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## Antitrust and Consumer Protection

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# ANTITRUST AND CONSUMER PROTECTION

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## I. INTRODUCTION

ALTHOUGH the purposes served by the antitrust laws and the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA")<sup>1</sup> are complementary, they are not identical. The objective underlying the antitrust laws is protecting competition.<sup>2</sup> In contrast, the DTPA is intended "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."<sup>3</sup>

The shared concern, nevertheless, of both antitrust law and the DTPA, is the consumer. The United States Supreme Court has described the antitrust laws as a "consumer welfare prescription,"<sup>4</sup> and the lower courts have echoed this principle, recognizing that "[u]ltimately, the consumer is the beneficiary."<sup>5</sup> An additional connection is found in the DTPA's genesis. The statute is modeled on the Federal Trade Commission Act ("FTC Act"); indeed, the DTPA provides that "[i]t 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."<sup>6</sup>

Although both the antitrust laws and the DTPA ultimately are concerned with consumer welfare, they focus on different aspects of the competitive process. While antitrust primarily is concerned with the misuse of market power to harm consumers, the DTPA primarily focuses on consumer harm through deception. Further, although consumer protection statutes like the DTPA are frequently referred to as "little FTC Acts,"<sup>7</sup> the Texas legislature did not include the "unfair methods of competition" prohibition contained in section 5 of the FTC Act, rather adopted only the "deceptive acts or practices" prong of that statute.<sup>8</sup>

This survey covers significant developments under the federal and Texas antitrust laws and the Texas DTPA from November 1, 2006 through October 31, 2007.

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1. TEX. BUS. & COM. CODE ANN. §§ 17.41-17.63 (Vernon 2002 & Supp. 2008).

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

3. TEX. BUS. & COM. CODE ANN. § 17.44(a) (Vernon 2002).

4. *Reiter v. Sonotone*, 442 U.S. 330, 343 (1979) (quoting R. BORK, *THE ANTITRUST PARADOX* (1978)).

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

6. TEX. BUS. & COM. CODE ANN. § 17.46(c)(1) (Vernon 2002 & Supp. 2008).

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

8. TEX. BUS. & COM. CODE ANN. § 17.46(a) (Vernon 2002 & Supp. 2008).

## II. ANTITRUST STATUTES

"The Sherman Act, enacted in 1890, the Clayton Act, enacted in 1914, and the Robinson-Patman Act, which amended the Clayton Act in 1936, all serve the purpose of protecting competition."<sup>9</sup> Likewise, the purpose of the Texas Free Enterprise and Antitrust Act ("TFEAA")<sup>10</sup> "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."<sup>11</sup> Noteworthy antitrust decisions rendered during the Survey period address standards of proof and pleading, concerted refusals to deal, and antitrust injury.

The principal federal antitrust statutes are sections 1 and 2 of the Sherman Act.<sup>12</sup> Section 1 condemns contracts, combinations, and conspiracies in unreasonable restraint of trade.<sup>13</sup> Section 2 condemns monopolization and attempts and conspiracies to monopolize a relevant economic market.<sup>14</sup> Although certain offenses like price-fixing among competitors are deemed unlawful *per se* and no proof of actual market impact is required to demonstrate a violation, most antitrust claims require proof of an actual or threatened injury to competition, which usually requires proof that the defendant possesses market power in a relevant economic market.<sup>15</sup> The analytical approach used to make this determination is called the "rule of reason."<sup>16</sup>

In *Leegin*, a divided Supreme Court overturned ninety-six years of precedent to hold that minimum resale price maintenance is no longer *per se* illegal under section 1; instead it is to be judged under the rule of reason.<sup>17</sup> In so holding, the five-to-four majority overruled *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,<sup>18</sup> which held that it is always unlawful for a manufacturer and its distributor or retailer to agree on the minimum price that the latter will charge on resale of the manufacturer's goods.<sup>19</sup>

At the time of trial, *Leegin* manufactured the Brighton line of women's accessories, which were sold primarily in small, independently-owned boutiques.<sup>20</sup> *Leegin* sold Brighton products to the plaintiff, a women's

9. *Brooke Group Ltd. V. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 251 (1993) (citations omitted).

10. TEX. BUS. & COM. CODE ANN. §§ 15.01-.52 (Vernon 2002 & Supp. 2008).

11. *Id.* § 15.04.

12. 15 U.S.C. §§ 1-2 (2006). The parallel provisions exist under Texas law. TEX. BUS. & COM. CODE ANN. § 15.05 (a)-(b) (Vernon 2002).

13. 15 U.S.C. § 1. Notwithstanding the literal language of the statute, the Supreme Court recognized as early as 1911 that section 1 only condemns unreasonable restraints. *Am. Tobacco 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); *Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 289 (1985).

14. 15 U.S.C. § 2. *See* *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

15. *See* *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977).

16. *Leegin Creative Leather Prods., Inc. v. PSKS*, 127 S. Ct. 2705, 2712 (2007).

17. *Id.*

18. 220 U.S. 373 (1911).

19. *Id.* at 384-85.

20. *Leegin*, 127 S. Ct. at 2710.

clothing and accessories specialty store.<sup>21</sup> In 1997, Leegin instituted its "Brighton Retail Pricing and Promotion Policy," which provided that Leegin would only do business with retailers who followed its suggested retail prices.<sup>22</sup> Leegin also introduced a marketing initiative that rewarded retailers for certain promotional activities.<sup>23</sup> This initiative required retailers to pledge to follow the "Brighton Suggested Pricing Policy at all times."<sup>24</sup>

In contravention of Leegin's policies, the plaintiff placed its entire line of Brighton products on sale.<sup>25</sup> When the plaintiff refused to stop discounting, Leegin suspended all shipments of Brighton products to the plaintiff, resulting in a substantial decrease in the plaintiff's sales.<sup>26</sup> The plaintiff sued, claiming that Leegin had violated section 1 of the Sherman Act by entering into illegal agreements with retailers to fix the prices of Brighton products and by terminating the plaintiff for not complying with those agreements.<sup>27</sup> Leegin had planned to introduce expert testimony at trial describing the procompetitive effects of its pricing policy.<sup>28</sup> Relying on the *Dr. Miles* per se rule against minimum resale price maintenance, the district court excluded the proffered testimony as irrelevant to the jury's inquiry.<sup>29</sup> The jury found that Leegin and its retailers agreed to fix prices, causing the plaintiff to suffer antitrust injury and lost profits of \$1.2 million.<sup>30</sup>

In an unpublished opinion, the Fifth Circuit affirmed the trial court's judgment, holding that *Dr. Miles* required application of the *per se* rule notwithstanding Leegin's claimed lack of competitive harm.<sup>31</sup> The Supreme Court granted certiorari.<sup>32</sup>

Writing for the majority, Justice Kennedy asserted that *Dr. Miles* was based on the common law rule that restraints upon alienation were ordinarily invalid and on the argument that resale price agreements are analogous to an illegal agreement between competing distributors because the resale agreements benefit the distributors, not the manufacturer.<sup>33</sup> The majority further argued that these rationales had been abandoned by more recent Supreme Court jurisprudence.<sup>34</sup> Since *Dr. Miles*, the Supreme Court has rejected attempts to base antitrust law on "formalistic" legal doctrines, such as the common law rule against restraints upon

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21. *Id.* at 2711.

22. *Id.*

23. *Id.*

24. *Id.* at 2710-11.

25. *Id.* at 2711.

26. *Id.*

27. *Id.* at 2712.

28. *Id.*

29. *Id.*

30. *Id.* at 2711-12.

31. *Id.* at 2712.

32. *Id.*

33. *Id.* at 2713-14.

34. *Id.* at 2714.

alienation, in favor of demonstrable economic effects.<sup>35</sup> Quoting *Continental T.V.*, the majority “reaffirm[ed] that ‘the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today.’”<sup>36</sup> The majority similarly concluded that since *Dr. Miles*, the Supreme Court has rejected analyzing vertical restraints by comparing them to horizontal restraints.<sup>37</sup>

Finding that the foundations of the *Dr. Miles* rule have since been rejected, the majority determined that it should reexamine whether a *per se* prohibition against minimum resale price maintenance is appropriate.<sup>38</sup> In doing so, the majority cited empirical studies and economics literature skeptical of resale price maintenance claims, suggesting procompetitive reasons for a manufacturer’s imposition of mandatory resale prices.<sup>39</sup> Conceding that resale price maintenance can have anticompetitive effects, the majority asserted that the elimination of intrabrand price competition also may encourage

retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer’s position as against rival manufacturers. Resale price maintenance also has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between.<sup>40</sup>

The majority concluded that resale price maintenance can increase interbrand competition by “facilitating market entry for new firms and brands” and by encouraging retailer services that would not otherwise be provided.<sup>41</sup> These procompetitive justifications made application of the *per se* rule inappropriate because a *per se* prohibition would “proscribe a significant amount of procompetitive conduct.”<sup>42</sup> In so holding, the majority rejected *stare decisis* as a reason to maintain the *per se* rule in large part because the Sherman Act is expected to “evolve to meet the dynamics of present economic conditions” and because it is not uncommon for the Supreme Court to reverse precedent where, as here, subsequent cases have undermined an opinion’s doctrinal basis.<sup>43</sup>

The majority provided limited guidance for the application of its newly-announced “rule of reason” test, suggesting that lower courts should consider the number of manufacturers in a given industry that make use of the practice to determine the likelihood that the practice is being used to facilitate a manufacturer cartel.<sup>44</sup> Also relevant is the source of the re-

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35. *Id.*

36. *Id.* at 2714.

37. *Id.* at 2713-14.

38. *Id.* at 2714.

39. *Id.* at 2714-15.

40. *Id.* at 2715.

41. *Id.* at 2716.

42. *Id.* at 2718.

43. *Id.* at 2715-2725.

