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## Consumer Protection

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# CONSUMER PROTECTION

Matthew J. McGowan\*

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## I. INTRODUCTION

The Texas Deceptive Trade Practices-Consumer Protection Act (DTPA)<sup>1</sup> focuses on consumer harm brought about through deception.<sup>2</sup> This article covers significant developments under the DTPA during the Survey period, December 1, 2016, through November 31, 2017.

Some of the salient changes to the DTPA came through statutory additions inserted by the 85th Texas Legislature during the Summer 2017 session, which added to the DTPA’s laundry list of violative acts and also

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1. TEX. BUS. & COM. CODE ANN. §§ 17.41–44, 17.461, 17.47–48, 17.50–63 (West 2011), §§ 17.45–46, 17.462–463, 17.49 (West Supp. 2017). 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 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. TEX. BUS. & COM. CODE ANN. § 17.44(a) (West 2011); TEX. BUS. & COMM. CODE ANN. § 17.50 (West 2011); 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).

amended the Texas Insurance Code such that related DTPA claims may be more easily removed to federal court. Also, case law developments have, among other things, revealed that certain DTPA fraud claims might be barred by the ecclesiastical abstention doctrine while others may be fatally defective because they lack an enforceable contract as a predicate.

## II. DECEPTIVE TRADE PRACTICES–CONSUMER PROTECTION ACT

### A. STATUTORY CHANGES BY THE 85TH LEGISLATURE

#### 1. *Texas Business & Commerce Code § 17.46*

The Texas Legislature added two provisions during the 2017 legislative session to the so-called laundry list of acts constituting deceptive trade practices.<sup>3</sup> Both new provisions took effect on September 1, 2017.

The first addresses representations regarding licensure of a “massage establishment.” The new provision expands the laundry list of proscribed deceptive practices to include

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

- (A) is not appropriately licensed under Chapter 455, Occupations Code, or is not in compliance with the applicable licensing and other requirements of that chapter; or
- (B) is not in compliance with an applicable local ordinance relating to the licensing or regulation of massage establishments.<sup>4</sup>

The new designation comes as part of lawmakers’ broader statewide efforts to address “[c]oncerns . . . that human trafficking and compelled prostitution are prevalent in Texas and may take place at businesses presenting themselves as massage establishments.”<sup>5</sup> Thus, prostitution parlors masquerading as spas may find themselves confronting new civil liabilities. But, considering that at least some “consumers” of these services might not want to out themselves as such through publicly filed lawsuits and that those who inadvertently patronize unlicensed masseuses might have trouble establishing much by way of damages,<sup>6</sup> it appears that lawmakers were focused primarily on affording the Texas Attorney General a statutory vehicle rather than creating a private cause of action for the Texas public.

3. See TEX. BUS. & COM. CODE ANN. § 17.46(b)(33) (West Supp. 2017). Lawmakers appear to have overlooked a scrivener’s error in the amended statute by actually adding two provisions to subsection 17.46(b), both designated as 17.46(b)(33).

4. *Id.*

5. House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2552, 85th Leg., R.S. (2017); see also S. Comm. on State Affairs, Bill Analysis, Tex. H.B. 2552, 85th Leg., R.S. (2017) (citing “[a] recent report by The University of Texas at Austin’s Institute on Domestic Violence & Sexual Assault,” which concluded “that there are over 300,000 victims of human trafficking in Texas,” making Texas second only to California in the prevalence of such illicit practices).

6. See, e.g., TEX. BUS. & COM. CODE ANN. § 17.50 (West 2011) (requiring economic damages or mental anguish as an element of a DTPA claim).

The second addition to the laundry list proscribes the marketing of vehicle warranties using terms typically associated with insurance products.<sup>7</sup> Specifically, the new subsection provides that deceptive practices include “a warrantor of a vehicle protection product warranty using, in connection with the product, a name that includes ‘casualty,’ ‘surety,’ ‘insurance,’ ‘mutual,’ or any other word descriptive of an insurance business, including property or casualty insurance, or a surety business.”<sup>8</sup>

The law takes aim at practices that conflate, in the minds of consumers, vehicle *warranties* with car *insurance*. Lawmakers also intended this language to prohibit vehicle dealers from requiring consumers to purchase after-market products and warranties (beyond those offered by manufacturers).<sup>9</sup> The new prohibition actually stemmed from a general *deregulation* of the vehicle warranty industry in Texas.<sup>10</sup> Lawmakers appear to have included the new item on the laundry list to safeguard consumers in the absence of state oversight.

