the same, or greater than the damages found by the trier of fact, the court then determines the attorneys' fees necessary to compensate the consumer for attorneys' fees incurred before the date and time of rejection of the offer.¹²⁶ If the court finds that the offer of attorneys' fees in the defendant's offer was the same, substantially the same, or more, than the amount of reasonable attorneys' fees, the consumer may not recover fees greater than the amount of fees tendered in the settlement offer.¹²⁷

Referring again to the

above hypothetical, assume that the court determines that the amount of reasonable attorney's fees at the time the settlement was rejected was \$500. The consumer will be limited to the recovery of \$500, the amount offered in the settlement offer, notwithstanding the fact that the jury awarded fees in the amount of \$15,000.

The DTPA is designed to provide a liability scheme that can be understood by the parties, and notice and settlement practices that encourage settlement rather than litigation. Plaintiffs' attorneys must be careful to send reasonable notice letters designed to encourage settlement in full and prompt resolution, while defendants' attorney should always offer some amount in settlement to be able to take advantage of the DTPA penalty provisions in the event a reasonable settlement offer is rejected.

6. Limitations

An action under the DTPA must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice.¹²⁸

Section 17.565 provides what is generally referred to as a "discovery rule" of limitations. It provides an objective and a subjective test for determining when limitations begin to run. Limitations run two years from either:

- (i) The date of the act or practice;
- (ii) The date the consumer discovered the act or practice; or
- (iii) The date the consumer in the exercise of reasonable diligence should have discovered the act or practice.

Note that the third alternative applies a reasonable person test to the consumer's discovery. Actual discovery is not required if "in the exercise of reasonable diligence" the act or practice should have been discovered. In most cases, the courts have held that a consumer "should have" discovered the act or practice, no later than the date the injury occurs.¹²⁹

7. Preemption

In some cases the provisions of the DTPA may be preempted by other state law provisions. For example, state law specifically exempts certain acts of health care providers,¹³⁰ and veterinarians¹³¹ from the provisions of the DTPA. The Texas Supreme Court has also held that the DTPA is indirectly pre-empted by the provisions of the Texas Antitrust Act.¹³² It is important that attorneys for both parties carefully review Texas law outside of the DTPA to see if the provisions of the DTPA have been preempted.

The courts have also found that various federal laws preempt the DTPA when their provisions conflict. For example, it has been held that the DTPA may be preempted by ERISA,¹³³ the Airline Deregulation Act,¹³⁴ and the Carmack Amendment.¹³⁵ In many other cases, however, preemption claims have been unsuccessful. The issue depends upon whether the statute in question expressly provides for preemption

The DTPA has always provided for liberal damages to an aggrieved consumer.



or whether it is implied by the regulation itself and whether that preemption is applicable to the facts of the particular case. Again, it is essential that the attorney in a DTPA case be familiar with relevant federal law and understand its possible preemptive effect.

VI. REMEDIES

The DTPA has always provided for liberal damages to an aggrieved consumer. This was done to insure that consumers were fully compensated, provide an incentive for attorneys to handle such cases, and provide a deterrent to wrongful conduct. As originally enacted, the DTPA provided for mandatory trebling of all actual damages, as well as attorneys' fees to a prevailing consumer. In 1979, the legislature recognized the potential for over-compensation from a mandatory trebling provision and amended section 17.50 to require trebling of only the first \$1,000 of damages. Damages in excess of \$1,000 were subject to trebling at the discretion of the jury, if the defendant was found to have acted "knowingly."

Today, section 17.50 still provides significant relief for consumers who prevail under the Act. The 1995 amendments, however, have substantially reduced potential damages. The amendments, however, did not change the mandatory award of attorneys' fees to a prevailing plaintiff, nor did they eliminate the potential for additional damages based on "knowing" conduct by a defendant.¹³⁶ It is fair to say that although DTPA damages have been reduced, they still provide a generous potential for recovery when compared to alternative causes of action. The Act also permits the award of attorneys' fees to defendants in cases where a consumer files a frivolous claim.

1. Causation

One of the most significant elements of recovery under the DTPA is the lower causation under section 17.50(a). To recover damages a DTPA consumer must show that the defendant's conduct was "a producing cause of economic damages or damages for mental anguish." Thus, the causation standard for recovery of damages under the Act is "producing cause." This is the lowest causation standard employed by the courts and has been defined to mean: "an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of."¹³⁷ "A producing cause is a substantial factor which brings about the injury and without which the injury would not have occurred."¹³⁸ Note that this is a lower standard than "proximate cause," which incorporates an element of foreseeability and that there may be more than one producing cause.¹³⁹

2. Damages in General

The current language of the DTPA provides that each consumer who prevails may obtain economic damages and, in an appropriate case, damages for mental anguish and additional damages of not more than three times the damages awarded.¹⁴⁰ Each consumer who prevails under the Act is entitled to recover "economic damages." This is a new term that was added to the DTPA in 1995 to replace the former damage standard of "actual damages." Economic damages is defined to mean:

compensatory damages for pecuniary loss, including costs of repair and replacement. The term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.¹⁴¹

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

Although there have been few cases discussing the term economic damages, it should be interpreted to include all compensatory damages and exclude all "soft" damages. For example,

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

Note that the term "economic damages" expressly excludes recovery for mental anguish. Damages for mental anguish, however, are expressly authorized by section 17.50(b)(1), upon a finding that the defendant acted "knowingly."

