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## Antitrust and Consumer Protection

A. Michael Ferrill

*Cox Smith Matthews Incorporated*

Leslie Sara Hyman

*Pulman, Cappuccio, Pullen & Benson LLP*

Soledad Valenciano

*Spivey Valenciano, PLLC*

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# ANTITRUST AND CONSUMER PROTECTION

*A. Michael Ferrill*\*

*Leslie Sara Hyman*\*\*

*Soledad Valenciano*\*\*\*

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## I. INTRODUCTION

Consumer welfare is the common concern of the antitrust laws and the Texas Deceptive Trade Practices—Consumer Protection Act (DTPA).<sup>1</sup> Antitrust,

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\* B.B.A., St. Mary's University; J.D., Baylor University; Shareholder, Cox Smith Matthews Incorporated, San Antonio, Texas.

\*\* B.A., Brandeis University; J.D., Hastings College of the Law; Partner, Pulman, Cappuccio, Pullen & Benson LLP, San Antonio, Texas.

\*\*\* B.A., Texas A&M University; M.Ed., Texas State University, J.D., Southern Methodist University Dedman School of Law; Partner, Spivey Valenciano, PLLC, San Antonio, Texas.

1. See TEX. BUS. & COM. CODE ANN. §§ 17.41 et seq. (West 2011 & Supp. 2013). Section 17.50 of the DTPA provides:

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

however, primarily addresses the misuse of market power used to harm consumers, while the DTPA focuses on consumer harm brought about through deception.<sup>2</sup> The antitrust laws and the DTPA therefore are best viewed as focusing on complementary aspects of consumer welfare.

This Article covers significant developments under the federal and Texas antitrust laws and the DTPA during the survey period, November 1, 2012 through October 31, 2013.<sup>3</sup>

## II. ANTITRUST

Texas courts were quiet on antitrust issues during the Survey period. The decisions from the United States Supreme Court and lower federal courts in Texas that addressed antitrust claims are discussed below.

### A. ANTITRUST LIABILITY FOR REVERSE PAYMENT SETTLEMENTS

The United States Supreme Court considered the antitrust ramifications of reverse payment settlement of patent infringement claims in *F.T.C. v. Actavis, Inc.*<sup>4</sup> The Federal Trade Commission had sued several settling parties, challenging the legality of the form of patent settlement known as “reverse payment,” in which the alleged infringer agrees not to produce the patented product during the patent’s term in exchange for a large payment from the holder of the patent.<sup>5</sup>

The district court dismissed the FTC’s claims and the Eleventh Circuit affirmed, holding that “absent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent.”<sup>6</sup> The United States Supreme Court reversed, holding that antitrust legality should be measured both against patent law policy and against procompetitive antitrust policy.<sup>7</sup>

The Court concluded that reverse payment settlements can “sometimes” result in antitrust violations.<sup>8</sup> The Court first observed that an agreement that

act or practice that is: (A) specifically enumerated in a subdivision of Subsection (b) of Section 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 Chapter 541, Insurance Code.

2. *Id.* § 14.44(a); *Reiter v. Sonotone*, 442 U.S. 330, 343 (1979); *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1382 (5th Cir. 1994).

3. Because this article was not published last year, the authors have also included select opinions from the twelve months preceding the Survey Period.

4. *F.T.C. v. Actavis, Inc.*, 133 S. Ct. 2223, 2227 (2013).

5. *Id.* at 2225.

6. *FTC v. Watson Pharms., Inc.*, 677 F.3d 1298, 1312, 1315 (2012), *rev’d sub nom. Actavis*, 1333 S. Ct. at 2223.

7. *Actavis*, 133 S. Ct. at 2235–36.

8. *Id.* at 2234.

the claimed infringer would not attempt to enter the market for a specified period of time had the “potential for genuine adverse effects on competition.”<sup>9</sup> Additionally, while any settlement could reflect the parties’ evaluation of avoided litigation costs or other competition neutral valuations, there is also the potential for anticompetitive consequences that are not justified by such considerations.<sup>10</sup> The Court next observed that there was evidence in the record “showing that reverse payment agreements are associated with the presence of higher-than-competitive profits—a strong indication of market power.”<sup>11</sup>

The Court rejected the Eleventh Circuit’s concern that antitrust scrutiny of a reverse payment settlement would require determination of the underlying patent validity or infringement case.<sup>12</sup> Finally, the Court stated that even though a “large, unjustified reverse payment risks antitrust liability,” the parties could settle their lawsuit on different terms.<sup>13</sup>

