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Antitrust and Consumer Protection

A. Michael Ferrill

Leslie Sara Hyman

William Hulse

ANTITRUST AND CONSUMER PROTECTION

*A. Michael Ferrill**
*Leslie Sara Hyman***
*William "Butch" Hulse****

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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; Shareholder, Cox Smith Matthews Incorporated, San Antonio, Texas.
*** B.A., Angelo State University; J.D., Baylor University; Shareholder, Cox Smith Matthews Incorporated, San Antonio, Texas.

I. INTRODUCTION

AT first blush the relationship between the antitrust laws and the Texas Deceptive Trade Practices–Consumer Protection Act ("DTPA")[1] might not be apparent. The antitrust laws are generally thought to be concerned with protecting competition.[2] In contrast, the stated purpose of the DTPA is "to protect consumers against false, misleading and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection."[3]

The shared denominator is the concern of both antitrust law and the DTPA for the consumer. The United States Supreme Court has described the antitrust laws, collectively, as a "'consumer welfare prescription,'"[4] and the lower courts have echoed this principle, recognizing that "[u]ltimately, the consumer is the beneficiary."[5]

An additional connection is found in the origins of the DTPA itself. The statute is modeled after the Federal Trade Commission Act ("FTC"); indeed, 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]

The relationship between the antitrust laws and the DTPA should not, however, be pressed too far. Although both are ultimately concerned with consumer welfare, antitrust and the DTPA focus on different aspects of the competitive process. While antitrust is primarily concerned with the misuse of market power to harm consumers, the DTPA primarily focuses on consumer harm brought about through deception. Further, although consumer protection statutes like the DTPA are frequently referred to as the "little FTC Acts,"[7] in enacting the DTPA the legislature did not include the "unfair methods of competition" prong of section 5 of the FTC Act but rather adopted only the "deceptive acts or practices" prong of section 5.[8] Further, it should be noted that the concept of "con-

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1. TEX. BUS. & COM. CODE ANN. §§ 17.41 et seq. (Vernon 2002 & Supp. 2006) [hereinafter "DTPA"].

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

3. DTPA § 17.44(a).

4. Reiter v. Sonotone, 442 U.S. 330, 343 (1979) (quoting ROBERT BORK, THE ANTITRUST PARADOX 66 (Free Press 1978)).

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

6. DTPA § 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. DTPA § 17.46(a).

sumer welfare" itself is not all of a piece, as illustrated by one of the court decisions discussed in this year's Survey.

This Survey covers significant developments under the federal and Texas antitrust laws and the Texas DTPA from November 1, 2005, through October 31, 2006.

II. ANTITRUST STATUTES

"The Sherman Act, 26 Stat. 209, enacted in 1890, the Clayton Act, 38 Stat. 730, enacted in 1914, and the Robinson-Patman Act, which amended the Clayton Act in 1936, all serve the purpose of protecting competition."[9] Likewise, the purpose of the Texas Free Enterprise and Antitrust Act ("TFEAA")[10] "is to maintain and promote economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the benefits of that competition to consumers in the state."[11] Noteworthy antitrust decisions rendered during the Survey period address market power, joint ventures, and the TFEAA's extraterritorial reach.

A. THE SHERMAN ACT

The principal federal antitrust statutes are sections 1 and 2 of the Sherman Act.[12] Section 1 condemns contracts, combinations, and conspiracies in unreasonable restraint of trade,[13] whereas section 2 condemns monopolization, attempts to monopolize, and conspiracies to monopolize a relevant economic market.[14] Although certain offenses like price-fixing among competitors are deemed illegal per se, meaning that no proof of actual market impact is required, most antitrust claims require proof of an actual or threatened injury to competition, which in turn usually requires proof that the defendant possesses market power in a relevant economic market.[15]

In *Illinois Tool Works, Inc. v. Independent Ink, Inc.*,[16] the United States Supreme Court considered the issue of whether a patented product necessarily confers market power on the patent holder. The defendants were manufacturers of patented printheads and ink containers and unpatented ink who marketed the products together to original equipment manufac-

9. *Brooke Group Ltd.*, 509 U.S. at 251.
10. TEX. BUS. & COM. CODE ANN. §§ 15.01-.26 (Vernon 2002 & Supp. 2006).
11. *Id.* § 15.04.
12. 15 U.S.C. §§ 1-2 (2000). The parallel provisions under Texas law are TFEAA sections 15.05(a) and (b). TEX. BUS. & COMM. CODE ANN. § 15.05 (a)-(b) (Vernon 2002 & Supp. 2006).
13. 15 U.S.C. § 1 (2000). Notwithstanding the literal language of the statute, the Supreme Court recognized as early as 1911 that section 1 only condemns unreasonable restraints. Standard Oil Co. v. United States, 221 U.S. 106, 175-84 (1911). *See also* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988); Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co., 472 U.S. 284, 289 (1985).
14. 15 U.S.C. § 2 (2000). *See* United States v. Grinnell Corp., 384 U.S. 563, 569 (1966).
15. *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).
16. 126 S. Ct. 1281 (2006).

turers ("OEMs"), who in turn agreed to purchase ink exclusively from the manufacturers. The OEMs also agreed that neither they nor their customers would refill the containers. The plaintiff was a competing manufacturer who alleged that this marketing scheme constituted illegal "tying" of ink to the patented printhead system[17] and monopolization. The trial court granted the defendants summary judgment based on the absence of evidence defining the relevant market or establishing the defendants' power within the relevant market.[18]

The Federal Circuit reversed. The court believed that it was bound by Supreme Court precedent recognizing an inference of market power arising from a patented product.[19] The Supreme Court granted certiorari "to undertake a fresh examination of the history of both the judicial and legislative appraisals of tying arrangements."[20] Based upon an extensive historical analysis of the original purpose of the market power inference and how patent law and antitrust law jurisprudence have changed since that time, the Court concluded that tying arrangements involving patented products are unlawful only when supported by proof, not a presumption, of market power in the relevant market.[21]

In *Texaco Inc. v. Dagher*,[22] the Supreme Court encountered allegations of price setting by a joint venture. Defendants Texaco, Inc. and Shell Oil had teamed up in a joint venture called Equilon Enterprises in order to refine and sell gasoline in the Western United States under the Texaco and Shell brand names. Equilon set a single price for both Texaco and Shell brand gasoline. Service station owners sued, alleging that, by unifying gas prices under the two brands, the defendants had engaged in unlawful price-fixing that was a per se violation of section 1 of the Sherman Act. The plaintiffs did not argue that the defendants' actions were illegal under the rule of reason.[23]

The district court granted summary judgment in favor of the defendants, holding that the per se rule did not apply and that the plaintiffs' decision not to seek recovery under the rule of reason doomed their claim.[24] The Ninth Circuit reversed, characterizing the defendants' argument as requesting an exception to the per se rule against price-fixing, and then rejecting that request.[25]

A unanimous Supreme Court (less Justice Alito, who took no part in

17. A tying arrangement "is an agreement by a party to sell one product [the tying product] but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase the product from any other supplier." Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958) (footnote omitted).

18. 126 S. Ct. at 1284-85.

19. *Id.* at 1285.

20. *Id.* at 1285.

21. *Id.* at 1285-93.

22. 126 S. Ct. 1276 (2006).

23. *Id.* at 1278-79.

24. *Id.* at 1279.

25. *Id.*

the consideration of the case) reversed.[26] The Court acknowledged that horizontal price-fixing agreements are per se unlawful.[27] The Court held, however, that Texaco's and Shell's price-setting actions were not that of competitors, but of participants in the Equilon joint venture. The Court held that "[w]hen 'persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . such joint ventures [are] regarded as a single firm competing with other sellers in the market.'"[28] As such, the price-setting before the Court was actually done by a single entity and was "not price-fixing in the antitrust sense."[29]

The Court held that Equilon's decision to sell gas under two brand names did not affect the analysis because a joint venture has the discretion to determine both the prices at which it sells its products and the brand names under which they are sold.[30] In reaching this conclusion, the Court assumed that Equilon was a lawful joint venture because its formation had been approved by federal and state regulators and there was no contention that it was a sham.[31] The Court noted that had the plaintiffs challenged Equilon itself, they would have had to show that its creation was anticompetitive under the rule of reason.[32]

B. The Robinson-Patman Act

The federal Robinson-Patman Act prohibits certain forms of discrimination by sellers in the prices and other terms of sale extended to their customers.[33] There is no parallel provision in the TFEAA.

In *Volvo Trucks North America, Inc. v. Reeder-Simco GMC*,[34] a dealer of specially-ordered, heavy-duty trucks sued Volvo, alleging that Volvo discriminated between dealers in its pricing. Volvo manufactures heavy-duty trucks that are sold by distributors to customers through a competitive bidding process. Under that process, the retail customer describes its specific product requirements and invites bids from dealers. When a dealer receives the customer's specifications, it contacts Volvo and requests a discount off the wholesale price. Volvo decides on a case-by-case basis whether to offer a discount and, if so, what the discount will be. The dealer then uses the Volvo discount in preparing its bid, and trucks are purchased from Volvo only if the retail customer accepts the bid. Volvo's dealers are assigned to nonexclusive geographic territories. In the event that multiple dealers compete for a single customer, Volvo's policy is to

26. *Id.* at 1278.
27. *Id.*
28. *Id.* at 1280 (quoting Arizona v. Maricopa County Med. Soc., 457 U.S. 332, 356 (1982)).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *See generally* ABA Section of Antitrust Law, Antitrust Law Developments Ch. V (5th ed. 2002).
34. 126 S. Ct. 860 (2006).

provide the dealers the same discount.[35]

Reeder was an authorized Volvo dealer that participated in the competitive-bidding process. Volvo announced its intention to enlarge its dealers' territories, thereby reducing the number of dealers. Around the same time, Reeder learned that Volvo had given another dealer a discount greater than the discounts Reeder typically received. This led Reeder to suspect that it was one of the dealers destined for elimination. Reeder sued Volvo, alleging violations of the Robinson-Patman Act and the Arkansas Franchise Practices Act.[36]

At trial, Reeder relied primarily on comparisons between discounts Volvo offered Reeder when it was bidding against non-Volvo dealers and larger discounts Volvo offered to other dealers bidding against non-Volvo dealers for bidding processes in which Reeder did not participate. In four of the examples presented, Reeder was the successful bidder and purchased Volvo trucks. Reeder did not search for or present any evidence of instances in which it received larger discounts than did other Volvo dealers in different bidding processes. Nor did Reeder conduct any statistical analysis as to whether it was disfavored on average compared to any other dealer or set of dealers.[37]

Reeder did present evidence of two instances where Reeder bid against another Volvo dealer for a single customer. In one instance, Reeder initially was offered a smaller discount than its competitor. Volvo then increased the discount until both dealers had the same discount. Neither dealer won the bid. In the other instance, Volvo offered both dealers the same discount. After the customer selected the other dealer, the customer demanded a further price concession, to which Volvo agreed.[38]

The jury found in favor of Reeder and the Eighth Circuit affirmed.[39] Reversing, the Supreme Court recalled prior holdings that the Robinson-Patman Act proscribes price discrimination only when it threatens to injure competition, not simply whenever different prices are charged to different customers.[40] Competitive injury may be found in diversion of sales or profits from a disfavored purchaser to a favored purchaser.[41] A permissible inference of such injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time.[42]

The Court found Reeder's evidence insufficient to establish competitive injury.[43] Evidence of a difference between the price offered to Reeder for bidding to one customer and the price offered to another

35. *Id.* at 866-67.
36. *Id.* at 867.
37. *Id.* at 867-68.
38. *Id.*
39. *Id.* at 868.
40. *Id.* at 870.
41. *Id.*
42. *Id.*
43. *Id.* at 871.