44. *Id.* at 2719.

straint, because if retailers are the impetus, the restraint might be facilitating a retailer cartel or supporting a dominant, inefficient retailer.<sup>45</sup> The majority also suggested that the market power of the manufacturer and retailer involved should be considered because a dominant player could abuse resale price maintenance for anticompetitive purposes.<sup>46</sup>

Finally, while acknowledging that "reliance on a judicial opinion is a significant reason to adhere to it, especially in cases involving property and contract rights,"<sup>47</sup> the majority concluded that "[t]he reliance interests . . . cannot justify an inefficient rule."<sup>48</sup>

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented.<sup>49</sup> For the dissent, the doctrine of *stare decisis* mandated continued adherence to *Dr. Miles*.<sup>50</sup> Justice Breyer argued that no changed circumstances justified departure from the nearly century-old *per se* prohibition against minimum resale price maintenance, particularly given that in 1975 Congress repealed the McGuire and Miller-Tydings Acts which had made certain acts of resale price maintenance lawful.<sup>51</sup> The dissent concluded that in doing so, Congress had consciously extended the *Dr. Miles* rule of *per se* illegality.<sup>52</sup> Indeed, the Congress considered and rejected "virtually every argument presented now to this Court [against the *Dr. Miles* rule] as well as others not here presented."<sup>53</sup>

Surveying the anti-resale-price maintenance economic literature, Justice Breyer found it variously flawed and criticized, and noted that "many other economists take a different view. Regardless, taken together these studies at most may offer some mild support for the majority's position. But they cannot constitute a major change in circumstances" warranting departure from the rule of *per se* illegality.<sup>54</sup> The dissent reached a similar conclusion with respect to changes in the United States economy that might justify abandonment of the *per se* rule, concluding: "In sum, there is no relevant change."<sup>55</sup> And without some change, there is no ground for abandoning a well-established antitrust rule."<sup>56</sup>

Justice Breyer then examined the list of factors the Supreme Court should consider before overturning its own precedent.<sup>57</sup> The dissent determined that the following factors preponderated against overruling *Dr. Miles*: the case was statutory, not constitutional; *Dr. Miles* is almost 100 years old and has been relied upon by the Supreme Court in the interim;

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45. *Id.*

46. *Id.* at 2720.

47. *Id.* at 2724 (quoting *State Oil Co. v. Kahn*, 522 U.S. 3, 20 (1997)).

48. *Id.*

49. *Id.* at 2725.

50. *Id.* at 2725-26.

51. *Id.* at 2731.

52. *Id.*

53. *Id.* (citations omitted).

54. *Id.* at 2732.

55. *Id.* at 2734.

56. *Id.*

57. *Id.*

the *per se* rule has not created an unworkable legal regime; *Dr. Miles* has not unsettled the law; the case involves property and contract rights; and the *Dr. Miles* rule has become “embedded in our national culture.”<sup>58</sup>

In conclusion, the dissent argued that “a court that rests its decision upon economists’ views of the economic merits should also take account of legal scholars’ views about common-law overruling.”<sup>59</sup> Noting that the relevant jurisprudence weighs strongly in favor of *stare decisis* in these circumstances, Justice Breyer observed that “the only safe predictions to make about today’s decision are that it likely will raise the price of goods at retail and that it will create considerable legal turbulence as lower courts seek to develop workable principles.”<sup>60</sup>

In *Bell Atlantic Corp. v. Twombly*,<sup>61</sup> the United States Supreme Court held that a complaint alleging that competitors engaged in parallel conduct but lacking a description of facts “suggesting agreement, as distinct from identical, independent action” cannot survive a Rule 12(b)(6) motion to dismiss for failure to state a claim.<sup>62</sup>

The plaintiffs, on behalf of themselves and a putative class of all “subscribers of local telephone and/or high speed internet services,” alleged a conspiracy in restraint of trade that resulted in inflated charges for local telephone and high-speed internet service.<sup>63</sup> The defendants were the former “Baby Bells,” or Incumbent Local Exchange Carriers (“ILECs”), originally created as regional monopolies by the divestiture of AT&T.<sup>64</sup> More than a decade after the divestiture, Congress enacted the Telecommunications Act of 1996, which withdrew approval of the ILECs’ monopolies and imposed duties upon the ILECs to facilitate market entry by others,<sup>65</sup> including the obligation to share the ILECs’ networks with competitive local exchange carriers (“CLECs”).<sup>66</sup> The ILECs successfully litigated the scope of their sharing obligation, which resulted in a narrower of the range of network elements that must be shared with the CLECs.<sup>67</sup>

In their complaint, the plaintiffs alleged that the ILECs engaged in parallel conduct in their respective service areas to inhibit the growth of upstart CLECs, including making unfair agreements for access to the ILEC networks and providing inferior connections to those networks.<sup>68</sup> The plaintiffs further alleged that the ILECs had a common motivation to suppress competition from the CLECs, which led the ILECs to form a conspiracy.<sup>69</sup> The plaintiffs also alleged that the ILECs agreed not to

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58. *Id.* at 2734-36.

59. *Id.* at 2737.

60. *Id.*

61. 127 S. Ct. 1955 (2007).

62. *Id.* at 1961.

63. *Id.* at 1962.

64. *Id.* at 1961.

65. *Id.*

66. *Id.*

67. *Id.* at 1961-62.

68. *Id.* at 1961.

69. *Id.*



compete with each other, which could be inferred from the fact that the ILECs had failed to pursue business opportunities in each other's markets.<sup>70</sup>

The district court granted the ILECs' motion to dismiss for failure to state a claim.<sup>71</sup> The court held that circumstantial evidence of consciously parallel behavior was insufficient to state a claim under section 1 of the Sherman Act absent the allegation of facts tending to show that the defendants' behavior could not be explained as independent, self-interested conduct.<sup>72</sup> The Second Circuit reversed, holding that an antitrust plaintiff asserting a section 1 claim based upon parallel conduct need not plead "plus factors," but need only plead facts demonstrating that a conspiracy is plausible.<sup>73</sup>

The Supreme Court reversed in a seven-to-two decision.<sup>74</sup> Writing for the majority, Justice Souter first restated the standard for proving an anti-trust conspiracy.<sup>75</sup> Parallel behavior of competitors, even when done consciously of each other's actions, is admissible circumstantial evidence of an agreement but does not itself conclusively establish such an agreement.<sup>76</sup> Parallel conduct is consistent with both conspiracy and unilateral, competitive business strategy.<sup>77</sup> In order to survive summary judgment, a plaintiff must offer evidence that tends to rule out independent action by the defendants.<sup>78</sup> Also, Parallel conduct standing alone does not entitle a plaintiff to a directed verdict.<sup>79</sup>

In analyzing what is required at the pleading stage, the majority acknowledged that Federal Rule of Civil Procedure 8(a)(2) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief."<sup>80</sup> A plaintiff need not include detailed factual allegations but must do more than recite the elements of a cause of action, and the allegations in the complaint "must be enough to raise a right to relief above the speculative level."<sup>81</sup> The majority then disavowed the Supreme Court's earlier statement in *Conley v. Gibson*,<sup>82</sup> that a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."<sup>83</sup> Although lower courts had relied upon the "no set of facts" language to permit a claim to survive Rule 12(b)(6) dismissal unless its factual impossibility was shown from

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70. *Id.* at 1962.

71. *Id.* at 1963.

72. *Id.*

73. *Id.*

74. *Id.* at 1960.

75. *Id.* at 1964.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 1964-65.

82. 355 U.S. 41 (1957).

83. *Twombly*, 127 S. Ct. at 1968.

the face of the pleadings, the majority concluded that “[t]he phrase is best forgotten.”<sup>84</sup>

The majority offered two reasons for rejecting the dissent’s argument that disposing of implausible claims should be accomplished after the pleading stage.<sup>85</sup> First, discovery is expensive and time-consuming and second, courts have had limited success in checking discovery abuse.<sup>86</sup> The expense of discovery means that defendants are likely to settle even meritless claims before the summary judgment or trial stages.<sup>87</sup>

Applying its new standard to section 1 claims, the Supreme Court held that “stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made,” which “calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”<sup>88</sup> The keyword in the standard is “suggest.”<sup>89</sup> The majority distinguished between allegations merely *consistent* with an agreement, which are insufficient to survive a motion to dismiss, and allegations *suggesting* an agreement, which will survive such a motion.<sup>90</sup> Similarly, showing the *possibility* of entitlement to relief is not enough and a plaintiff must plead facts showing that entitlement to relief is *plausible*.<sup>91</sup> The majority then concluded that because parallel conduct standing alone does not establish a conspiracy, an allegation of parallel conduct accompanied by a bare allegation of conspiracy is insufficient to withstand a motion to dismiss.<sup>92</sup>

Turning to the plaintiffs’ complaint, the majority found that no actual agreement between the ILECs was alleged, and that nothing in the complaint “invests either the action or inaction alleged with a plausible suggestion of conspiracy” given the independent reasons that each ILEC would have to resist competition from the CLECs, the historical genesis of the ILECs as sanctioned monopolies, and the difficulties the CLECs were having competing with the ILECs.<sup>93</sup> “Because the plaintiffs [had] not nudged their claims across the line from conceivable to plausible,” the Supreme Court held that dismissal was appropriate.<sup>94</sup>

Dissenting, Justice Stevens observed that this case did not involve the question of whether parallel anticompetitive conduct of potential competitors that has anticompetitive effects, standing alone, will support a section 1 claim.<sup>95</sup> “The answer to that question has been settled for more

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84. *Id.* at 1964-65, 1968-69.

85. *Id.* at 1966-67.

86. *Id.* at 1967.

87. *Id.*

88. *Id.* at 1965.

89. *Id.*

90. *Id.* at 1966.

91. *Id.*

92. *Id.* at 1965-66.

93. *Id.* at 1971.

94. *Id.* at 1974.

95. *Id.*

than 50 years."<sup>96</sup> Rather, the issue before the Supreme Court was the requisite degree of specificity required for pleading an agreement not to compete.<sup>97</sup> Noting that Federal Rule of Civil Procedure 8 requires only that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Justice Stevens emphasized that "[u]nder the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court, but rather to keep them in."<sup>98</sup> Proof of this is found in Form 9, appended to the Federal Rules, which alleges negligence in the barest of terms. As Justice Stevens noted, the Supreme Court has previously endorsed Form 9 "as an example of the simplicity and brevity of statement which the rules contemplate."<sup>99</sup>

With respect to the majority's dismissal of *Conley's* "no set of facts" language as having "puzzle[ed] the [legal] profession for 50 years," Justice Stevens went on to cite a dozen opinions of the Supreme Court and four separate writings, where "the language [was not] 'questioned,' 'criticized,' or explained away;" as well as decisions of the courts of twenty-six states that have utilized the *Conley* formulation.<sup>100</sup> Emphasizing that "[t]his case is a poor vehicle for the Court's new pleading rule," because in anti-trust cases, "the proof is largely in the hands of the alleged conspirators,"<sup>101</sup> Justice Stevens expressed the following concern:

I fear that the unfortunate result of the majority's new pleading rule will be to invite lawyers' debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence. It is no surprise that the antitrust defense bar—among whom "lament" as to inadequate judicial supervision of discovery is most "common,"—should lobby for this state of affairs. But "we must recall that their primary responsibility is to win cases for their clients, not to improve law administration for the public."<sup>102</sup>

In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*<sup>103</sup> the Supreme Court was called upon to decide whether a plaintiff alleging predatory bidding must meet the same test applied to claims of predatory pricing.<sup>104</sup> Plaintiff Ross-Simmons had been a hardwood lumber sawmill in the Pacific Northwest since the 1960s.<sup>105</sup> Defendant Weyerhaeuser entered the market in 1980 by acquiring an existing lumber company and owned six hardwood sawmills.<sup>106</sup> Both companies acquired red alder

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96. *Id.* (Stevens, J., dissenting) (citing *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954)).