The Court declined to hold that reverse payment settlement agreements are presumptively unlawful and thus could be evaluated using the “quick look” approach, rather than the rule of reason.<sup>14</sup> Because

the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor’s anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification [and the] existence and degree of any anticompetitive consequence may . . . vary as among industries . . . the FTC must prove its case as in other rule-of-reason cases.<sup>15</sup>

#### B. ANTITRUST AND CLASS ACTION ARBITRATION WAIVERS

In *AT&T Mobility LLC v. Concepcion*,<sup>16</sup> the Supreme Court upheld the use of contractual class action arbitration waivers, even where the amount of individual damages made individual arbitration unfeasible. In *American Express Co. v. Italian Colors Restaurant*,<sup>17</sup> the Court considered whether anything about antitrust claims or federal statutory claims generally required a different result.

The merchant plaintiffs brought a putative class action against American Express, claiming that AMEX had “used its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards.”<sup>18</sup> The contract at issue contained an arbitration clause that precluded class arbitration, which the plaintiffs attempted to avoid on the ground that “requiring them to litigate their

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9. *Id.*

10. *Id.* 2235–36

11. *Id.* at 2236.

12. *Id.* at 2234.

13. *Id.* at 2237.

14. *Id.*

15. *Id.*

16. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752–53 (2011).

17. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2306 (2013).

18. *Id.* at 2308.

claims individually . . . would contravene the policies of the antitrust laws.”<sup>19</sup>

The Supreme Court rejected the argument. The Court agreed that in some ways, such as the enactment of treble damages provisions, Congress had evinced a willingness to exceed normal limits to advance “its goals of deterring and remedying unlawful trade practices.”<sup>20</sup> However, nothing in the Sherman Act or Clayton Act guarantees an affordable avenue for vindicating antitrust rights and neither statute demonstrates an intention to preclude class action waivers.<sup>21</sup>

The Court also rejected the plaintiffs’ appeal to the judge-made exception to the FAA that “allow[s] courts to invalidate agreements that prevent the ‘effective vindication’ of a federal statutory right.”<sup>22</sup> The plaintiffs argued only that they had “no economic incentive to pursue their antitrust claims individually in arbitration.”<sup>23</sup> “But the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”<sup>24</sup>

### C. THE STATE ACTION IMMUNITY DOCTRINE

In *F.T.C. v. Phoebe Putney Health System, Inc.*,<sup>25</sup> the Supreme Court considered the applicability of the state action doctrine to actions of a special purpose public entity. A county hospital authority in Georgia owned a hospital and decided to purchase the only other hospital in the county.<sup>26</sup> The Federal Trade Commission challenged the acquisition and the county argued that it was entitled to state action immunity from the antitrust laws.<sup>27</sup>

Under *Parker v. Brown*,<sup>28</sup> state governments are entitled to immunity from antitrust scrutiny when they impose market restraints. In an effort to balance state action immunity with “the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws,” municipalities and other substate governmental entities are entitled to state action immunity when they act “pursuant to a clearly articulated and affirmatively expressed state policy to displace competition.”<sup>29</sup> Authority to act is not sufficient.<sup>30</sup> The “governmental entity must also show that it has been delegated authority to act or regulate anticompetitively.”<sup>31</sup>

The Court reviewed the enabling legislation and concluded that the Georgia

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19. *Id.* at 2309.

20. *Id.*

21. *Id.* The Court acknowledged that both the Sherman Act and the Clayton Act predated the Federal Rules of Civil Procedure allowing for class action practice. *Id.* The Court held that congressional approval of those rules failed to “establish an entitlement to class proceedings for the vindication of statutory rights.” *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 2311 (emphasis in original).

25. *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1007 (2013).

26. *Id.* at 1005.

27. *Id.*

28. *Parker v. Brown*, 317 U.S. 341, 351-52 (1943).

29. *Phoebe*, 133 S. Ct. at 1007, 1010.

30. *Id.* at 1012.