Volvo dealer for bidding to a different customer fell short because it did not show discrimination for the same customer.[44] The incidents also were separated in time by as much as seven months and were not the subject of a systematic study.[45] The Court concluded that the evidence was insufficient to support even an inference of a favored dealer or set of dealers because it did not preclude the possibility that Reeder might have received a better price than one or more of the dealers in its comparisons.[46]

The evidence of head-to-head bidding likewise failed to establish competitive injury because it did not show that Reeder was disfavored or that the discrimination was substantial.[47] Acknowledging that Reeder may have competed with other Volvo dealers for the opportunity to bid on a potential sale, the Court noted that competition for the opportunity to bid was based on factors other than price.[48] Indeed, a dealer approaches Volvo for a price only after it has been invited to submit a bid.[49]

The Fifth Circuit considered the "meeting competition" defense to the Robinson-Patman Act ("Act") in *Water Craft Management LLC v. Mercury Marine*.[50] In that case, distributors of marine products sued a manufacturer of such products for price discrimination under the Act. Water Craft sold marine products, including outboard motors purchased from Mercury Marine. Water Craft's largest competitor was Travis Boating Center. For several years, Travis had a sales agreement with outboard motor manufacturer Outboard Marine Corporation ("OMC") but not with Mercury Marine. Travis was expanding rapidly—in some instances buying Mercury Marine dealerships and converting them to Travis retail stores that did not carry Mercury Marine motors. As a result, Mercury Marine was losing market share to OMC.[51]

Seeking to stem this loss of market share, Mercury Marine attempted to enlist Travis as a distributor. Travis refused on the ground that Mercury's prices were not competitive with OMC's process. Mercury Marine eventually offered Travis product discounts. Water Craft then sued, claiming that the discounts extended to Travis were greater than those available to Water Craft or other distributors in the area.[52]

Mercury Marine defended on the ground that the discounts it offered Travis were in response to OMC's low prices and therefore fell within the "meeting competition" defense. This defense is available when the lower price to the favored dealer is made in good faith for the purpose of meeting a competitor's price. Mercury Marine presented evidence that it had relied on several sources for its estimation of OMC's prices and at-

44. *Id.*
45. *Id.*
46. *Id.* at 870-72.
47. *Id.* at 872.
48. *Id.*
49. *Id.*
50. 457 F.3d 484 (5th Cir. 2006).
51. *Id.* at 487-88.
52. *Id.*

tempted to corroborate that information by studying boat pricing in the market and monitoring industry gossip.[53]

The district court found that Mercury Marine was entitled to the meeting competition defense. On appeal, Water Craft challenged the district court's factual finding that Mercury Marine had acted in good faith.[54]

Rejecting this challenge, the Fifth Circuit first analyzed case law, recognizing that analysis of the meeting competition defense is fact specific, that good faith does not require absolute certainty that a price concession is necessary to meet an equally low price offered by a competitor, and that the concept of good faith is "'flexible and pragmatic, not technical or doctrinaire.'"[55] The court also recited several recognized indicia of good faith, such as (1) whether the seller had received reports of similar discounts from several customers; (2) whether the seller was threatened with termination if it failed to meet a discount; (3) whether the seller made efforts to corroborate the reported discount; and (4) whether the seller had prior experience with the favored dealer.[56]

Applying these indicia to the evidence, the Fifth Circuit concluded that the record supported the district court's finding that Mercury Marine acted in good faith.[57] The Fifth Circuit noted that, had Mercury Marine investigated its competitor's pricing further, it might have exposed itself to risk of liability under section 1 of the Sherman Act.[58] Further, the act of meeting a competitor's price in order to win a new customer, when that customer had previously refused to do business, matched the Supreme Court's recognition that the indicia of good faith include a buyer's price-related threats of termination.[59] Under either mode of analysis, the final, lower price appears necessary to compete, rather than an attempt to undermine competition.[60]

The Fifth Circuit also rejected Water Craft's argument, first advanced at oral argument, that Mercury Marine did not meet the competition because its prices to Travis remained above OMC's prices.[61] The key factor of the meeting competition defense is the seller's *intent* to meet a competitor's price, not the actual relationship between the two prices.[62] Granting the defense only to defendants who actually meet a competitor's price, and not also to those who attempt to compete by offering discounts short of the competitor's price, would have the perverse effect of limiting the defense to those who discriminate more.[63] Accordingly, the Fifth Cir-

53. *Id.* at 487-88, 490.
54. *Id.* at 488.
55. *Id.* at 489 (quoting United States v. United States Gypsum Co., 438 U.S. 422, 454 (1978)).
56. *Id.* at 488-89.
57. *Id.* at 490.
58. *Id.*
59. *Id.* at 490-91.
60. *Id.* at 491.
61. *Id.*
62. *Id.*
63. *Id.* at 492.

cuit held that the meeting competition defense is available if the defendant offers a discriminatory price in response to the competition even if the defendant knows that its discriminatory price is not as low as its competitor's price.[64]

C. Criminal Antitrust Liability and Sentencing

In *United States v. Rose*,[65] the Fifth Circuit considered the appropriate sentence for a corporate president's conviction for conspiracy to "suppress and eliminate competition by fixing the price, rigging bids, and allocating customers for choline chloride," a B complex vitamin.[66] In 1997, Defendant Rose became the president of a choline chloride manufacturer DuCoa, L.P. At that time, DuCoa, Bioproducts, Inc., and Chinook Group Limited accounted for ninety percent of the United States choline chloride market. After the United States Department of Justice began a grand jury investigation into price-fixing of bulk vitamins, Bioproducts approached the Justice Department and exposed a price-fixing conspiracy involving choline chloride. The ensuing investigation and indictments led to guilty pleas from five current and former officers of both DuCoa and Chinook as well as DuCoa's guilty plea.[67]

Rose was indicted for conspiracy to violate section 1 of the Sherman Act, found guilty, and sentenced to thirty months imprisonment. The sentence included an enhancement for bid-rigging, an enhancement for affecting in excess of $15 million in commerce, and an enhancement for Rose's role in the conspiracy as a manager or supervisor. On appeal, Rose challenged the sufficiency of the evidence to support his conviction, the district court's finding that he was a manager or supervisor, and the time period used to calculate the volume of commerce affected by the conspiracy.[68]

Affirming the conviction, the Fifth Circuit relied upon evidence showing that the three companies entered into an agreement to maintain their respective shares of the U.S. choline chloride market.[69] In furtherance of the agreement, the companies fixed prices for choline chloride disclosed in trade journals and used those prices as a reference point in determining the price for various customers. They also decided which company would offer the lowest price for choline chloride at particular competitive-bidding opportunities.[70]

Rose argued that the conspiracy no longer existed when he became president of DuCoa.[71] Indeed, the Fifth Circuit found that the companies did occasionally engage in competitive activity in disregard of their agree-

64. *Id.* at 491-92.
65. 449 F.3d 627 (5th Cir. 2006).
66. *Id.* at 629.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 630.
71. *Id.* at 632.

ment and that, at the time Rose assumed office, there had been increased disregard of the agreement and decreased communication between the competitors.[72] Nevertheless, there was evidence that the outgoing president believed the conspiracy was continuing, met with Rose to learn about the business, and believed that he openly discussed the conspiracy with Rose.[73]

Rose's immediate subordinate similarly believed that the conspiracy was ongoing when Rose became president.[74] That employee testified that he discussed the conspiracy with Rose and that he and Rose were both present at meetings of the conspirators at which market allocation and pricing was discussed.[75] The Fifth Circuit concluded that this evidence was sufficient to support the jury's verdict.[76]

Turning to Rose's sentence, the Fifth Circuit held that the district court's factual finding regarding Rose's role in the offense was appropriate.[77] Once Rose knew of the conspiracy, he determined whether DuCoa would continue to participate, had the authority to decide which bids would be submitted to customers, spoke for DuCoa at the meetings with the competition, and made decisions for DuCoa.[78]

The Fifth Circuit agreed, however, with Rose's challenge to the amount of commerce allegedly affected by the conspiracy.[79] Rose claimed that his involvement, if any, in the conspiracy did not begin until he attended his first meeting of the competitors.[80] Although there was evidence that Rose was aware of the conspiracy when he became DuCoa's president, there was neither evidence that he had knowingly joined or participated in the conspiracy at that time[81] nor any evidence that Rose failed to stop a subordinate that he knew was participating.[82] The earliest either situation could have occurred was when Rose began discussing the conspiracy with his subordinate.[83] Because the Fifth Circuit was unable to say whether the resulting error in calculating the amount of commerce affected was harmless, the court vacated Rose's sentence and remanded for resentencing.[84]

D. Texas Free Enterprise and Antitrust Act

The plaintiffs in *Coca-Cola Co. v. Harmar Bottling Co.*[85] were Royal

72. *Id.* at 630.
73. *Id.*
74. *Id.* at 631.
75. *Id.* at 631-32.
76. *Id.* at 633.
77. *Id.*
78. *Id.* at 633-34.
79. *Id.* at 634.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 635.
85. 218 S.W.3d 671 (Tex. 2006).

Crown Cola distributors in a four-state region covering portions of Texas, Arkansas, Louisiana, and Oklahoma (the "Ark-La-Tex" region). The plaintiffs sued Coca-Cola and its distributors, alleging that certain marketing agreements between Coke and its distributors unreasonably restrained trade and that Coke was liable for monopolization and conspiracy and attempt to monopolize in violation of the TFEAA and the antitrust laws of the other states in the region.

Sodas are distributed to retail locations by bottlers. In the Ark-La-Tex region, the Coca-Cola bottler and its affiliates held seventy-five to eighty percent of the market for national brands of soda. The Pepsi-Cola bottler held thirteen to fifteen percent of the market, and Royal Crown Cola bottlers held the remainder.[86]

Soda manufacturers and bottlers use promotional agreements with retailers known as calendar–marketing agreements ("CMAs"). CMAs typically provide that in exchange for payments and price discounts, the retailer will promote the distributor's product over competing brands for a specified period of time. For example, a CMA might provide for particular advertising or preferential product placement within the store, that the retailer must price the distributor's products below those of competing brands, or even that the retailer is prohibited from promoting competing brands.[87]

Coca-Cola used CMAs with most retailers in the Ark-La-Tex region, including every major retailer other than Wal-Mart. Coke's CMAs in the region prohibited or limited retailer advertising of competing national brands. The CMAs generally covered between forty-two and fifty-two weeks of the year, compared to twenty-six weeks in other regions of the country. Coke's CMAs sometimes required retailers to price certain products below competing products even when the competitor's wholesale prices were below Coke's, forcing the retailers to raise their prices for the competing products in order to comply. For some retailers, Coke's CMAs paid bonuses if the retailer agreed not to carry competitive flavors of root beer, orange, and grape sodas. Coke also occasionally required retailers to give more shelf space to Coke's root beer, orange, and grape products than was justified by the market share of those products.[88]

Acknowledging that CMAs are not inherently anticompetitive, the plaintiffs complained that Coke used its dominant position in the Ark-La-Tex region to negotiate CMAs with terms that suppressed competition.[89] The plaintiffs presented expert testimony that Coke's use of its dominant market share to force retailers into restrictive CMAs inhibited competition and negatively impacted the plaintiffs' sales of Royal Crown products.[90] Among other things, the plaintiffs alleged that they were unable

86. *Id.* at 675.
87. *Id.* at 676.
88. *Id.* at 676-77.
89. *Id.* at 676.
90. *Id.* at 677.

to introduce two products into the market without diverting shelf space from other Royal Crown products.[91] In contrast, at Wal-Mart, where there were no Coke CMAs, competing bottlers had no difficulty getting shelf space, and Coke products often sold at prices higher than those for competing sodas.[92] The plaintiffs' expert also testified that Coke was monopolizing or attempting to monopolize the soda markets served by the parties and was likely to succeed if not stopped.[93] However, the expert neither opined on how Coke's CMAs affected marketwide prices or output, nor attempted to precisely quantify the amount of competition foreclosed by the CMAs.[94]

The jury found for the plaintiffs and assessed actual damages in excess of $5 million.[95] Coke appealed, and the Texarkana Court of Appeals affirmed.[96] In a 5-4 decision, the Texas Supreme Court reversed.[97] Writing for the majority, Justice Hecht first held that as a matter of statutory construction, the Texas Legislature did not intend for the TFEAA to remedy injury occurring in other states.[98] Invoking the principle that a statute will be given extraterritorial effect only when such intent is clear, the majority held that no provision of the TFEAA evinced a purpose of promoting competition outside Texas or redressing extraterritorial injury.[99] The supreme court also rejected the arguments that the TFEAA applied because Coke engaged in the same conduct both within and without Texas and because Coke made decisions in Texas regarding CMAs used in other states.[100]

Turning to the claims under the other states' antitrust laws, the majority held that comity requires Texas courts to defer to the courts of other states to enforce those states' antitrust laws.[101] Even in the absence of any contention that the statutes differed, the supreme court would not presume them to be the same because application of antitrust laws requires analysis of economic theory and social needs and values.[102] The majority reasoned that abstention is required when a court must determine another state's policies in order to adjudicate rights claimed under that state's statutes.[103] The majority thus concluded that the trial court should not have entertained the plaintiffs' claims under the antitrust laws of Arkansas, Louisiana, and Oklahoma.[104]

The supreme court finally considered the plaintiffs' claims of injury in

91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 678.
96. *Id.* at 679.
97. *Id.* at 675.
98. *Id.* at 682.
99. *Id.* at 682-83.
100. *Id.* at 683.
101. *Id.* at 684-85.
102. *Id.* at 686-87.
103. *Id.* at 685.
104. *Id.* at 688.