97. *Twombly*, 127 S. Ct. at 1974-75.

98. *Id.* at 1975-76.

99. *Id.* at 1977 (quoting *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 513 n.4 (2002)).

100. *Id.* at 1978.

101. *Id.* at 1983 (quoting *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976) (quoting *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962))).

102. *Id.* at 1988 (quoting CLARK, SPECIAL PLEADING IN THE "BIG CASE?," *PROCEDURE—THE HANDMAID OF JUSTICE* 52 (C. Wright & H. Reasoner eds. 1965)).

103. 127 S. Ct. 1069 (2007).

104. *Id.* at 1072.

105. *Id.*

106. *Id.*

sawlogs on the open bidding market.<sup>107</sup> Between 1998 and 2001, prices for sawlogs rose while prices for the finished lumber fell.<sup>108</sup> Ross-Simmons suffered heavy losses and eventually shut its mill.<sup>109</sup> Ross-Simmons then sued Weyerhaeuser for monopolization and attempted monopolization, alleging that Weyerhaeuser had overpaid for sawlogs in order to artificially raise prices such that Ross-Simmons could not make a profit.<sup>110</sup>

Weyerhaeuser moved for summary judgment before trial and for judgment as a matter of law at the close of the evidence.<sup>111</sup> The district court denied both motions and instructed the jury that Ross-Simmons could succeed on its predatory bidding case if the jury found that Weyerhaeuser “purchased more logs than it needed, or paid a higher price for logs than necessary in order to prevent [Ross-Simmons] from obtaining the logs they needed at a fair price.”<sup>112</sup> The jury found for Ross-Simmons on the monopolization claim and awarded \$26 million in damages.<sup>113</sup>

On appeal to the Ninth Circuit, Weyerhaeuser argued that proof of illegal predatory bidding should mirror that required by the Supreme Court in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*<sup>114</sup> for predatory pricing—pricing below cost in order to drive rivals from the market.<sup>115</sup> In *Brooke Group*, the Supreme Court held that recovery on a predatory pricing claim requires proof that prices are below an “appropriate measure” of the competitor’s costs and that the competitor had a “dangerous probability” of recouping the losses caused by the below-cost pricing.<sup>116</sup> The Ninth Circuit disagreed with Weyerhaeuser and affirmed the jury’s verdict.<sup>117</sup>

The Supreme Court granted certiorari to consider the proper test for analyzing a claim of monopolization by predatory bidding.<sup>118</sup> Writing for a unanimous Supreme Court, Justice Thomas relied heavily on scholarly articles, describing predatory bidding as a scheme in which a buyer acquires monopsony power by bidding up the market price of a necessary product so high that rival buyers cannot compete.<sup>119</sup> Once the buyer has caused its competitors to leave the market, it seeks to reduce the price for the products by restricting its purchases below the competitive level.<sup>120</sup> The resulting cost savings then offset any losses incurred during the bidding-up phase.<sup>121</sup> The Court noted that when the predatory firm’s com-

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107. *Id.*

108. *Id.* at 1073.

109. *Id.*

110. *Id.* at 1072-73.

111. *Id.*

112. *Id.*

113. *Id.*

114. 509 U.S. 209 (1993).

115. *Weyerhaeuser Co.*, 127 S. Ct. at 1073.

116. *Brooke Group*, 509 U.S. at 222-23.

117. *Weyerhaeuser Co.*, 127 S. Ct. at 1073-74.

118. *Id.* at 1074.

119. *Id.* at 1074-75.

120. *Id.*

121. *Id.* at 1074-76.

petitors participate in both the input and output markets, the would-be predator might also recoup its losses by raising the output prices to monopolistic levels.<sup>122</sup>

The Supreme Court held that predatory pricing and predatory bidding are economically similar in that both involve "the deliberate use of unilateral pricing measures for anticompetitive purposes."<sup>123</sup> As the Court explained:

Predatory pricing requires a firm to suffer certain losses in the short term on the chance of reaping supracompetitive profits in the future. A rational business will rarely make this sacrifice. The same reasoning applies to predatory bidding. A predatory-bidding scheme requires a buyer of inputs to suffer losses today on the chance that it will reap supracompetitive profits in the future. For this reason "[s]uccessful monopsony predation is probably as unlikely as successful monopoly predation."<sup>124</sup>

The Supreme Court also recognized that firms may have legitimate, even procompetitive, reasons for setting low prices for their outputs or paying high prices for needed inputs, and that failed predatory pricing schemes and failed predatory bidding schemes both may benefit consumers.<sup>125</sup>

These similarities convinced the Court that the two-pronged *Brooke Group* test was appropriately applied to predatory bidding.<sup>126</sup> A plaintiff alleging predatory bidding therefore must prove that the alleged predatory bidding led to below-cost pricing of the bidder's outputs because the cost of the outputs exceeded the revenues generated in selling those outputs.<sup>127</sup> The plaintiff also must "prove that the [bidder] has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power."<sup>128</sup> Ross-Simmons conceded that it had not satisfied the *Brooke Group* test.<sup>129</sup> Its predatory bidding theory thus could not support the jury's verdict.<sup>130</sup>

In *Credit Suisse Securities, LLC v. Billing*,<sup>131</sup> a putative class of securities investors sued the underwriting firms that marketed and distributed the securities, alleging that the firms had violated the antitrust laws by agreeing with each other to refuse to sell buyers shares of a popular new issue unless the buyers agreed to additional terms.<sup>132</sup> The Supreme Court, in a 7-1 decision (Justice Stevens concurred in the judgment, Jus-

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122. *Id.* at 1076.

123. *Id.*

124. *Id.* at 1077 (quoting R. BLAIR & J. HARRISON, *MONOPSONY* 66 (1993)).

125. *Id.* (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993)).

126. *Id.* at 1078.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. 127 S. Ct. 2383 (2007).

132. *Id.* at 2387.

tice Kennedy took no part in the decision) held that the securities laws implicitly precluded the antitrust claims.<sup>133</sup>

In the typical initial public offering ("IPO") of a company's shares, securities underwriters form a syndicate to market the shares.<sup>134</sup> The syndicate conducts an investigation into suitable initial share prices and quantities and makes a recommendation to the issuer.<sup>135</sup> The investigation typically involves meetings between potential investors and the syndicate underwriters and representatives of the issuer in which the underwriters present information about the company and the stock and attempt to gauge the strength of the investors' interest in the stock.<sup>136</sup> The syndicate and the company then agree upon the number of shares to be sold and the price per share.<sup>137</sup> The syndicate buys all the newly-issued shares from the company at a discount and then resells the shares to the public at the agreed-upon price, netting the difference as commissions.<sup>138</sup>

A group of sixty investors filed two antitrust class actions against ten leading investment banks that allegedly formed underwriting syndicates to help execute the IPOs of several hundred technology-related companies.<sup>139</sup> The investors alleged that the underwriters had "abused the . . . practice of combining into underwriting syndicates" by agreeing to impose conditions upon potential investors.<sup>140</sup> Specifically, the underwriters allegedly required the investors to pay charges in addition to the usual underwriting commission in the form of (1) investor promises to place bids in the aftermarket at higher prices; (2) investor promises to purchase other, less attractive securities; and (3) investor payment of excessive "commissions," including agreements to purchase an issuer's shares in follow-up public offerings.<sup>141</sup> The investors also alleged that the underwriters' agreement artificially inflated the price of the securities in question.<sup>142</sup>

The underwriters moved to dismiss the investors' complaints on the ground that the federal securities laws impliedly preclude application of antitrust law to the alleged conduct.<sup>143</sup> The district court granted the motion to dismiss, but the Second Circuit reversed and the Supreme Court granted certiorari.<sup>144</sup>

Writing for the Court, Justice Breyer first canvassed three prior Supreme Court decisions addressing the relationship between securities law

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133. *Id.* at 2386-87.

134. *Id.* at 2388.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 2389.

142. *Id.*

143. *Id.*

144. *Id.*

and antitrust law: *Silver v. New York Stock Exchange*,<sup>145</sup> *Gordon v. New York Stock Exchange, Inc.*,<sup>146</sup> and *United States v. National Association of Securities Dealers, Inc.* ("NASD").<sup>147</sup> In *Silver*, the Supreme Court held that, where possible, courts should reconcile the operation of the securities and antitrust laws where possible, and that the securities laws should be implied to have precluded application of the antitrust laws only when necessary and then only to the extent necessary, to make the Securities Exchange Act work.<sup>148</sup> The *Silver* Court found no such necessity and held that the securities laws did not preclude application of the antitrust laws to an alleged boycott of a broker by the New York Stock Exchange.<sup>149</sup> In *Gordon*, the Supreme Court held that an "implied repeal" of the antitrust laws should be found only when there is a "plain repugnancy" between the two statutory schemes.<sup>150</sup> The *Gordon* Court found that such a repugnancy precluded application of the antitrust laws to a complaint regarding the commissions charged by stockbrokers.<sup>151</sup> In doing so, the Supreme Court relied in large part on the direct regulatory power of the Securities and Exchange Commission ("SEC") over underwriter commissions and the SEC's active role in reviewing commission rates.<sup>152</sup> In *NASD*, the Supreme Court applied a "clear repugnancy" test in holding that the securities laws precluded an antitrust claim alleging that securities broker-dealers had conspired to, among other things, fix prices and terms of sale.<sup>153</sup> Again, the *NASD* Court relied upon the SEC's existing regulatory authority over the challenged practices.<sup>154</sup>

This review of prior cases led the Supreme Court to conclude that the proper test for determining whether the securities laws preclude application of the antitrust laws is whether, given the context and the likely consequences, the securities laws and the antitrust allegations are "clearly incompatible."<sup>155</sup> Relying on *Gordon* and *NASD*, the Court concluded that, in making this determination, the following factors are critical: (1) the existence of securities-related regulatory authority over the activities in question; (2) evidence of the exercise of that authority; (3) a risk that if both schemes were applicable, conflicting guidance, requirements, duties, privileges, or standards of conduct would arise; and (4) whether the challenged practices "lie squarely within an area of financial market activity that the securities law seeks to regulate."<sup>156</sup>

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145. 373 U.S. 341 (1963).

146. 422 U.S. 659 (1975).

147. 422 U.S. 694 (1975).

148. 127 S. Ct. at 2389-90.

149. *Id.*

150. *Id.* at 2390.

151. *Id.*

152. *Id.*

153. *Id.* at 2391.

154. *Id.*

155. *Id.* at 2392.

