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Antitrust and Consumer Protection

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ANTITRUST AND CONSUMER PROTECTION

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I. INTRODUCTION

THE relationship between the antitrust laws and the Texas Deceptive Trade Practices—Consumer Protection Act (DTPA)¹ is not immediately apparent. It has long been recognized that the anti-

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1. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon 2002 & Supp. 2009).

trust laws are concerned with protecting competition,² while the DTPA protects consumers “against false, misleading and deceptive business practices, unconscionable actions, and breaches of warranty”³

The shared concern of antitrust laws and the DTPA is consumer welfare. Indeed, the Supreme Court has described antitrust laws as a “‘consumer welfare prescription,’”⁴ and the lower courts have echoed this principle, recognizing that “[u]ltimately, the consumer is the beneficiary.”⁵

A further connection is found in the origins of the DTPA, which is modeled after the Federal Trade Commission Act. The DTPA provides: “It is the intent of the legislature that in construing Subsection (a) of this section . . . the courts to the extent possible will be guided by . . . the interpretations given by the Federal Trade Commission and federal courts to Section 5(a)(1) of the Federal Trade Commission Act.”⁶

Although the antitrust laws and the DTPA are ultimately concerned with consumer welfare, each focuses on different aspects of the competitive process. While antitrust laws are primarily concerned with the misuse of market power to harm consumers, the DTPA focuses on consumer harm brought about through deception. Further, although consumer protection statutes like the DTPA are frequently referred to as “little FTC Acts,”⁷ the Texas legislature did not include the “unfair methods of competition” prong of section 5 of the FTC Act in the DTPA, but rather adopted only the “deceptive acts or practices” prong of section 5.⁸ Accordingly, the antitrust laws and the DTPA are best viewed as focusing on complementary aspects of consumer welfare.

This Article covers significant developments under federal and Texas antitrust laws and the DTPA during the Survey period, November 1, 2008 through October 31, 2009.

II. ANTITRUST

This year the U.S. Supreme Court addressed the “price squeeze” theory of liability under the antitrust laws, while the Fifth Circuit considered the issues of antitrust injury and limitations. There were no reported decisions from the Texas federal district courts or the Texas state courts involving substantive antitrust issues.

2. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 251 (1993).

3. TEX. BUS. & COM. CODE ANN. § 17.44(a).

4. *Reiter v. Sonotone*, 442 U.S. 330, 343 (1979) (quoting ROBERT BORK, *THE ANTI-TRUST PARADOX* (1978)).

5. *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1382 (5th Cir. 1994).

6. TEX. BUS. & COM. CODE ANN. § 17.46(c)(1).

7. Marla Pleyte, *Online Undercover Marketing: A Reminder of the FTC's Unique Position to Combat Deceptive Practices*, 6 U.C. DAVIS BUS. L.J. 14 (2006) (“Many states have enacted consumer protection laws known as Little FTC Acts.”).

8. TEX. BUS. & COM. CODE ANN. § 17.46(a).

A. PRICE SQUEEZE

In *Pacific Bell Telephone Co. v. linkLINE Communications, Inc.*, the Supreme Court considered whether the “price squeeze” theory of liability survived some relatively recent changes in antitrust law.⁹ A price squeeze claim alleges that a competitor who provides goods or services at both the wholesale and retail levels “must leave its rival a ‘fair’ or ‘adequate’ margin between the wholesale price and the retail price.”¹⁰

AT&T provides wholesale DSL services to Internet service providers (ISPs) like linkLINE and also sells DSL services itself. LinkLINE claimed that AT&T was driving its competitors in the retail DSL market out of business by charging too high a wholesale price (thereby raising linkLINE’s costs) and charging too low a retail price (thereby effectively reducing linkLINE’s revenue). LinkLINE sued, alleging that AT&T’s price squeeze violated section 2 of the Sherman Act.¹¹

In 2004, in *Verizon v. Trinko*, the Supreme Court held that a company that does not have any antitrust duty to deal with its competitors cannot be subjected to antitrust liability based on the manner in which it deals with its competitors.¹² The Court applied *Trinko* to conclude that because AT&T had no antitrust duty to deal with linkLINE, AT&T had no antitrust duty to sell wholesale DSL services to linkLINE at any particular price.¹³ Then relying on its 1993 decision, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,¹⁴ the Court held that the only duty AT&T had with respect to setting its retail pricing was the ordinary antitrust duty not to engage in predatory pricing.¹⁵ The Court rejected the idea that the “price squeeze” theory somehow trumped the *Trinko* and *Brooke Group* analyses of AT&T’s wholesale and retail pricing decisions, holding that linkLINE’s price squeeze claim was “nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level.”¹⁶ Thus, a firm that has no duty to deal at the wholesale level and has priced above predatory levels at retail is not required to price both services so as to maintain its rivals’ profit margins.¹⁷

B. ANTITRUST INJURY

Jebaco, Inc. v. Harrah’s Operating Co., Inc., involved a dispute over the location of riverboat gambling.¹⁸ Jebaco had a contractual right to receive part of the rent for two berths used for river boats in Lake Charles,

9. 129 S. Ct. 1109 (2009).

10. *Id.* at 1121.

11. *Id.* at 1115.

12. 540 U.S. 398, 410 (2004).

13. *Pac. Bell Tel.*, 129 S. Ct. at 1119.