## 2. Texas Insurance Code § 542A

The Texas Legislature also amended the Texas Insurance Code (Code) to include a number of new procedural and substantive provisions that amount to what might be considered insurance-related tort reform.<sup>11</sup> Because claims for violations of the Code often go hand-in-hand with claims for DTPA violations,<sup>12</sup> one of the Code’s new provisions in particular could significantly increase the number of DTPA claims that qualify for removal to federal court, where they can be subjected to a host of early-stage dispositive motions not available in state court and where the venue is generally less favorable to plaintiffs.

That relevant new Code provision, effective beginning September 1, 2017, affords insurance carriers that are sued for allegedly deceptive insurance practices—which is simultaneously actionable under the DTPA—an option to assume agents’ (including adjusters)<sup>13</sup> liability as their own.<sup>14</sup> If a carrier assumes an agent’s liability, trial courts must dismiss *any* factually related cause of action against the individual agent and permit only the claims against the insurer itself to proceed.<sup>15</sup>

Tactically, this is potentially game-changing for the DTPA/insurance

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7. TEX. BUS. & COM. CODE ANN. § 17.46(b)(33) (West Supp. 2017).

8. *Id.* Accompanying this addition to the laundry list is an expansion of the DTPA’s definitional section to include the terms “vehicle protection product,” “warrantor,” and “loss of or damage to the vehicle” (as the latter is used in the preceding definitions). *See* TEX. BUS. & COM. CODE ANN. § 17.45(14)–(16) (West Supp. 2017).

9. S. Comm. on Licensing & Admin. Procedures, Bill Analysis, Tex. S.B. 2065, 85th Leg., R.S. (2017).

10. *See* S. Comm. on Licensing & Admin. Procedures, Bill Analysis, Tex. S.B. 2065, 85th Leg., R.S. (2017).

11. *See* TEX. INS. CODE ANN. § 542(A) (West Supp. 2017).

12. TEX. BUS. & COM. CODE ANN. § 17.50(a)(4) (West 2011).

13. TEX. INS. CODE ANN. § 542A.001(1) (West Supp. 2017) (“‘Agent’ means an employee, agent, representative, or adjuster who performs any act on behalf of an insurer.”).

14. *See id.* § 542A.

15. *See id.* § 542A.006.

defense bar.<sup>16</sup> It restores insurance carriers' access to federal courts by allowing them to elect not to have diversity-defeating Texas residents as co-defendants. Because a carrier's election to assume the agent's liability negates *all* claims against the individual, the agent's dismissal is absolute—i.e., it opens the door to removal of all claims, whether under the Code or DTPA.

The timing of the new agent-election statute is particularly noteworthy in light of the widespread property damage sustained by Texas's coastal residents during 2017's active hurricane season. Federal courts should brace themselves, and their dockets, for the coming wave of diversity-based removals—and so, too, should the plaintiffs' bar.

## B. CASE LAW DEVELOPMENTS

### 1. *DTPA Claims as Ecclesiastical in Nature?*

In *Episcopal School*, the Dallas Court of Appeals arguably broadened the ecclesiastical abstention doctrine (Doctrine) to potentially bar DTPA claims brought by students of religiously affiliated private schools to the extent such claims even remotely “concern a faith-based organization's internal affairs, governance, administration, membership, or disciplinary procedures and are protected religious decisions.”<sup>17</sup>

The *Episcopal School* plaintiff (John) was a student at a Dallas-area private school whom the school expelled for leaving campus one afternoon to allegedly smoke marijuana.<sup>18</sup> John sued the school on a number of causes of action, including a DTPA claim for alleged misrepresentations in a letter to parents by school officials that declared that “‘in most cases, students should be given a chance to redeem themselves’ and that ‘we are not a zero tolerance school.’”<sup>19</sup> The school filed a plea to the jurisdiction with the trial court asserting that the ecclesiastical abstention

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16. A review of just one year's worth of DTPA-related cases illustrates just how often DTPA defendants remove to federal court only to be bounced back to state court on a motion to remand, which federal courts are wont to grant. *See, e.g.,* Marminco III Family, L.P. v. Arch Specialty Ins. Co., No. EP-17-CV-311-KC, 2017 WL 7797711, at \*4 (W.D. Tex. Dec. 19, 2017) (“Furthermore, to the extent that this Court gives any weight to those cases disagreeing with *Linron*, such a split in authority must be resolved in favor of remand because, in the context of a motion to remand, [a]ny ambiguities are construed against removal and in favor of remand to state court.”); *Affordable Portable Structures, Inc. v. Cincinnati Ins. Co.*, No. 1:16-CV-1267-RP, 2017 WL 2266903, at \*3 (W.D. Tex. May 23, 2017) (“As noted above, this Court must resolve all ambiguities of state law in favor of remand.”); *Winterrowd v. Allstate Vehicle & Prop. Ins. Co.*, No. 4:17-CV-00110-ALM-CAN, 2017 WL 1370768, at \*4 (E.D. Tex. Mar. 27, 2017), *adopted by* *Winterrowd v. Allstate Vehicle & Prop. Ins. Co.*, No. 4:17-CV-110, 2017 WL 1355331 (E.D. Tex. Apr. 13, 2017).