156. *Id.*

Applying these principles to the case at hand, the Supreme Court quickly concluded that the first two factors preponderated in favor of preclusion.<sup>157</sup> The Court found that the SEC has authority to supervise all of the IPO-related activities in question and has continuously exercised that authority. The Court also found that the fourth factor supported preclusion because the activities in question were “central to the proper functioning of well-regulated capital markets.”<sup>158</sup>

Turning to the third factor—the risk of conflict—the Supreme Court read the investors’ complaints regarding particular underwriting practices to attack the manner in which the underwriters jointly sought to collect the allegedly excessive commissions.<sup>159</sup> The investors contended that these claims could not be repugnant to the securities laws because the SEC has disapproved of the challenged practices.<sup>160</sup> The Court rejected this argument, holding instead that the securities and antitrust laws were clearly incompatible in this situation.<sup>161</sup> The Court relied on several facts, the first of which was the “fine, complex, detailed line” that currently separates IPO-related underwriter activity “that the SEC permits or encourages . . . from activity that the SEC must (and inevitably will) forbid.”<sup>162</sup> The Court determined that “evidence tending to show unlawful antitrust activity and evidence tending to show lawful securities marketing activity may overlap, or prove identical.”<sup>163</sup> Because of this fine line, the Supreme Court expressed concern that nonexpert judges and juries would be unable to separate acceptable behavior on the part of underwriters from unacceptable behavior, given the “nuanced nature” of the required evidentiary evaluations. Given the fact-specific nature of the evaluations, different courts might not evaluate similar fact patterns consistently.<sup>164</sup>

The Court believed that “antitrust courts are likely to make unusually serious mistakes” in attempting to differentiate between lawful and unlawful activities.<sup>165</sup> Such likelihood of mistakes, in the Court’s view, means that underwriters would have to forgo permitted activities in order to safely avoid prohibited activities.<sup>166</sup> The Court acknowledged that this may be a problem “to some degree in respect to other antitrust lawsuits,” but concluded that mistakes are “unusually likely” in the IPO arena.<sup>167</sup>

The Supreme Court concluded that allowing an antitrust lawsuit in these circumstances “would threaten serious harm to the efficient functioning of the securities markets,” that there was an unusually small en-

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157. *Id.*

158. *Id.* at 2393.

159. *Id.* at 2393-94.

160. *Id.* at 2394.

161. *Id.*

162. *Id.*

163. *Id.* at 2395.

164. *Id.*

165. *Id.* at 2396.

166. *Id.*

167. *Id.*



forcement-related need for antitrust lawsuits, and that permitting antitrust lawsuits might enable a plaintiff to circumvent the procedural requirements that securities plaintiffs must satisfy.<sup>168</sup> In the face of these conflicts, the securities laws were clearly incompatible with the application of the antitrust laws to the underwriters' complained-of activities.<sup>169</sup>

Concurring in the judgment, but not the majority's opinion, Justice Stevens opined that the complained-of activity did not violate the antitrust laws.<sup>170</sup> Justice Stevens went on, however, to disagree with another aspect of the Court's opinion:

I would not suggest, as the Court did in *Twombly*, and as it does again today, that either the burdens of antitrust litigation or the risk 'that antitrust courts are likely to make unusually serious mistakes,' should play any role in the analysis of the question of law presented in a case such as this.<sup>171</sup>

Justice Thomas dissented. He concluded that the savings clauses of the Securities Act and the Securities Exchange Act preserved the plaintiffs' rights and remedies under the antitrust laws.<sup>172</sup>

The Fifth Circuit considered the standard for concerted refusals to deal in *Tunica Web Advertising v. Tunica Casino Operators Association, Inc.*,<sup>173</sup> which involved an Internet advertising company that sued casino operators. Tunica Web Advertising and its owner, Cherry Graziosi, owned the domain names "tunicamiss.com," "tunicamississippi.com," and "tunica.com" and leased the domains to the Gold Strike casino in Tunica County, Mississippi for several years.<sup>174</sup> None of the domains had a website.<sup>175</sup> Instead, they redirected searchers to the casino's home page.<sup>176</sup>

The Tunica Country Tourism Commission ("TCTC") sued Graziosi, alleging that she was a cybersquatter who had no right to own "tunicamiss.com" or "tunicamississippi.com."<sup>177</sup> As part of the settlement of that suit, Graziosi transferred her rights in "tunicamiss.com" and "tunicamississippi.com" to the TCTC and the TCTC released their claims to "tunica.com."<sup>178</sup>

Graziosi then proposed to the TCTC that she lease "tunica.com" collectively to all the casinos in Tunica County.<sup>179</sup> Under the terms of the proposal, in exchange for a monthly payment from each casino, visitors to "tunica.com" would be redirected to the TCTC website, which already

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168. *Id.*

169. *Id.* at 2396-97.

170. *Id.* at 2398.

171. *Id.* (Stevens, J. concurring).

172. *Id.* at 2399 (Thomas, J. dissenting).

173. 496 F.3d 403 (5th Cir. 2007).

174. *Id.* at 406-07.

175. *Id.* at 406.

176. *Id.*

177. *Id.* at 407.

178. *Id.*

179. *Id.*

contained information about the casinos.<sup>180</sup> The proposal was referred to the casinos' trade group, the Tunica Casino Operators Association ("TCOA").<sup>181</sup> The TCOA met and discussed the proposal and reached a consensus to not utilize the "tunica.com" domain name.<sup>182</sup> Graziosi and Tunica Web Advertising contend that at the same meeting, members of the TCOA agreed to individually refuse to deal with Tunica Web Advertising on any terms.<sup>183</sup> Shortly after the TCOA meeting, the Gold Strike casino cancelled its lease of "tunica.com."<sup>184</sup> Gold Strike's marketing director allegedly told Graziosi that the casinos had entered into a "gentlemen's agreement" not to do business with Tunica Web Advertising and that her "hands were officially tied" by the TCOA.<sup>185</sup> Supposedly, the refusal to deal was intended to lower the value of the "tunica.com" domain name.<sup>186</sup>

Tunica Web Advertising then developed its own web site at "tunica.com" with the intention of generating revenue through advertising from casinos and commissions from online hotel booking.<sup>187</sup> Tunica Web Advertising approached the casinos with this new business model, but none of the casinos chose to advertise on the site.<sup>188</sup> Graziosi and Tunica Web Advertising alleged that this refusal conformed to the earlier agreement to refuse to deal with Tunica Web Advertising, and presented an email from Gold Strike's marketing director to Graziosi stating that the TCOA later met and reaffirmed its agreement.<sup>189</sup>

Graziosi and Tunica Web Advertising sued the casinos, the TCTC, and the TCOA. The TCTC was dismissed by the court on immunity grounds and the TCOA and Gold Strike were dismissed by agreement of the parties.<sup>190</sup> The trial court granted summary judgment for the remaining casinos, holding that (1) the casinos' alleged conduct could not constitute a *per se* violation of section 1 of the Sherman Act; (2) the alleged original agreement not to deal with Tunica Web Advertising was a legal joint response to a joint proposal; and (3) Tunica Web Advertising did not show that any refusals to deal after the original agreement were the result of concerted action because it did not present detailed evidence of its proposals to the casinos.<sup>191</sup>

On appeal, the Fifth Circuit agreed that the casinos' original agreement to reject Tunica Web Advertising's offer was not actionable because it

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180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 407-08.

189. *Id.*

190. *Id.*

191. *Id.*

was a joint response to a joint proposal.<sup>192</sup> The court disagreed, however, with the argument that there was no evidence of any actionable agreement.<sup>193</sup> The statements by Gold Coast's marketing director disclosing a "gentlemen's agreement" between the casinos that none of them would use "tunica.com" or deal with Tunica Web Advertising, and the later email reporting a subsequent agreement were sufficient to raise a fact issue about whether the casinos had engaged in concerted action.<sup>194</sup> Such direct evidence of an agreement relieved the plaintiffs of the need to provide circumstantial evidence of an agreement such as details of the rejected proposals to the casinos.<sup>195</sup> The direct evidence also meant that the existence of plausible reasons for independent action did not establish the casinos' right to summary judgment.<sup>196</sup>

The Fifth Circuit also considered Tunica Web Advertising's argument that the refusal to deal was a *per se* illegal horizontal boycott.<sup>197</sup> Although the casinos clearly were direct competitors, they pointed to language from the Supreme Court and Fifth Circuit suggesting that *per se* illegal boycotts are those intended to harm a competitor of the conspirators.<sup>198</sup> Relying on this language, the casinos argued that a *per se* illegal horizontal boycott requires that at least one of the conspirators be a direct competitor of the victim.<sup>199</sup> Acknowledging that "[p]recisely which group boycotts are subject to the *per se* rule is . . . not always clear," the court observed that the Supreme Court has never held that injury to a competitor of the conspirators is an absolute prerequisite to a finding of *per se* illegality, and concluded that the district court had erred in so holding.<sup>200</sup> Relying on *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*,<sup>201</sup> the Fifth Circuit held that in determining whether the *per se* rule should apply to the alleged horizontal boycott, a court should consider "(1) whether the casinos hold a dominant position in the relevant market; (2) whether the casinos control access to an element necessary to enable [Tunica Web Advertising] to compete; and (3) whether there exist plausible arguments concerning pro-competitive effects."<sup>202</sup> The Fifth Circuit remanded the case to allow the district court to make the first analysis of these issues.<sup>203</sup>

The Fifth Circuit also considered the antitrust injury component of standing during the Survey period. In *Norris v. The Hearst Trust*,<sup>204</sup> former distributors of the *Houston Chronicle* sued the newspaper's owners,

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192. *Id.* at 410.

193. *Id.* at 411.

194. *Id.* at 410-11.

195. *Id.* at 411.

196. *Id.*

197. *Id.*

198. *Id.* at 412.

199. *Id.*

200. *Id.* at 412, 414.

201. 472 U.S. 284 (1985).

202. 496 F.3d at 414-15.

203. *Id.* at 415.