Prior to 1995, damages for mental anguish were recoverable as part of "actual damages."¹⁴² In 1995, the legislature replaced the term actual damages with the term "economic damages." As noted above, the term "economic damages" expressly excludes recovery for mental anguish. The DTPA states, however, that: "If the trier of fact finds that the conduct of the defendant was committed knowingly, the consumer may also recover damages for mental anguish."¹⁴³

"Knowingly" is defined by the Act to mean: actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practices giving rise to the consumer's claim, or, in an action brought under Subdivision (2) of Subsection (a) of Section 17.50, actual awareness of the act, practice, condition, defect, or failure constituting the breach of warranty, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.¹⁴⁴

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

The award of damages for mental anguish damages must be made based on the same standard that would be required to award such damages in any other cause of action. There is no requirement that the consumer be awarded economic damages or that there be an accompanying physical

injury.¹⁴⁵ The consumer must, however, show a relatively high degree of mental pain and distress, more than mere disappointment, anger, resentment, or embarrassment. Compensation can only be for mental anguish that causes a “substantial disruption in... daily routine” or “a high degree of mental pain and distress” that is “more than mere worry, anxiety, vexation, embarrassment or anger.”¹⁴⁶ For example, recovery may be based upon mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair and/or public humiliation.

A DTPA consumer who prevails may recover all of the consumer’s pecuniary loss as “economic damages.” This includes any economic damages arising out of an incident involving a personal injury, such as hospital bills or lost income, and includes direct and consequential damages. If the defendant acted “knowingly,” the consumer may also recover damages for “mental anguish.” Economic damages, however, do not include traditional “soft” tort damages such as pain and suffering, loss of consortium, or disfigurement.

3. Additional Damages

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

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

If the trier of fact finds that the conduct of the defendant was committed knowingly,...the trier of fact may award not more than three times the amount of economic damages; or if the trier of fact finds that the conduct was committed intentionally, ...the trier of fact may award not more than three times the amount of damages for mental anguish and economic damages.¹⁴⁷

In other words, whenever the fact finder finds the defendant acted knowingly, it may award a total of up to three times the consumer’s economic damages. A finding of intentional conduct entitles the consumer to a total of up to three times economic damages and damages for mental anguish.

It is important to note that this section authorizes the trier of fact to award a total of not more than three times economic damages, or, a total of three times economic damages and damages for mental anguish. This means that the maximum recovery is three times economic damages, or economic damages and damages for mental anguish. For example, assume that the fact finder awards \$5,000 in economic damages. If it then finds the conduct was committed knowingly, it may award a total recovery between \$5,000 and \$15,000. This section does not authorize the recovery of economic damages plus three times economic damages.¹⁴⁸ To fully understand the DTPA additional damages it is best to view it as authorizing the award of damages, plus up to an additional two-times damages, for a total of not more than three times damages.

4. Attorneys’ Fees

In order to fully compensate the consumer, as well as encourage attorneys to represent consumers, the DTPA mandates the award of attorneys’ fees to a prevailing consumer.

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

a. Consumers’ Attorneys’ Fees

“Each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys’ fees.”¹⁴⁹ By using the word “shall” this section makes it clear that the award of attorneys’ fees to a prevailing plaintiff is not optional. Attorneys’ fees must be awarded to a successful consumer. Attorneys’ fees are awarded even if the consumer’s entire recovery of damages is offset by a claim of the defendant.¹⁵⁰

A consumer is entitled to recover attorneys’ fees in an amount that is “reasonable and necessary.” Although many attorneys will have a percentage contingency fee arrangement with his or her attorney, the Texas Supreme Court has held that although such an agreement is valid between the parties, the amount of the fees awarded by the fact finder must be determined in a dollar amount not as a percentage of the recovery.¹⁵¹

b. Defendants’ Attorneys’ Fees

Section 17.50(c) provides that “on a finding by the court that an action under this section was groundless in law or in fact or brought in bad faith, or brought for purpose of harassment, the court shall award to the defendant reasonable and necessary attorneys’ fees and court costs.”¹⁵² Note that similar to the award of consumers’ attorneys’ fees, the award of defendants’ attorneys’ fees is mandatory once a court makes the requisite factual findings.

The determination of whether adequate facts exist to justify the award of defendants’ attorneys’ fees is a question of law for the court, not the fact finder.¹⁵³ If the court finds the consumer’s claim was groundless or brought in bad faith it shall award attorneys’ fees to the defendant.¹⁵⁴ Groundless should be defined as having “no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law.”¹⁵⁵ Although the courts have not yet defined “bad faith” in the context of DTPA attorneys’ fees, however, a finding of malice, ill will, spite, or reckless disregard should be sufficient. Note that the court must find the action to have been either brought in bad faith or groundless to justify the award of attorneys’ fees.

Under the present version of the DTPA, harassment alone is also sufficient to support the award of defendants’ attorneys’ fees. The suit, however, must be brought for the sole purpose of harassment.¹⁵⁶ Essentially, to establish harassment it is necessary to show the consumer would not be better off after the suit than he or she was before the suit.