14. 509 U.S. 209, 251 (1993) (holding that low prices give rise to liability only if they are predatory, i.e., that they are set below the relevant measure of cost with a dangerous probability of being able to recover the losses after driving competitors out of business).

15. *Pac. Bell Tel.*, 129 S. Ct. at 1120.

16. *Id.*

17. *Id.*

18. 587 F.3d 314 (5th Cir. 2009).

Louisiana, and received that rent from Harrah's and its predecessor until 2005. After Hurricane Rita damaged one of the boats and docking areas, Harrah's stopped operations at this location, "halted its per-patron fee payments to Jebaco, and solicited bids for the two riverboats, the gaming licenses associated with the riverboats, and the real property associated with the berths."¹⁹ Jebaco attempted to purchase the assets but was outbid by Pinnacle Entertainment, which, according to Jebaco, paid much more than the reasonable value of the assets. Included in the draft purchase agreement between Harrah's and Pinnacle was a penalty provision that should Pinnacle attempt to transfer the gaming operations to New Orleans or Shreveport, it would have to pay Harrah's. However, that provision was not included in the final documents.²⁰

After the completion of the purchase, Pinnacle sought a permit to use one of the gaming licenses at a Lake Charles berth other than the one in which Jebaco held its interest. Jebaco sued Harrah's and Pinnacle, accusing them of violating the Sherman Act by dividing the Louisiana casino market and by monopolizing and attempting to monopolize that market. According to Jebaco, Harrah's and Pinnacle held six of the fifteen riverboat gambling licenses in Louisiana and together accounted for 60 percent of the gaming revenue in Louisiana. Jebaco alleged that the defendants' conduct deprived it of the rent it received before Harrah's ceased its Lake Charles operations and deprived it of the opportunity to compete by purchasing Harrah's Lake Charles assets. The defendants sought judgment on the pleadings, arguing, among other things, that Jebaco had failed to allege antitrust injury, and the district court granted the motion.²¹

In affirming the district court's judgment, the Fifth Circuit held that neither Jebaco's loss of rent nor its alleged inability to compete constituted antitrust injury.²² Regarding its role as a supplier of berth space, Jebaco had characterized its loss "as injury to its 'competitive position,'"²³ but Jebaco failed to allege just how it was competing or against whom.²⁴ The Fifth Circuit explained that under *Bell Atlantic Corp. v. Twombly*,²⁵ it was required to "accept Jebaco's factual allegations but [was] not bound to accept its legal conclusions."²⁶ Analogizing the relationship between Jebaco and the casino operators to that between a landlord and tenant or a supplier and customer, the court recognized that antitrust injury rarely will arise when such relationships are terminated as a byproduct of downstream, anticompetitive conduct.²⁷ In addition, Jebaco's decision to move one of the riverboats from one Lake Charles

19. *Id.* at 316.

20. *Id.*

21. *Id.* at 317.

22. *Id.* at 319.

23. *Id.* at 320.

24. *Id.*

25. 550 U.S. 544 (2007).

26. *Jebaco*, 587 F.3d at 320.

27. *Id.*

berth to another was unrelated to the alleged market division, and Jebaco did not claim that the repositioning of the license within Lake Charles itself was an anticompetitive act.²⁸ Because it was Pinnacle's decision to change berths—rather than the alleged market division—that injured Jebaco, the court concluded that Jebaco's loss did not constitute antitrust injury.²⁹

The court further concluded that Jebaco's alleged injury as a potential competitor did not flow from the alleged antitrust violations even assuming that Jebaco was prepared to enter the market.³⁰ Jebaco would have been equally unable to enter the market had Harrah's decided to retain its Lake Charles assets or sell them to someone other than Pinnacle.³¹ The court further determined that Jebaco's status as a potential competitor was supported only by Jebaco's interest in the two berths and that any conspiracy between Harrah's and Pinnacle to dominate the casino market operated independently of Jebaco's interest.³² Based upon this understanding of Jebaco's allegations, the court concluded that Jebaco's inability to enter the casino market was not a result of antitrust injury.³³

C. LIMITATIONS

In *Rx.com v. Medco Health Solutions, Inc.*,³⁴ Rx.com, an internet pharmacy, sued several pharmacy benefit managers (PBMs), which are third-party administrators of prescription drug programs, alleging that the PBMs violated sections 1 and 2 of the Sherman Act by acting in concert to refuse Rx.com entry into their networks. There was some evidence that the defendants had collectively "decided to exclude all internet pharmacies from access to their networks to prevent the internet pharmacies from competing with Defendants' direct mail businesses."³⁵ Rx.com's applications for admission into each of the Defendants' networks were denied in February 2000, and at that time it complained to the Federal Trade Commission that it had been excluded from certain PBM networks. Rx.com did not file suit, however, until October 2004. The defendants moved for summary judgment on the ground that the causes of action were time-barred pursuant to 15 U.S.C. § 15b.³⁶

In response, Rx.com first argued that its claims did not accrue until sometime after October 2000, when its injury was discoverable. The court rejected this argument, holding that Rx.com knew it was injured and had sufficient knowledge to complain to the FTC in February 2000.³⁷

28. *Id.* at 320-21.

29. *Id.*

30. *Id.* at 321.

31. *Id.*

32. *Id.* at 322.

33. *Id.*

34. 322 F. App'x 394 (5th Cir. 2009).

35. *Id.* at 396.