204. 500 F.3d 454 (5th Cir. 2007).

complaining that they had been wrongfully terminated. The Fifth Circuit held that the former distributors' antitrust claims failed because they lacked antitrust injury and antitrust standing.<sup>205</sup>

The Hearst Trust, the Hearst Corporation, and Hearst Newspapers Partnership, L.P. (collectively, "Hearst") cancelled the plaintiffs' distribution agreements for the *Chronicle*, the only daily newspaper of general circulation in the greater Houston area.<sup>206</sup> All but one of the plaintiffs sued in state court, alleging that Hearst had coerced the plaintiffs into producing fraudulent circulation reports and that cancellation of their distribution contracts was in retaliation for the plaintiffs' complaints.<sup>207</sup> Judgment was entered against the plaintiffs in state court and, joined by an additional distributor, they filed suit in federal court asserting essentially the same claims with the addition of federal and state antitrust claims.<sup>208</sup> The only product described in the distributors' complaint was the *Houston Chronicle* and the only users of that product were its readers and advertisers.<sup>209</sup> The distributors did not allege that they were consumers of the paper or its advertising services or that they were competitors of Hearst or the paper. Nor did they allege that the cancellation of their distribution agreements had harmed the subscribers or readers.<sup>210</sup> They did allege that their termination had been related to Hearst's plan to inflate circulation figures with the intended result of increasing advertising sales and revenue.<sup>211</sup>

The district court granted Hearst's Rule 12(b)(6) motion to dismiss, holding that the plaintiffs' re-repleaded state court claims were barred by *res judicata* and collateral estoppel due to the prior state court judgment and that the antitrust claims were barred for lack of antitrust injury and antitrust standing.<sup>212</sup> On appeal, the distributors argued that they had sustained antitrust injury because they were terminated as a result of their refusal to participate in Hearst's illegal scheme to raise advertising prices, itself an antitrust violation.<sup>213</sup> The Fifth Circuit rejected this argument, finding that the only persons who would be directly injured by Hearst's scheme to inflate circulation numbers would be those desiring to advertise in the *Chronicle* and other media that sell advertising.<sup>214</sup> The court concluded that such persons were the appropriate parties to sue for any violation arising from Hearst's alleged scheme.<sup>215</sup>

The court further held that the plaintiffs' bare allegations that Hearst had vertically integrated into newspaper distribution and therefore was

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205. *Id.* at 469.

206. *Id.* at 457.

207. *Id.*

208. *Id.* at 457, 460.

209. *Id.* at 463.

210. *Id.*

211. *Id.* at 463-64.

212. *Id.* at 460.

213. *Id.* at 463-64, 466.

214. *Id.*

215. *Id.* at 466.

the distributors' competitor did not confer antitrust standing in the absence of any allegation that the vertical integration had anything to do with the plaintiffs' termination.<sup>216</sup> There was no allegation that the plaintiffs' termination increased the *Chronicle's* price or decreased its availability.<sup>217</sup> In these circumstances, even had Hearst terminated the distributors in order to take over the *Chronicle* distribution, Hearst would not have committed an antitrust violation giving rise to antitrust injury to the distributors.<sup>218</sup>

### 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."<sup>219</sup> 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 defined in the statute.<sup>220</sup> To qualify as a consumer, the plaintiff must be one who "seeks or acquires, by purchase or lease, any goods or services;" further, those goods or services must form the basis of the plaintiff's complaint.<sup>221</sup> Consumer status under the DTPA depends upon a showing that the plaintiff's relationship to the transaction entitles him to relief.<sup>222</sup> When the facts underlying the determination of consumer status are undisputed, whether a plaintiff qualifies for such status is a question of law.<sup>223</sup>

The First District Houston Court of Appeals, in *Richardson-Eagle, Inc. v. William M. Mercer, Inc.*,<sup>224</sup> affirmed the dismissal of a plaintiff's DTPA claims by determining that the plaintiff was not a consumer.<sup>225</sup> In this factually convoluted matter, Mercer contracted with the Houston Independent School District ("HISD") to solicit bids for a benefit plan to be

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216. *Id.* at 468.

217. *Id.*

218. *Id.* at 468.

219. TEX. BUS. & COM. CODE ANN. § 17.44(a) (Vernon 2002).

220. *See id.* § 17.50.

221. *Id.* § 17.45(4); *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 351-52 (Tex. 1987).

222. *Amstadt v. U.S. 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).

223. *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 406 (Tex. App.—Houston [14th Dist.] 1997, writ dismissed by agr.).

224. 213 S.W.3d 469 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

225. *Richardson-Eagle*, 213 S.W.3d at 477.

provided by HISD to its employees.<sup>226</sup> Richardson-Eagle responded to the bid on behalf of two insurance companies, one who offered to provide a disability insurance policy and the other who offered a cancer and hospital-indemnity policy.<sup>227</sup> HISD rejected the proposals and directed Mercer to negotiate directly with the two insurance companies that submitted bids. While one company refused to negotiate, the other did, ultimately leading to a contract.<sup>228</sup>

Richardson-Eagle then filed suit against Mercer asserting a multitude of claims, including tortious interference and violations of the DTPA.<sup>229</sup> Mercer moved for summary judgment arguing that Richardson-Eagle was not a consumer and therefore lacked standing to sue under the DTPA.<sup>230</sup> The trial court agreed, finding that Richardson-Eagle did not seek goods or services from Mercer, and accordingly granted summary judgment, which was affirmed by the Houston court.<sup>231</sup>

## 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.<sup>232</sup>

### 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.

*Bossier Chrysler-Dodge II, Inc. v. Riley*,<sup>233</sup> involved allegations of two of these “laundry list” actions—section 17.46(b)(12), which prohibits representing that an agreement conferred or involved rights, remedies, or obligations that it did not have, and section 17.46(b)(24), which prohibits failure to disclose known information with the intent to induce a consumer into a transaction the consumer would not have entered if the information had been disclosed.<sup>234</sup> Bossier Chrysler-Dodge sued James Riley for failing to deliver a pickup truck as a trade-in for a used car that Riley allegedly had purchased.<sup>235</sup> Riley counterclaimed for fraud and DTPA violations arising from a dispute over the financing terms and whether and when Riley could cancel the sales contract.<sup>236</sup> The jury

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226. *Id.* at 472.

227. *Id.* at 472-73.

228. *Id.*

229. *Id.* at 472.

230. *Id.* at 478-79.

231. *Id.*

232. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)-(3) (Vernon 2002 & Supp. 2008).

233. 221 S.W.3d 749 (Tex. App.—Waco 2007, pet. denied).

234. *Id.* at 753.

235. *Id.* at 752.

236. *Id.*

found that Bossier had committed fraud and violated the DTPA and awarded Riley damages.<sup>237</sup>

Bossier appealed, arguing that there was insufficient evidence of actionable misrepresentations or omissions.<sup>238</sup> Riley testified at trial that at the time he signed the contract for the purchase of the used car, a Bossier representative told him that financing had been approved.<sup>239</sup> He also testified that he was told that he could cancel the contract.<sup>240</sup> The Waco Court of Appeals concluded that this evidence of misrepresentation was legally sufficient.<sup>241</sup> Likewise, there was legally sufficient evidence that Bossier knew that financing was not approved until after Riley signed the installment contract, that Bossier failed to disclose this information, and that Riley would not have signed the contract if he had known that financing had not yet been approved.<sup>242</sup> Because there was conflicting evidence regarding when financing was approved, when Riley signed the various documents, and when Riley cancelled the contract, the court concluded that it was required to defer to the jury's resolution of those issues and that the evidence was factually sufficient to support the verdict.<sup>243</sup>

## 2. Section 17.50—Breach of Warranty

A DTPA claim may be based on the breach of an express or implied warranty, although the DTPA does not itself create any warranties.<sup>244</sup> The Fort Worth Court of Appeals considered whether a plaintiff's knowledge of defects precludes an implied warranty claim in *Haire v. Nathan Watson Co.*<sup>245</sup> The Haires' home began having structural problems and investigations revealed excessive swelling of the soil beneath the home without design and construction to accommodate the swelling.<sup>246</sup> The Haires sued the subdivision's developer, alleging that it had a duty to prepare the lot so that it could adequately support a home, and that providing such services gave rise to an implied warranty that the Haires' lot would be prepared in a good and workmanlike manner. The Haires also brought a breach of implied warranty claim against the geotechnical engineering firm that, in the initial development stages of the subdivision, had been hired to perform soil analysis to serve as a basis for the design of the foundations of the subdivision's homes. The engineering firm successfully moved for summary judgment on the warranty claim and the Haires appealed.<sup>247</sup>

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237. *Id.*

238. *Id.*

239. *Id.* at 753.

240. *Id.* at 754.

241. *Id.* at 756.

242. *Id.*

243. *Id.* at 756-57.

244. *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 438 (Tex. 1995). See also TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon 2002 & Supp. 2008).

245. 221 S.W.3d 293 (Tex. App.—Fort Worth 2007, pet. denied).

246. *Id.* at 296.

247. *Id.* at 297.

The Fort Worth Court of Appeals affirmed the trial court's grant of the engineering firm's summary judgment motion.<sup>248</sup> The court first explained that "[o]ne of the purposes behind the implied warranty that services be performed in a good and workmanlike manner is the protection of the helpless consumer who takes what he gets because he does not know enough technically to test or judge what is before him."<sup>249</sup> This protection is unwarranted if the consumer is advised of the need for repairs and the consequences of failing to make them.<sup>250</sup> The summary judgment evidence showed that, the Haires were aware of the potential problems in the subdivision and in the home they were buying through the original homeowner's disclosure, an earlier inspection, and their own pre-purchase inspector's findings, and were on notice of the potential for structural problems without proper maintenance and repairs.<sup>251</sup> The court concluded that this knowledge barred the Haires' claim for breach of implied warranty.<sup>252</sup>

### C. DETERMINING THE MEASURE OF DAMAGES

A prevailing plaintiff in a DTPA action may recover economic damages.<sup>253</sup> In cases involving misrepresentation, the plaintiff may recover either "out-of-pocket" or "benefit-of-the-bargain" damages.<sup>254</sup> Out-of-pocket damages measure the difference between what the buyer paid and the value of what he received.<sup>255</sup> Benefit-of-the-bargain damages measure the difference between the value of the goods or services as represented and the value as received.<sup>256</sup> If the trier of fact finds that the defendant acted "knowingly," the plaintiff may also recover damages for mental anguish and treble statutory damages.<sup>257</sup>

#### 1. Damages for Mental Anguish

The Texarkana Court of Appeals considered the evidence necessary to support an award of mental anguish damages in *Medical Protective Co. v. Herrin*.<sup>258</sup> Herrin, a surgeon, sued his former malpractice carrier for refusing to renew his insurance policy.<sup>259</sup> At trial, he sought damages for reduced earnings and mental anguish.<sup>260</sup> He testified that when he received the nonrenewal notice he felt "terrible," and that the insurer's statement that there were frequent and severe malpractice claims against

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248. *Id.* at 303.

249. *Id.* at 302.

250. *Id.*

251. *Id.* at 303.

252. *Id.* at 302-03.

253. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 2002 & Supp. 2008).

254. *Leyendecker & Assocs. v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984).

255. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 817 (Tex. 1997).

256. *Id.*

257. *Leyendecker*, 683 S.W.2d at 373.

258. 235 S.W.3d 866 (Tex. App.—Texarkana 2007, pet. denied).

259. *Id.* at 870-71.