Texas.[105] Coke conceded that it held a seventy-five and eighty percent share of the Ark-La-Tex market, and the record was "replete with evidence that Coke used its dominant market position to extract from retailers agreements with terms it might not otherwise have been able to obtain to promote its products with more favorable advertising and store displays and lower prices."[106] Coke nonetheless argued that there was no evidence of a substantial foreclosure of competition or a sufficient adverse impact on price, output, or choice.[107] The majority agreed, concluding that the evidence established "only that Coke's CMAs *could have* had"[108] anticompetitive and monopolistic effects, which did not entitle the jury to infer that the CMAs *did have* such effects.[109] In the absence of evidence quantifying the effect of Coke's CMAs in any relevant market, or establishing that the market foreclosure was substantial, the plaintiffs' claims could not succeed.[110]

RTLC AG Products, Inc. v. Treatment Equipment Co.[111] involved the question of whether a "sole source" agreement was a per se violation of the TFEAA. The case arose from the City of Dallas' Bachman Water Treatment Plant Filter Improvements Project. Dallas County had adopted uniform specifications for water and waste treatment facilities, including specifications for fabricated steel and stainless steel pipe, filters, and valves. Plaintiff RTLC supplied the specified steel and stainless steel pipe. In the Dallas area, defendant Treatment Equipment was the authorized representative for the specified filters and defendant Municipal Valve was the representative for the specified valves.[112]

When Dallas County sought bids for the Bachman project, Treatment Equipment, Municipal Valve, and defendant Piping Systems, Inc., which manufactures the specified pipes, agreed to submit a combined bid that packaged their respective components to general contractors bidding on the project. RTLC submitted a bid to the same general contractors for the pipe alone. The general contractors accepted the packaged bid and used it in their successful bid to Dallas County.[113]

RTLC sued Treatment Equipment, Municipal Valve, and Piping Systems, Inc., among others, alleging an unlawful tying arrangement in violation of the TFEAA. Treatment Equipment and Municipal Valve filed successful no-evidence motions for summary judgment and RTLC appealed.[114]

The Dallas Court of Appeals first addressed RTLC's argument that tying steel pipe to the sole source filters and valves was an arrangement

105. *Id.*
106. *Id.* at 689.
107. *Id.* at 689-90.
108. *Id.* at 690 (emphasis in original).
109. *Id.*
110. *Id.* at 689-90 (emphasis added).
111. 195 S.W.3d 824 (Tex. App.—Dallas 2006, no pet.).
112. *Id.* at 827-28.
113. *Id.* at 828
114. *Id.*

that, on its face, had an anticompetitive effect and thus should be considered a per se violation of the TFEAA.[115] The court of appeals held that under the United States Supreme Court's decision in *Illinois Tool Works, Inc. v. Independent Ink, Inc.*,[116] tying arrangements are not subject to per se analysis.[117] Rather, liability requires proof of sufficient market power in the tying product market to restrain competition in the tied product market.[118] The court of appeals thus rejected RTLC's argument.[119]

The court of appeals then examined the evidence offered by RTLC in opposition to the summary judgment motions.[120] The court of appeals described the elements of a tying claim under the TFEAA as:

> (1) a tying [condition]; (2) actual coercion by the seller that forced the buyer to accept the tied product; (3) the seller must have sufficient market power in the tying product market to force the buyer to accept the tied product; (4) there are anticompetitive effects in the tied market; and (5) the seller's activity in the tied product must involve a substantial amount of interstate commerce.[121]

The court of appeals held that RTLC's evidence with respect to only a single buyer on a single project was insufficient to warrant antitrust concern.[122] Because RTLC did not meet its burden of producing a scintilla of evidence on this element of its claim, the court of appeals affirmed the summary judgment.[123]

In *Roberts v. Whitfill*,[124] the Waco Court of Appeals considered whether standing under the TFEAA can be challenged for the first time on appeal. Roberts and Whitfill were former partners in a telecommunications business who became rivals. Both received services from a third party, and Whitfill believed that she was paying more than Roberts for the services. Whitfill sued Roberts and the third party, asserting claims of preferential pricing and restraint of trade in violation of the TFEAA. The case was tried to a jury, which found in favor of Whitfill, and the trial court entered judgment against the defendants jointly and severally for $758,264.19, representing a trebling of the actual damages, attorneys' fees, and costs, and against Roberts for $50,000 in exemplary damages. Roberts appealed, arguing that Whitfill lacked antitrust standing and that the damages award was legally flawed.[125]

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115. *Id.* at 831-32.
116. 126 S. Ct. 1281 (2006).
117. *RTLC*, 195 S.W.3d at 832.
118. As noted above, the TFEAA is to be construed in harmony with federal interpretation of comparable federal antitrust statutes. TEX. BUS. & COM. CODE ANN. § 15.04 (Vernon 2002 & Supp. 2006).
119. 195 S.W.3d at 832.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. 191 S.W.3d 348 (Tex. App.—Waco 2006, no pet.).
125. *Id.* at 351-54.

The Waco Court of Appeals initially considered whether it could hear the standing question, which Roberts raised for the first time on appeal.[126] The court of appeals held that while it might be a better practice to raise antitrust standing in the trial court, there was no reason to differentiate antitrust standing from standing in general, which can be raised for the first time on appeal.[127]

The court of appeals then considered whether Whitfill had established antitrust standing, which requires that the injury to the plaintiff corresponds to an injury of the same type to the relevant market.[128] Whitfill claimed that Roberts and the third party had secretly agreed that Whitfill would be charged more than Roberts. She argued that this agreement restrained trade because it provided preferential pricing to Roberts, suppressed and destroyed competition, and had the effect of increasing prices.[129] Whitfill also asserted that the agreement provided an unfair pricing advantage that prevented her from competing with Roberts and deprived customers of the benefits of competition.[130] Whitfill claimed she had lost customers to Roberts because he offered price incentives that she could not match due to her higher prices.[131]

Examining the evidence, the court of appeals held that there was no evidence showing how the alleged misconduct or Whitfill's alleged injuries corresponded to an injury to either consumers or competition in the marketplace.[132] Whitfill had testified that Roberts' company was her only competition except in Tarrant and Dallas Counties. The evidence showed that, at best, one other company sold a similar service using similar software, that the market was slowing at the time of trial, and that Roberts' company had lost customers to another competitor.[133] Without much substantive discussion, or acknowledgement that the TFEAA does not even have a price discrimination provision, the court of appeals concluded that Whitfill had not suffered antitrust injury.[134] The court of appeals noted that Whitfill and Roberts had a dispute and that Whitfill did not make as much money as she expected when they divided their business because she paid a "hosting fee" that Roberts was not required to pay, but the court held that this did not constitute antitrust injury.[135] Absent antitrust injury, Whitfill lacked antitrust standing, which deprived the trial court of jurisdiction over her antitrust claim.[136]

126. *Id.*
127. *Id.* at 356.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 356-57.
136. *Id.*

III. DECEPTIVE TRADE PRACTICES—CONSUMER PROTECTION ACT

The DTPA was enacted in 1973 "to protect consumers against false, misleading and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection."[137] Noteworthy DTPA decisions during the Survey period address the sufficiency of the evidence of a DTPA violation, preemption, and damages.

A. STANDING AND CONSUMER STATUS

In order to bring a DTPA claim, a plaintiff must be a "consumer" as that term is defined in the statute.[138] To qualify as a consumer, the plaintiff must be an individual who seeks or acquires by purchase or lease, goods or services; further, those goods or services must form the basis of the plaintiff's complaint.[139] Consumer status under the DTPA depends upon a showing that the plaintiff's relationship to the transaction entitles it to relief.[140] When the facts underlying the determination of consumer status are undisputed, whether a plaintiff qualifies for such status is a question of law.[141]

The United States District Court for the Northern District of Texas, Wichita Falls Division, examined the definition of consumer in *Marketic v. U.S. Bank National Association*.[142] The plaintiff obtained a home equity loan from New Century Mortgage Corporation that was evidenced by a promissory note. New Century obtained a first lien mortgage on the plaintiff's property. The security instrument that created the lien provided that if the plaintiff defaulted on the promissory note, the noteholder could accelerate the indebtedness and foreclose on the property. Both the home equity note and the lien were subsequently assigned to the defendant. The plaintiff failed to make several monthly payments and the defendant accelerated her debt. The plaintiff filed suit seeking declaratory and injunctive relief to prevent the foreclosure. She also sought damages for DTPA violations and violations of the Texas Debt Collection Act ("TDCA").[143]

The defendant moved for summary judgment on the DTPA claim on the ground that the plaintiff was not a consumer, arguing that the

137. DTPA § 17.44(a).
138. *See id.* § 17.50.
139. *Id.* § 17.45(4); Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 351-52 (Tex. 1987).
140. Amstadt v. United States Brass Corp., 919 S.W.2d 644, 650 (Tex. 1996); *see also* Sanchez v. Liggett & Myers, Inc., 187 F.3d 486, 491 (5th Cir. 1999) (holding that a "DTPA claim requires an underlying consumer transaction; there must be a nexus between the consumer, the transaction, and the defendant's conduct") (citing *Amstadt*, 919 S.W.2d at 650).
141. Vinson & Elkins v. Moran, 946 S.W.2d 381, 406 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.).
142. 436 F. Supp. 2d 842 (N.D. Tex. 2006).
143. *Id.* at 844-45.

purchase of an intangible, such as a home equity loan, is not considered the purchase of goods or services. The plaintiff responded that a violation of the TDCA also establishes a violation of the DTPA. The district court acknowledged that the DTPA grants a private right of action under the DTPA to one seeking to recover under the TDCA[144] but concluded that section 17.50 does not exempt a plaintiff from the necessity of establishing consumer status under the DTPA.[145] Because the defendants were correct that the purchase of an intangible like a home equity loan is not considered the purchase of goods or services under the DTPA, the district court granted summary judgment for the defendants on the plaintiff's DTPA claim.[146]

The Lubbock Division of the United States District Court for the Northern District of Texas considered consumer status and standing in *Crawford v. GuideOne Mutual Insurance Co.*[147] The case arose from an alleged duty to defend Crawford under an insurance policy that the defendant issued to Lubbock Christian University ("LCU"). The plaintiff in the underlying state court litigation, Pliler, was injured during a practice for a school-sponsored and school-controlled entertainment event. Pliler sued LCU for damages he suffered as a result of his injuries. LCU, allegedly at the urging of its insurer, then filed a third-party claim against others involved in the entertainment event, including Crawford. LCU's President testified that he had "moral concerns" about the third-party claim but was concerned that the insurer would "withdraw its support in defending the Pliler suit." Crawford requested a defense under LCU's insurance policy for the third-party claims but was not afforded one.[148]

At trial of the Pliler lawsuit, the jury found LCU to be fifty-five percent negligent, Pliler to be twenty-five percent negligent, and Crawford and another individual each to be ten percent negligent.[149] The jury also found that Crawford had been acting for the benefit of LCU and subject to LCU's control.[150] In its judgment, the trial court ordered that LCU take nothing on its claims against Crawford.[151] Crawford then wrote to the defendant demanding payment of the attorneys' fees and expenses incurred in defending against the third-party claim. When no payment was made, Crawford sued, alleging Insurance Code and DTPA violations. The defendant then moved for summary judgment.[152]

The district court first analyzed the insurance policy and the allegations against Crawford in the state court suit and determined that Crawford was neither an insured nor an intended third-party beneficiary under the

144. *Id.* at 854 (citing TEX. BUS. & COM. CODE ANN. § 17.50(h) (Vernon 2002 & Supp. 2006) and TEX. FIN. CODE ANN. § 392.404 (Vernon 2006)).
145. *Marketic*, 436 F. Supp. 2d at 855.
146. *Id.* at 854-55.
147. 420 F. Supp. 2d 584 (N.D. Tex. 2006).
148. *Id.* at 588-90.
149. *Id.* at 590.
150. *Id.*
151. *Id.*
152. *Id.* at 591.

policy. Accordingly, the defendant had no duty to defend Crawford.[153] Citing *Hamburger v. State Farm Mutual Automobile Insurance Co.*,[154] the district court held that in order to impose liability upon an insurer for violations of the Texas Insurance Code and the DTPA, an insured must show that it is entitled to recover for a breach of the duty of good faith and fair dealing.[155] Because Crawford was not an insured, his claims under the Insurance Code and DTPA failed.[156] Likewise, Crawford's DTPA claims of unconscionable conduct and misrepresentation of goods and services failed because he was not a consumer of the insurance policy.[157] The district court held that Crawford's DTPA claim under section 17.46(b)(12)[158] did not require consumer status, but that summary judgment nevertheless was appropriate because Crawford failed to produce evidence that the defendant represented that the insurance policy involved rights, remedies, or obligations that it did not have or involve.[159] The district court thus granted summary judgment on all of Crawford's DTPA claims.[160]