A defendant is entitled to recover attorneys’ fees in an amount that is “reasonable and necessary.” The Texas Supreme Court has held that, in the context of a consumer’s attorneys’ fees, this requires that the amount of the fees be determined in a dollar amount not as a percentage of the recovery.¹⁵⁷ A similar standard should be applied with respect to defendants’ attorneys’ fees.

6. Tie-in Statutes: Actual damages

Prior to 1995, the DTPA permitted a consumer who prevailed to recover all “actual damages.” Actual damages is generally defined to include all damages recoverable at common law, and includes damages for mental anguish, and the so-called “soft damages,” such as pain and suffering and loss of consortium. As discussed above, this term has been

replaced as the DTPA's general damage standard with the less inclusive term "economic damages." Actual damages, however, may still be recovered in cases brought through the so-called "tie-in statutes."

Since the enactment of the DTPA, the legislature has chosen to incorporate its provisions into many other statutes dealing with consumer-related issues. This is accomplished by making a violation of those statutes a violation of the DTPA, actionable under the provisions of the DTPA. Because these statutes tie them to the DTPA, they are generally referred to as "tie-in statutes."

Section 17.50(h) of the DTPA provides that if the consumer brings a claim through another law, i.e. a tie-in statute, the consumer may recover any "actual damages" incurred. For purposes of DTPA "additional damages" in an action brought through a tie-in statute, the term "economic

damages" is replaced with the term actual damages. A brief example demonstrates the significance of this provision. Consumer went to a health club to discuss a possible membership. The salesperson misrepresented the qualification of the instructors and the terms of the membership agreement. As a result, Consumer was injured. If consumer files a complaint under the laundry list she will recover economic damages. To recover mental anguish damages she must show the defendant acted knowingly. To recover treble economic damages she must show the defendant acted knowingly. To recover treble mental anguish damages she must show defendant acted intentionally.

Tie-in Statute

Business Opportunity Act
 Career Counseling Services
 Certain Sales Of Homestead
 Coastal Public Lands Management Act of 1973
 Contest and Gift Tex. Giveaway Act
 Debt Collection Act
 Disclosure by Financial Institution that Deposits are Not Insured
 Disclosure to Purchaser of Property
 Health Spa Act
 Licensing and Regulation of Speech-Language Pathologists and Audiologist
 Personal Employment Services
 Credit Service Organizations
 Regulation of Invention Development Services Act
 Removal of Unauthorized Vehicles from Parking Facility or Public Roadway
 Rental-Purchase Agreements
 Representation as Attorney
 Residential Service Company Act
 Sales of Certain Fuel
 Self-Service Storage Facility Liens
 Talent Agency Registration Act
 Telephone Solicitation
 Texas Manufactured Housing Standards Act
 Texas Membership Camping Resort Act
 Texas Motor Vehicle Commission Code
 Texas Optometry Act
 Texas Timeshare Act
 Treatment Facilities Marketing Practices Act
 Unfair Claim Settlement Practices Act
 Private Child Support Enforcement Agencies
 Private Action for Damages Authorized
 Cigarette Tax, Enforcement of Tax
 Occupational and Business Regulation, Miscellaneous
 Medical Liability, Arbitration Agreements
 Currency Exchange, Transportation, and Transmission
 Home Improvement Contract
 Seller's Disclosure of Tax Payments and Insurance Coverage
 Disposition of Insurance Proceeds
 Interest in Land, Disclaimer and Disclosure Required
 Executory Contract for Conveyance, Oral Agreements
 Prohibited
 Seller's Disclosure of Property Condition

Citation

Tex. Bus. & Com. Code § 41.302
 Tex. Occ. Code § 2502.302
 Tex. Prop. Code § 41.006(b)
 Tex. Nat. Res. Code § 33.135(d)
 Tex. Bus. & Com. Code § 40.122
 Tex. Fin. Code § 392.404(a)

 Tex. Ins. Code § 556.052
 Tex. Nat. Res. Code § 61.025(d)
 Tex. Occ. Code § 702.403

 Tex. Occ. Code § 401.501
 Tex. Occ. Code § 2501.204
 Tex. Fin. Code § 393.504
 Tex. Rev. Civ. Stat. Art. 9020 § 9(c)

 Tex. Transp. Code § 684.086
 Tex. Bus. & Com. Code § 35.74(c)
 Tex. Gov. Code § 406.017(f)
 Tex. Occ. Code § 1303.405
 Tex. Rev. Civ. Stat. Art. 8614 § 6(d)
 Tex. Prop. Code § 59.005
 Tex. Occ. Code § 2105.251
 Tex. Bus. & Com. Code § 38.303
 Tex. Occ. Code § 1201.603
 Tex. Prop. Code § 222.011(a)
 Tex. Occ. Code §§ 2303.054, 2302.053
 Tex. Occ. Code § 351.604
 Tex. Prop. Code § 221.071(a)
 Tex. Health & Safety Code § 164.013
 Tex. Ins. Code § 542.004
 Tex. Finance Code § 396.353(a)
 Tex. Ins. Code § 541.151
 Tex. Tax Code § 154.4095
 Tex. Rev. Civ. Stat. art. 9020 § 9(c)
 Tex. Civ. Prac. & Rem. Code § 74.451(c)
 Tex. Finance Code § 153.404
 Tex. Prop. Code § 41.007(b)
 Tex. Prop. Code § 5.070(b)(1)
 Tex. Prop. Code § 5.078(d), (e)
 Tex. Prop. Code § 41.0051(c)

 Tex. Prop. Code § 5.072(e)(1), (f)
 Tex. Prop. Code § 5.069(d)(a), (e)

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

The term actual damages has been defined to include any damages recoverable at common law. The amount of damages recoverable is determined by the total loss of the consumer.¹⁵⁸The term includes all compensatory damages, as well as damages for mental anguish and pain and suffering.