260. *Id.*



him made him “tremendously upset.” He further testified that following the nonrenewal, he felt like his work was more difficult and was no longer as pleasant as it once had been.<sup>261</sup> Although he described himself as somewhat suicidal, he later conceded that he was not suicidal, but merely engaging in uncharacteristically dangerous behavior.<sup>262</sup> There was no evidence presented of the severity of his symptoms, no evidence that Herrin’s mental anguish had harmed his physical health, no evidence that he sought professional psychiatric assistance, and no evidence that the mental anguish substantially disrupted Herrin’s daily routine.<sup>263</sup> The Texas Court of Appeals therefore reversed the jury’s award of mental anguish damages, concluding that, at most, the evidence showed “mere worry, anxiety, vexation, embarrassment, or anger,” which was legally insufficient to establish compensable mental anguish.<sup>264</sup>

## 2. *Restitution*

In *Thomas v. State*,<sup>265</sup> the State of Texas, acting through the Consumer Protection Division of the Attorney General’s Office, brought suit against Ruth C. Thomas and John W. Thomas, alleging that the defendants’ immigration services business violated the DTPA by engaging in the unauthorized practice of law.<sup>266</sup> The jury found in favor of the State and the trial court ordered restitution from each defendant of \$469,416.50, which was the amount the jury found that each defendant had acquired by means of engaging in an unlawful act or practice.<sup>267</sup> The trial court also ordered that “the review, determination and allocations of amounts of money to be restored to consumers shall be within the sole discretion of the Consumer Protection and Public Health Division.”<sup>268</sup> The Thomases appealed, arguing that an order of restitution “without specifically identifying the persons to whom monies were to be paid or the amount due to each recipient” and that included monies the Thomases received more than two years prior to the filing of the lawsuit violated section 17.47(d) of the DTPA.<sup>269</sup>

Section 17.47(d) of the DTPA provides that a court

may make such additional orders or judgments as are necessary to compensate identifiable persons for actual damages or to restore money or property, real or personal, which may have been acquired by means of any unlawful act or practice. Damages may not include any damages incurred beyond a point two years prior to the institution of the action by the consumer protection division.<sup>270</sup>

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261. *Id.*

262. *Id.*

263. *Id.* at 869-70.

264. *Id.*

265. 226 S.W.3d 697 (Tex. App.—Corpus Christi 2007, pet. dism’d).

266. *Id.* at 700.

267. *Id.* at 706.

268. *Id.* at 707.

269. *Id.* at 700-01.

270. TEX. BUS. & COM. CODE ANN. § 17.47(d) (Vernon 2002 & Supp. 2008).

Addressing this issue of first impression, the Corpus Christi Court of Appeals held that the statute provides for two types of damages: (1) compensation to identifiable persons for actual damages, and (2) "restoration of money or property acquired by unlawful means."<sup>271</sup> The court concluded that an award of "restoration" damages does not require "that the trial court specify 'identifiable persons' or the amount of money to be paid to each consumer."<sup>272</sup> The court also concluded that the two-year statute of limitation applies only to an award of actual damages, and not to a restitution award.<sup>273</sup>

#### D. EXEMPTIONS, DEFENSES, AND LIMITATIONS ON RECOVERY

The DTPA has been characterized as a strict liability statute, only requiring proof of misrepresentation without regard to the offending party's intent.<sup>274</sup> This is only partially correct, since several DTPA provisions expressly require proof of intentional conduct.<sup>275</sup> Some courts have gone so far as to hold that common law defenses, such as estoppel and ratification, are unavailable in DTPA claims.<sup>276</sup> Other courts have recognized a variety of DTPA defenses.<sup>277</sup> Additionally, both the courts and the legislature have carved out exemptions from the DTPA's reach.

##### 1. Exemptions Within the DTPA

Section 17.49 of the DTPA contains several exemptions from the Act's reach. During the survey period, the Western District of Texas examined the exemption for certain professional services in what is one of few published opinions on the provision. *Pazarin v. Armes*<sup>278</sup> demonstrates that not all professionals can avoid claims under the DTPA by blind reliance on the Act's professional services exclusion. The plaintiff Elizabeth Pazarin, retained Jay Armes, a private investigator and security expert, to advise and assist her in efforts to secure the release of her brother-in-law who had been kidnapped in Tijuana, Mexico. Pazarin paid \$100,000 to

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271. *Thomas*, 226 S.W.3d at 706.

272. *Id.* at 707.

273. *Id.* at 706-11.

274. *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 dismissed).

275. *See, e.g., TEX. BUS. & COM. CODE ANN.* § 17.46(b)(9), (10), (13), (17) & (24) (Vernon 2002 & Supp. 2008).

276. *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).

277. *See, e.g., Ostrow v. United Bus. Machs., 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, \*10 (Tex. App.—Dallas Aug. 23, 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 refused n.r.e.) (applying statute of frauds to DTPA claims).

278. 512 F. Supp. 2d 861 (W.D. Tex. 2007).

retain Armes. Shortly thereafter, Pazarin decided to rely instead upon the services of Mexican investigators and negotiators and requested the return of the \$100,000. Armes refused, taking the position that the \$100,000 was a non-refundable deposit.<sup>279</sup> Pazarin then sued, asserting, among other things, a DTPA claim.<sup>280</sup>

Armes moved for summary judgment, claiming immunity under section 17.49(c)'s "professional services" exemption.<sup>281</sup> The United States District Court for the Western District of Texas disagreed, finding that the plaintiff's claims were not based on the performance of professional services.<sup>282</sup> Instead, the court concluded that because Pazarin's claims related to alleged misrepresentations regarding the \$100,000 payment, the claims did not fall within the professional services exemption.<sup>283</sup> The court accordingly denied the motion for summary judgment and allowed Pazarin to proceed with the prosecution of her DTPA claim.<sup>284</sup>

## 2. Preemption and Exemption From the DTPA

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

### a. Texas Medical Liability and Insurance Improvement Act

Under the Texas medical liability law, a plaintiff bringing a "health care liability claim" must file an expert report within 120 days after filing suit.<sup>285</sup> If no expert report is served by that time, on proper motion by the defendant, the trial court is required to dismiss the action with prejudice and award the defendant reasonable attorneys' fees and costs.<sup>286</sup>

The Dallas Court of Appeals examined this requirement in *Lee v. Boothe*.<sup>287</sup> Lee hired Boothe to perform an Interlasik eye procedure. Lee alleged that during the procedure she was rushed through the pre-operative steps, that she was not given the proper anesthetic on her eyes, and that Boothe used excessive force on her eyes, causing intense pain. Lee further alleged that she was in pain for several weeks following the procedure and that her vision was not corrected to 20/20 as had been promised. When she tried to collect on the money-back guarantee, she was asked to sign a form releasing Boothe from liability.<sup>288</sup> Lee declined

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279. *Id.* at 863.

280. *Id.*

281. *Id.* at 864.

282. *Id.* at 879.

283. *Id.*

284. *Id.*

285. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon 2005 & Supp. 2008).

286. *Id.* at § 74.351(b).

287. 235 S.W.3d 448 (Tex. App.—Dallas 2007, pet. denied). Last year's Survey reported on another case against the same doctor. *See Boothe v. Dixon*, 180 S.W.3d 915 (Tex. App.—Dallas 2005, no pet.).

288. *Lee*, 235 S.W.3d at 450.

to sign the release and sued, alleging that Boothe had violated the DTPA by failing to fulfill the promises in his advertisements. Boothe moved for dismissal of the DTPA claim on the ground that Lee had failed to file an expert report within the deadline required by Texas law.<sup>289</sup> The trial court granted the motion and Lee appealed, arguing that her claim was not a health care liability claim.<sup>290</sup>

The Dallas Court of Appeals affirmed the dismissal.<sup>291</sup> The court recognized that a plaintiff cannot recast a health care liability claim as a different cause of action.<sup>292</sup> The focus is on the “nature and essence” of the claim, not on how the claim was pleaded.<sup>293</sup> “If the factual allegations are related to the medical treatment provided by the defendant and constitute ‘an inseparable part of [the defendant’s] rendition of medical services,’ then the plaintiff’s claim is a health care liability claim subject to the requirements of chapter 74.”<sup>294</sup> Applying this test, the court concluded that Lee’s allegations were, in essence, claims of negligence because her injuries arose from the allegedly wrongful manner in which Boothe operated on her eyes.<sup>295</sup> As Lee had not timely filed an expert report, dismissal under the Texas medical liability law was proper.<sup>296</sup>

#### b. Exhaustion of Administrative Remedies

Exhaustion of administrative remedies is required before an injured worker may sue for damages for a workers’ compensation insurance carrier’s alleged bad faith delay or denial of medical benefits.<sup>297</sup> In *Pickett v. Texas Mutual Insurance Co.*,<sup>298</sup> the Austin Court of Appeals considered the effect of this requirement on a DTPA claim. Conceding that they had not exhausted their administrative remedies, the Pickets argued that exhaustion was not required for their claims for damages other than the allegedly wrongfully denied medical benefits.<sup>299</sup> The court disagreed, holding that the determination of whether a claim is within the exclusive jurisdiction of the Commission turns not on the source of the claim (such as common law tort or statute) but on “whether the claim is based on a claimant’s entitlement to benefits.”<sup>300</sup> The Picketts’ DTPA claims were based on alleged denials, delays, and premature terminations of medical treatment, and on the contention that Texas Mutual misrepresented the

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289. *Id.*

290. *Id.* at 451.

291. *Id.* at 452.

292. *Id.* at 451.

293. *Id.* at 451-52.

294. *Id.* at 451 (quoting *Walden v. Jeffery*, 907 S.W.2d 446, 448 (Tex. 1995)).

295. *Id.*

296. *Lee*, 235 S.W.3d at 452. The court also mentioned that under Section 74.004 of the Civil Practice and Remedies Code, DTPA claims for personal injuries allegedly resulting from negligence on the part of health care providers is prohibited. *Id.*

297. *See* *Am. Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801, 802 (Tex. 2001).

298. 239 S.W.3d 826 (Tex. App.—Austin 2007, no pet.).

299. *Id.* at 832.