31. *Id.* at 1013.

legislature had not expressly adopted a policy to permit hospitals to make acquisitions that could substantially lessen competition.<sup>32</sup> It therefore concluded that state action immunity did not apply.<sup>33</sup>

#### D. THE INTERPLAY BETWEEN THE FEDERAL AND STATE ANTITRUST LAWS

*American Airlines, Inc. v. Sabre, Inc.*<sup>34</sup> arose from a dispute between American Airlines and Sabre, a commercial reservations system with which American had contracted. After making technology improvements that enabled American to sell its services directly to consumers, American alleged that the owners and operators of Sabre engaged in anticompetitive conduct and other violations of the Sherman Act.<sup>35</sup> American sued Sabre in federal court in the Northern District of Texas, raising federal antitrust claims, and sued Sabre in the 67th Texas Judicial District Court in Tarrant County for monopolization in violation of the Texas Free Enterprise and Antitrust Act of 1983 (TFEAA).<sup>36</sup>

Sabre removed the state court case to federal court.<sup>37</sup> The district court granted American's motion to remand and awarded American \$15,955 in attorneys' fees on the ground that the removal was objectively unreasonable.<sup>38</sup> Sabre appealed. Relying on *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*,<sup>39</sup> Sabre argued that American's TFEAA claim necessarily raised a federal issue because TFEAA is to be construed "in harmony with federal judicial interpretations of comparable federal antitrust statutes."<sup>40</sup> The Fifth Circuit determined that "nothing in the plain language of the TFEAA or Texas case law interpreting the TFEAA requires that federal law control Texas' interpretation of its state antitrust statute."<sup>41</sup> Because Sabre failed to demonstrate that American's state law claim necessarily raised an issue of federal law, and deferring to the discretion vested in district courts when assessing attorneys' fees, the Fifth Circuit affirmed the district court's fee award.<sup>42</sup>

### III. DECEPTIVE TRADE PRACTICES—CONSUMER PROTECTION ACT

Noteworthy DTPA decisions during the Survey Period examined misrepresentations, the professional services exemption, limitations, jury questions, and remedies.

#### A. MISREPRESENTATIONS

Section 17.50(a)(1) of the DTPA provides a cause of action for consumers

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32. *Id.* at 1015.

33. *Id.* at 1011.

34. *Am. Airlines, Inc. v. Sabre, Inc.*, 694 F.3d 539, 540 (5th Cir. 2012).

35. *Id.* at 541.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005).

40. *Am. Airlines*, 694 F. 3d at 542.

41. *Id.*

42. *Id.* at 544.

harmful by certain categories of misrepresentations enumerated in DTPA section 17.46(b).<sup>43</sup> In *Red Roof Inns, Inc. v. Jolly*,<sup>44</sup> the Houston Court of Appeals considered whether the evidence admitted at trial was legally sufficient to support the jury's verdict against Red Roof Inns.

Donna Jolly and James Glick (the Guests) rented a motel room in Houston at 2:30 a.m., at which time they received a room key card and observed an on-duty security guard.<sup>45</sup> Discussions between motel staff and the Guests were limited. The Guests confirmed vacancy, booked their motel room, and determined they could not use the motel's safe.<sup>46</sup> The Guests alleged that during their stay, someone stole \$50,000 in jewelry from their motel room.<sup>47</sup>

The Guests sued, alleging in part that Red Roof Inns violated the DTPA by making actionable misrepresentations.<sup>48</sup> The jury found Red Roof Inns engaged in false, misleading, or deceptive acts or practices that the Guests relied on to their detriment and that were a producing cause of the Guests' damages.<sup>49</sup> In particular, the jury found that Red Roof Inns violated sections 17.46(b)(7) and (24) of the DTPA.<sup>50</sup>

On appeal, in a case of first impression, the court considered whether an implied misrepresentation was actionable under section 17.46(b)(7).<sup>51</sup> Under section 17.46(b)(7), a false, misleading, or deceptive act or practice includes representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, when they are of another.<sup>52</sup> To set a legal standard for determining whether a misrepresentation may be implied under the DTPA, the court of appeals looked to the law of implied covenants.<sup>53</sup> The court concluded that a representation should be implied from conduct "only when, under the circumstances at the time the party engaged in that conduct, the only reasonable interpretation of that conduct is that the party meant to convey the representation in question."<sup>54</sup>

Using that standard, the court identified several reasonable interpretations of the motel's conduct with respect to giving a room key card and for having a security guard on duty.<sup>55</sup> The court held that therefore, neither act would enable reasonable and fair-minded people to find that Red Roof Inns represented its goods or services to be of a particular standard, quality, or grade (i.e., that the Guests' room could not be accessed by motel employees or that the hotel was secure) when they were of another.<sup>56</sup>

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43. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (West 2011).

44. *Red Roof Inns, Inc. v. Jolly*, 2011 Tex. App. 2011 WL 6288147 (Tex. App.—Houston [14th Dist.] 2011, no pet. h.).

45. *Id.* at \*1.