36. *Id.* at 396-97.

37. *Id.* at 397.

The court determined that Rx.com's claims accrued in February 2000, because discovery of the injury, not the other elements of the claim, started the limitations clock.³⁸ The court likewise rejected Rx.com's argument that the defendants' continuing violations of the antitrust laws tolled limitations because there was no evidence that any defendant had reiterated its refusal to admit Rx.com to a network during the limitations period.³⁹

The court also rejected Rx.com's argument that the defendants' fraudulent concealment tolled limitations.⁴⁰ Rx.com alleged only that the defendants engaged in secret communications between themselves while claiming to be working unilaterally. Fraudulent concealment, however, requires an affirmative act of concealment, which was not demonstrated by Rx.com.⁴¹ Finally, the court rejected Rx.com's argument that the limitations period should be equitably tolled from May 2001, when all of Rx.com's officers and directors resigned, until April 2004, when it regained officers and directors.⁴² Rx.com failed to cite any authority for the proposition that this period warranted equitable tolling and failed to allege any reason why the shareholders could not have called a special meeting to appoint a new board or brought a derivative suit on Rx.com's behalf.⁴³

III. DECEPTIVE TRADE PRACTICES—CONSUMER PROTECTION ACT

Noteworthy DTPA decisions during the Survey period addressed consumer status in credit situations, violations of the DTPA "laundry list," reliance, producing cause, and attorneys' fees.

A. STANDING AND CONSUMER STATUS

To bring a DTPA claim, a plaintiff must be a "consumer."⁴⁴ During the Survey period, several courts examined whether seeking or obtaining a line of credit affects a plaintiff's consumer status.

Dewayne Rogers Logging, Inc. v. Propac Industries, Ltd. was brought by Lloyds of London in the name of its subrogee, Rogers Logging, which had purchased a machine that caught fire.⁴⁵ The defendants moved for summary judgment on the ground that Lloyds could not be a consumer because it had assets in excess of \$25 million.⁴⁶ Lloyds responded that it became entitled to consumer status "upon joining its subrogation claim

38. *Id.*

39. *Id.*

40. *Id.* at 397-98.

41. *Id.* at 397.

42. *Id.* at 398-99.

43. *Id.*

44. TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon 2002 & Supp. 2009). A consumer is one who seeks to acquire goods or services by purchase or lease. *Id.* § 17.45.

45. 299 S.W.3d 374, 380-81 (Tex. App.—Tyler 2009, pet. filed).

46. "[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" does not qualify as a DTPA consumer. TEX. BUS. & COM. CODE ANN. § 17.45(4).

with the DTPA claims of Rogers Logging.⁴⁷ Rejecting this argument, the Tyler Court of Appeals held that “a subrogee who cannot qualify as a consumer in its own right may not assume the status of its insured.”⁴⁸ Because subrogee status did not confer consumer status and because Lloyds admitted that it had assets over \$25 million, Lloyds lacked standing to pursue its DTPA claims as Rogers Logging’s subrogee.⁴⁹

In *Cushman v. GC Services, L.P.*, Cushman fell behind on her American Express credit card payments.⁵⁰ Distressed by GC Services’ debt collection efforts, Cushman sued under the DTPA and the Texas Debt Collections Practices Act. GC Services moved for summary judgment, arguing that Cushman could not sue under the DTPA because she was not a consumer.⁵¹ The U.S. District Court for the Southern District of Texas agreed.⁵² Relying on the Texas Supreme Court’s decision in *Riverside National Bank v. Lewis*,⁵³ the court reasoned that because money falls outside of the DTPA’s definition of “goods,” then so too must a line of credit, as both are intangibles.⁵⁴ In so holding, the court distinguished its decision from the narrow exceptions to *Riverside National Bank* that have been identified by the Texas Supreme Court, including cases holding that plaintiffs who had used a line of credit to purchase specific goods, such as a home or equipment, qualified as DTPA consumers.⁵⁵ In such exceptions, “the borrowers’ motives were the same: to obtain money to acquire a specific good.”⁵⁶ Because Cushman presented no evidence that she had applied for her American Express credit card to acquire any *specific* good or service, but instead used the credit card for “general purposes,” the court held it was bound by *Riverside National Bank*.⁵⁷ The court also rejected Cushman’s argument that the Texas Debt Collection Practices Act⁵⁸ confers standing under the DTPA, holding that consumer status is required even when violation of another law provides the legal basis for a DTPA claim.⁵⁹

Using a different analysis to arrive at the same DTPA conclusion, the bankruptcy court in *Eastman v. Baker Recovery Services*, held that a borrower

47. *Dewayne Rogers Logging*, 299 S.W.3d at 386.

48. *Id.* at 387.

49. *Id.*

50. 657 F. Supp. 2d 834, 835 (S.D. Tex. 2009).

51. *Id.* at 838.

52. *Id.* at 846.

53. 603 S.W.2d 169, 174-75 (Tex. 1980). In *Riverside*, the Texas Supreme Court held: (1) money is not “tangible chattel” or “goods” under the DTPA; (2) borrowing money is not seeking or acquiring any services; and (3) any “attempt to acquire money, or the use of money, [i]s not an attempt to acquire services.” *Id.*

54. *Cushman*, 657 F. Supp. 2d at 843.