Ortiz v. Collins[161] is another 2006 case in which the Houston Court of Appeals for the Fourteenth District was called upon to address the plaintiff's status as a consumer. Collins and Welsh purchased a townhouse at a trustee's foreclosure sale. Ortiz challenged the foreclosure but was unable to prevent it. Collins and Welsh subsequently initiated a forcible-detainer action. After their first attempt was unsuccessful, Collins and Welsh hired Tyman, an attorney, to initiate a second forcible-detainer action to seek possession of the townhouse. While the second detainer proceeding was pending, the parties began to negotiate in an attempt to settle. The negotiations became the subject of another dispute, in which Ortiz asserted fraud, negligent misrepresentation, promissory estoppel, breach of contract, conspiracy, and DTPA claims against Collins, Welsh, and their attorney Tyman.[162] The trial court granted summary judgment for the defendants disposing of all claims, and Ortiz appealed.[163]

One basis for summary judgment for Tyman was that Ortiz was not a consumer of goods or services from Tyman. On appeal, Ortiz argued that he was in fact a consumer of goods or services from Tyman by virtue of the fact that the proposed settlement contemplated Ortiz buying back the townhouse from Collins and Welsh, essentially arguing that this made the

153. *Id.* at 599.
154. 361 F.3d 875, 880 (5th Cir. 2004).
155. *Crawford*, 420 F. Supp. 2d at 599.
156. *Id.* at 600.
157. *Id.*
158. Section 17.46(b)(12) prohibits "representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law." DTPA § 17.46(b)(12).
159. 420 F. Supp. 2d at 600.
160. *Id.*
161. 203 S.W.3d 414 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).
162. *Id.* at 418-19.
163. *Id.* at 419.

transaction a consumer transaction.[164] The court of appeals disagreed. Citing settled law, the court of appeals recognized that Ortiz's status as a consumer was dependent upon his relationship to the transaction and not the contractual relationship of the parties. Privity of contract was not required for Ortiz to maintain a DTPA claim against Tyman.[165] However, the court of appeals concluded that the relevant transaction was not the sale or repurchase of the townhouse but, rather an attempt to settle the forcible-detainer action.[166] The court of appeals went on to note that negotiations to settle litigation do not constitute consumer transactions even when the litigation involves goods.[167] As the court of appeals observed, if that were the case, every lawsuit stemming from a dispute over the purchase or lease of goods or services would itself become a consumer transaction.[168] Based on this analysis, the court of appeals concluded that Ortiz was not a consumer and that the trial court had properly granted Tyman's motion for summary judgment.[169]

B. Deceptive Practices

In addition to establishing consumer status, a DTPA plaintiff must show that a "false, misleading, or deceptive act," breach of warranty, or unconscionable action or course of action occurred, and that such conduct was the producing cause of the plaintiff's damage.[170]

1. Laundry List Claims

DTPA section 17.46(b) contains, in 27 subparts, a nonexclusive "laundry list" of actions that constitute "false, misleading or deceptive acts" under the statute.[171] Several interesting cases involving laundry-list claims were decided during the Survey period.

In *Main Place Custom Homes, Inc. v. Honaker*,[172] the Fort Worth Court of Appeals decided a homeowners' suit against a builder in connection with property damages caused by a slope failure and related soil movement on the homeowners' property. The builder purchased the lot and built a custom luxury home on the property. The Honakers became interested in the home while it was under construction but were concerned about a steep embankment behind the home. The builder repeatedly assured the Honakers that the "house and lot [are] as solid as they come," and that the property "was stable and . . . there would be no problems with the house or property falling away."[173] The Honakers

164. *Id.* at 425.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. DTPA § 17.50(a)(1)-(3).
171. *Id.* § 17.46(b).
172. 192 S.W.3d 604 (Tex. App.—Fort Worth 2006, pet. denied).
173. *Id.* at 610.

agreed to purchase the home and later testified that they relied on the builder's statements in making their decision. During the remaining construction, the builder also provided the homeowners with two letters, both of which opined that the retaining wall was strong enough to withstand the pressure of the built-up foundation.[174]

Less than two years after the Honakers closed on the property, the soil on the south side of the foundation began cracking and pulling away from the back porch. The builder inspected the cracking and told the Honakers that it was not a problem and to fill the area with sand. Three months later, the slope behind the home failed and caused a major landslide. The builder inspected the damage and told the Honakers that the slope failure would not damage the home; however, over the next several months, the property sustained damage related to the slope failure. The Honakers also discovered that the home's sprinkler system had been improperly connected to the city water system, which caused thousands of gallons of water to leak under the home. The Honakers learned that the water leakage, coupled with the home having been built at the joining of two different types of soil, caused the movement in the soil under the home. The Honakers sued the builder, the initial developers of the property, a contractor who repaired the retaining wall, the subcontractor that installed the sprinkler system, and their homeowners' insurance company. The Honakers settled with everyone except the builder. After a bench trial, the trial court found in favor of the Honakers and rendered judgment awarding damages, prejudgment interest, and attorney's fees for both the trial and any appeals.[175]

The builder appealed, arguing that the evidence was legally and factually insufficient to support the trial court's conclusion that the builder violated the DTPA. Specifically, the builder claimed that its statements to the Honakers were merely statements of opinion, not misrepresentations of fact. The court of appeals disagreed, concluding that the builder's statements affirmatively represented that the property was stable and able to support the house when it was not.[176] In reaching this conclusion, the court of appeals noted that a determination of whether a statement is an opinion or an actionable misrepresentation requires consideration of three factors: the specificity of the statement, "the comparative knowledge of the buyer and seller, and whether the representation relates to a past or current event or condition versus a future event or condition."[177] Applying these factors to the evidence, the court of appeals held that the statements were specific, that the builder was in a better position to know about the condition of the property than the Honakers, and that the statements applied equally to the present and fu-

174. *Id.* at 610-11.
175. *Id.* at 610-12.
176. *Id.* at 624-25.
177. *Id.* at 624 (citing Kessler v. Fanning, 953 S.W.2d 515, 520 (Tex. App.—Fort Worth 1997, no pet.)).

ture condition of the home and property.[178] The court of appeals thus concluded that the evidence was sufficient to support the trial court's finding that the builder violated the DTPA.[179]

Reynolds v. Murphy[180] involved "the potential liability of an author and publisher of an investment-related newsletter to a subscriber who allege[d] that he incurred losses as a result of making investments in accordance with recommendations in the newsletter."[181] The subscriber alleged that he relied on and attempted to follow the information in the newsletter in making his investment decisions. He became concerned about the advice in the newsletter because the returns on his investments did not match what the newsletter described. He eventually sold those investments at a loss and sued the author and publisher for breach of contract, negligence, negligent misrepresentation, fraud and misrepresentation, and violations of the DTPA. The investor claimed that the defendants had misrepresented the author's level of experience, skill, and expertise in technology investments and erroneously represented that the author personally researched the companies in which he advised investing and "would safely guide investors so they could invest and make profits safely."[182] The investor also alleged that the defendants made misrepresentations about the author's investment methodology, including statements that the methodology was proven and "based on highly reliable principles" and that investors who followed it "would realize great returns on investments."[183] The investor also alleged that the defendants failed to disclose the author's criminal history. The defendants filed no-evidence and traditional motions for summary judgment, arguing that none of their statements could support a DTPA claim. The trial court granted the motions and the investor appealed.[184]

The Fort Worth Court of Appeals first examined the evidence relating to the author's skill and expertise as a stock analyst. The defendants' summary judgment evidence demonstrated that the author had been involved in stock analysis since the late 1960s and included excerpts from books and articles identifying the author as an expert and ranking his model portfolio as fifth best among seventy-seven newsletters. In response, the investor provided evidence that he claimed showed that the author was a failure at analyzing and picking technology stocks. The court of appeals determined that, while there was evidence that the author may have had poor returns pursuant to aggressive or short-term methods he advocated in other contexts, in the newsletter in question, the author consistently emphasized a different, long-term investment approach and explained that the investment funds he managed were sepa-

178. *Id.* at 624-25.
179. *Id.* at 625.
180. 188 S.W.3d 252 (Tex. App.—Fort Worth 2006, pet. denied).
181. *Id.* at 256-57.
182. *Id.* at 272.
183. *Id.*
184. *Id.* at 258.

rate from, and more aggressive than, the investments recommended in the newsletter. The court of appeals concluded that the investor's evidence did not raise a fact issue as to his claims relating to the author's expertise and skill.[185]

The court of appeals also held that the investor did not raise a fact issue on his claim under DTPA section 17.46(b)(8), which forbids using false or misleading facts to disparage the goods, services, or business of another.[186] The investor based this allegation on statements by the author that he had a "wall of shame" for analysts who were poor performers and that another analyst was headed to hell because of his stock picks. The court of appeals held that section 17.46(b)(8) applies to misrepresentations of fact, not opinion, and that the statements at issue were statements of opinion.[187] Finally, the court of appeals rejected the investor's claim that the defendants had violated DTPA section 17.46(b)(24) by failing to disclose the author's past history for the purpose of inducing subscriptions to the newsletter.[188] Section 17.46(b)(24) prohibits "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."[189] Included in the defendants' summary judgment evidence were affidavits in which they maintained that they did not intend anyone to rely on the absence of information about the author's past in deciding whether to subscribe to the newsletter. The court of appeals concluded that summary judgment was proper because the investor failed to present any evidence raising a fact issue as to the defendants' intent in failing to disclose the information.[190]

The Dallas Court of Appeals considered the sufficiency of the evidence of a DTPA violation in *Dal-Chrome Co. v. Brenntag Southwest, Inc.*[191] Dal-Chrome purchased sulfuric acid from Brenntag. After determining that the acid had been contaminated, Dal-Chrome sued, and the jury found that Brenntag had violated the DTPA by misrepresenting the quality and characteristics of the sulfuric acid.[192]

Brenntag appealed, arguing that the evidence was legally and factually insufficient to support the jury's findings that it violated the DTPA. According to Brenntag, it represented that the sulfuric acid would be tech grade ninety-three percent; it in fact delivered tech grade ninety percent sulfuric acid, and there was no evidence that the acid varied from the manufacturer's specifications. According to the Dallas Court of Appeals'

185. *Id.* at 274.
186. *Id.* at 274-75.
187. *Id.*
188. *Id.* at 275.
189. DTPA § 17.46(b)(24).
190. *Reynolds*, 188 S.W.3d at 274-75.
191. 183 S.W.3d 133 (Tex. App.—Dallas 2006, no pet.).
192. *Id.* at 136.

review of the evidence, Brenntag represented to Dal-Chrome that the acid would meet the manufacturer's product specifications, but Brenntag's quality control procedures involved obtaining a certificate of compliance from the supplier and not independent testing to determine whether the acid met product specifications. Brenntag presented evidence that it was common industry practice to rely on such certificates, but the record also established that the acid sold to Dal-Chrome was contaminated. The court of appeals concluded that there was sufficient evidence to conclude that Brenntag represented that the acid had characteristics, ingredients, uses, or benefits that it did not have, or that the acid was of a particular standard, quality, or grade when it was of another.[193] The court of appeals rejected Brenntag's argument that, absent evidence of the manufacturer's specifications, there was no evidence that Brenntag represented the acid would not be contaminated.[194] The court of appeals also held that based on Brenntag's reliance on the supplier's certification, coupled with evidence that Brenntag represented to Dal-Chrome that the certificates were the manufacturer's specifications and the fact that the acid did not meet the specifications in the certificates, the jury could have reasonably concluded that Brenntag's representations were false.[195] Although there were some conflicts in the testimony, the court of appeals affirmed the verdict, holding that it could not substitute its judgment for the jury's and that the evidence was both legally and factually sufficient.[196]

In *Lundstrom v. United Services Automobile Association-CIC*,[197] homeowners sued their insurer for wrongfully denying coverage for water and mold damage. The insurer moved for summary judgment, arguing that the homeowners' extra-contractual claims, including their DTPA claims, were barred because a good-faith dispute existed regarding coverage. The trial court granted the motion and the homeowners appealed.[198] The Houston Court of Appeals first affirmed summary judgment on the homeowners' breach of contract claim, holding that the insurance policy did not cover mold damage under the facts alleged.[199] The court of appeals then recognized that an insured does not have a claim for bad faith when an insurer has denied a claim that is not covered and has not otherwise breached the contract, unless, in denying the claim, the insurer committed an act so extreme that it caused an injury independent of the policy claim. Because the policy did not cover the damage at issue and the homeowners had not alleged any act extreme enough to cause an injury independent of the insurer's denial of the claim, the court of appeals held that the homeowners' bad-faith claim failed as a matter of