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

* Dwight Olds Chair in Law, University of Houston Law Center, Alderman@uh.edu.

1. See generally, John Hill, *Introduction — Consumer Protection Symposium*, 8 St. Mary's L.J. 609 (1977).
2. TEX. BUS. & COM. CODE §§17.41—63. Note that the Act has been amended nearly every legislative session since its enactment. For a comprehensive discussion of the DTPA, and all of the language of the amendments, see Richard M. Alderman, *The Lawyer's Guide to the Texas Deceptive Trade Practices Act* (2d ed. 2003).
3. TEX. BUS. & COM. CODE §17.44. It is important to note that the mandate of section 17.44 was left unchanged by the 1995 amendments.
4. Section 17.43 states:
The provisions of this subchapter are not exclusive. The remedies provided in this subchapter are in addition to any other procedures or remedies provided for in any other law; provided, however, that no recovery shall be permitted under both this subchapter and another law of both damages and penalties for the same act or practice. A violation of a provision of law other than this subchapter is not in and of itself a violation of this subchapter. An act or practice that is a violation of a provision of law other than this subchapter may be made the basis of an action under this subchapter if the act or practice is proscribed by a provision of this subchapter or is declared by such other law to be actionable under this subchapter. The provisions of this subchapter do not in any way preclude other political subdivisions of this state from dealing with deceptive trade practices. TEX. BUS. & COM. CODE § 17.43.
5. For example, in *Prudential Ins. Co. of America v. Jefferson Associates, Ltd.*, 896 S.W.2d 156 (Tex. 1995) (a sophisticated purchaser of commercial real estate sued the seller for damages in excess of \$25 million).
6. See, e.g., *Berry Property management, Inc. v. Bliskey*, 850 S.W.2d 644 (Tex. App.—Corpus Christi 1993) (suit by tenant who was sexually assaulted in apartment).
7. See, e.g., *Latham v. Castillo*, 972 S.W.2d 66 (Tex. 1998) (suit against attorney based on unconscionable conduct).

8. Most of these suits were found to be unsustainable under the DTPA. See, e.g., *Rojas v. Wal-Mart Stores, Inc.*, 857 F. Supp. 533 (N.D. Tex. 1994).
9. Section 17.50(d) of the Act mandates the award to attorneys' fees to a prevailing consumer.
10. See generally Joseph Sanders and Craig Joyce, “*Off to the Races: The 1980s Tort Crisis and the Law Reform Process*,” 27 HOUSTON L. REV. 207 (1990).
11. In 1987, TEX. BUS. & COM. CODE § 17.50 was amended in an attempt to bring the DTPA in line with traditional torts claims. The result was a provision that actually increased damages under the DTPA by making certain DTPA suits subject to Chapter 41 of the Civil Practice and Remedies Code.
12. The 1995 amendments to the DTPA may be found at Tex. H.B. 668, 74th Leg., R.S. (1995).
13. See, Texas Residential Construction Commission Act, Ch. 401 TEX. PROP. CODE; and Residential Contractors' Liability Act, Ch. 27 TEX. PROP. CODE.
14. Tex. H.B. 883, 68th Leg., R.S. (1983).
15. TEX. BUS. & COM. CODE §17.45(4)
16. For a more comprehensive discussion of the term “consumer,” see RICHARD M. ALDERMAN, *THE LAWYER'S GUIDE TO THE TEXAS DECEPTIVE TRADE PRACTICES ACT*, 2d ed., at Chapter 2.
17. 696 S.W.2d 180 (Tex. App.—Houston [14th Dist.] 1985).
18. “A DTPA consumer is one who in good faith initiates the purchasing process. An individual initiates the purchasing process when he (1) presents himself to the seller as a willing buyer with the subjective intent or specific “objective” of purchasing, and (2) possesses at least some credible indicia of the capacity to consummate the transaction.” *Id.* at 184-5.
19. 970 F.2d 1420 (5th Cir. 1992).
20. “Although Bobby did not enter into a contractual relationship with the defendants, he acquired the garage door opener and the benefits it provided. Wellborn did not purchase the garage door opener specifically for Bobby's benefit; nevertheless, Bobby lived with Wellborn and regularly used the garage door opener until the time of his death. Wellborn testified that one of the reasons that she bought the garage door opener was to provide additional security for Bobby on the nights that Bobby was home by himself. Indeed, Wellborn had instructed Bobby to lock the house up at night. Because Bobby acquired the garage door opener when it was purchased for his benefit, installed in his home, and used by him, we hold that, under the facts of this case, Bobby is a consumer.” *Id.* at 1426-27.
21. 581 S.W.2d 500 (Tex. Civ. App.—Dallas 1979, no writ)
22. 689 S.W.2d 890 (Tex. 1985).
23. *Kennedy v. Sale*, 689 S.W.2d 890 (Tex. 1985). See also *HOW Ins. Co. v. Patriot Fin. Serv.*, 786 S.W.2d 533 (Tex. App.—Austin 1990, writ denied) (condominium owner is consumer as to warrantor even though policy was purchased by builder); See also *D/FW Commercial Roofing v. Mehra*, 854 S.W.2d 182 (Tex. App.—Dallas 1993, no writ) (lessee who acquired roof paid for by lessor is consumer).
24. *Birchfield v. Texarkana Memorial Hosp.*, 747 S.W.2d 361 (Tex. 1987) (child is consumer with respect to medical services purchased by parents).
25. *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. App.—Corpus Christi 1991, writ denied) (person who acquires legal services paid for by another is a consumer).
26. *Parker v. Carnahan*, 772 S.W.2d 151 (Tex. App.—Texarkana 1989, writ denied) (wife is consumer with respect to attorney's service purchased by husband).