55. *Id.* at 844 (citing *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705 (Tex. 1983) (seeking to purchase a house); *Knight v. Int’l Harvester Credit Corp.*, 627 S.W.2d 382 (Tex. 1982) (seeking to purchase a dump truck)).

56. *Id.*

57. *Id.*

58. TEX. FIN. CODE ANN. §§ 392.001-404 (Vernon 2009).

59. *Cushman*, 657 F. Supp. 2d at 845-46.

did not qualify as a DTPA consumer.⁶⁰ This case arose from Baker Recovery Services' efforts to collect a credit card debt from Eastman. The debt, however, had been incurred by Eastman's ex-wife and was discharged in Eastman's bankruptcy. Although the U.S. Bankruptcy Court for the Western District of Texas held that Baker Recovery Services indeed violated the Texas Debt Collection Act when it ignored the court's discharge injunction and that the violation would qualify as a "deceptive trade practice" under the DTPA,⁶¹ no liability against Baker Recovery Services could be had.⁶² The court explained that Eastman was not a DTPA consumer because the debt at issue was not one for which Eastman had ever sought credit from Baker Recovery Services in order to purchase goods or services.⁶³ Accordingly, the court ruled that Eastman could not recover under the DTPA, because he lacked consumer status.

In *Monsour v. Companies Inc.*, on the other hand, the U.S. District Court for the Western District of Texas held that plaintiffs who sought a line of credit qualified as DTPA consumers.⁶⁴ *Monsour* arose from the plaintiffs' efforts to obtain a \$1 million line of credit. In order to enhance their creditworthiness, the Monsours purchased a two-day training course and access to a corporate credit coach from Companies Inc. Despite purchasing and fully participating in the course, the Monsours never qualified for any lines of credit and could never purchase any real estate. Companies Inc., which was not a financial institution and did not offer lines of credit, moved for summary judgment based on the Monsours' lack of consumer status. The court denied the motion, holding that the Monsours, who purchased the course, were DTPA consumers,⁶⁵ because unlike in *Riverside National Bank*, where those seeking only a line of credit could not qualify as consumers, in the Monsours' case, there was an actual purchase of a service. The fact that the Monsours *ultimately* sought to obtain a line of credit was irrelevant, as in the interim, a service was purchased. The court was further persuaded that it was not bound by *Riverside National Bank* because Companies Inc. did not offer lines of credit and was not a financial institution.⁶⁶

B. DECEPTIVE PRACTICES

In addition to establishing consumer status, a DTPA plaintiff must establish conduct in violation of the DTPA.⁶⁷

60. 419 B.R. 711, 720 (Bankr. W.D. Tex. 2009).

61. See TEX. FIN. CODE ANN. § 392.404(a) ("A violation of this chapter is a deceptive trade practice under Subchapter E, Chapter 17, Business & Commerce Code, and is actionable under that subchapter.").

62. *Eastman*, 419 B.R. at 731-32.

63. *Id.* at 732.

64. No. SA-08-CV-917-XR, 2009 U.S. Dist. LEXIS 74656, *28-34 (W.D. Tex. Aug. 24, 2009).

65. *Id.* at *32.

66. *Id.* at *30-31.

67. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)-(3) (Vernon 2002 & Supp. 2009).

In *Thermacor Process L.P. v. BASF Corp.*, Thermacor Process alleged that BASF, the manufacturer of a high-temperature foam spray insulation, violated sections 17.46(b)(5) and (7) of the DTPA.⁶⁸ Because the FDA banned the spray foam insulation that Thermacor Process previously used, it asked BASF to develop a replacement foam.⁶⁹ When delivering the finished product, BASF stated that “the Hi-Temp spray . . . is done,” and warned Thermacor Process to “thoroughly test any application, and independently determine satisfactory performance before commercialization, during the trials.”⁷⁰ Thermacor alleged that “BASF falsely represented it could and did develop a high-temperature spray foam capable of meeting Thermacor’s thermal stability requirements [of viability at temperatures above 366°F].”⁷¹ Affirming summary judgment in favor of BASF, the Fifth Circuit held that Thermacor failed to establish a false representation as required by sections 17.46(b)(5) and (7).⁷² Instead, the evidence showed that BASF never represented that its product could withstand temperatures above 366°F, that the term “Hi-Temp” included viability at temperatures as low as 250°F (which temperature the spray met), and that BASF referred to the product as a “trial.”⁷³ In the absence of any false representation, there was no DTPA violation under sections 17.46(b)(5) or (7).⁷⁴

In *Robertson v. Odom*, the Houston Fourteenth Court of Appeals affirmed a directed verdict as to a home seller’s liability under DTPA section 17.46(b)(7).⁷⁵ Robertson, a home buyer, alleged that Odom had represented that the townhome he was selling was of a particular quality when it was actually of another. Robertson claimed that Odom failed to disclose previous “structural” repairs to the townhome in his seller’s disclosure notice, including repairs to the townhome’s cabinets, kitchen sink, sheet rock, and bathroom fixtures. Such repairs were made necessary by a rainstorm in 2002. However, the court of appeals examined the term “structural” as used in the Texas Property Code, from which the seller’s disclosure notice was derived, and held that “structural repairs” denotes work performed on “the load-bearing portions of a residence.”⁷⁶ Because the repairs at issue did not amount to “structural repairs” as de-

68. 567 F.3d 736, 738 (5th Cir. 2009). Section 17.46(b)(5) states that it is a violation of the DTPA to represent “that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not.” TEX. BUS. & COM. CODE ANN. § 17.46(b)(5). Section 17.46(b)(7) states that it is a violation of the DTPA to represent “that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.” *Id.* § 17.46(b)(7).