46. *Id.*

47. *Id.*

48. *See id.*

49. *Id.*

50. *Id.*

51. *See id.* at \*2-3.

52. TEX. BUS. & COM. CODE ANN. § 17.46(b)(7) (West 2002).

53. *Red Roof*, 2011 WL 6288147 at \*3.

54. *Id.* at \*4.

55. *Id.* at \*4-6.

56. *Id.* at \*7.

The court then analyzed the jury's verdict as to claims brought under section 17.46(b)(24). Under section 17.46(b)(24), a false, misleading, or deceptive act or practice includes failing to disclose information concerning goods or services, which was known at the time of the transaction, if the failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.<sup>57</sup>

The Guests listed six categories of undisclosed information, including 152 service calls to the motel by local law enforcement in the preceding two years, instances of inaccurate room key card reporting, which prevented accurate tracking of who entered a motel room, and security camera deficiencies.<sup>58</sup> Red Roof Inns disputed whether motel agents transacting with the Guests had knowledge of such information. The court of appeals held that even if those agents knew of the information when transacting with the Guests, there was no evidence that Red Roof Inns intentionally withheld the information with the intent of inducing the Guests to rent a hotel room.<sup>59</sup> Ultimately, the court held that there must be direct evidence of the intent to induce under this subsection of the DTPA.<sup>60</sup> The court rejected the Guests' request that the court adopt the legal rule followed in *Jones v. Ray Insurance Agency*,<sup>61</sup> in which the Corpus Christi Court of Appeals had held that "in the absence of direct evidence of intent to induce, intent may be presumed if the undisclosed information" is material and known to the defendant.<sup>62</sup>

In *Texas Real Estate Commission v. Asgari*,<sup>63</sup> the San Antonio court of appeals considered whether purchasers of a commercial lot may recover from the Texas Real Estate Recovery Trust Account based on a licensed real estate broker's alleged misrepresentations under the DTPA.<sup>64</sup> The real estate broker, who was licensed by the Texas Real Estate Commission, represented to the purchasers of a commercial "lot that they needed only to rezone the property for it to be suitable" for use as a used car lot.<sup>65</sup> This representation was false as the property also needed to be platted and removed from flood plain status.<sup>66</sup>

The purchasers sued the real estate broker for representing that the property (1) had characteristics, uses and benefits which it did not have, and (2) "was of a particular standard and quality when in fact it was of another."<sup>67</sup> The county court at law found in favor of the purchasers. The purchasers, who were

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57. TEX. BUS. & COM. CODE ANN. § 17.46(b)(24).

58. *Red Roof*, 2011 WL 6288147 at \*7.

59. *Id.* at \*9.

60. *See id.* at \*8-9.

61. *Jones v. Ray Ins. Agency*, 59 S.W.3d 739, 750 (Tex. App.—Corpus Christi 2001), *pet. denied*, 92 S.W.3d 530 (Tex. 2002) (per curiam).

62. *Red Roof*, 2011 WL 6288147 at \*8-9.

63. *Tex. Real Estate Comm'n v. Asgari*, 402 S.W.3d 814 (Tex. App.—San Antonio 2013, no *pet.*).

64. Section 1101.601(a) of the Texas Occupations Code provides that the Texas Real Estate Commission shall maintain a real estate recovery trust account to reimburse aggrieved persons who suffer actual damages caused by an act described by section 1101.602 of that Code committed by a license holder.

65. *Tex. Real Estate*, 402 S.W.3d at 815.

66. *Id.*

67. *See* TEX. BUS. & COM. CODE § 17.46(b)(5) and (7).



ultimately unable to collect from the real estate broker, requested payment from the Texas Real Estate Recovery Trust Account.<sup>68</sup>

The Commission objected that payment from the Texas Real Estate Recovery Trust Account could only be had upon a finding of fraud, misrepresentation, or dishonesty.<sup>69</sup> Thereafter, the trial court clarified its judgment, finding liability based on the real estate broker's violations of sections 17.46(b)(5) and (7) of the DTPA. The Trust Account appealed the trial court's order mandating payment, claiming the evidence was legally insufficient to support the judgment.<sup>70</sup> The court of appeals held that "the evidence [was] legally sufficient for a reasonable fact finder to determine that [the real estate broker] engaged in misrepresentations."<sup>71</sup> That the real estate broker did not know that his representations regarding the property were false was irrelevant; the DTPA does not require proof of knowing or intentional conduct.<sup>72</sup>