27. *Arthur Anderson v. Perry Equip. Corp.*, 898 S.W.2d 914 (Tex. App.—Houston [1st Dist.] 1995), rev'd on other grounds, 945 S.W.2d 812 (Tex. 1997) (company that acquires accounting services paid for by another is a consumer).
28. *Precision Sheet Metal Mfg. Co., Inc. v. Yates*, 794 S.W.2d 545 (Tex. App.—Dallas 1990, writ denied) (plaintiff need not be the one who pays).
29. TEX. BUS. & COM. CODE §17.45(1)
30. *Id.* at §17.45(2)
31. *United Postage Corp. v. Kammeyer*, 581 S.W.2d 716, 721 (Tex. Civ. App.—Dallas 1979, no writ). See also *Parr v. Tagco Indus.*, 620 S.W.2d 200, 206 (Tex. Civ. App.—Amarillo 1981, no writ) (“goods” includes “every species of property which is not real estate or a freehold”).
32. See, e.g., *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 174 (Tex. 1980); *Snyders Smart Shop Inc. v. Santi, Inc.*, 590 S.W.2d 167, 170 (Tex. Civ. App.—Corpus Christi 1979, no writ); *In re Sterling Foster & Co. (Price v. Sterling Foster & Co.)*, 222 F. Supp. 2d 289 (E.D.N.Y. 2002); *Swenson v. Englestad*, 626 F.2d 421, 428 (5th Cir. 1980); *Hand v. Dean Witter Reynolds Inc.*, 889 S.W.2d 483 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *English v. Fisher*, 660 S.W. 2d 521, 524 (Tex. 1983); *Meineke Discount Muffler v. Jaynes*, 999 F.2d 120 (5th Cir. 1993); *Marshall v. Quinn-L Equities, Inc.*, 704 F. Supp. 1384, 1393 (N.D. Tex. 1988).
33. *Riverside National Bank v. Lewis*, 603 S.W.2d 169 (Tex. 1980).
34. See, e.g., *Bank One, Texas v. Taylor*, 970 F.2d 16 (5th Cir. 1992); *Cushman v. Resolution Trust Co.*, 954 F.2d 317 (5th Cir. 1992); *La Sara Grain Co. v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 564, 38 U.C.C. Rep. Serv. 963 (Tex. 1984); *Farmers & Merchants State Bank of Krum v. Ferguson*, 617 S.W.2d 918, 920 (Tex. 1981). See also *Security Bank v. Dalton*, 803 S.W.2d 443 (Tex. App. Fort Worth 1991, writ denied) (“appellees are consumers, both in connection with the various checking accounts and in connection with the extensions of credit”); *Plaza Nat'l Bank v. Walker*, 767 S.W.2d 276 (Tex. App. Beaumont 1989, writ denied) (savings account customer is consumer).
35. See, e.g., *First Tex. Savs. Ass'n v. Stiff Properties*, 685 S.W.2d 703, 705 (Tex. App. Corpus Christi 1984, no writ).
36. See, e.g., *First Fed. Savs. & Loan Ass'n v. Ritenour*, 704 S.W.2d 895, 900 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.). See also *McDade v. Texas Commerce Bank*, 822 S.W.2d 713 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (customer seeking to purchase bank's services as IRA trustee is consumer).
37. See, e.g., *Juarez v. Bank of Austin*, 659 S.W.2d 139, 142 (Tex. App.—Austin 1983, writ ref'd n.r.e.); *McNiell v. McDavid Ins. Agency*, 594 S.W.2d 198, 202 (Tex. Civ. App.—Fort Worth 1980, no writ).
38. See, e.g., *Fortner v. Fannin Bank in Windom*, 634 S.W.2d 74, 76 (Tex. App.—Austin 1982, no writ).
39. See, e.g., *Mercantile Mortgage Co. v. University Homes, Inc.*, 663 S.W.2d 45, 47 (Tex. App.—Houston [14th Dist.] 1983, no writ); *Lubbock Mortgage & Inv. Co., Inc. v. Thomas*, 626 S.W.2d 611, 613 (Tex. App.—El Paso 1981, no writ).
40. 661 S.W.2d 705 (Tex. 1983).
41. “Privity between the plaintiff and defendant is not a consideration in deciding the plaintiff's status as a consumer under the DTPA A plaintiff establishes his standing as a consumer in terms of his relationship to a transaction, not by a contractual relationship with the defendant. The only requirement is that the goods or services sought or acquired by the consumer form the basis of his complaint.” *Id.* at 707.
42. 665 S.W.2d 756 (Tex. 1984).
43. *Eckman v. Centennial Savings Bank*, 784 S.W.2d 672 (Tex. 1990).
44. See TEX. BUS. & COM. CODE §17.49(a)(b).
45. TEX. BUS. & COM. CODE § 17.49(c).
46. One way to view this exemption is that it is service specific, not profession specific. In other words, it is the nature of the service performed, not the person who performs it, that matters.
47. TEX. BUS. & COM. CODE § 17.49(c)(1)-(4)
48. See, e.g., *Latham v. Castillo*, 972 S.W.2d 66 (Tex. 1998) (Pre-1995 version of Act).
49. See *Sorokolit v. Rhodes*, 889 S. W.2d 239 (Tex. 1994) (Pre-1995 version of Act).
50. See generally, TEX. BUS. & COM. CODE §17.46(b)(24).
51. Even before the 1995 amendments, courts recognized that a negligence claim could not be turned into a DTPA claim simply by re-classifying it.
52. TEX. BUS. & COM. CODE § 17.49(f)(1).
53. *Id.* at §17.49(f)(2).
54. *Id.* at § 17.49(f)(3).
55. *Id.* at §17.49(g).
56. It may be possible to avoid the application of this exemption through the use of separate business entities, each being a separate consumer. For example, if one entity purchased the land, and another developed the property, there would be two separate consumers and the total consideration paid for by “the” consumer would not include funds expended by the other entity.
57. TEX. BUS. & COM. CODE §17.49(g).
58. “We have also recognized at least two requirements that must be established for a person to qualify as a consumer under the DTPA. One requirement is that the person must have sought or acquired goods or services by purchase or lease. Another requirement recognized by this Court is that the goods or services purchased or leased must form the basis of the complaint. If either requirement is lacking, the person aggrieved by a deceptive act or practice must look to the common law or some other statutory provision for redress.” *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 539 (1981).
59. 618 S.W.2d 535 (Tex. 1981).
60. *Id.* at 541.
- We find no indication in the definition of consumer in section 17.45(4), or any other provision of the Act, that the legislature intended to restrict its application only to deceptive trade practices committed by persons who furnish the goods or services on which the complaint is based. Nor do we find any indication that the legislature intended to restrict its application by any other similar privity requirement. In contrast, privity requirements have been dispensed with altogether in negligence suits, in implied warranty suits for economic loss, and, for the most part, privity requirements have also been abolished in strict liability suits. The Act is designed to protect consumers from any deceptive trade practice made in connection with the purchase or lease of any goods or services. To this end, we must give the Act, under the rule of liberal construction, its most comprehensive application possible without doing any violence to its terms. *Id.* at 540-41.
61. 919 S.W.2d 644 (Tex. 1996).
62. *Id.* at 649.
63. In its opinion, the court states what is not “in connection with,” rather than what is. For example, as to one of the parties the court noted:

Although the conduct of U.S. Brass comes closer to being in connection with the plaintiffs' purchase of their homes than the conduct of Shell or Celanese, it also falls short of meeting the nexus required for DTPA liability. U.S. Brass exercised significant control over the design and installation of the plumbing systems, but as with Shell and Celanese, U.S. Brass had no role in the sale of the homes to the plaintiffs. As with Shell, U.S. Brass' marketing efforts were not intended to, nor were they, incorporated into the marketing of the homes to the plaintiffs. Finally, U.S. Brass' products were subject to independent evaluation by building code officials, homebuilders, and the plumbing contractors who installed the materials. Viewed in this context, we conclude that U.S. Brass' actions were not connected with the plaintiffs' transactions, that is, the sale of the homes, in a way that justifies liability under the DTPA. *Id.* at 652.

64. *See, e.g.,* Norwest Mortgage, Inc. v. Salinas, 999 S.W.2d 846 (Tex. App. Corpus Christi 1999, no pet.) wherein the court finds the Amstadt test to be satisfied; and, Marshall v. Husch, 84 S.W.3d 781 (Tex. App. Dallas 2002, no pet. h.), wherein the court notes that Amstadt requires that the representation reach the consumer, or that there be a benefit from the consumer's transaction to the party making the misrepresentation. Richard M. Alderman, *THE LAWYER'S GUIDE TO THE TEXAS DECEPTIVE TRADE PRACTICES Act* § 3.022 at note 32 (2^d ed. 2003).

65. TEX BUS. & COM. CODE § 17.46(b).

66. This requirement was added by the 1995 amendments. A similar requirement of reliance had been imposed by the supreme court in Prudential Ins. Co. of America v. Jefferson Assocs. Ltd., 896 S.W.2d 156 (Tex. 1995). An interesting issue is the continued validity of Prudential in light of these changes.

67. Requiring actual reliance by the consumer maintaining the claim would often result in the inequitable situation of allowing a merchant to misrepresent goods or services with no liability based simply on the fact that the goods were purchased for another.

68. TEX BUS. & COM. CODE §§ 17.54(b)(10), (13), (23).

69. 606 S.W.2d 682 (Tex. 1980).