69. *Thermacor Process*, 567 F.3d at 738.

70. *Id.* at 738-39.

71. *Id.* at 738, 740.

72. *Id.* at 740-44.

73. *Id.* at 741-43.

74. *Id.* at 740, 744.

75. 296 S.W.3d 151, 158 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

76. *Id.* at 157 (comparing TEX. PROP. CODE ANN. §§ 5.008(b), 27.001(8), and 401.002(13)). The seller’s disclosure notice derives from section 5.008(b) of the Texas Property Code. *Id.* at 156.

fined in the Texas Property Code, liability under section 17.46(b)(7) was not established.⁷⁷

C. NECESSITY OF PROVING CAUSATION

Liability under the DTPA is limited to conduct that is a producing cause of the plaintiff's damages.⁷⁸ Unlike the doctrine of proximate cause, producing cause does not require that the injury be foreseeable.⁷⁹ "Producing cause" has been defined as "an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of."⁸⁰ When determining whether the actions complained of are a producing cause of a plaintiff's damages, courts look to whether the alleged cause is a substantial factor that brings about the plaintiff's injury, without which the injury would not have occurred.⁸¹

In *Bernstein v. Thomas*, an issue arose from the sale of the Bernsteins' house to the Thomases.⁸² While the home was listed for sale, several prospective purchasers mentioned that the home's floor sloped, so the Bernsteins contracted with Bedrock Foundation Repair for an analysis. Bedrock Foundation prepared an estimate to repair the foundation, yet the Bernsteins did not have the foundation repaired and did not disclose the estimate to prospective purchasers. The Bernsteins subsequently executed a seller's disclosure notice in which they denied being aware of any "defects" or "malfunctions" in the foundation. The Thomases then contracted to purchase the home, and at the time of the purchase, the Thomases were aware of the sloping floor and had obtained their own inspection report. The report stated that there had been "some movement . . . in the structure of the home" but that it was typical based on the home's age and nothing to worry about.⁸³ Mr. Thomas then visited the house again to take some measurements of the degree of the slope. During that visit, Mr. Bernstein assured Mr. Thomas that "there was nothing wrong with the house."⁸⁴ Several months after closing on the house, the Thomases received a follow-up inquiry from Bedrock Foundation. The Thomases then requested and obtained from Bedrock Foundation the earlier evaluation and estimate. After learning about the previous foundation estimate, the Thomases sued the Bernsteins for breach of contract, fraud, and DTPA violations, in which they obtained a jury verdict on their DTPA claims for \$16,550 in damages. The trial court denied the Bernsteins' motion for judgment notwithstanding the verdict.⁸⁵

77. 296 S.W.3d at 158. The court of appeals noted that the 2002 water damage was caused by improper stucco installation, which had been disclosed to Robertson. *Id.*

78. *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995).

79. *See Hycel, Inc. v. Wittstruck*, 690 S.W.2d 914, 922 (Tex. App.—Waco 1985, writ *dism'd*).

80. *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775 (Tex. 1995).

81. *Prudential Ins. Co. v. Jefferson Assocs.*, 896 S.W.2d 156, 161 (Tex. 1995).

82. 298 S.W.3d 817, 819 (Tex. App.—Dallas 2009, no *pet.*).

83. *Id.* at 820.

84. *Id.* at 820-21.

85. *Id.* at 821.

On appeal, the Bernsteins argued that the true cause of the Thomases' injury was the Thomases' own failure to investigate the sloping floor. The Thomases had testified at trial that they did not pursue an investigation because both their inspector and the Bernsteins said that the house was in good condition. The Dallas Court of Appeals concluded that the inspector's failure to discover the foundation issues may have been a producing cause of the Thomases' damages.⁸⁶ However, because there can be more than one producing cause, the Bernsteins' failure to disclose the repair estimate and their affirmative statements were also producing causes of the Thomases' injury.⁸⁷

D. NECESSITY OF PROVING RELIANCE

Recovery under section 17.50 of the DTPA for a laundry-list violation requires proof that the consumer relied on the act or practice.⁸⁸ The home sellers in *Bernstein v. Thomas* also sought to overturn the jury's verdict on the ground that the Thomases relied on their own investigation and inspector, and not on any representations from the Bernsteins.⁸⁹ The Thomases had testified that they relied upon the Bernsteins' disclosure that the home had no defects and upon Mr. Bernstein's statement that there was "nothing wrong with the house."⁹⁰ The Dallas Court of Appeals held that the evidence before the jury showed that the Thomases had relied on the Bernsteins' representations and assurances because the Bernsteins, not the Thomases, had knowledge of the need for repairs.⁹¹ Moreover, awareness of a slope in a floor is not the same as awareness of the need for repair work.⁹² The court of appeals thus held that "the jury could have reasonably concluded . . . that the Bernsteins' assurances about the condition of the house, and their specific representation that there was no defect or malfunction in the foundation, played a part" in the Thomases' decision not to conduct further investigation.⁹³ The court of appeals therefore concluded that there was legally sufficient evidence of reliance.⁹⁴

IV. EXEMPTIONS, DEFENSES, AND LIMITATIONS ON RECOVERY

During the Survey period, several courts were called upon to examine various exemptions, defenses, and limitations on recovery under the DTPA.