193. *Id.* at 141-42.
194. *Id.* at 142.
195. *Id.* at 140.
196. *Id.* at 139-141.
197. 192 S.W.3d 78 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).
198. *Id.* at 80.
199. *Id.* at 95.

law.[200] The court of appeals then reviewed the pleadings and summary judgment arguments and concluded that the homeowners' DTPA claim was premised on the same underlying theory as their bad-faith claim and that in disproving the bad-faith claim, the insurer also disproved the DTPA claim.[201] The Houston Court of Appeals thus affirmed summary judgment against the homeowners on both claims.[202]

Daugherty v. Jacobs[203] involved a dispute over repair and restoration work on a 1960 Jaguar. Daugherty and his repair shop K&K estimated the cost of the work at $16,165, predicted a two to three month timeline, and extended a one-year warranty. But K&K worked on the car for nine months, and the cost came to approximately $30,000. In late 2000, K&K informed Jacobs that his Jaguar was ready, but the repairs were not actually completed. Jacobs refused to take possession of the car. K&K kept the car several more months and billed Jacobs an additional $6,000. When Jacobs finally picked up the car, he discovered that many of the problems still had not been resolved and stopped payment on his final check to K&K. Jacobs then took the car to another repair shop to complete the work. While the car was there, K&K took possession of the car pursuant to a mechanic's lien and held it until Jacobs agreed to repay the stopped check plus attorneys' fees and interest. K&K agreed to honor the warranty but charged Jacobs for additional work and parts, which Jacobs believed should have been included under the warranty. Jacobs eventually paid approximately $10,000 to yet another repair shop to complete the work to his satisfaction and then sued Daugherty and K&K, alleging negligence, breach of contract, DTPA violations, fraud, breach of warranty, and breach of bailment and conversion. After trial, the jury found in Jacobs' favor on all claims.[204]

Daugherty appealed, arguing in part that there was insufficient evidence that he had engaged in a false, misleading, or deceptive act that was a producing cause of Jacobs' damages. The Houston Court of Appeals first explained that Daugherty, as K&K's agent, could be held personally liable under the DTPA for misrepresentations he personally made. The court of appeals then considered the evidence that Daugherty told Jacobs that K&K was the best in Houston, and perhaps the best in the country, for repairing Jaguars, that Jacobs would have a one-year warranty on the work, and that the work would take two to three months and cost approximately $16,000. Jacobs testified he relied on these representations and that for the majority of time the Jaguar was at K&K, he thought things were going fine. Jacobs' expert testified about the repairs still needed after K&K allegedly completed its work and that K&K completed repairs in the wrong order, using wrong procedures. The expert opined that the repairs were not completed in the manner in which they

200. *Id.* at 96-97.
201. *Id.*
202. *Id.* at 80.
203. 187 S.W.3d 607 (Tex. App.—Houston [14th Dist.] 2006, no pet.).
204. *Id.* at 612-13.

were charged and that the invoices seemed made up. He further testified that Jacobs had been overcharged and received substandard work. The court of appeals concluded that Jacobs had produced ample evidence that the faulty and incomplete repairs and false invoicing caused him damages.[205] Although the defendants pointed to a break in the causal connection due to the passage of time between the repairs made at K&K and the expert's observations of the Jaguar and argued that any work to rebuild the engine was outside the original estimate, the court of appeals held that the jury was within its province to disbelieve the defendants' alternate theory of causation.[206] The court of appeals thus affirmed the jury's verdict in Jacobs' favor.[207]

Pierce v. State[208] involved complaints by customers of a floral shop concerning unauthorized charges on their credit and debit cards.[209] The customers complained to Pierce and sought reimbursements, but Pierce was unresponsive to most of the complaints. After receiving several complaints about Pierce, the Texas Attorney General sued, alleging that Pierce violated the DTPA by placing unauthorized charges on the customers' credit cards, falsely representing to credit card companies that the customers had approved the charges, and inducing customers into transactions by failing to disclose that Pierce or her employees might make unauthorized charges on the customers' cards. The State sought a temporary restraining order with asset freeze, which the trial court granted.[210]

Pierce appealed, arguing that the Attorney General lacked standing to bring the suit because making unauthorized charges on customers' credit cards is not a service within the meaning of the DTPA or an unlawful practice under the DTPA. The Dallas Court of Appeals disagreed.[211] The court of appeals held that allowing customers to pay with credit cards is part of the service that Pierce provided and that, without a sales transaction, the deception would not have occurred.[212] The court of appeals concluded that the allegations that Pierce made unauthorized charges on the customers' credit cards and that the customers would not have purchased flowers from Pierce had they known that unauthorized charges would follow constituted deceptive acts involving a service and a sales transaction that were actionable under the DTPA, and therefore, the Attorney General had standing to bring the suit.[213] The court of appeals thus affirmed the temporary injunction.[214]

205. *Id.* at 615.
206. *Id.*
207. *Id.* 615-16, 620.
208. 184 S.W.3d 303 (Tex. App.—Dallas 2005, no pet.).
209. *Id.*
210. *Id.* at 304-05.
211. *Id.* at 304.
212. *Id.* at 305-06.
213. *Id.* at 306.
214. *Id.* at 305-06.

In *Mays v. Pierce*,[215] the plaintiff signed a contract and work order for the defendant to perform water and mold remediation and restoration on the plaintiff's home.[216] After instructing the plaintiff to leave her home immediately due to the presence of toxic mold, the defendant deconstructed the residence but failed to repair or reconstruct the home. The plaintiff subsequently sued for breach of contract and violations of the DTPA.[217] The plaintiff alleged both false, misleading, and deceptive acts or practices under the laundry list as well as an unconscionable course of action.[218] The case was tried to the bench, and a judgment was entered against the defendant for over $43,000 in actual damages and additional DTPA damages in the same amount.[219] The defendant appealed the legal and factual sufficiency of the evidence supporting liability and damages.[220]

The Houston Court of Appeals reversed the portion of the judgment awarding DTPA damages.[221] The defendant argued, and the court of appeals agreed, that the plaintiff's evidence, at best, demonstrated a breach of contract. The court of appeals explained that the determination of whether a breach of contract gives rise to the level of a misrepresentation sufficient to trigger a DTPA violation is a fact-intensive inquiry.[222] The court of appeals further explained that whether the facts, once determined, constitute a DTPA violation is a question of law.[223] Ultimately, the court of appeals concluded that the evidence presented by the plaintiff demonstrated a breach of contract but was not actionable under the DTPA.[224]

Patterson v. McMickle[225] addressed whether intent is required for a DTPA claim. The plaintiff asserted claims, including a DTPA claim, against an annuity broker. The broker was successful in dismissing all of the claims on summary judgment.[226]

On appeal, the plaintiff argued that the broker was not entitled to summary judgment on the DTPA claim because there was a fact issue as to whether the broker failed to disclose information to the plaintiff, despite a duty to do so in violation of section 17.46(b)(24).[227] The Fort Worth Court of Appeals affirmed, holding that mere nondisclosure of material information is not enough to establish an actionable DTPA claim.[228] Rather, a plaintiff is required to provide some evidence that the defen-

215. 203 S.W.3d 564 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).
216. *Id.* at 569.
217. *Id.* at 570.
218. *Id.* at 571.
219. *Id.* at 568.
220. *Id.* at 569.
221. *Id.*
222. *Id.* at 574.
223. *Id.*
224. *Id.* at 575.
225. 191 S.W.3d 819 (Tex. App.—Fort Worth 2006, no pet.).
226. *Id.* at 821-22.
227. *Id.* at 827.
228. *Id.*

dant withheld information with the intent of inducing the consumer into the transaction.[229] As the plaintiff failed to present any such evidence, summary judgment was proper.[230]

2. *Unconscionability*

DTPA section 17.45(5) defines an "unconscionable action or course of action" as "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree."[231] In *Daugherty v. Jacobs*,[232] discussed above, a dissatisfied car owner sued K&K repair shop alleging that K&K and its owner Daugherty violated the DTPA by engaging in an unconscionable action or course of action. After the car's owner prevailed at trial, Daugherty appealed. The owner had testified that he did not receive any details about the work performed over the course of the thirteen months until litigation began and that the backup of the invoices did not match the work allegedly done. There also was evidence that Daugherty double-charged Jacobs for some services, charged repeatedly for work that was never done, and charged for what appeared to be his own errors. The owner's expert testified that there was no way that the owner could have understood the erroneous invoices. The Houston Court of Appeals held that, based upon this record, the jury's verdict was "not so contrary to the overwhelming weight and preponderance of the evidence as to be clearly wrong and unjust."[233]

The plaintiff in *Strauss v. Ford Motor Co.*[234] brought a putative class action against Ford and a car leasing company alleging that they were distributing cars "wholly incapable" of compliance with the Texas Transportation Code because they lacked hardware necessary to affix a front license plate to the bumper. The plaintiff alleged that the defendants' actions constituted an unconscionable course of action in violation of the DTPA. The defendants filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The United States District Court for the Northern District of Texas, Dallas Division, granted the motions.[235] The court of appeals acknowledged that under Texas law, unconscionable conduct is more than conduct that takes unfair advantage of the consumer; it requires conduct that takes advantage of the consumer to a "'glaringly noticeable, flagrant, complete and unmitigated'" degree.[236] The district court concluded that, even taking the plaintiff's allegations as true, an allegation "that the defendants sold him a car that makes it somewhat inconvenient to comply with Texas law" did not meet this

229. *Id.*
230. *Id.*
231. TEX. BUS. & COM. CODE ANN. § 17.45(5) (Vernon 2006).
232. 187 S.W.3d 607 (Tex. App.—Houston [14th Dist.] 2006, no pet.).
233. *Id.* at 616-17.
234. 439 F. Supp. 2d 680 (N.D. Tex. 2006).
235. *Id.* at 682.
236. *Id.* at 687 (quoting Chastain v. Koonce, 700 S.W.2d 579 (Tex. 1985)).

standard.[237]

In *Mays v. Pierce*,[238] discussed above, the plaintiff alleged an unconscionable action or course of conduct. The defendant appealed the entry of a judgment following a bench trial, challenging the legal and factual sufficiency of the evidence supporting the judgment[239] The Houston Court of Appeals explained that while a plaintiff need not prove reliance or a specific misrepresentation to establish a claim based on unconscionability, the court must examine the entire transaction to determine whether the defendant took advantage of the plaintiff to a grossly unfair degree.[240] The court of appeals then examined the record and concluded that there was no evidence that the defendant did not follow through on his representations or contractual obligations, nor evidence of an intention by the defendant not to perform when the representations were made.[241] The court of appeals went on to explain that, when the evidence in the record is so weak as to merely create a suspicion of the existence of a fact, it constitutes no evidence.[242] Relying on this standard, the court of appeals reversed the finding of an unconscionable act.[243]

C. Determining the Measure of Damages

A prevailing plaintiff in a DTPA action may recover economic damages.[244] In cases involving misrepresentation, the plaintiff may recover under either the "out-of-pocket" or "benefit-of-the-bargain" measure of damages, whichever gives the plaintiff a greater recovery.[245] Out-of-pocket damages measure the difference between what the buyer paid and the value of what he received.[246] Benefit-of-the-bargain damages measure the difference between the value of the goods or services as represented and the value as received.[247] If the trier of fact finds that the defendant acted "knowingly," the plaintiff also may recover damages for mental anguish and statutory damages up to three times the amount of economic damages.[248]

1. Actual Damages

The Houston Court of Appeals considered the damages available to remedy an insurer's DTPA violation in *Fire Insurance Exchange v. Sullivan*.[249] The plaintiff homeowners' home had several leaks that led to

237. *Id.* at 687-88.
238. 203 S.W.3d 564 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).
239. *Id.* at 569.
240. *Id.* at 571.
241. *Id.* at 573.
242. *Id.*
243. *Id.* at 575.
244. DTPA § 17.50(b)(1).
245. Leyendecker & Assocs. v. Wechter, 683 S.W.2d 369, 373 (Tex. 1984).
246. Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 817 (Tex. 1997).
247. *Id.*
248. *Leyendecker & Assocs.*, 683 S.W.2d at 372.
249. 192 S.W.3d 99 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

mold contamination. After initially estimating the loss as less than $5,000, the insurer's adjuster requested additional testing on the residence, which revealed the scope of the contamination. The insurer then issued checks to the homeowners in excess of $82,000. The homeowners were not satisfied with the payments and sued the insurer, alleging that their home's condition had deteriorated due to the delay and mishandling of their claims. At trial, the jury found that the insurer breached the dwelling coverage portion of the policy, but not the personal property and additional living expenses coverage provisions, and awarded damages for mold remediation, repair of the home, and personal property damage.[250]

The insurer appealed, arguing in part that the homeowners could not recover for personal property damage because the jury did not find that the insurer breached the personal property coverage portion of the policy or that the homeowners' loss was caused by a covered, named peril. The homeowners responded that there was a single contract that the jury found was breached, that the trial court properly disregarded the jury's finding of no breach of the personal property section of the contract, and that it was an error to submit the breach question in three parts. The Houston Court of Appeals examined the contract and concluded that the insurer could have breached the dwelling section of the policy without breaching the personal property section because the contract was an all-risk policy as to the dwelling but personal property coverage was limited to damages caused by specifically named perils.[251] Because the jury did not find a breach of the personal property section of the policy, and even found that the personal property damage was caused by excluded perils, and because DTPA liability related to breach of an insurance policy is contingent on a finding of coverage, the jury's finding of personal property damages was immaterial and should have been disregarded. The court of appeals also held that personal property damages could not be premised directly on the insurer's handling of the homeowners' claims because the jury did not find that the insurer had made any material misrepresentations relating to coverage, represented that work or services had been performed when they had not, or breached its duty of good faith and fair dealing.[252]

The Fort Worth Court of Appeals applied a statutory-standing analysis in *Everett v. TK-Taito, L.L.C.*[253] to determine whether a putative class of automobile purchasers had standing to assert a DTPA claim. The Everetts sued the defendants on behalf of themselves and others similarly situated based on the production and sale of allegedly defective seat belt buckles. The Everetts alleged that their vehicles came factory-equipped with buckles which had a propensity to only partially engage, that Mr.