17. *In re Episcopal Sch. of Dallas, Inc.*, No. 05-17-00493-CV, 2017 WL 4533800, at \*9 (Tex. App.—Dallas Oct. 11, 2017, orig. proceeding, no pet.).

18. John initially denied leaving campus at all, an assertion that was later belied by security cameras. *Id.* at \*2. John then denied smoking marijuana—which was substantiated by an initial negative drug test—but his assertions were also later belied by a witness's testimony that John had, in fact, smoked marijuana, and revelations that John's initial drug test analyzed the urine of a different student. *Id.* John failed a subsequent drug test. *Id.*

19. *Id.*

doctrine deprived the court of jurisdiction over the dispute, which the trial court denied.

On mandamus review, the court of appeals reversed and held that the trial court lacked jurisdiction under the Doctrine because (1) the school was a religious institution<sup>20</sup> and (2) John's lawsuit "derive[d] solely from the calculus of the school's internal policies and management of its internal affairs, all directed at the school's decision regarding whether [John] should be a member of the school community."<sup>21</sup>

As explained by the court, the Doctrine has its roots in the First Amendment's Free Exercise Clause and it "precludes government action that burdens the free exercise of religion 'by encroaching on the church's ability to manage its internal affairs.'"<sup>22</sup> The court of appeals also acknowledged that the Doctrine "does not foreclose civil court subject matter jurisdiction over all disputes involving religious entities" and that "[b]ecause churches, their congregations, and their hierarchies exist and function within the civil community, they are amenable to rules governing civil, contract, and property rights in appropriate circumstances."<sup>23</sup> The court of appeals then framed the analysis as turning on "whether a particular dispute is ecclesiastical in nature or simply a civil dispute in which church officials happen to be involved."<sup>24</sup> Thus, the Doctrine begs a two-part, conjunctive inquiry: First, is the defendant a religious institution? Second, if so, is the dispute ecclesiastical in nature?

On the first question, the court discussed the school's governance structure and procedures for the internal resolution of disputes "regarding spiritual instruction," which were to be ultimately resolved through "appeal to the Bishop of the Episcopal Diocese of Dallas."<sup>25</sup> The school also conditioned enrollment on compliance with its code of conduct—which noted that "everyone is created in the image of God" and requires that students conduct themselves in a manner consistent with state laws "related to illegal drugs and underage drinking."<sup>26</sup> In light of all these facts and despite John's arguments to the contrary, the court found that the school was a religious institution as contemplated by the first of the Doc-

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20. This conclusion followed extensive discussion by the court of appeals. *Id.* at \*6 ("The record thus leaves only one reasonable conclusion: the school's purpose and mission are religious. And that the school may not be an affiliate of or have a formal legal relationship with a specific church does not undermine the factual conclusion that it is a faith-based institution."). Because such a finding—though suspect—did not involve DTPA-specific inquiries, this article presumes for present purposes that the school was properly deemed a religious institution. As previously discussed, *Episcopal School* invokes DTPA-only issues to the extent that John's misrepresentation allegations were deemed ecclesiastical in nature.

21. *Id.* at \*8.

22. *Id.* at \*3 (quoting *Westbrook v. Penley*, 231 S.W.3d 389, 395 (Tex. 2007)).

23. *Id.* at \*4.

24. *Id.*

25. *Id.* at \*5.

26. *Id.*

trine's inquiries.<sup>27</sup>

The court likewise held that the nature of John's dispute was ultimately ecclesiastical in nature.<sup>28</sup> The crux of the court's reasoning on this point was the precise way in which John brought his claims—chiefly, that the alleged DTPA misrepresentations arose from the school's "maintain[ing] secret or alternative policies and procedures related to discipline."<sup>29</sup> The Dallas Court of Appeals noted that, although "the dispute does not expressly concern religious doctrine in all respects," it could not resolve the claims (including DTPA fraud) without "pass[ing] judgment on the school's internal affairs and governance."<sup>30</sup> In finding that the dispute required a religious inquiry, the court attempted, unconvincingly, to distinguish John's facts from those of *Tilton v. Marshall*.<sup>31</sup>