86. *Id.* at 824.

87. *Id.* at 824-25.

88. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)(B) (Vernon 2002 & Supp. 2009).

89. 298 S.W.3d 817, 821 (Tex. App.—Dallas 2009, no pet.).

90. *Id.* at 821-22.

91. *Id.* at 824.

92. *Id.*

93. *Id.* at 823.

94. *Id.* at 822-23.

A. PREEMPTION AND EXEMPTION FROM THE DTPA

Pursuant to the Texas Medical Liability and Insurance Improvement Act (MLIIA), a plaintiff bringing a “health care liability claim” must file an expert report within a specified time after filing suit.⁹⁵ If no expert report is served by that time, on proper motion by the defendant, the trial court is required to dismiss the action with prejudice and award the defendant its reasonable attorneys’ fees and costs.⁹⁶

Scientific Image Center Management, Inc. v. Brewer arose from a “botched facelift.”⁹⁷ Brewer sued Scientific Image Center Management (Scientific Image) under the DTPA and the Texas Health Care Liability Act (the Chapter 74 claim). As intimated by the Dallas Court of Appeals, Brewer’s DTPA claim was likely asserted to remedy any deficiencies in her Chapter 74 claim. With respect to her DTPA claim, Brewer alleged that Scientific Image violated the DTPA when it failed to inform her of the risks and complications of her surgical procedure and when it misrepresented the quality of the service and the benefits that she would obtain from the surgical procedure.

Scientific Image’s motion to dismiss was denied.⁹⁸ Scientific Image then filed an interlocutory appeal arguing that the trial court erred in allowing Brewer to recast her Chapter 74 claim as a violation of the DTPA’s laundry list.⁹⁹ Permitting such re-casting was particularly advantageous to Brewer, as her original and supplemental Chapter 74 expert report was under serious attack. Without an adequate expert’s report on file, Brewer’s Chapter 74 claims were subject to dismissal. On appeal, the Dallas Court of Appeals held that based on Brewer’s claims of failure to disclose medical or surgical risks, Brewer could recover only for negligence under Chapter 74, because her DTPA claim was inextricably intertwined with the doctor’s provision of health care services.¹⁰⁰ The court of appeals distinguished its holding from that in *Sorokolit v. Rhodes*, where the Texas Supreme Court permitted a patient to raise a DTPA claim against her doctor.¹⁰¹ Reasoning that *Sorokolit* was limited to a patient’s claim that her plastic surgeon misrepresented the effects of cosmetic surgery—i.e., that she would resemble a person shown in a photograph—rather than a failure to disclose the risks associated with such surgery, the court of appeals held that *Sorokolit* was inapplicable to Brewer’s claims.¹⁰² Because “[t]he Texas Supreme Court repeatedly has held that plaintiffs cannot, through artful pleading, avoid the strictures now codi-

95. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (Vernon 2005 & Supp. 2009).

96. *Id.* § 74.351(b).

97. 282 S.W.3d 233, 235 (Tex. App.—Dallas 2009, pet. denied). Brewer claimed that Scientific Image misrepresented the quality of the services she would receive, presumably a claim under section 17.46(b)(7). *Id.* at 236.

98. *Id.* at 235.

99. *Id.* at 239.

100. *Id.*

101. 889 S.W.2d 239, 242-43 (Tex. 1994) (a physician’s promise that facelift would result in an appearance identical to specific photograph is actionable under the DTPA).

102. *Brewer*, 282 S.W.3d at 239.

fied in Chapter 74 by recasting health care liability claims as other causes of action,” the court of appeals refused to recast Brewer’s Chapter 74 claim as a DTPA laundry-list claim.¹⁰³ Accordingly, Brewer’s claims were dismissed due to the court’s determination that Brewer’s expert and supplemental expert reports were inadequate.¹⁰⁴

B. AFFIRMATIVE DEFENSE—SECTION 17.506

A party suing under the DTPA also may find its claims barred by the affirmative defense provided under section 17.506.¹⁰⁵ Section 17.506 bars an award of damages if a defendant proves that (1) before completing the transaction, he gave the plaintiff reasonable and timely written notice that the defendant was relying on written information from a third party relating to the goods in question, (2) the information was false or inaccurate, and (3) “the defendant did not know and could not reasonably have known of the falsity or inaccuracy of the information.”¹⁰⁶

Featherston v. Weller illustrates the successful use of section 17.506 as a bar to liability.¹⁰⁷ Featherston’s claims stemmed from his purchase of a pistol from Tom Keilman & Son Auctioneers that Featherston believed to have belonged to “Buffalo Bill” Cody. Prior to bidding on the pistol, Featherston examined a Keilman & Son catalog that described the pistol, contained the pistol’s provenance,¹⁰⁸ and set forth the conditions of sale. Clint Baermann, an antique firearms expert, researched the pistol’s authenticity, examined the pistol’s provenance, and authored Keilman & Son’s catalog’s description. In addition to Baermann’s description, Keilman & Son’s catalog stated, “The auctioneer assumes no responsibility for the authenticity or condition of any item sold,” and “All merchandise will be sold ‘as is, where is’ ‘no warranties, no guarantees’ in accordance with the conditions of sale.”¹⁰⁹

After purchasing the pistol for \$22,000, Featherston learned that it was not an authentic Buffalo Bill pistol. He sued Keilman & Son, Baermann, and the pistol’s consigner for negligence and DTPA violations. Although the jury found that the DTPA had been violated, it also found that the defendants had successfully invoked an affirmative defense under section 17.506. The Austin Court of Appeals affirmed the jury’s findings, holding that it was not unreasonable for the jury to have regarded the Keilman & Son catalog and the pistol’s provenance (both of which were placed alongside the pistol on auction day) as the defendants’ written notice of

103. *Id.* at 237, 239.