70. *Id.* at 687.

71. *Id.*

72. *See, e.g.,* Pennington v. Singleton, 606 S.W.2d 682 (Tex. 1980).

73. *See, e.g.,* First Title Co. of Waco v. Garrett, 860 S.W.2d 74 (Tex. 1993).

74. *See, e.g.,* Kessler v. Fanning, 953 S.W.2d 515 (Tex. App.—Fort Worth 1997).

75. *See, e.g.,* Orkin v. LeSassier, 688 S.W.2d 651 (Tex. App.—Beaumont 1995).

76. *See, e.g.,* Weitzel v. Barnes, 691 S.W.2d 598 (Tex. 1985).

77. *See, e.g.,* State v. Bachynsky, 770 S.W.2d 563 (Tex. 1989).

78. *See, e.g.,* Smith v. Baldwin, 611 S.W.2d 611 (Tex. 1980).

79. *See, e.g.,* Gunn Buick v. Rosano, 907 S.W.2d 628 (Tex. App.—San Antonio 1995).

80. *See, e.g.,* Weitzel v. Barnes, 691 S.W.2d 598 (Tex. 1985).

81. TEX BUS. & COM. CODE §17.46(b)(12).

82. *Id.*

83. *See, e.g.,* Leal v. Furniture Barn, 571 S.W.2d 864 (Tex. 1978).

84. *See, e.g.,* Myers v. Ginsberg, 735 S.W.2d 600 (Tex. App.—Dallas 1987).

85. *See, e.g.,* Villarreal v. Elizondo, 831 S.W.2d 474 (Tex. App.—Corpus Christi 1992).

86. *See, e.g.,* River Oaks Townhomes Owner's Association v. Bunt, 712 S.W.2d 529 (Tex. App.—Houston [14th Dist.] 1986).

87. *See, e.g.,* Chandler v. Gene Messer Ford, Inc., 81 S.W.3d 493 (Tex. App. Eastland 2002, no pet)

88. *See, e.g.,* Ojeda de Toca v. Wise, 748 S.W.2d 449 (Tex. 1988).

89. TEX BUS. & COM. CODE §17.45(5). Note that until 1995 the definition of unconscionability included a subsection (B), defining unconscionability to mean charging a price grossly in excess of value received. When reading unconscionability cases be sure to determine which definition the court is employing.

90. *See, e.g.,* Parkway Corporation v. Woodruff, 901 S.W.2d 434 (Tex. 1995).

91. *See, e.g.,* Chastain v. Koonce, 700 S.W.2d 579 (Tex. 1985).

92. *Id.* at 583.

93. For a complete discussion of Texas warranty law, see RICHARD M. ALDERMAN, *THE LAWYER'S GUIDE TO THE TEXAS DECEPTIVE TRADE PRACTICES ACT*, 2nd ed. at Chapter 5.

94. Under the DTPA, damages may be enhanced and additional, or punitive, damages may be recovered in situations where they would not otherwise be authorized. For example, under Chapter 2 of the Texas Business and Commerce Code, damages for mental anguish and punitive damages may not be recovered. If the claim is pled through the DTPA, however, these damages may be recovered if the defendant acted "knowingly." See TEX BUS & COM CODE §17.50(b).

95. *See* La Sara Grain Company v. First National Bank of Mercedes, 673 S.W.2d 558 (Tex. 1984).

96. *See* TEX. BUS. & COM. CODE §§2.312-314.

97. Melody Home Manufacturing Co. v. Barnes, 741 S.W.2d 349 (Tex. 1987). Note that there is no implied warranty of good and workmanlike performance in professional services. Murphy v. Campbell, 964 S.W.2d 265 (Tex. 1998); Dennis v. Allison, 698 S.W.2d 94 (Tex. 1985).

98. Davidow v. Inwood North Professional Group, 747 S.W.2d 373 (Tex. 1988).

99. *See* Humber v. Morton, 426 S.W.2d 554 (Tex. 1968).

100. But see the recent Texas Supreme Court decision in PPG Industries, Inc. v. JMB/Houston Centers Limited Partnership, 146 S.W.3d 79, at 89 (Tex. 2004) wherein the court held that a breach of implied warranty claim may not be brought under the DTPA against a "remote" seller, such as a manufacturer. The court stated, "Thus, we have established a clear distinction between DTPA and warranty claims: A downstream buyer can sue a remote seller for breach of an implied warranty, but cannot sue under the DTPA." (emphasis in original)

101. *See* Southwestern Bell Telephone Company v. FDP Corp., 811 S.W.2d 572 (Tex. 1991).

102. TEX BUS & COM CODE §17.506.

103. Smith v. Baldwin, 611 S.W.2d 611 (Tex. 1980).

104. Weitzel v. Barnes, 691 S.W.2d 598 (Tex. 1985).

105. Kennemore v. Bennett, 755 S.W.2d 89 (Tex. 1988).

106. Note that such a contract will also negate reliance required by TEX. BUS. & COM. CODE § 17.50(a) for a laundry list claim.

107. 896 S.W.2d 156 (Tex. 1995).

108. *Id.* at 161

109. *Id.* at 162

110.