250. *Id.* at 101-03.
251. *Id.* at 107.
252. *Id.* at 108.
253. 178 S.W.3d 844 (Tex. App.—Fort Worth 2005, no pet.).

Everett was injured by a defective buckle but did not seek damages for his injuries, and that Ms. Everett's buckles had not failed or caused injury. They also claimed that the defendants had made false representations concerning the buckles, that they relied upon the representations, and that the allegedly deceptive acts were a producing cause of damages because they did not receive the benefit of their bargain. They did not allege that their buckles ever partially engaged, provided them with insufficient restraint, or came unlatched while they were driving. The trial court granted the defendants' motion to dismiss on the ground that the Everetts lacked standing because they failed to allege injury in fact.[254]

The Fort Worth Court of Appeals affirmed, holding that the Everetts had failed to plead facts demonstrating compensable injury.[255] The court of appeals began its analysis by considering the distinction between manifested product defects and unmanifested product defects, and concluding that the Everetts had alleged an unmanifested defect.[256] The Texas Supreme Court has not addressed a standing analysis for a plaintiff alleging an unmanifested product defect that causes only economic damages, so the Fort Worth Court of Appeals examined the facts pleaded and the cause of action asserted.[257] Because the Everetts' seat belt buckles latched and provided sufficient restraint and the Everetts did not identify any way in which the buckles in their vehicles performed differently from how the defendants represented they would perform or otherwise differed from how they were represented, the court of appeals concluded that the Everetts had received the benefit of their bargain.[258] The court of appeals held that, "[a]t some point, potential loss-of-benefit-of-the-bargain injuries and potential cost-of-repair or replacement injuries from a defect that has not manifested itself simply become too remote in time to constitute an 'injury' for statutory standing purposes under the DTPA."[259] In the absence of pleaded facts comprising an allegation of an economic injury, the court of appeals held that the Everetts lacked statutory standing to assert a DTPA claim.[260]

2. *Additional Damages for "Knowing" Conduct*

In *Main Place Custom Homes, Inc. v. Honaker*,[261] discussed above, homeowners successfully sued a builder for damages caused by a slope failure and related soil movement on their property. On appeal, the builder argued that the evidence was legally and factually insufficient to support a finding that it committed one of the "laundry-list" violations knowingly. The Fort Worth Court of Appeals observed that the home-

254. *Id.* at 848-50, 852.
255. *Id.* at 849.
256. *Id.* at 857.
257. *Id.* at 852-53.
258. *Id.* at 858.
259. *Id.*
260. *Id.* at 852-53, 857-59.
261. 192 S.W.3d 604 (Tex. App.—Fort Worth 2006, pet. denied).

owners testified at trial that they did not believe the builder's representative made any statements to them that he did not believe to be true when made.[262] The representative testified that, in making his statements, he relied on engineering reports that he obtained from the developer. Although there was evidence that at least one of those reports raised concerns about the stability of the property, there was no evidence that simply reading the reports would alert a non-engineer to the stability problems. The court of appeals therefore concluded that there was no evidence to support the trial court's finding that appellants "knowingly" violated the DTPA.[263]

In *Dal-Chrome Co. v. Brenntag Southwest, Inc.*,[264] discussed above, a purchaser of contaminated sulfuric acid alleged that the seller knowingly led it to believe that the seller's quality-control measures would ensure that the acid complied with the manufacturer's specifications. The seller argued that there was insufficient evidence of a knowing violation because its quality-control efforts met or exceeded the industry's standard practices. The Dallas Court of Appeals acknowledged evidence that the seller took steps to avoid contamination and evidence that the seller's procedures would not disclose whether the acid was contaminated. There also was evidence that the seller represented that it would stand behind the acid if anything was wrong with it but failed to disclose the results of post-customer complaint testing of the acid until after it was sued. Finally, the seller's regional manager testified that it did promise that every product it sold would meet the manufacturer's specifications and that the seller's product brochure stated that "all products . . . delivered to customers must meet the manufacturer's specifications."[265] Based on this evidence, the court concluded that a jury could reasonably infer that the seller had actual awareness of the falsity, deception, or unfairness of its conduct at the time of the conduct.[266]

American Title Co. of Houston v. BOMAC Mortgage Holdings, L.P.[267] arose out of a dispute involving a refinanced mortgage. The plaintiff sold the mortgage to a third party prior to the debtor's default and was required to pay off the debt. The plaintiff then sued the title company involved in the transaction for breach of contract, fraud, and violations of the DTPA. After a bifurcated jury trial, the trial court entered a judgment in favor of the plaintiff that awarded both actual and additional damages under the DTPA; the defendant appealed.[268]

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262. *Id.* at 626.
263. *Id.* at 625-26.
264. 183 S.W.3d 133 (Tex. App.—Dallas 2006, no pet.).
265. *Id.* at 142.
266. *Id.* at 141-42. *See also* Daugherty v. Jacobs, 187 S.W.3d 607, 618 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (holding that repair shop owner's testimony that he reviewed every invoice before sending it, coupled with expert testimony about the mistakes, overcharges, and duplications on the invoices, provided sufficient evidence that the defendant acted knowingly).
267. 196 S.W.3d 903 (Tex. App.—Dallas 2006, pet. granted, judgm't vacated w.r.m.).
268. *Id.* at 906-07.

One of the issues on appeal was whether the trial court properly bifurcated the issue of additional damages under the DTPA.[269] The Dallas Court of Appeals first explained that on a motion by a defendant in an action with a claim for exemplary damages, the trial court shall bifurcate the trial, reserving determination of the amount of exemplary damages for the second phase.[270] The court of appeals then explained that additional damages under the DTPA are exemplary damages, and concluded that it was proper for the trial court to bifurcate the additional damages portion of the trial.[271]

D. Exemptions, Defenses, and Limitations on Recovery

The DTPA has been characterized as a "strict-liability" statute, requiring only proof of a misrepresentation, without regard to the offending party's intent.[272] This is only partially correct, since several DTPA provisions expressly require proof of intentional conduct.[273] Some courts have gone so far as to hold that common-law defenses, such as estoppel and ratification, are unavailable to defend against DTPA claims.[274] Other courts have recognized a variety of DTPA defenses.[275] Additionally, both the courts and the legislature have carved out exemptions from the DTPA's reach.

1. Preemption and Exemption From the DTPA

Certain statutory schemes and common-law doctrines bar DTPA claims, either expressly or by implication, or affect a plaintiff's procedures for bringing DTPA claims.

a. Texas Medical Liability and Insurance Improvement Act

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.[276] If no ex-

269. *Id.* at 912-13.

270. *Id.* at 912-13 (citing Tex. Civ. Prac. & Rem. Code Ann. § 41.009(c), (d) (Vernon 2006)).

271. *Id.* at 913.

272. *See, e.g.*, White Budd Van Ness P'ship v. Major-Gladys Drive Joint Venture, 798 S.W.2d 805, 809 (Tex. App.—Beaumont 1990, writ dism'd).

273. *See, e.g.*, DTPA § 17.46(b)(9), (10), (13), (17) & (24).

274. *See, e.g.*, Ins. Co. of N. Am. v. Morris, 928 S.W.2d 133, 154 (Tex. App.—Houston [14th Dist.] 1996), *aff'd in part, rev'd in part*, 981 S.W.2d 667 (Tex. 1998); *see also* Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980) (recognizing that a primary purpose of the DTPA is to relieve consumers of the burden of overcoming common law defenses while providing a cause of action for misrepresentation).

275. *See, e.g.*, Ostrow v. United Bus. Mach., Inc., 982 S.W.2d 101, 105 (Tex. App.—Houston [1st Dist.] 1998, no pet.) ("We hold a DTPA claim arising out of a contract may be barred by accord and satisfaction."); Johnson v. McLeaish, No. 05-94-01673-CV, 1995 WL 500308, at *10 (Tex. App.—Dallas 1995, writ denied) (applying illegality/public policy affirmative defense to DTPA claims); Keriotis v. Lombardo Rental Trust, 607 S.W.2d 44, 46 (Tex. App.—Beaumont 1980, writ ref'd n.r.e) (applying statute of frauds to DTPA claims).

276. Tex. Civ. Prac. & Rem. Code Ann. § 74.351 (Vernon 2006).

pert 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.[277]

The Dallas Court of Appeals examined this requirement in *Boothe v. Dixon*.[278] Dixon alleged that following laser eye surgery by Boothe, his eyesight initially improved but then deteriorated. Boothe then performed "touch up" laser surgery, but Dixon's vision further deteriorated. Boothe assured Dixon that approval was forthcoming on an abrasion procedure that would solve Dixon's problem, but, when Dixon sought the procedure, he was told that Boothe did not see patients after one year. Dixon subsequently learned that he had not been a candidate for either surgery and that, due to the surgeries, could not have the abrasion procedure. Dixon sued alleging that Boothe had violated the DTPA by, among other things, misrepresenting the availability of future medical procedures and making false or misleading statements concerning the need for corrective surgery. Boothe moved for dismissal and summary judgment on the DTPA claim on the ground that Dixon had failed to file an expert report within the deadline required by MLIIA. The trial court denied both motions and Boothe appealed.[279]

The Dallas Court of Appeals reversed and dismissed the suit.[280] The court of appeals first held that the expert report requirements apply to all health care liability claims.[281] The applicable version of the MLIIA defined "health care liability claim" as:

> a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.[282]

"Health care" also is a defined term and includes "any act or treatment performed or furnished . . . by any health care provider."[283] The determination of whether a cause of action falls under the definition of a health care liability claim requires examination of the claim's underlying nature. "If the act or omission alleged in the complaint is an inseparable part of the rendition of health care services, or if it is based on a breach of a standard of care applicable to health care providers, then the claim is a health care liability claim."[284] The Dallas Court of Appeals agreed with Boothe's argument that Dixon's claims were intertwined with Boothe's

277. *Id.*
278. 180 S.W.3d 915 (Tex. App.—Dallas 2005, no pet.).
279. *Id.* at 916-18.
280. *Id.* at 916.
281. *Id.* at 919.
282. *Id.* at 918 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (Vernon 2005 & Supp. 2006)).
283. *Id.* (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(10) (Vernon 2005 & Supp. 2006)).
284. *Id.* at 919.

rendition of medical services because proving that Boothe's diagnoses and treatment were to Dixon's detriment would require Dixon to provide proof of his medical condition before and after the laser surgeries and in relation to custom abrasion, and proof that Boothe undertook a treatment that a reasonable and prudent doctor would not undertake under the same or similar circumstances.[285] The court of appeals concluded that such proof would require expert medical testimony.[286] The court of appeals rejected Dixon's argument that statements amounting to specific promises of cure or a particular result are actionable under the DTPA, holding that Boothe's alleged representations related to a possible future procedure that was never performed and were insufficiently specific to form a knowing misrepresentation or breach of warranty regarding the results of treatment.[287] The court of appeals concluded that Dixon's claims met the statutory definition of a "health care liability claim" and thus were subject to the MLIIA expert report requirement.[288] The court of appeals reversed the trial court's order denying Boothe's motions and rendered judgment in Boothe's favor.[289]

b. The Warsaw Convention

During the Survey period, the Fifth Circuit, in a matter of first impression, considered the preemptive scope of the Warsaw Convention[290] in *Mbaba v. Societe Air France*.[291] "The 'cardinal purpose' of the Warsaw Convention 'is to achieve uniformity of rules governing claims arising from international air transportation.'"[292] The convention applies to the commercial aircraft transportation of passengers and goods and provides that "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention."[293]