#### B. PROFESSIONAL SERVICES EXEMPTION

In *Retherford v. Castro*,<sup>73</sup> the Waco Court of Appeals examined the scope and applicability of the DTPA professional services exemption.<sup>74</sup> Retherford was a home inspector licensed by the Texas Real Estate Commission.<sup>75</sup> The Castros hired Retherford to inspect a home they had contracted to buy.<sup>76</sup> When the home's roof leaked within a year of its purchase, the Castros hired a second inspector who opined that Retherford would have discovered the leaky roof had he possessed the necessary knowledge and experience.<sup>77</sup> The Castros then sued Retherford alleging he misrepresented that his services had characteristics, uses, benefits, and a standard of quality they did not have.<sup>78</sup> Retherford pled that the DTPA's professional services exemption in section 17.49(c) insulated him from

68. See TEX. OCC. CODE § 1101.652(a)(3).

69. *Id.*; see TEX. OCC. CODE § 1101.652(a)(3). "The commission may suspend or revoke a license issued under this chapter or take other disciplinary action authorized by this chapter if the license holder . . . engages in misrepresentation, dishonesty, or fraud when selling, buying, trading, or leasing real property in the name of . . . the license holder."

70. Section 1101.608(c) of the Texas Occupations Code allows the Texas Real Estate Commission to re-litigate any material and relevant issue that resulted in the judgment in favor of the aggrieved person.

71. *Tex. Real Estate*, 402 S.W.3d at 819.

72. See TEX. BUS. & COM. CODE § 17.50(1).

73. *Retherford v. Castro*, 378 S.W.3d 29 (Tex. App.—Waco 2012, pet. denied).

74. Section 17.49(c) of the DTPA provides, "Nothing in this subchapter 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. 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)(24);
- (3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion;
- (4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion; or
- (5) a violation of Section 17.46(b)(26).

75. *Retherford*, 378 S.W.3d at 31.

76. *Id.*

77. *Id.* at 32.

78. See TEX. BUS. & COM. CODE ANN. § 17.46(b)(5), (7) (West 2011).

any alleged liability.<sup>79</sup> Following a bench trial, the trial court found that the professional services exemption did not apply.<sup>80</sup> Retherford appealed.

The court of appeals began its analysis by observing that the professional services exemption does not define the “professions” covered by the exemption.<sup>81</sup> While the DTPA was amended in 2011 to exclude specific real estate professionals listed in Chapter 1101 of the Texas Occupations Code from DTPA liability, licensed professional home inspectors were not included in that separate exclusion.<sup>82</sup> Looking to the Eastland Court of Appeals’ decision in *Duncanville Diagnostic Center, Inc. v. Atlantic Lloyd’s Insurance Company*,<sup>83</sup> the court of appeals held that the definition of a professional is one who (1) “engages in work involving mental or intellectual rather than physical labor; (2) requires special education to be used on behalf of others; and (3) earns profits dependent mainly on these considerations.”<sup>84</sup> The court of appeals concluded that a professional real estate inspector is a professional under this definition.<sup>85</sup>

Because Retherford’s inspection report included Retherford’s professional opinion, the conduct complained of involved Retherford’s services, the essence of which was providing advice, judgment or an opinion.<sup>86</sup> Therefore, the court the court of appeals concluded that the professional services exemption applied.<sup>87</sup> The court of appeals also concluded that the *exception* to the professional services exemption provided in section 17.49(c)(1) did not apply.<sup>88</sup> The court of appeals reversed and remanded for a new trial on the Castros’ remaining claims.<sup>89</sup>

### C. STATUTE OF LIMITATIONS

The statute of limitations for a DTPA claim, with certain exceptions, is two years.<sup>90</sup> In both *Gonzales v. Southwest Olshan Foundation Repair Company, LLC*<sup>91</sup>

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79. *Retherford*, 378 S.W.3d at 33.

80. *Id.* at 32.

81. *Id.* at 33.

82. *See id.* at 34–35.

83. *Duncanville Diagnostic Ctr., Inc. v. Atl. Lloyd’s Ins. Co.*, 875 S.W.2d 788, 790 (Tex. App.—Eastland 1994, writ denied).

84. *Id.*

85. *Retherford*, 378 S.W.3d at 36.

86. *Id.*

87. *Id.*

88. The professional services exception does not apply to an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion. TEX. BUS. & COM. CODE ANN. § 17.49(c)(1) (West 2011).

89. *Retherford*, 378 S.W.3d at 38.