111. TEX. BUS. & COM. CODE § 17.5051.

112. *Id.*
113. *See, e.g.,* Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266 (Tex. 1992). For a general discussion of arbitration in the consumer context, see Richard M. Alderman, Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform, 38 Hous. L. Rev. 1237 (2001).
114. If the giving of 60 days written notice is impracticable by reason of the necessity of filing suit in order to prevent the expiration of the statute of limitations or if the consumer's claim is asserted by way of counterclaim, notice is not required. DTPA §17.505(b).
115. *Id.*
116. TEX. BUS. & COM. CODE § 17.505(c).
117. Note that the fourth option was not available before the 1995 amendments.
118. Note that even if the plaintiff refuses an offer of settlement in full, the tender itself will constitute a defense if the plaintiff pursues the matter.
119. A settlement offer is not an admission of engaging in an unlawful act or practice or liability under the Act. It may not be offered as evidence except in connection with the limitation of damages or attorneys' fees. TEX. BUS. & COM. CODE § 17.5052(k).
120. *Id.* at § 17.5052 (a).
121. *Id.* at § 17.5052 (c).
122. *Id.* at § 17.5052(f).
123. *Id.* at § 17.5052(g).
124. *Id.* at § 17.5052 (d)(2).
125. *Id.* at § 17.5052(h).
126. *Id.*
127. TEX. BUS. & COM. CODE §17.565. The limitation period may be extended 180 days if the consumer proves that failure to timely file was due to the defendant's knowingly engaging in conduct solely calculated to induce the plaintiff to refrain from or postpone the commencement of the action.
128. *See, e.g.,* KPMG Peat Marwick v. Harrison Co. Hous. Fin. Corp., 988 S.W.2d 746 (Tex. 1999).
129. TEX. CIV. PRAC. & REM. CODE §74.004.
130. TEX OCC. CODE § 801.507, Nonapplicability of Deceptive Trade Practices-Consumer Protection Act, provides, "Subchapter E, Chapter 17, Business & Commerce Code, does not apply to a claim against a veterinarian for damages alleged to have resulted from veterinary malpractice or negligence."
131. Segura v. Abbott Laboratories, Inc., 907 S.W.2d 503 (Tex. 1995).
132. *See, e.g.,* Cathey v. Metropolitan Life Ins. Co., 805 S.W.2d 387 (Tex. 1991).
133. *See, e.g.,* Trans World Airlines, Inc. v. Mattox, 897 F.2d 773 (5th Cir. 1990) *aff'd*, 498 U.S. 926 (1992).
134. *See, e.g.,* Moffitt v. Bekins Moving & Storage, 818 F. Supp. 178 (N.D. Tex. 1993).
135. Note that this is a substantially lower standard than that required in a tort case. See generally, Chapter 41 of the Texas Civil Practice and Remedies Code, which requires a finding of fraud, malice or gross negligence to support an award of exemplary damages.
136. *See* Rourke v. Garza, 530 S.W.2d 794, 801 (Tex. 1975). See generally Page Keeton, Causation, 28 S. TEX. L. REV. 231 (1986).
137. Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 481 (Tex. 1995).
138. For example, in Archibald v. Act III Arabians, 755 S.W.2d 84 (Tex. 1988), the jury found conduct sufficient to satisfy the producing cause standard but not proximate cause.
139. TEX. BUS. & COM. CODE § 17.50(b)(1). Note that the general damage standard was changed in 1995 from "actual damages," to "economic damages." Actual damages, however, remains the damage standard under section 17.50(h) for violation of "tie-in" statutes.
140. *Id.* at § 17.45(11).
141. Note this is still the applicable standard for a tie-in statute. See TEX. BUS. & COM. CODE 17.50(h).
142. TEX. BUS. & COM. CODE § 17.50(b)(1).
143. *Id.* at § 17.45(9).
144. *See, e.g.,* Latham v. Castillo, 972 S.W.2d 66 (Tex. 1998) (Pre-1995 version of Act).
145. *See, e.g.,* Parkway Co. v. Woodruff, 901 S.W.2d 434 (Tex. 1995).
146. TEX. BUS. & COM. CODE § 17.50(b)(1).
147. *See, e.g.,* Jim Walter Homes, Inc. v. Valencia, 690 S.W.2d 239 (Tex 1985) (decided under pre-1995 DTPA).
148. TEX. BUS. & COM. CODE § 17.50(d).
149. *See* McKinley v. Drozd, 685 S.W.2d 7 (Tex. 1985).
150. *See* Arthur Andersen & Co. v. Perry Equipment Corp., 945 S.W.2d 812 (Tex. 1997).
151. TEX. BUS. & COM. CODE § 17.50(c).
152. Donwerth v. Preston II Chrysler-Dodge, Inc., 775 S.W.2d 634 (Tex. 1989).
153. Note that the term "or" was added in 1995 replacing the term "and." This would appear to create a lower standard for the award of defendants' attorneys' fees.
154. *See* Donwerth v. Preston II Chrysler-Dodge, Inc., 775 S.W.2d 634 (Tex. 1989).
155. *Id.*
156. *See* Arthur Andersen & Co. v. Perry Equipment Corp., 945 S.W.2d 812 (Tex. 1997).
157. *See, e.g.,* Kish v. Van Note, 692 S.W.2d 463 (Tex. 1985).