The plaintiff in *Mbaba* was charged more than $4,000 in excess baggage fees. He sued the airline, asserting several state-law claims, including DTPA violations, and the airline moved for summary judgment. The district court granted the motion, holding that the Warsaw Convention preempted the plaintiff's state-law claims.[294] On appeal, the Fifth Circuit considered the opinion of the United States Supreme Court in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*.[295] In *Tseng*, the Supreme Court reviewed a previous version of the Warsaw Convention to determine the

285. *Id.*
286. *Id.*
287. *Id.* at 920.
288. *Id.* at 921.
289. *Id.* at 919-21.
290. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 879 (1934) [hereinafter Warsaw Convention].
291. 457 F.3d 496 (5th Cir. 2006).
292. *Id.* at 497 (quoting El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng, 523 U.S. 155 (1999)).
293. Warsaw Convention, *supra* note 290, art. 29.
294. *Mbaba*, 457 F.3d at 500.
295. 523 U.S. 155 (1999).

effect of the Convention on a plaintiff's claims for psychic and psychosomatic injuries. The Supreme Court found that the Warsaw Convention did address psychological injuries and concluded that recovery for a personal injury not addressed by the Convention was unavailable.[296] The Supreme Court held that providing plaintiffs with recourse to local law would undermine the Warsaw Convention's goal of uniformity.[297] Applying the Supreme Court's analysis, the Fifth Circuit concluded that because Mbaba's claims did not fall within the language of the Warsaw Convention, they were preempted by the Convention and were not actionable.[298] The Fifth Circuit therefore affirmed the district court's grant of summary judgment.[299]

c. The Texas Residential Construction Liability Act

In *Gentry v. Squires Construction, Inc.*,[300] the Dallas Court of Appeals considered whether the Texas Residential Construction Liability Act ("TRCLA")[301] preempted the DTPA. The Gentrys hired Squires Construction to build a house. Under the parties' contract, Squires would receive payment by submitting draw requests to the lender. The Gentrys refused to authorize payment for Squires' final draw request, complaining of numerous construction defects. Squires sued the Gentrys, who responded with various claims against Squires including DTPA violations. After a bench trial, the trial court rendered judgment in favor of Squires and denied all relief requested by the Gentrys. The trial court ruled that the Gentrys' DTPA claims were preempted by the TRCLA. Both parties appealed.[302]

Citing to the Beaumont Court of Appeals' decision in *Sanders v. Construction Equity, Inc.*,[303] the Dallas Court of Appeals acknowledged that the RCLA provides notice provisions, defenses, and limitations on damages, encourages settlement, and determines the standard of causation for residential construction disputes. The court of appeals concluded, however, that while the TRCLA "modifies causes of action for damages resulting from construction defects in residences by limiting and controlling causes of action that otherwise exist," it does not create a cause of action.[304] The TRCLA does not provide a structure for liability, contain a description of what conduct will result in liability, or contain an express statement of the elements of a cause of action.[305] Furthermore, the TRCLA and the DTPA expressly refer to each other. The TRCLA provides

296. *Id.* at 161.
297. *Id.*
298. *Mbaba*, 457 F.3d at 497.
299. *Id.* at 500-01.
300. 188 S.W.3d 396 (Tex. App.—Dallas 2006, no pet.).
301. TEX. PROP. CODE ANN. §§ 27.001 *et seq.* (Vernon 2006).
302. *Id.* at 400-02.
303. 42 S.W.3d 364, 370 (Tex. App.—Beaumont 2001, pet. denied).
304. *Gentry*, 188 S.W.3d at 404.
305. *Id.*

that it prevails over any conflict between it and the DTPA[306] and that the "inspection and repair provisions of the TRCLA are in addition to any rights of inspection and settlement provided by common law or by another statute, including Section 17.505 [of the DTPA]."[307] Similarly, the DTPA provides that the TRCLA "prevails over this subchapter to the extent of any conflict."[308] The Dallas Court of Appeals concluded that it was "unreasonable to assume the Texas Legislature retained the rights of inspection and settlement under the DTPA, but preempted the liability structure under the DTPA that gives rise to those rights."[309] The court of appeals thus held that the TRCLA does not preempt the DTPA.[310]

2. *Necessity of Proving Causation*

Liability under the DTPA is limited to conduct that is a producing cause of the plaintiff's damages.[311] Unlike the doctrine of proximate cause, producing cause does not require that the injury be foreseeable.[312] "Producing cause" has been defined as "an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of."[313] 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.[314]

In *Main Place Custom Homes, Inc. v. Honaker*,[315] discussed above, homeowners successfully sued a builder in connection with a slope failure and related soil movement on the homeowners' property, allegedly caused by water leakage from the sprinkler system coupled with the home having been built at the juncture of two different types of soil. On appeal, the builder challenged causation, arguing that the evidence was legally and factually insufficient to support the trial court's finding that the builder and its owner were together eighty-percent responsible for the damage and that the subcontractor who installed the sprinkler system was twenty-percent responsible for the damage. According to the builder, the evidence instead showed that improper installation of the sprinkler system caused the sprinkler leak, which was the primary cause of the slope failure and the Honakers' damages. The builder also argued that the secondary cause of the slope failure was development of the lot before the builder purchased it.[316]

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306. TEX. PROP. CODE ANN. § 27.002 (Vernon 2006).
307. *Gentry*, 188 S.W.3d at 405.
308. DTPA § 17.44(b).
309. *Gentry*, 188 S.W.3d at 405.
310. *Id.*
311. Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 478 (Tex. 1995).
312. *See* Hycel, Inc. v. Wittstruck, 690 S.W.2d 914, 922 (Tex. App.—Waco 1985, writ dism'd).
313. Union Pump Co. v. Allbritton, 898 S.W.2d 773, 775 (Tex. 1995).
314. Prudential Ins. Co. v. Jefferson Assocs., 896 S.W.2d 156, 161 (Tex. 1995).
315. 192 S.W.3d 604 (Tex. App.—Fort Worth 2006, pet. denied).
316. *Id.* at 615.

The Fort Worth Court of Appeals disagreed.[317] The evidence at trial showed that an independent plumber had concluded that the leaking sprinkler hookup had been made by the builder or its subcontractors and that the slope had failed because it was too steep, and the land was scarified or terraced inappropriately with improper fill. A geotechnical engineer testified that the home was located on two different ground formations that met in a "transition area" on the property and that, when the builder purchased the property, it had been presented with engineering reports that would raise questions about the stability of the lot and indicate the need for further testing. The court of appeals concluded that, considering the entire record, the evidence showed that the damage to the property was due to numerous causes, such as the sprinkler leak, poor drainage in the soil around the home, the inclusion of improper fill in the back of the property, a slope that was steeper than recommended, and a foundation that was not properly designed for the soil upon which it was built.[318] All of these problems, however, related to the original design and placement of the home on inherently unstable soil. The court of appeals also held that the Honakers' DTPA claims were based upon a causal connection between the builder's misrepresentations regarding the stability of the property and their damages, and the evidence supported the conclusion that, but for the builder's misrepresentations, the Honakers would not have incurred damages in connection with the property.[319]

In *Hoover v. Larkin*,[320] a defendant was able to obtain summary judgment on the plaintiff's DTPA claim because the plaintiff failed to present evidence that the alleged DTPA violations were the producing cause of her alleged damages. Hoover sued her former attorney for legal malpractice, breach of fiduciary duty, and violations of the DTPA for allegedly mishandling the settlement of a civil litigation. In short, the plaintiff complained that the defendant attorney failed to advise her that a settlement offer she accepted in the underlying dispute was a gross amount rather than a net amount. The attorney moved for and was granted summary judgment.[321] The plaintiff appealed, and the Houston Court of Appeals reversed the summary judgment on the DTPA claim.[322] On remand, the defendant attorney again moved for summary judgment on the DTPA claim, arguing that the plaintiff presented no evidence of causation of her

317. *Id.* at 620.

318. *Id.* at 619.

319. *Id.* at 616-20. *See also* Reynolds v. Murphy, 188 S.W.3d 252 (Tex. App.—Fort Worth 2006, pet. denied) (holding that an investor's DTPA claim against the author and publisher of an investment-related newsletter failed for lack of causation because the investor did not follow the author's advice to hold the recommended stocks long term so his losses were caused by his decision to sell, rather than any misrepresentations about the author's abilities).

320. 196 S.W.3d 227 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

321. *Id.* at 228-29.

322. *Id.* at 229-30.

alleged damages.[323]

On the second appeal, the court of appeals explained that the plaintiff was required to present some evidence that, "but for" the attorney's actionable conduct, she would not have sustained injury, in this case attorney's fees. Stated differently, the court of appeals explained that the violation must be the producing cause of the injury.[324] As this was a no-evidence motion for summary judgment, Hoover had the burden of producing evidence that she incurred attorney's fees because of the attorney's allegedly wrongful conduct.[325] The court of appeals agreed with the trial court that she failed to present any such evidence.[326] Accordingly, the court of appeals concluded that the trial court properly granted summary judgment on the DTPA claim.[327]

3. Procedural Issues

A plaintiff seeking damages under the DTPA is required to give sixty-days notice before filing suit.[328] If a plaintiff fails to comply with the notice requirement, the court must abate the proceedings for sixty days.[329] If the court has not ruled within eleven days after a properly verified motion to abate is filed and the plaintiff has not responded to the motion, then the suit is automatically abated without court order until sixty days after the plaintiff serves the required written notice.[330] This pre-suit demand requirement is intended to discourage litigation and encourage settlement.[331]

The United States District Court for the Northern District of Texas, Dallas Division, considered the pre-suit demand requirement in *Kennard v. Indianapolis Life Insurance Co.*,[332] which arose from the attempted creation of a tax shelter. Kennard and his professional association established a defined benefit plan to provide its employees with retirement benefits. At the suggestion of Indianapolis Life agents, Kennard established a defined benefit plan that was represented as being in compliance with the Internal Revenue Code. Indianapolis Life also promised that the plan would provide significant tax benefits. The Internal Revenue Service subsequently determined that Kennard's plan was not in compliance with the Internal Revenue Code and did not qualify for the prom-

323. *Id.* at 230.
324. *Id.* at 230.
325. *Id.*
326. *Id.*
327. *Id.* Ibarra v. Nat'l Constr. Rentals, Inc., 199 S.W.3d 32 (Tex. App.—San Antonio 2006, no pet.) also addresses the causation requirement under the DTPA. In *Ibarra*, the trial court granted the DTPA defendant's no-evidence motion for summary judgment. On appeal, the San Antonio Court of Appeals affirmed, finding that the plaintiff provided evidence that, at best, raised a mere surmise or suspicion of causation, which is, in legal effect, no evidence. *Id.* at 35-36.
328. DTPA § 17.505(a).
329. Hines v. Hash, 843 S.W.2d 464, 468-69 (Tex. 1992).
330. DTPA § 17.505.
331. *Hines*, 843 S.W.2d at 468-69.
332. 420 F. Supp. 2d 601 (N.D. Tex. 2006).

ised tax benefits.[333]

Kennard sued Indianapolis Life and its agents, alleging DTPA violations. The defendants filed a motion to abate the DTPA claim on the ground that no pre-suit demand had been served. Kennard responded that subsequent to filing suit he gave the required notice to the defendants. The district court concluded that, since the case "was automatically abated pursuant to the DTPA," and the sixty-day period after the notice was served had already expired, there was no reason to abate, and the motion would be denied.[334]

In *Clark v. Power Marketing Direct, Inc.*,[335] the Houston Court of Appeals considered whether a forum-selection clause contained in a license agreement covered pre-contractual claims, including DTPA claims. Licensees brought an action against the licensor for fraud in the inducement of the license agreement as well as for violations of the DTPA. The license agreement contained a forum-selection clause that provided that any suit:

> arising under or as a result of this Agreement shall be filed in the Common Pleas Court of Franklin County, Ohio, and [licensee] hereby agrees and consents to the jurisdiction of the Franklin County Court of Common Pleas as to any dispute involving the parties' business relationship, including personal jurisdiction over [licensee] and subject matter jurisdiction over the dispute.[336]

The trial court granted the defendant's motion to dismiss based on this clause. Applying an abuse of discretion standard of review, the court of appeals affirmed.[337] In analyzing the issue, the court of appeals stated that forum-selection clauses are prima facie valid and are to be enforced unless a party can demonstrate that the clause is unreasonable under the circumstances.[338] Applying this test to the facts before it, the court of appeals affirmed the dismissal, concluding the clause was broad enough to encompass the DTPA claim.[339]

IV. CONCLUSION

This was not a good year for antitrust plaintiffs. Of the seven civil cases selected for this Survey, the plaintiffs lost them all.[340] On the DTPA side, plaintiffs continued their unbroken string of losing more cases than they won, although they improved on last year's dismal thirteen percent show-

333. *Id.* at 604-05.
334. *Id.* at 610.
335. 192 S.W.3d 796 (Tex. App.—Houston [1st Dist.] 2006, no pet.).
336. *Id.* at 797.
337. *Id.* at 798, 800.
338. *Id.* at 799-800.
339. *Id.* at 800.
340. An unpublished opinion not selected for the survey is PSKS, Inc. v. Leegin Creative Prods., 171 F. App'x 464 (5th Cir.), *cert. granted*, 127 S. Ct. 763 (2006), which affirmed a judgment in favor of the plaintiff on a resale price maintenance claim. The Supreme Court has granted certiorari, and its opinion will be reported in next year's Survey.

ing. Of the twenty-two private civil DTPA cases reviewed in this year's Survey, the plaintiffs won seven, or thirty-two percent. Still, in no year since the authors began writing the annual Survey have DTPA plaintiffs managed a .500 appellate batting average.