300. *Id.* at 835-36.

availability of benefits.<sup>301</sup> The court concluded that the Picketts' claims were "predicated on the denial of benefits" and thus subject to the exhaustion requirement.<sup>302</sup> The court also rejected the Picketts' argument that exhaustion was not required because they sought damages other than denied medical benefits, relying on the holding in *Fodge* that a damages award "'equal to the cost of denied medical care is tantamount to ordering that the care be paid for.'"<sup>303</sup>

### 3. *Necessity of Proving Causation*

Liability under the DTPA is limited to conduct that is a "producing cause" of the plaintiff's damages.<sup>304</sup> Unlike the doctrine of proximate cause, producing cause does not require that the injury be foreseeable.<sup>305</sup> "Producing cause" has been defined as "an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of."<sup>306</sup> 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 without which the injury would not have occurred.<sup>307</sup>

In *Sparks v. Booth*<sup>308</sup> the Dallas Court of Appeals considered when misrepresentations by someone other than a homebuilder could be the producing cause of injury arising from defects in home construction. The Booths planned to build a house and went to a model home to obtain information from the builders. They spoke with Johnathan Sparks, who told them that they could choose a model home or, for a design fee of \$2,500, design their own home using the services of an architect. The Booths paid the fee and Sparks and the Booths created a computer-generated design that Sparks said he would provide to the architect who would prepare the plans. The design indicated the home would be built by Covenant Builders, which was Johnathan Sparks' company.<sup>309</sup> The next day, the Booths signed a contract for \$234,180 for the house. The contract indicated that the builder would not be Covenant Builders, but instead Sparks Heritage Homes, which was a company owned by Sparks' father. When the Booths questioned this disparity, they were told that all legal documents were done through Sparks Heritage Homes.<sup>310</sup> At that time, the Booths believed that their home would nevertheless be built by Johnathan Sparks but at closing, Johnathan's father said that he would be

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301. *Id.* at 836.

302. *Id.*

303. *Id.* at 836 (quoting *Fodge*, 63 S.W.3d at 804).

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

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

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

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

308. 232 S.W.3d 853 (Tex. App.—Dallas 2007, no pet.).

309. *Id.* at 859.

310. *Id.* at 859-60.

the builder.<sup>311</sup>

During the home's construction it became apparent that there were many problems and that the plans had not, in fact, been prepared by an architect. The Booths consulted with another builder, who estimated that it would cost \$350,000 to repair and complete the house. The Booths sued Johnathan Sparks and Sparks Heritage Homes. The case was tried to the bench, which entered judgment against the defendants.<sup>312</sup>

On appeal, Johnathan Sparks argued that there was legally insufficient evidence to prove that his actions were the producing cause of the Booths' damages because neither he nor his company was the builder of the home and there was no evidence that the damages were directly related to his alleged misrepresentation.<sup>313</sup> The Dallas Court of Appeals disagreed with both arguments.<sup>314</sup> There was evidence that Johnathan Sparks told the Booths that an architect would design the home. When the Booths met Sparks to go over the "architectural drawing," there were a few inaccuracies, and Johnathan and his father said they would send the drawings back to the architect.<sup>315</sup> There was also evidence that no architect was ever hired and that, although the Sparks used the term "architect," they in fact regularly used a design company.<sup>316</sup> The court held that although the Booths' contract was with Sparks Heritage Homes, Johnathan Sparks represented to the Booths that an architect would design the house and the defects in the house resulted from inadequate plans. The court concluded that this was legally sufficient evidence to prove that Johnathan Sparks was the producing cause of the Booths' damages.<sup>317</sup>

#### 4. *Necessity of Proving Reliance*

To recover under section 17.50 of the DTPA for a "laundry list" violation, a consumer must prove that the "false, misleading, or deceptive act or practice" was a producing cause of damages and that the consumer relied upon the act or practice.<sup>318</sup> In *Kupchynsky v. Nardiello*,<sup>319</sup> homebuyers sued a builder in connection with construction defects in the house. During the pre-sale inspections, an inspector found water on the tile of a balcony. The buyers discussed the problem with the builder and installer, who assured them that the water was to be expected based upon the design and construction of the balconies. The buyers accepted this explanation and, after renegotiating the sales price to cover unrelated problems, purchased the house. Five months later, the balconies began to

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311. *Id.* at 860.

312. *Id.* at 860-61.

313. *Id.* at 864.

314. *Id.* at 860.

315. *Id.*

316. *Id.* at 864-65.

317. *Id.* at 865.

318. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (Vernon 2002 & Supp. 2008).

319. 230 S.W.3d 685 (Tex. App.—Dallas 2007, pet. denied).

leak. Construction experts found numerous problems with the balconies' construction and concluded that the home was not built in a good and workmanlike manner. The builder refused to pay for the necessary repairs, the buyers sued, and a jury awarded the buyers \$52,695 in damages.<sup>320</sup>

On appeal, the builder argued that as a matter of law, the homebuyers' inspections of the house, and related renegotiation of the sales contract, precluded reliance.<sup>321</sup> In doing so, they cited *Dubow v. Dragon*,<sup>322</sup> which held that a buyer's careful inspection of a house's condition "constituted a new and independent basis for the purchase which intervened and superseded the [sellers'] alleged wrongful act."<sup>323</sup> The Dallas Court of Appeals rejected the builder's argument, holding that the outcome in *Dubow* did not turn solely on the buyer-purchased independent inspection but also on their reliance on the inspector's opinions to renegotiate the sales contract.<sup>324</sup> In contrast, the homebuyers in the present case relied on not just the inspectors' findings but on representations by the builder. Moreover, while the contract was renegotiated based upon defects identified in the inspections, the balcony drainage system was not part of the renegotiation.<sup>325</sup> The court concluded that given the distinct circumstances, *Dubow* did not preclude the buyers' recovery.<sup>326</sup>

*In re Riviera*<sup>327</sup> is another 2007 case that hinged on whether the plaintiffs could establish reliance upon the misrepresentations underlying the DTPA claims. The Rivas, who had sought bankruptcy protection, initiated an adversary proceeding against Texas State Bank claiming that the bank misrepresented the terms of a loan made to the Rivas. Specifically, the Rivas complained that the bank made them a commercial loan rather than a residential loan to secure financing on a property that the Rivas intended to use for both business and homestead purposes.<sup>328</sup> Texas State Bank filed a motion to dismiss the claims, including the DTPA claim.<sup>329</sup>

In reviewing the materials presented to it, the bankruptcy court noted that in responding to the motion, the Rivas offered no evidence of reliance upon the alleged misrepresentations. To the contrary, the Rivas alleged that they failed to learn of the alleged misrepresentations until after the adversary proceeding was initiated.<sup>330</sup> As the Rivas' DTPA claims were all laundry list claims that require reliance on a misrepresentation, the court granted the Bank's motion and dismissed the DTPA

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320. *Id.* at 686-87.

321. *Id.* at 688.

322. 746 S.W.2d 857 (Tex. App.—Dallas 1988, no writ).

323. *Id.* at 860.

324. *Id.* at 689.

325. *Id.*

326. *Nardiello*, 230 S.W.3d at 689.

327. 358 B.R. 688 (Bankr. S.D. Tex. 2007).

328. *Id.* at 691.

329. *Id.*

330. *Id.* at 691-92.

claims.<sup>331</sup>

### 5. “As Is” Clauses

An “as is” agreement generally negates the causation element of a DTPA claim.<sup>332</sup> The Texas Supreme Court considered such a clause in *Gym-N-I Playgrounds, Inc. v. Snider*.<sup>333</sup> Gym-N-I leased a building from Snider, and agreed in the lease to accept the building “as is.” The parties operated under the lease during its original term. Although the lease was never renewed, after the expiration of the original term Gym-N-I occupied the premises on a month-to-month tenancy. During this hold-over period, the building was destroyed by a fire.<sup>334</sup> Gym-N-I sued Snider, asserting various claims relating to the condition of the building.<sup>335</sup> The trial court granted Snider’s motion for summary judgment, and Gym-N-I appealed.<sup>336</sup> The Austin Court of Appeals affirmed and Gym-N-I sought review in the Texas Supreme Court, arguing that the “as is” clause could not be enforced after the lease’s original term and that the clause did not negate the reliance element of its DTPA claim.<sup>337</sup>

The Texas Supreme Court first rejected Gym-N-I’s argument that the “as is” provision did not survive the expiration of the lease’s original term.<sup>338</sup> The parties’ lease expressly provided that “[a]ny holding over without written consent of Landlord shall constitute a lease from month-to-month, under the terms and provisions of this Lease to the extent applicable to a tenancy from month-to-month.”<sup>339</sup> The supreme court concluded that the phrase “under the terms and provisions of this Lease” meant that the lease governed the month-to-month tenancy and thus the as-is clause was in effect when the fire occurred.<sup>340</sup>

Turning to the application of the as-is clause, which required Gym-N-I to accept the premises “as is” and stated that Snider “has not made and does not make any representations as to the commercial suitability, physical condition, layout, footage, expenses, operation or any other matter affecting or relating to the premises,” the supreme court held that Gym-N-I had “contractually disavowed any reliance upon any representation by Snider.”<sup>341</sup> The as-is clause thus negated Gym-N-I’s claim that Snider’s actions caused it injury.<sup>342</sup>

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331. *Id.*

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

333. 220 S.W.3d 905 (Tex. 2007). The lower court decision, *Gym-N-I Playgrounds, Inc. v. Snider*, 158 S.W.3d 78 (Tex. App.—Austin 2005, pet. granted), was discussed in the Summer 2007 Survey.

334. *Snider*, 220 S.W.3d at 906-07.

335. *Id.* at 907-08.

336. *Id.* at 908.

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* at 908-09.

341. *Id.* at 914.

342. *Id.*



The Fort Worth Court of Appeals considered whether a third party to a contract may enforce an as-is clause in *Haire v. Nathan Watson Co.*, discussed above.<sup>343</sup> The Haires purchased their home from a relocation service under a contract bearing an as-is clause. The home began having structural problems and investigations revealed faulty design and construction. The Haires sued the subdivision's developer and a consulting engineering firm.<sup>344</sup> Both defendants moved for summary judgment on the ground that the as-is clause in the Haires' contract precluded a DTPA claim. The trial court granted summary judgment on this ground but the Fort Worth Court of Appeals reversed.<sup>345</sup>

The court acknowledged that the Haires were bound by their agreement but held that neither the developer nor the engineering firm could rely on that agreement.<sup>346</sup> Neither defendant had identified any caselaw for the proposition that outsiders to a contract are protected by an as-is clause. The court also rejected the defendants' argument that they were third-party beneficiaries of the sales contract.<sup>347</sup> Quoting *Loyd v. ECO Resource, Inc.*,<sup>348</sup> the court held that "[t]he fact that a person is directly affected by the parties' conduct, or that he 'may have a substantial interest' in a contract's enforcement, does not make him a third-party beneficiary."<sup>349</sup> For this reason, parties are presumed to contract for themselves alone unless it "clearly appears" that they intended to benefit a third party.<sup>350</sup> Applying these principles to the evidence, the court held that there was no evidence that the Haires' contract was intended to benefit the subdivision's developer or engineer.<sup>351</sup> Because the defendants were neither parties to nor third-party beneficiaries of the contract, the court held that the defendants could not rely on the "as is" provision of the contract.<sup>352</sup>

In *Kupchynsky v. Nardiello*,<sup>353</sup> discussed above, homebuyers sued a builder for defects in a house. On appeal from a jury verdict in favor of the homebuyers, the builder argued that under the holding in *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*,<sup>354</sup> the "as is" provision in the contract negated causation as a matter of law.<sup>355</sup> The Dallas Court of Appeals held that the buyers were not bound by the "as is" clause because under the *Prudential* holding, such clauses are not binding if (1) the buyer was induced to make the contract by a fraudulent representation or concealment of information by the seller or (2) the "nature

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343. 221 S.W.3d 293 (Tex. App.—Fort Worth 2007, pet. denied).