In *Tilton*, the Texas Supreme Court held that the Doctrine did not apply to fraud claims against a televangelist who falsely represented that he would "perform certain concrete acts" of "personally reading, touching, and praying over [viewers'] prayer requests."<sup>32</sup> The Texas Supreme Court declined to apply the Doctrine because a factfinder would not need to delve into the truth or falsity of a religious representation (e.g., "Your prayers will be answered.") and would instead only need to contend with "concrete acts" and determine whether the televangelist "had no intention of personally reading, touching, and praying over their prayer requests at the time he said he would do so."<sup>33</sup> The supreme court did find, however, that the Doctrine *did* bar fraud claims based on the televangelists sincerity when he told viewers that sending \$100 would satisfy biblical tithing mandates.<sup>34</sup> Adjudicating those claims, the supreme court held, would improperly assess the veracity of the televangelist's statements of biblical meaning, so the supreme court fractured those claims and dismissed them for lack of secular jurisdiction.<sup>35</sup>

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27. *Id.* at \*6 ("[T]hat the school may not be an affiliate of or have a formal legal relationship with a specific church does not undermine the factual conclusion that it is a faith-based institution.").

28. *Id.* at \*9.

29. *Id.*

30. *Id.* In so concluding, the court distinguished *Shannon v. Memorial Drive Presbyterian Church*, 476 S.W.3d 612, 619 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) and *Tilton v. Marshall*, 925 S.W.2d 672, 677–79 (Tex. 1996). *Id.* at \*8. *Shannon* was inapposite because it "involved a former employee's tort and breach of contract suit against a church arising out of a breach of a settlement agreement containing a non-disparagement clause." *Id.* *Tilton* was distinguishable because it involved television viewers' claims for "fraud, conspiracy, and intentional infliction of emotional distress regarding 'prayer cloths' [the defendant] sold and promised to bless." *Id.*

31. *Id.* at \*8–9 (discussing *Tilton v. Marshall*, 925 S.W.2d 672, 677–79 (Tex. 1996)). The court did cite two cases that, the court reasoned, do support its holding. *See, e.g., In re St. Thomas High School*, 495 S.W.3d 500, 509 (Tex. App.—Houston [14th Dist.] 2016, pet. granted); *In re Vida*, No. 04-14-00636-CV, 2015 WL 82717, at \*2 (Tex. App.—San Antonio Jan. 7, 2015, orig. proceeding) (mem. op.).

32. *Tilton*, 925 S.W.2d at 679.

33. *Id.*

34. *Id.*

35. *Id.* at 685.

In *Episcopal School*, the court of appeals held that *Tilton* was inapplicable because John's claims—unlike those alleged against the televangelist—all related to a “faith-based organization's internal affairs, governance, administration, membership, or disciplinary procedures,” which were “protected religious decisions.”<sup>36</sup> Because John's claims purportedly “ha[d] no secular aspect for the courts to consider,” the court held that *Tilton*-esque claim fracturing was unnecessary.<sup>37</sup>

The court's refusal to fracture John's DTPA claim was arguably a misapplication of *Tilton* because John's claim did arguably have strictly secular questions relating to concrete acts and representations. While perhaps true that the John's contract claims would likely require an inquiry into whether skipping school and smoking pot breaches an agreement to behave “in the image of God,”<sup>38</sup> the same is not true of an inquiry into whether the school was sincere when it told prospective enrollees that “we are not a zero tolerance school.”<sup>39</sup> John alleged that the school misrepresented to him that it would not take certain acts (not expel) if he was ever found to have violated the code of conduct and further alleged that the school did exactly that after accusing him of violating the code of conduct for the first time.<sup>40</sup> This is no different than the concrete acts promised by the televangelist in *Tilton* that the Texas Supreme Court held could be the basis of a fraud claim subject to secular court jurisdiction.<sup>41</sup>

More generally, the *Episcopal School* holding casts doubt on whether the Doctrine truly is circumscribed to ensure that religious institutions are not exempt from “rules governing civil, contract, and property rights in appropriate circumstances.”<sup>42</sup> The *Episcopal School* court seemed content to bundle up all of John's claims—which ranged from DTPA to negligent misrepresentation and breach of fiduciary duty—and disposed of all without parsing in detail the legal and factual nuances attendant to DTPA

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36. *Episcopal School*, 2017 WL 4533800, at \*9.

37. *Id.*

38. *Id.* at \*5. Arguably, even that would not require a judicial review of dogma. As the *Episcopal School* itself pointed out, the school's code of conduct actually incorporates secular laws on drug use and alcohol consumption, the interpretation of which unquestionably falling within the constitutional purview of civil courts. These appear to be the very provisions in the code of conduct that John was accused of violating.