This year's Survey continues another longstanding trend. Of the decisions favoring the defendant, six of the seven antitrust cases and 12 of the 15 DTPA cases were summary judgments or other dispositions on legal grounds. Remarkably, in two of the antitrust cases, the basis for rejecting the plaintiff's case was raised for the first time on appeal—in one instance by the court itself.

The *Coca-Cola* decision is noteworthy for several reasons. Appellate lawyers no doubt were surprised to learn that their cases may be decided on grounds never raised by any party in the trial court, in the court of appeals, or before the supreme court itself. The basis for the court's refusal to enforce the antitrust laws of neighboring states—that antitrust law is so "policy laden" that no state court should presume to apply the law of a sister state—recasts abstention as an exception to the Full Faith and Credit Clause. The boundaries of this new exception remain unclear. As the dissent noted, if a private antitrust dispute involving soda pop involves "fundamental policy choices" of greater importance than, for example, a dispute over the custody of a child, "it is unclear . . . what other claims against Texas residents cannot be brought in Texas courts."[341] By such a measure, it would appear that state consumer protection laws (including the DTPA) likewise are destined for the new black hole of interstate abstention.

As the dissent noted, the majority's ostensible concerns regarding conflict of laws were illusory, as the antitrust laws of Texas' neighboring states are—like the TFEAA itself—modeled on the federal antitrust laws. It is unclear how this new abstention doctrine will play out in federal district courts asked to apply the antitrust laws of Texas or another state. If a Texas state court cannot be trusted to apply a sister state's antitrust law, it is not apparent why either a federal court or another state's courts should presume to apply Texas' antitrust laws either. This implicit "Don't Mess With Texas" aspect of abstention was not addressed by either the *Coca-Cola* majority or the dissent, and its future application will be legal *terra incognita*—provided it survives constitutional scrutiny. Surely it is a novel brand of federalism that Balkanizes economic markets by bisecting them across state lines, as is a policy of denying litigants a state law remedy in state court, sending them down the street to sue "in federal court under federal antitrust laws."[342]

As interesting as these questions may be, they likely are only of academic interest to the *Coca-Cola* litigants. Although the majority and dissent extensively debated the abstention issue, it appears unlikely that a contrary decision on that point would have changed the result, as the ma-

341. 218 S.W.3d at 697.
342. *Id.* at 686-87.

jority went on to globally reject the TFEAA claims as a matter of law anyway.

In rejecting the TFEAA claims, the majority erred at the level of first principles. First, the court erroneously required proof of mathematically quantifiable marketwide effects in order to sustain a claim of unreasonable restraint of trade under TFEAA subsection 15.05(a). The majority acknowledged that Coke's seventy-five-percent market share supported an inference of monopoly power, that the record "was replete with evidence that Coke used its dominant market position to extract from retailers agreements with terms it might not otherwise been able to obtain," that those agreements "made it more difficult for [the plaintiffs] to compete,"[343] and that Coca-Cola's practices raised the prices of competitive products to consumers and, in some instances, made those products unavailable in stores subject to the restrictive agreements. Yet the majority rejected the subsection 15.05(a) claim *as a matter of law* because the plaintiffs failed to quantify a marketwide effect on price or output, or a percentage of market foreclosure. Here the majority misapprehended the nature of the competitive-injury inquiry.[344] Interference with "consumer choice by impeding the 'ordinary give and take of the market'" is a hallmark of competitive injury.[345] Impairment of consumers' ability to make informed "apples to apples" product comparisons and raising the information costs of customers also constitute injury to competition.[346] Indeed, "the majority of producers produce much more complex amalgamations that consist of the product or service itself, branding, display facilities, advertising, and other forms of communication. All of these things are parts of the business firm's output."[347] Although the *Coca-Cola* majority acknowledged that the result of the defendants' exclusionary practices was to deprive consumers of rivals' products at convenience stores, the solution was not the imposition of antitrust liability but to send consumers "down the street" to another store.[348] Evidently lost on the majority is the fact that the *raison d'être* of convenience stores is consumer convenience.

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343. *Id.* at 689.

344. "We are often unable to disentangle the effects of challenged conduct. That is the reason we are so often forced to turn to surrogates for actual effects." VII P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 1503, at 351 (2d ed. 2003) [hereinafter "ANTITRUST LAW"]. "Because market output reductions are difficult to measure, the antitrust tribunal must rely on surrogates. The usual one is market power, plus inferences to be drawn from the character of the agreement." *Id.* at 352.

345. FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 459 (1986) (quoting National Soc. of Prof'l Engineers v. United States, 435 U.S. 679, 692, (1978)); Wilk v. Am. Med. Ass'n, 895 F.2d 352, 360 (7th Cir. 1990).

346. *Indiana Fed'n of Dentists*, 476 U.S. at 459, 461-62; VII ANTITRUST LAW ¶ 1503a, at 348-49, 351; *Wilk*, 895 F.2d at 360; *see also* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 473-76 (1992) (recognizing the significance of information costs when assessing competitive effects).

347. III ANTITRUST LAW, ¶ 1503a.

348. 218 S.W.3d at 689. .

With respect to the monopolization claim, the majority confused the principles applicable to restraints of trade under Sherman Act section 1 and its counterpart TFEAA provision, subsection 15.05(a), and the principles that govern claims of unlawful monopolization under Sherman Act section 2 and TFEAA subsection 15.05(b). Contrary to the majority's assumption, the rule-of-reason mode of analysis applicable to the former is neither coterminous with, nor necessarily dispositive of, the latter. In many cases, the two will follow along similar lines of inquiry and reach consistent results; in others, however, both the analysis and results will differ.[349]

The *Coca-Cola* majority's insistence on an economist's mathematical demonstration of anticompetitive effects is a throwback to the pseudo-quantitative economics of the so-called Chicago School reign of antitrust. Although one of the justifications offered by the Coca-Cola majority for refusing to recognize the antitrust laws of adjoining states is the fact that "'varying times and circumstances' give antitrust law changing content,'"[350] the *Coca-Cola* majority seems stuck in the 1980s. The *Coca-Cola* dissent supplied the majority with ample caselaw supporting affirmance of the jury's verdict;[351] however, the majority did not address those authorities in its opinion.

It should surprise no one that legal arguments based upon an econometric view of antitrust rely on methods that predispose the validity of that view, namely methods designed to identify and quantify econometric data. Setting aside the circularity between the ontological position taken by advocates of such a view and the methods employed to vindicate that position, the problem with such an approach is that it requires measurement of what often is unmeasurable.[352] Recognizing that it usually is impossible to mathematically measure "but-for" economic effects, antitrust focuses on whether the defendant possesses market power and whether the challenged conduct is efficiency-enhancing or unduly

349. Standard Oil v. United States, 221 U.S. 1, 61 (1911); United States v. Dentsply Int'l, 399 F.3d 181, 187 (3d Cir. 2005); Le Page's, Inc. v. 3M, 324 F.3d 141, 151-52 (3d Cir. 2003); United States v. Microsoft Corp., 253 F.3d 34, 70 (D.C. Cir. 2001); *see generally* III ANTITRUST LAW ¶ 606 (2d ed. 2002); VII ANTITRUST LAW ¶ 1512; E. Elhauge, *Defining Better Monopolization Standards*, 56 STAN L. REV. 253 (2003).

350. 218 S.W.3d at 685 (quoting Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 731 (1988)).

351. *See, e.g.*, FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986) (finding concerted refusal to provide x-rays to insurers violated rule of reason absent any finding of marketwide effect on price or output or foreclosure); Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451 (1992); Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 789 (6th Cir. 2002); *see also supra* note 371. The closest the majority came to acknowledging the authorities cited by the dissent was a "But cf." footnote citation to *Conwood*, which affirmed liability notwithstanding proof of expanded output because the defendant's conduct "caused higher prices and reduced consumer choice, both of which are harmful to competition").

352. "In most cases it would be impossible for the court to measure the actual impact of a restraint on output. Rather, the test is whether the practice would 'tend to restrict competition and decrease output.'" VII ANTITRUST LAW ¶ 1503, at 351-52 (quoting Broadcast Music v. CBS, 441 U.S. 1, 8-10 (1979)); *see also supra* note 344.

exclusionary.[353]

The other Survey decision to reject an antitrust claim based on an argument raised for the first time on appeal likewise compounded its error by getting the law wrong. The basis for the Waco court's decision in *Roberts*—that it saw no reason to differentiate antitrust standing from standing in general, which can be raised for the first time on appeal[354]—fundamentally misapprehends the nature of antitrust standing. Unlike constitutional standing, which is concerned with whether there is a justiciable case or controversy, antitrust standing is concerned with whether the plaintiff has alleged an injury to its business or property entitling it to relief.[355] Contrary to the Waco court's assumption, antitrust standing, including the antitrust injury requirement on which the court based its opinion, is *not* jurisdictional.[356]

This is not to say that the *Roberts* court reached the wrong result. The antitrust claim clearly was defective but for a reason with which the court evidently was unfamiliar. The essence of the plaintiffs' claim—that the defendant was providing services to a competitor at a price lower than the price that was available to the plaintiff—is not actionable under the TFEAA. Although, in enacting the TFEAA, the legislature modeled the statute on certain provisions of the federal Sherman and Clayton Acts, it did *not* enact a state law version of the Robinson-Patman Act, which is the federal price-discrimination law.[357] Hence the plaintiffs' claim simply was not cognizable under the TFEAA.

As the dissent in *Coca-Cola* observed, not since the enactment of the TFEAA in 1983 has the Texas Supreme Court found a violation of the statute. Given the court's determinedly static approach toward antitrust enforcement, perhaps consumers in adjacent states will take some comfort in the fact that the Texas courts are uninterested in interpreting their antitrust laws. For Texas consumers of soft drinks, however, the majority's suggestion to go "down the street" to Wal-Mart no doubt is cold comfort, as is its suggestion that Coke's competitors go down the street to federal court.

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353. *See id.*

354. Roberts v. Whitfill, 191 S.W. 3d 348, 356 (Tex. App.—Waco 2006, no pet.).

355. *See* II ANTITRUST LAW ¶ 335a, at 286-87 (2d ed. 2000).

356. Allen v. Wright, 468 U.S. 737, 750-51 (1984); *In re* Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 107-08 (D.C. Cir. 2002); D. Berger and R. Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L. REV. 809, 813 n. 11 (1977) (cited with approval in Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535 n. 31 (1983)); New York v. Microsoft Corp., 209 F. Supp. 2d 132, 139-44 (D.D.C. 2002).

357. *See* TEX. BUS. & COM. CODE ANN. § 15.05 (Vernon 2002 & Supp. 2006); Comment, *The Texas Free Enterprise and Antitrust-Act—Analysis and Implications*, 22 HOUS. L. REV. 1181, 1196 (1985); Note, *The Texas Free Enterprise and Antitrust Act of 1983: A Step Into the Present*, 36 BAYLOR L. REV. 733, 745 (1984); ABA ANTITRUST LAW SECTION, STATE ANTITRUST PRACTICE AND STATUES, p. 46-19 (1990) ("The Texas Free Enterprise and Antitrust Act of 1983 has no analogue to the Robinson-Patman Act."). Even had it done so, the Robinson-Patman Act only applies to the sale or lease of commodities. It does not apply to services. *See* 15 U.S.C. § 13a; ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 469 (5th ed. 2002) (citing cases).