344. *Id.* at 296-97.

345. *Id.* at 297.

346. *Id.* at 300.

347. *Id.* at 301.

348. 956 S.W.2d 110, 134 (Tex. App.—Houston [14th Dist.] 1997, no pet.).

349. *Haire*, 221 S.W.3d at 301.

350. *Id.*

351. *Id.*

352. *Id.* at 301.

353. 230 S.W.3d 685 (Tex. App.—Dallas 2007, pet. denied).

354. 896 S.W.2d 156 (Tex. 1995).

355. *Nardiello*, 230 S.W.3d at 695.

of the transaction and totality of the circumstances surrounding the agreement” render enforcement of the “as is” clause unjust.<sup>356</sup> The court concluded that because the “as is” clause in question was contained in a form contract, was neither discussed nor negotiated, and unlike the clause in *Prudential*, did not expressly address latent defects, it was not an “important basis of the bargain” that negated causation as a matter of law.”<sup>357</sup>

#### 6. *A Mere Breach of Contract is Not Actionable Under the DTPA*

A breach of contract unaccompanied by a misrepresentation or fraud is not a false, misleading or deceptive act and thus does not violate the DTPA.<sup>358</sup> In *Bossier Chrysler-Dodge II, Inc. v. Riley*,<sup>359</sup> discussed above, Bossier argued that Riley’s DTPA claims regarding misrepresentations of Riley’s right to cancel the contract and the timing of Riley’s financing approval were not actionable because these were merely contract claims.<sup>360</sup> The Waco Court of Appeals held that it was required to consider “the totality of the circumstances surrounding the parties’ dealings . . . taking in consideration all relevant factors” including (1) whether the representation was factual, interpretive, or some combination; (2) whether the relevant contractual language was ambiguous; (3) whether the parties were in a substantially equal position of knowledge and information; (4) whether there was evidence of overreaching; (5) whether there was evidence of unconscionable conduct; and (6) whether the parties were in a confidential or fiduciary relationship.<sup>361</sup> Applying this standard to the facts before it, the court held that Bossier’s alleged representation regarding Riley’s right to cancel was “clearly interpretive,” that a reasonable jury could infer that Bossier was in a superior position of knowledge and information, and that there was evidence of unconscionable conduct.<sup>362</sup> Based upon these factors, the court concluded that Riley’s claims did not seek recovery for a mere breach of contract and therefore were actionable under the DTPA.<sup>363</sup>

### IV. CONCLUSION

The past year was a busy one for antitrust law in the United States Supreme Court. This is not to say that it was a good one for antitrust plaintiffs. Of the four cases reported in this Survey, the plaintiffs lost

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356. *Id.* at 690.

357. *Id.* at 690-91 (quoting *Prudential*, 896 S.W.2d at 162). The court also acknowledged the builder’s alleged misrepresentation and concealment of facts regarding the balconies. *Nardiello*, 230 S.W.3d at 691.

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

359. 221 S.W.3d 749 (Tex. App.—Waco 2007, pet. denied).

360. *Id.* at 755.

361. *Id.*

362. *Id.*

363. *Id.* at 756.

them all. Perhaps more interesting is how the plaintiffs lost. Two of the four decisions, *Leegin* and *Twombly*, involved overruling a total of 146 years of Supreme Court precedent, while another, *Credit Suisse*, granted blanket immunity to underwriters of IPOs from the antitrust laws despite the urgings of the Solicitor General and the Department of Justice that such broad immunity was unnecessary.

*Leegin* and *Twombly* represent an erosion of traditional principles governing the deference to *stare decisis*. As Justice Breyer noted in his *Leegin* dissent, the arguments advanced in support of overruling *Dr. Miles* were neither new nor compelling.<sup>364</sup> Justice Stevens made a similar point in his *Twombly* dissent: *Conley's* "no set of facts" standard has been cited with approval in sixteen Supreme Court opinions, followed by innumerable lower federal courts, and embraced by the courts of at least twenty-six states and the District of Columbia.<sup>365</sup> Indeed, before *Twombly*, no member of the Supreme Court had expressed any reservations about the *Conley* test and neither the petitioner nor the six amici who submitted briefs asked that it be overruled.<sup>366</sup> One might be forgiven for noting the resemblance of this disposition to the Texas Supreme Court's decision in *Coca Cola Co. v. Harmar Bottling Co.*<sup>367</sup> As reported in last year's Survey, the *Coca-Cola* court ruled for the antitrust defendants on grounds never raised by any party in the trial court, in the court of appeals, or in the supreme court itself.<sup>368</sup>

*Credit Suisse* does not represent such an explicit break with precedent. It is, however, noteworthy for finding the securities laws as implicitly precluding application of the antitrust laws to the conduct alleged. Although the Supreme Court's opinion framed the salient question as "whether there is a 'plain repugnancy'"<sup>369</sup> between the plaintiffs' antitrust claims and the federal securities laws, its finding of a "plain repugnancy" rested on no actual conflict between antitrust and securities law.<sup>370</sup> Indeed, the majority's opinion acknowledged the fact that "the SEC has *disapproved* [(and, for argument's sake, we assume it will continue to disapprove)] the conduct that the antitrust complaints attack."<sup>371</sup> Rather, the Supreme Court found a "plain repugnancy" between antitrust law and securities law because "only a fine, complex, detailed line" separates activity the SEC encourages from activity the SEC forbids, and "who but a securities expert could say whether the present SEC rules set forth a virtually per-

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364. *Leegin Creative Leather Prod., Inc. v. PSKS*, 127 S. Ct. 2705, 2732-34 (2007) (Breyer, J., dissenting).

365. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1978 (2007) (Stevens, J., dissenting).

366. *Id.* at 1978-79.

367. 218 S.W.3d 671 (Tex. 2006).

368. See A. Michael Ferrill, Leslie Sara Hyman & William "Butch" Hulse, *Antitrust and Consumer Protection* 60 SMU L. REV. 669, 708 (2007).

369. *Credit Suisse Sec. LLC v. Billing*, 127 S. Ct. 2383, 2387 (2007) (quoting *Gordon v. NYSE*, 422 U.S. 659, 682 (1975)).

370. *Id.* at 2387.

371. *Id.* at 2394.

manent line” between the two?<sup>372</sup> To this the Court added the concern that nonexpert judges and juries across the country might reach differing results.

Of course, the use of experts to assist a court in “line-drawing” is not foreign to antitrust litigation, nor is the risk that judges and juries across the country might reach differing results on the same or similar facts. One may assume this true of any litigation. And however pressing these concerns might be, it is doubtful that they establish “plain repugnancy” between the antitrust and securities laws. Indeed, one might fairly conclude that the proposition is self-refuting. After all, if the line is so difficult to find, what could be clear about it? Rather, as Justice Stevens noted in *Credit Suisse*, the majority’s opinion in *Twombly* stands for a quite different proposition, namely, that some antitrust complaints are too complicated to be entrusted to judges and juries. Justice Stevens categorically rejected this proposition:

Surely I would not suggest, as the Court did in *Twombly*, and as it does again today, that either the burdens of antitrust litigation or the risk “that antitrust courts are likely to make unusually serious mistakes” should play any role in the analysis of the question of law presented in a case such as this.<sup>373</sup>

In contradistinction to the *Credit Suisse* Court, the *Leegin* majority abandoned *Dr. Miles*’ bright-line rule of *per se* illegality in favor of case-by-case “line-drawing” under the rule of reason.<sup>374</sup> The majority explained that “[a]s courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses.”<sup>375</sup>

One might reasonably ask why this kind of case-by-case line-drawing, aided by experts, is suitable for exploring the supposed vagaries of vertical price-fixing, yet is so unsuited to a purely hypothetical conflict between antitrust and securities laws. *Credit Suisse* notwithstanding, it is at least debatable whether recent experience demonstrates that the SEC’s regulatory oversight is sufficient to police manipulation in the securities markets, much less identify and remedy anticompetitive activity. As Professor Einer Elhauge has observed,

[g]iven the extent of modern federal regulation, it may well be the case that, in most of our economy, some agency has exercised power to regulate some conduct that might also constitute an antitrust violation. If all such conduct were exempt from antitrust scrutiny, there could well be little left to the antitrust laws.<sup>376</sup>

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372. *Id.* at 2395.

373. *Id.* at 2398 (Stevens, J., concurring).

374. *Leegin Creative Leather Prods., Inc. v. PSKS*, 127 S. Ct. 2705, 2720 (2007).

375. *Id.* at 2720.

376. E. Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent Supreme Court Decisions?*, COMPETITION POL’Y INT’L, Autumn 2007, at 58, 74.

With apologies to Justice Stewart,<sup>377</sup> one thing that can be said with certainty about the Supreme Court's recent antitrust decisions is that the defendant always wins. As Professor Elhauge has noted, over the past fourteen years, the Supreme Court has decided fourteen antitrust cases, and the plaintiffs have lost them all.<sup>378</sup> Here also one finds a parallel with the Texas Supreme Court, which is enjoying a twenty-five-year unbroken record of never once siding with an antitrust plaintiff.<sup>379</sup>

If, as Justice Stevens suggests, the *Credit Suisse* and *Twombly* decisions are based on concerns over "the burdens of antitrust litigation or the risk 'that antitrust courts are likely to make unusually serious mistakes,'" <sup>380</sup> one might be forgiven for asking whether, in the quest for avoiding false positives, it is good policy to allow "lawyers' debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence."<sup>381</sup> Absent equivalent solicitude for the avoidance of false negatives, the deterrence benefits of antitrust enforcement are compromised and, in the argot of antitrust economics, judicial resources are inefficiently utilized.

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377. See *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting ("[T]he sole consistency [in merger law] . . . is that . . . the government always wins.")).

378. See Elhauge, *supra* note 376, at 14 ("Since 1994, every Supreme Court antitrust case has been consistent with the rule that the antitrust defendant always wins.").

379. See Ferrill et al., *supra* note 368, at 711.

380. *Credit Suisse*, 127 S. Ct. at 2398 (Stevens, J., dissenting).

381. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1988 (2007) (Stevens, J., dissenting).