39. *Id.* at \*2. More problematic is the allegedly deceptive letter's language that, “*in most cases*,” violators would be given a chance to “redeem themselves.” *Id.* Whether John should have been given a chance to redeem himself might have been an ecclesiastical question, but the alleged misrepresentation that “we are not a zero tolerance school” appears to have been a standalone, unqualified affirmative representation. *See id.* (“The school sent upper school parents, including John Doe, a letter stating among other things ‘that *in most cases*, students should be given a chance to redeem themselves’ and that ‘we are not a zero tolerance school.’”).

40. *Id.* (“The lawsuit complains about [the school's] disciplinary actions *and* the application of the school's policies and procedures.”) (emphasis added). Obviously, John would have other hurdles to a finding of fraud—to wit, that the subsequent cover-up of the first strike involved a series of additional strikes, meaning the school did not actually violate its concrete not-zero-tolerance policy by the time it expelled John.

41. *See Tilton v. Marshall*, 925 S.W.2d 672, 679 (Tex. 1996).

42. *See Episcopal School*, 2017 WL 4533800, at \*4.

fraud claims that did not apply to others. If, as the *Tilton* court explained, the Doctrine requires more of a scalpel than a machete, the *Episcopal School* case demonstrates that courts nevertheless seem quick to wield the latter.

Furthermore, the court's analysis of John's claims neglected the policy aims of the DTPA, which is to protect all consumers from hucksters,<sup>43</sup> and such protections are in place regardless of whether such salesmen cloak themselves in literal or figurative religious garb.<sup>44</sup> After all, Texas law has made clear that all consumers have rights, and courts do not need to consult the Bible (or Quran or Torah or other religious text) to determine whether those rights have been violated.

## 2. *Misrepresentations Related to a Contract*

The Fourteenth Houston Court of Appeals has now suggested that certain misleading remarks related to a vehicle trade-in prior to a new vehicle purchase are not "misrepresentation[s]" under Section 17.46(b)(12) of the DTPA, which prohibits "represent[ions] that an agreement confers or involves rights, remedies, or obligations which it does not have or involve," in the absence of an underlying contract.<sup>45</sup>

The *Lindsey* plaintiff (Lindsey) was a construction firm that leased three trucks from Enterprise.<sup>46</sup> Toward the end of the lease term, one of the trucks (Ram) began making a "clicking noise."<sup>47</sup> Lindsey brought the Ram to an auto dealer/service provider (AutoNation). AutoNation informed Lindsey that the Ram's engine was broken and would need either a complete rebuild or replacement.<sup>48</sup> When Lindsey "arrived to retrieve the [disassembled] Ram," AutoNation proposed that Lindsey consider trading in the Ram and the other two trucks for three new vehicles out of AutoNation's inventory.<sup>49</sup> AutoNation's subsequent appraisal of the Ram

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43. This is not to say that the ultimate *outcome* in *Episcopal School* was incorrect. Nor is it to say that the school in that case had, in fact, acted wrongly. Instead, this article simply asserts that ecclesiastical (i.e., jurisdictional) dismissal should not have been the procedural vehicle for disposition of John's DTPA claims. The underlying merits appear to have been textbook summary judgment material.

44. *See* *Star Houston, Inc. v. Kundak*, 843 S.W.2d 294, 297 (Tex. App.—Houston [14th Dist.] 1992, no writ) ("The purpose of the DTPA is the protection of consumers from deceptive trade practices, and the act is to be liberally construed to achieve this underlying goal."); *see also* *State v. Valerie Saxion, Inc.*, 450 S.W.3d 602, 614 (Tex. App.—Fort Worth 2014, no pet.) (noting that constitutional protections do not bar states from placing "restraint on commercial speech necessary to protect the public."); *AEP Tex. Comm. & Indus. Retail Ltd. P'ship v. Pub. Util. Comm'n of Tex.*, 436 S.W.3d 890, 924 (Tex. App.—Austin 2014, no pet.) ("[T]here is no value to consumers or society for misleading or deceptive commercial speech.").

45. *Lindsey Constr., Inc. v. AutoNation Fin. Servs., LLC*, 541 S.W.3d 355, 364 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *see also* TEX. BUS. & COM. CODE ANN. § 17.46(b)(12) (West 2011) ("[T]he term 'false, misleading, or deceptive acts or practices' includes . . . representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law . . .").

46. *Lindsey*, 541 S.W.3d at 358.