104. *Id.* at 240.

105. TEX. BUS. & COM. CODE ANN. § 17.506 (Vernon 2002).

106. *Id.*

107. No. 03-05-00770-CV, 2009 WL 1896072, at *4 (Tex. App.—Austin July 3, 2009, no pet.) (mem. op.).

108. A provenance is a collection of documents that purport to illustrate a pistol’s authenticity. *Id.* at *1.

109. *Id.* at *2-6.

the reliance on the provenance, which was authored by third parties.¹¹⁰

C. A "MERE" BREACH OF CONTRACT IS NOT ACTIONABLE UNDER THE DTPA

A breach of contract unaccompanied by a misrepresentation or fraud is not a false, misleading, or deceptive act and thus does not violate the DTPA.¹¹¹ *Dewayne Rogers Logging, Inc. v. Propac Industries, Ltd.*, discussed above, involved the purchase of a machine that caught fire.¹¹² The trial court granted summary judgment for one defendant on the ground that the machine was the subject of the contract between the parties and that the plaintiff's only loss was the destruction of the machine.¹¹³ The Tyler Court of Appeals affirmed, holding that because the only representations were set forth in the purchase order for the machine and that the only injury was the economic loss to the machine, the matter was governed by contract law, not the DTPA.¹¹⁴

V. AWARD OF ATTORNEYS' FEES TO DEFENDANT

Section 17.50(c) of the DTPA provides that a defendant is entitled to recover attorneys' fees incurred in defending against a DTPA claim if the claim is groundless and brought in bad faith or for purposes of harassment.¹¹⁵ Under section 17.50(c), "groundless" means a claim having "[n]o basis in law or fact and not warranted by [any] good faith argument for the extension, modification, or reversal of existing law."¹¹⁶ In determining whether a claim is groundless, a court should determine "whether the totality of the tendered evidence demonstrates an arguable basis in fact and law for the consumer's claim."¹¹⁷ A suit is brought in bad faith if it is motivated by a malicious or discriminatory purpose.¹¹⁸ Whether a suit is groundless or brought in bad faith is a question of law.¹¹⁹

In *In re Frazin*,¹²⁰ the U.S. Bankruptcy Court for the Northern District of Texas considered a defendant's efforts to recover attorneys' fees under section 17.50(c). Frazin, a Chapter 13 debtor, filed an adversary proceeding against law firms that had represented him in a state court action and

110. *Id.* at *4-5; see also *Stack v. Richman*, 286 S.W.3d 44, 49-50 (Tex. App.—Dallas 2009, pet. denied) (holding that summary judgment for defendants raising a section 17.506 defense was improper when fact questions remained as to the defendants' knowledge of the true facts).

111. See *Ashford Dev., Inc. v. USLife Real Estate Serv. Corp.*, 661 S.W.2d 933, 935 (Tex. 1983); *Quitta v. Fossati*, 808 S.W.2d 636, 644 (Tex. App.—Corpus Christi 1991, writ denied).

112. 299 S.W.3d 374, 380 (Tex. App.—Tyler 2009, pet. filed).

113. *Id.* at 388.

114. *Id.* at 387-88.

115. TEX. BUS. & COM. CODE ANN § 17.50(c) (Vernon 2002 & Supp. 2009).

116. *Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634, 637 (Tex. 1989).

117. *Splettstosser v. Myer*, 779 S.W.2d 806, 808 (Tex. 1989).

118. *Cent. Tex. Hardware, Inc. v. First City, Texas-Bryan, N.A.*, 810 S.W.2d 234, 237 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

119. *Donwerth*, 775 S.W.2d at 637.

120. 413 B.R. 378, 383-84 (Bankr. N.D. Tex. 2009).

appeal against Lamajak, Inc., a highly successful Beanie Babies™ distributor. Although a jury awarded Frazin \$6 million on its claim against Lamajak, the court of appeals reduced the award to \$3.4 million. Frazin and Lamajak eventually settled for \$3.2 million. When the lawyers filed their fee applications with the bankruptcy court, Frazin sued the law firms for negligence, breach of fiduciary duty, and violations of the DTPA, arguing that their representation resulted in a loss to him of \$3 million.¹²¹

The law firms successfully argued that all of Frazin's DTPA claims, with the exception of one warranty claim which he failed to prove, were all really fractured negligence claims. Agreeing with the law firms, the bankruptcy court examined whether Frazin's one warranty claim was "groundless" such that it entitled the law firms to an award of their attorneys' fees under section 17.50(c).¹²² As an initial matter, the court rejected the law firms' argument that section 17.50(c) entitled the law firms to recovery of all fees; instead, the court clarified that the only fees the law firms could possibly recover under section 17.50(c) were those related to defending against the allegedly groundless DTPA warranty claim.¹²³

To determine whether the pleading was groundless, the court objectively examined whether "counsel made a reasonable inquiry into the legal and factual basis of the claim at the time the suit was filed."¹²⁴ Because the law firms presented evidence only as to how the *non-DTPA* claims were groundless, and not as to why the *warranty* claim was groundless, the court found that Frazin's DTPA claim was not groundless.¹²⁵

VI. CONCLUSION

This Survey period was yet another in a long string of bad years for antitrust and DTPA plaintiffs. Of the three reported antitrust decisions, the plaintiffs lost them all. The DTPA plaintiffs did not fare much better, losing seven of the nine reported decisions.