90. “All actions brought under this subchapter 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. The period of limitation provided in this section may be extended for a period of 180 days if the plaintiff proves that failure timely to commence the action was caused by the defendant’s knowingly engaging in conduct solely calculated to induce the plaintiff to refrain from or postpone the commencement of the action.” TEX. BUS. & COM. CODE ANN. § 17.565 (West 2011).

91. *Gonzales v. Sw. Olshan Found. Repair Co., LLC*, 400 S.W.3d 52, 54–55 (Tex. 2013).

and *Design Tech Homes, Ltd. v. Maywald*,<sup>92</sup> homeowners sued contractors for problems related to their homes' foundations more than two years after the complained-of work. The claims in *Gonzales* were deemed time barred.<sup>93</sup> The claims in *Maywald* were not.<sup>94</sup>

In *Gonzales*, the home had water leaks under its foundation. Gonzales hired Olshan to repair the resulting damage to the foundation. Olshan's written agreement stated that it would make repairs in a good and workmanlike manner.<sup>95</sup> In 2002 and 2003, Olshan excavated tunnels under the home to allow plumbers to fix additional leaks. Olshan leveled the foundation in August 2003 and again in October 2003. During the second leveling, an Olshan employee told Gonzales that Olshan's work was "the worst job I have ever seen."<sup>96</sup> The employee also cautioned that the tunnels should not be re-filled until the foundation was properly repaired and even advised Gonzales to hire an attorney.<sup>97</sup>

In November 2003, Olshan sent an engineer to the home who told Gonzales that the foundation was functioning properly. Still, Gonzales refused to allow the tunnels to be re-filled because she believed she was on Olshan's wait list for further work related to the troubled foundation. In July 2005, Olshan sent another engineer to the home. The engineer inspected the home and reported that the foundation was working properly. Olshan wanted to finish the job and fill in the tunnels, but Gonzales again refused.

In May 2006, more damage to the home was noted. Gonzales sued Olshan under several theories including breach of express and implied warranties and DTPA violations. The jury found that Olshan breached "the implied warranty of good and workmanlike repairs (but not its express warranty) and engaged in unconscionable actions under the DTPA."<sup>98</sup> Olshan appealed, and the San Antonio Court of Appeals reversed.<sup>99</sup>

On further appeal, the Texas Supreme Court held that Gonzales' DTPA claims were time barred because they accrued, at the latest, in October 2003 when Olshan's employee informed Gonzales of Olshan's poor work.<sup>100</sup> The common law doctrine of fraudulent concealment did not apply to the DTPA claims because the limitations period for a DTPA claim expressly includes a limited, 180-day fraudulent concealment provision.<sup>101</sup>

In *Maywald*, after foundation issues surfaced in 2001, the Maywalds notified their contractor of those issues and sought repairs in 2003; suit was filed in 2008. In contrast to the homeowner in *Gonzales*, the Maywalds believed their

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92. *Design Tech Homes, Ltd. v. Maywald*, 2013 WL 2732068 (Tex. App.—Beaumont 2013, pet. denied).

93. *Gonzales*, 400 S.W.3d at 59.

94. *Maywald*, 2013 WL 2732068 at \*5.

95. *Gonzales*, 400 S.W.3d at 54.

96. *Id.*

97. *Id.*

98. *Id.* at 55.

99. *Id.* at 54–55.

100. *Id.* at 57–58. The court also held that Olshan's express warranty (which was not breached) superseded any implied warranty.

101. *Id.* at 58–59.

contractor's representations, including representations made in 2008, that there were no remaining foundation problems and that cracks in the walls and ceilings of the Maywalds' home were due to normal settlement of the home's foundation.<sup>102</sup>

A jury sided with the Maywalds and found that the contractor violated the DTPA by making actionable misrepresentations. The contractors moved for a judgment notwithstanding the verdict, arguing "that the Maywalds failed to plead the discovery rule" and that the claims were therefore time barred.

The trial court denied the motion for judgment and the court of appeals affirmed, concluding that the discovery rule was tried by consent.<sup>103</sup> The court recognized the jury's findings that the Maywalds "knew of, or, in exercise of reasonable diligence, should have discovered the injury to their property by January 2008," and "should have discovered all the false, misleading, or deceptive acts or practices of [the contractor] by May 2009," and that the lawsuit was filed within two years of that date.<sup>104</sup>

#### D. REMEDIES

In *Cruz v. Andrews Restoration, Inc.*,<sup>105</sup> the Texas Supreme Court examined the DTPA's remedy of restoration.<sup>106</sup> Heavy storms caused extensive damage to Cruz's home. Litigation followed between Cruz, his insurer, and Protech, the company hired to repair the home. The insurer promised Protech that it would pay for its services, but ultimately paid only a portion, leaving outstanding invoices of \$705,548.02.<sup>107</sup>