47. *Id.*

48. *Id.*

49. *Id.*

valued it at \$13,500—but the appraisal did not state whether that value reflected the defective engine or instead assessed Ram’s value with a rebuilt or replaced engine.<sup>50</sup> Importantly, the truck appraisals themselves did not reference any proposed new sale agreement related to the trucks’ trade-in value.<sup>51</sup> Allegedly based on AutoNation’s appraisal value of the Ram (and uncontroversial appraisal of the other two trucks), Lindsey agreed to the deal and purchased (via a new lease agreement with Enterprise) three trucks from AutoNation. Shortly after accepting the new trucks, Lindsey received notice from Enterprise that AutoNation had refused to accept the still-broken Ram as a trade-in and that, consequently, the lease payments for the Ram’s replacement would be higher than Lindsey expected.<sup>52</sup>

Lindsey brought DTPA claims against AutoNation after AutoNation flatly refused to accept the broken Ram as a trade-in valued at \$13,500. Lindsey’s claim rested on the premise that, in violation of Section 17.46(b)(12), AutoNation failed to disclose that the trade-in agreement was conditioned on the replacement or rebuild of the Ram’s engine. The trial court rendered no-evidence summary judgment in favor of AutoNation on multiple grounds, implicitly finding that Lindsey failed to adduce sufficient evidence to support the existence of an enforceable agreement between Lindsey and AutoNation where the parties mutually assented to AutoNation’s purchase of the Ram for \$13,500.<sup>53</sup> Accordingly, the trial court held (again, implicitly, due to the trial court’s silence on the specific grounds) that Lindsey failed to raise any issues of fact with respect to an alleged misrepresentation about the terms or conditions of such an agreement.<sup>54</sup>

The court of appeals affirmed the trial court, holding that the record contained no evidence as to the mutual-assent prerequisite of a contract and, thus, no evidence of a misrepresentation as to the terms of that alleged contract.<sup>55</sup> The *Lindsey* court noted, after pointing out that Lindsey cited no authority for the proposition that a failure to disclose could constitute a deceptive act under Section 17.46(b)(12), that it would presume that a failure to disclose could amount to a misrepresentation.<sup>56</sup> Nevertheless, the Fourteenth Court of Appeals held that Lindsey’s applicable DTPA claim failed for want of an underlying contract, which the court reasoned was essentially a prerequisite to a claim under Section 17.46(b)(12).<sup>57</sup>

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50. *Id.* at 358–59.

51. *Id.* at 359.

52. *Id.*

53. *Id.* at 362.

54. *Id.* at 365.

55. *Id.* at 363–64.

56. *Id.* at 365.

57. *Id.* The court also held that Lindsey’s claims for violations of DTPA Section 17.46(b)(14)—relating to misrepresentations regarding the authority of an “agent to negotiate the final terms of a consumer transaction”—failed based on Lindsey’s inability to adduce relevant evidence. *Id.*

*Lindsey* illustrates the importance of pleading the correct items from the DTPA's so-called "laundry list" when bringing a claim for misrepresentation because courts do not always construe the DTPA as broadly as perhaps they should.<sup>58</sup> The *Lindsey* record certainly appears to have contained adequate allegations that some sort of misrepresentation had occurred. If nothing else, the Ram's appraisal itself was sufficiently misleading to support a DTPA claim.<sup>59</sup> *Lindsey* was quite arguably deceived during its discussions with AutoNation, which gave *Lindsey* the reasonable impression that it would accept the Ram at a trade-in value of \$13,500 despite major engine defects that were diagnosed by AutoNation and specifically discussed by the parties. Then, once the deal was done and *Lindsey* was locked into a new lease with Enterprise, AutoNation allegedly made an about-face and flatly refused to accept the Ram as a trade-in.

There is deception there, and that deception is actionable. But *Lindsey* apparently erred by alleging deception predicated on a valid contract when it could have made a standalone allegation based on the misleading appraisal.

What were *Lindsey*'s alternatives? Perhaps the DTPA claims would have survived summary judgment had *Lindsey* alleged that AutoNation's opaque appraisal was a "false or misleading statement[ ] of fact concerning the reasons for, existence of, or amount of price reductions" with respect to the new trucks.<sup>60</sup> *Lindsey*'s claims might have also fallen under the DTPA's prohibition against "failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed."<sup>61</sup> *Lindsey* might have also used the more general prohibition under Section 17.50(a)(3) against "any unconscionable action or course of action by any person."<sup>62</sup>

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58. See TEX. BUS. & COM. CODE ANN. § 17.44(a) (West 2011) ("This subchapter shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers . . ."); see also *Pennington v. Singleton*, 606 S.W.2d 682, 688 (Tex. 1980) ("A broad interpretation is warranted, however, due to human inventiveness in engaging in deceptive or misleading conduct.").