A review of past surveys reveals another discouraging trend for consumer protection plaintiffs. During the six years from 1998 to 2003, this Survey reported an average of thirty-four DTPA decisions per year.¹²⁶ In 2004, the number of DTPA decisions reported dropped to nineteen,¹²⁷ and in the seven years since that time, the average has been fewer than

121. *Id.* at 386-87.

122. The law firms did not argue that Frazin's DTPA claims were brought in bad faith or for the purposes of harassment. The court acknowledged that the law firms were entitled to an award of their attorneys' fees under section 38.001 of the Texas Civil Practices and Remedies Code and that it thus "need not reach whether [the law firms] are alternatively entitled to recover their fees under Section 17.50(c)," adding, "to facilitate appellate review, the Court will address the Defendants' claims for fees under the DTPA as well." *Id.* at 428.

123. *Id.* at 430.

124. *Id.*

125. *Id.*

126. See A. Michael Ferrill, Leslie Sara Hyman & Sara Evans, *Deceptive Trade Practices—Consumer Protection Act*, 57 SMU L. REV. 863, 880 (2004).

127. *Id.*

seventeen cases per year. Similarly discouraging is the lack of success that DTPA plaintiffs experienced in the courts during that seven-year period. Of the 155 DTPA decisions reported in the annual Survey since 2004, plaintiffs won just thirty-six, a mere 23% of the cases.

As dismal as this record might seem, it appears positively triumphant when compared to the fate of antitrust plaintiffs. In the four years since this Survey was expanded to include antitrust developments, we have reported on eleven antitrust decisions of the U.S. Supreme Court, the Fifth Circuit, and Texas state and federal courts. The plaintiffs lost them all. Indeed, as we noted in last year's Survey, it has been over fifteen years since the U.S. Supreme Court sided with an antitrust plaintiff and over twenty-six years since the Texas Supreme Court has done so.¹²⁸

One glimmer of hope can be found in recent enforcement developments at the federal level. As reported in last year's Survey, one of the last acts of the Antitrust Division under the previous administration was to publish its report, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*.¹²⁹ Shortly before last year's Survey article went to press, the incoming administration withdrew the Section 2 Report, announcing that it no longer represented Department of Justice policy, and cautioning that "[c]onsumers, businesses, courts and antitrust practitioners should no longer rely on it as Department of Justice antitrust enforcement policy."¹³⁰

The Justice Department went on to emphasize:

Withdrawing the Section 2 report is a shift in philosophy and the clearest way to let everyone know that the Antitrust Division will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers The Division will return to tried and true case law and Supreme Court precedent in enforcing the antitrust laws.¹³¹

It remains to be seen whether and to what extent this decision to reinvigorate antitrust enforcement at the federal level will produce tangible benefits for consumers. Although the appellate record of private antitrust plaintiffs could hardly get worse, one would hope for their sake that the Justice Department's commitment to follow "tried and true case law and Supreme Court precedent" will reach beyond the narrow Chicago

128. A. Michael Ferrill, Leslie Sara Hyman & Caleb Rackley, *Antitrust and Consumer Protection*, 62 SMU L. REV. 855, 873-74 (2009). As this Article went to press, the U.S. Supreme Court handed an antitrust plaintiff an interim partial win, holding that the National Football League is not a single entity for all purposes under Sherman Act section 1. *Am. Needle v. Nat'l Football League*, 78 U.S.L.W. 4431 (2010). The authors anticipate that this decision will be addressed in detail in next year's Survey.

129. See *id.* at 856 (citing U.S. DEP'T OF JUSTICE, *COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT* (2008), available at www.usdoj.gov/atr/public/reports/236681.htm).

130. Press Release, U.S. Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), available at www.justice.gov/atr/public/press_releases/2009/245710.htm.

131. *Id.*

School dogma reflected in recent precedent.¹³² There is reason to believe this may be the case. In recent remarks to the United States Chamber of Commerce,¹³³ Christine Varney, Assistant Attorney General in charge of the Antitrust Division, cited *Lorain Journal Co. v. United States*,¹³⁴ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,¹³⁵ and *United States v. Microsoft Corp.*¹³⁶ as among the cases that will illuminate enforcement decisions in situations involving single-firm conduct. If followed by the courts in private antitrust litigation—and this is a crucial “if”—such a re-orientation could bode well for private antitrust plaintiffs seeking to remedy anticompetitive conduct by dominant firms.

132. *See id.*

133. Christine A. Varney, Vigorous Antitrust Enforcement in this Challenging Era, Remarks as Prepared for the U.S. Chamber of Commerce (May 12, 2009), available at www.justice.gov/atr/public/speeches/245777.htm.

134. 342 U.S. 143 (1951).

135. 472 U.S. 585 (1985).

136. 253 F.3d 34 (D.C. Cir. 2001) (per curiam). Ms. Varney also cited *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005), and *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002).