Protech sued Cruz and the insurer. Cruz counterclaimed on several bases, including violations of the DTPA. "Cruz moved for partial summary judgment on one of his DTPA claims" alleging "that Protech's work authorizations omitted language mandated by the Texas Property Code."<sup>108</sup> The trial court granted Cruz's motion in part, holding that "Cruz was a [DTPA] consumer and that Protech committed a false, misleading, and/or deceptive act under the DTPA, but the court declined to grant summary judgment as to any remedy

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102. *Maywald*, 2013 WL 2732068 at \*4-5.

103. *Id.* at \*5.

104. *Id.*

105. *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817 (Tex. 2012).

106. *Id.* at 823. "In a suit filed under this section, each consumer who prevails may obtain: orders necessary to restore to any party to the suit any money or property, real or personal, which may have been acquired in violation of this subchapter." TEX. BUS. & COM. CODE ANN. § 17.50(b)(3) (West 2011).

107. *Cruz*, 364 S.W.3d at 821.

108. *Id.* The Property Code provision is among the "tie-in" statutes actionable under section 17.46 of the DTPA. The Property Code requires that certain contracts for work and materials used to improve a homestead contain a statutory warning, printed in at least 10-point bold type:

IMPORTANT NOTICE: You and your contractor are responsible for meeting the terms and conditions of this contract. If you sign this contract and you fail to meet the terms and conditions of this contract, you may lose your legal ownership rights in your home. KNOW YOUR RIGHTS AND DUTIES UNDER THE LAW.

Act of April 15, 1993, 73d Leg., R.S., ch. 48, § 4, 1993 Tex. Gen. Laws 97, 98 (amended 2007) (current version at TEX. PROP. CODE ANN. § 41.007(a) (West 2007)).

sought by Cruz.”<sup>109</sup> “In a subsequent order, the trial court found that \$1,059,940.52 would be necessary to restore to Cruz all sums that had been paid to Protech by Cruz or on his behalf under the agreements,” but did not order restoration.<sup>110</sup>

At trial, the court “instructed the jury that the trial court had previously found Protech’s failure to include the requisite Property Code language to be a false, misleading, or deceptive act that was a producing cause of injury or harm to Cruz.”<sup>111</sup> The jury was then asked what sum of money would reasonably compensate Cruz for his resulting DTPA damages, to which the jury answered “\$0.”<sup>112</sup> Therefore, the “trial court ordered that Cruz recover no relief on” his DTPA claim.<sup>113</sup>

On appeal, the Dallas Court of Appeals held that despite the trial court’s finding that Protech engaged in a deceptive act, Cruz was not entitled to restoration of consideration because Cruz had failed to prove that he was entitled to rescission.<sup>114</sup> On further appeal, the Texas Supreme Court held that Cruz’s DTPA claim for restoration failed because he was not a prevailing party given that he had not sustained a finding of actual damages and because he failed to secure a finding that he relied to his detriment on any deceptive act.<sup>115</sup> The Texas Supreme Court further held that the DTPA’s restoration remedy contemplates mutual restitution and affirmatively adopted the prerequisites of section 54(5) of the Restatement (Third) of Restitution and Unjust Enrichment for relief under section 17.50(b)(3).<sup>116</sup>

#### E. JURISDICTION

In *Frazin v. Haynes & Boone, L.L.P.*,<sup>117</sup> the United States Court of Appeals for the Fifth Circuit examined whether a bankruptcy court has constitutional authority to enter a final judgment on a DTPA counterclaim. After filing a Chapter 13 bankruptcy petition, and having obtained the bankruptcy court’s permission to hire a law firm to prosecute the lawsuit, Frazin sued Lamajak, Inc. in state court.<sup>118</sup> Although Frazin received a discharge, the bankruptcy proceeding remained open; therefore any recovery from the Lamajak lawsuit would be applied to claims by Frazin’s unsecured creditors.<sup>119</sup>

Frazin won a \$6.3 million dollar verdict against Lamajak.<sup>120</sup> When Lamajak appealed, the bankruptcy court gave Frazin permission to hire a different firm to handle the appeal.<sup>121</sup>

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109. *Cruz*, 364 S.W.3d at 821-22.

110. *Id.* at 821.

111. *See id.*

112. *Id.*

113. *Id.*

114. *Id.* at 827.