59. See, e.g., *Smith v. Hennessey & Associates, Inc.*, 103 S.W.3d 567, 569 (Tex. App.—San Antonio 2003, no pet.) (discussing DTPA claims against a real property appraiser for misrepresenting square footage and affirming summary judgment against homeowner on causation grounds only).

60. See TEX. BUS. & COM. CODE ANN. § 17.46(b)(11) (West 2011); but see *Washburn v. Sterling McCall Ford*, 521 S.W.3d 871, 875 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (construing § 17.46(b)(11) somewhat narrowly and holding that "[m]ost of the abuses in this area deal with conveying the false impression in an effort to promote products and services that the seller is bankrupt, liquidating its inventory, going out of business, or losing its lease").

61. See TEX. BUS. & COM. CODE ANN. § 17.46(b)(24) (West 2011). Had *Lindsey* brought its claim under this section, it would have also avoided any legal uncertainty as to whether a failure to disclose could have violated the applicable provision—as mentioned by the court of appeals.

62. See TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (West 2011). Such an unconscionability claim would have instead turned on the question of whether AutoNation, "to

Thus, as is often the moral of these DTPA cases, pleading DTPA claims under precisely the right statutory provision is key—and plaintiffs should not treat DTPA claims as afterthought, catchall causes of action.

### 3. Consumer Status Required for Tie-In Claims

In *Hunt v. City of Diboll*, the Tyler Court of Appeals has made it clear—if it was ever in doubt—that DTPA claims under a tie-in statute require consumer status like any other DTPA claim.<sup>63</sup>

The *Hunt* plaintiffs sued the City of Diboll and a company (ATS) that Diboll had contracted with to install and operate a series of red light cameras.<sup>64</sup> The plaintiffs asserted, among other things, that ATS had violated a DTPA tie-in statute that prohibits misrepresentations by private security firms regarding their licensure under the Texas Occupations Code.<sup>65</sup> ATS filed a plea to the jurisdiction asserting that the claims were improper because the plaintiffs could not establish consumer status under the DTPA.<sup>66</sup> The trial court granted the plea to the jurisdiction and dismissed the DTPA claims.<sup>67</sup>

On appeal, the court of appeals affirmed the trial court's dismissal because, in part, claims brought under DTPA tie-in statutes do require consumer status.<sup>68</sup> The plaintiffs argued that Section 17.50(h) of the DTPA, which provides that claimants under tie-in statutes may recover a different variety of damages than those bringing straight DTPA claims, implies that consumer status is likewise treated differently in the tie-in statute

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[Lindsey's] detriment, [took] advantage of the lack of knowledge, ability, experience, or capacity of [Lindsey] to a grossly unfair degree." See TEX. BUS. & COM. CODE ANN. § 17.45(5) (West 2011). Admittedly, the facts attendant to a new vehicle's price offset for a trade-in are not exactly an ideal match for an unconscionability claim. See, e.g., *Lon Smith & Associates, Inc. v. Key*, 527 S.W.3d 604, 624 (Tex. App.—Fort Worth 2017, pet. filed) (noting that an unconscionability claim requires a plaintiff to show that the defendant "took advantage of the consumer's lack of knowledge and that the resulting unfairness was glaringly noticeable, flagrant, complete, and unmitigated"). It is not clear that Lindsey's damages related to the new vehicle purchase itself resulted from AutoNation taking advantage of inferior knowledge, and instead appear to have flowed from plain old-fashioned deception or, at best, obfuscation. But, taking the appraisal in isolation, Lindsey might be said to have relied on AutoNation's expertise when it comes to the valuation of trucks with defective engines.

63. *Hunt v. City of Diboll*, No. 12-17-00001-CV, 2017 WL 7663041, at \*16 (Tex. App.—Tyler Nov. 8, 2017, pet. filed).

64. *Id.* at \*2.

65. *Id.* at \*15; see also TEX. OCC. CODE ANN. § 1702.3835(a) (West 2012) ("A person who performs or offers to perform an activity regulated under this chapter, but who is not licensed or otherwise authorized under this chapter to perform the activity, commits a false, misleading, or deceptive act or practice within the meaning of [the DTPA].").

66. *Hunt*, 2017 WL 7663041, at \*14.