115. *Id.*

116. *Id.* at 826-28.

117. *Frazin v. Haynes & Boone, L.L.P.*, 732 F.3d 313 (5th Cir. 2013).

118. *Id.* at 316.

119. *Id.*

120. *Id.*

121. *Id.*

Frazin settled with Lamajak for \$3.2 million.<sup>122</sup> When Frazin's lawyers filed their fee applications with the bankruptcy court, Frazin filed state law counterclaims against the law firms for, *inter alia*, violations of the DTPA.<sup>123</sup> The dispute was tried and the bankruptcy court entered a final judgment that denied the DTPA claims and awarded the law firms their outstanding fees.<sup>124</sup>

On appeal, Frazin argued that the bankruptcy court lacked authority under *Stern v. Marshal*<sup>125</sup> to enter final judgment on his counterclaims. Agreeing with Frazin, the Fifth Circuit stressed the importance of Article III of the U.S. Constitution "in maintaining separation of powers . . . safeguarding the independence of the judicial branch, and protecting litigants."<sup>126</sup> The court held that bankruptcy courts "lack the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim."<sup>127</sup> "Because it was not necessary to decide [Frazin's] DTPA claim to rule on the [a]ttorneys' fee applications, the bankruptcy court did not have authority to enter a final judgment as to that claim."<sup>128</sup> The court rejected the contentions that Frazin consented to the bankruptcy court's jurisdiction and that Frazin waived any objection by filing his counterclaims with the bankruptcy court.<sup>129</sup>

#### IV. CONCLUSION

If there is a common theme in the cases that populate this year's survey, it is found in the testing of the boundaries of consumer protection laws—antitrust and DTPA cases alike. On the antitrust side, *Actavis* and *Phoebe Putney Health System* tested the limits of patent immunity and state action immunity, respectively, while *AT&T Mobility* examined the interplay of antitrust law and the Federal Arbitration Act.

On the DTPA side, *Retherford* examined the professional services exemption to the DTPA, while *Gonzales* and *Maywald* applied the DTPA statute of limitations to similar, but not identical, facts. And two cases—*Red Roof Inns* and *Asgari*—examined the sufficiency of evidence offered in support of misrepresentation and nondisclosure claims.

Perhaps the biggest surprise among this year's cases was the Supreme Court's decision in *Actavis*. For the past several years, the lower federal courts have been presented with numerous challenges to "reverse payment" schemes, usually concluding that absent proof that (1) the patent-in-suit was procured by fraud, (2) the infringement suit was objectively baseless, or (3) the exclusionary effects of the settlement exceeded the scope of the so-called "patent monopoly," a reverse payment settlement does not violate antitrust law, as it is no more

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122. *Id.* at 317.

123. *Id.*

124. *Id.*

125. *Stern v. Marshal*, 131 S. Ct. 2594 (2011).

126. *Frazin*, 732 F.3d at 319.

127. *Stern*, 131 S. Ct. at 2620.

128. *Frazin*, 732 F.3d at 323.

129. *Id.* at 324.

exclusionary than the patent grant itself.<sup>130</sup>

In contrast, the Supreme Court's decision in *AT&T Mobility* to uphold class action waivers likely surprised few practitioners. Since the mid-1980s, the Court has issued a procession of decisions enforcing agreements to arbitrate against a wide range of challenges.<sup>131</sup> Although perhaps less surprising than *Actavis*, the Court's decision in *AT&T Mobility* may well prove to be more far-reaching, and not in a way that necessarily advances the interests of consumers. Injuries to consumers—whether they be antitrust overcharges or deceptive sales practices—often involve individual damages that are too small to make lawsuit or an arbitration proceeding worthwhile. Yet, especially when such claims involve a nationwide course of conduct, the aggregate harm to consumers may be in the millions or even billions of dollars. In such cases, class actions allow injured consumers to collectively pursue their claims in a single proceeding. By allowing sellers to foreclose consumers access to such remedies by including arbitration and class action waiver language in their form contracts the Supreme Court has erected a powerful obstacle to the vindication of consumer's rights.

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130. See, e.g., *Arkansas Carpenters Health & Welfare Fund v. Bayer AG*, 544 F.3d 1326 (Fed. Cir. 2008); *Joblove v. Barr Labs*, 466 F.3d 187 (2d Cir. 2006); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005); cf. *Cardizem CD Antitrust Litigation*, 332 F.3d 896 (6th Cir. 2003).

131. See, e.g., *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985); see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 321 (2011); *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 559 U.S. 662 (2010).