67. *Id.*

68. *Id.* at \*15 (citing *Cushman v. GC Servs., L.P.*, 397 Fed. App'x 24, 27–28 (5th Cir. 2010); *Deubler v. Bank of New York Mellon*, No. 07-13-00221-CV, 2015 WL 3750312, at \*6 (Tex. App.—Amarillo June 15, 2015, pet. denied)).

context.<sup>69</sup> The court rejected that argument.<sup>70</sup> While the court did not delve much into the analysis of whether consumer status is required for tie-in statute claims, it did approvingly cite to a U.S. Court of Appeals for the Fifth Circuit case that, after summarizing suggestive language from various Texas cases, held that a DTPA tie-in claim does require consumer status.<sup>71</sup>

Prior to *Hunt*, and certainly prior to the Amarillo Court of Appeal's decision in *Deubler*, only federal courts applying Texas law had addressed whether DTPA claims through tie-in statutes required consumer status. In light of *Hunt*, it now appears to be relatively established beyond a one-off case out of Amarillo that Texas courts agree with their federal counterparts—plaintiffs bringing claims under DTPA tie-in statutes must establish consumer status.

#### 4. Misrepresentations Regarding “Background Checks”

In *Ryan Construction Services, LLC v. Robert Half International, Inc.*, the Fourteenth Houston Court of Appeals held that a representation that one will conduct a “background check” on a prospective employee does not imply or require an investigation into the potential employee’s criminal history.<sup>72</sup> The plaintiff (Ryan) was an employer that had contracted with a third-party (RHI) to recruit, place, and vet an accountant who eventually embezzled \$160,000 from Ryan.<sup>73</sup> Prior to placing the accountant, an RHI employee represented to Ryan that it conducted “background checks” on all candidates.<sup>74</sup> RHI also sent Ryan materials detailing that “background check” meant checking references and did not include such things as drug screenings, medical exams, and criminal background checks.<sup>75</sup> After discovering the accountant’s embezzlement, Ryan discovered that the accountant did have a relevant criminal history that RHI did not uncover or disclose.<sup>76</sup> Ryan sued RHI for, among other things, violation of the laundry list prohibition against “representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have . . .”<sup>77</sup>

On appeal of the trial court’s summary judgment in RHI’s favor, the court of appeals held that “[RHI’s] employee did not state that [RHI]

69. *Id.*; see also TEX. BUS. & COM. CODE ANN. § 17.50(h) (West 2011) (“[I]f a claimant is granted the right to bring a cause of action under this subchapter by another law, the claimant is not limited to recovery of economic damages only, but may recover any actual damages incurred by the claimant . . .”).

70. *Hunt*, 2017 WL 7663041, at \*15.

71. *Id.* (quoting *Cushman*, 397 Fed. App’x at 27–28).

72. *Ryan Constr. Servs., LLC v. Robert Half Int’l, Inc.*, 541 S.W.3d 294, 304 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

73. *Id.* at 298–99.

74. *Id.* at 302–03.

75. *Id.* at 298. RHI did later conduct a seven-year criminal history check, but for DTPA purposes the representation at issue was the initial statement that the company conducted “background checks.” See *id.* at 299.

76. *Id.*

77. *Id.*; see also TEX. BUS. & COM. CODE ANN. § 17.46(b)(5) (West 2011).

would run a criminal background check, so the employee did not make a misrepresentation about any contract or service benefit or about the characteristics of [RHI]’s services.”<sup>78</sup> The opinion does go on to note that “[e]ven if as a general proposition the term ‘background check’ could include checking criminal history, [RHI] set forth precisely what it meant by the term” when it elaborated in subsequent materials that the vetting would include only reference checks.<sup>79</sup> The court therefore insinuated that, even absent RHI’s disclosure of what “background check” actually entailed, the representation would still not have been misleading.<sup>80</sup>

To the extent that the court held that a background check does not imply a criminal history check for purposes of DTPA misrepresentations, this holding is questionable.<sup>81</sup> Setting aside the fact that RHI actually did follow up on the representation with clarification of what “background check” meant, one cannot fault Ryan for reasonably believing that the professional human resources firm it was paying to vet potential employees was going to look into a candidate’s criminal history—particularly when that human resources firm specializes in placing, of all things, *accountants*.

### III. CONCLUSION

Although the statutory DTPA changes that took effect in 2017 are not exactly groundbreaking, changes to the closely-related Texas Insurance Code could have a significant impact on where many DTPA cases are tried going forward. Also, Texas courts made it clear in 2017 that the ecclesiastical abstention doctrine continues to be a valuable tool in the DTPA defense context.

More generally speaking, despite lawmakers’ clear directives that Texas courts construe the DTPA broadly in favor of consumers, several cases in 2017 illustrate that courts are increasingly keen on reading the DTPA’s language narrowly and in favor of defendants when possible.

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78. *Ryan*, 541 S.W.3d at 304.

79. *Id.*

80. *Id.*

81. *See id.* at 305.

