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Deceptive Trade Practices and Consumer Protection Act

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DECEPTIVE TRADE PRACTICES AND CONSUMER PROTECTION ACT

*Eve L. Pouliot**

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I. INTRODUCTION

DURING the Survey period, Texas courts heard numerous claims brought under the Deceptive Trade Practices and Consumer Protection Act¹ (DTPA). To recover under the DTPA, a plaintiff must establish that he is a "consumer," that a false, misleading or deceptive act occurred, and that this act was a producing cause of his damage.² The significant decisions reported during this Survey period addressed each of those elements as well as other issues such as waiver and preemption. This article discusses those cases.

II. CONSUMER STATUS

A. PROPER PLAINTIFFS—THE CONSUMER

The first element that a plaintiff suing under the DTPA must establish is that he is a "consumer."³ Whether a plaintiff is a consumer is a question of law for the courts to decide.⁴ In *Melody Home Manufacturing Co. v. Barnes*,⁵ the Texas Supreme Court stated that in order to qualify as a consumer, a plaintiff must meet two requirements: (1) the plaintiff "must have sought or acquired goods or services by purchase or lease;" and (2) "the goods or services purchased or leased must form the basis of the complaint."⁶ Texas courts use this two-step analysis to determine a plaintiff's consumer status.

1. *Step 1: Did the Plaintiff Seek or Acquire Goods or Services By Purchase or Lease?*

When the plaintiff has not purchased or leased the goods or services at issue, courts have analyzed the plaintiff's consumer status using an intended beneficiary theory.⁷ Under this theory, a plaintiff must be related

1. TEX. BUS. & COM. CODE ANN. §§ 17.41-17.63 (Tex. UCC) (Vernon 1987 & Supp. 1996) [hereinafter DTPA].

2. *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995). See also DTPA § 17.50(a)(1)-(3).

3. DTPA § 17.50. A consumer is defined as:

[A]n individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of \$25 million or more, or that is owned or controlled by a corporation or entity with assets of \$25 million or more.

§ 17.45(4).

4. *3Z Corp. v. Stewart Title Guar. Co.*, 851 S.W.2d 933, 937 (Tex. App.—Beaumont 1993, writ denied).

5. 741 S.W.2d 349 (Tex. 1987).

6. *Id.* at 351-52 (citing *Sherman Simon Enters., Inc. v. Lorac Serv. Corp.*, 724 S.W.2d 13, 15 (Tex. 1987); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 539 (Tex. 1981)).

7. The intended beneficiary theory evolved from the Texas Supreme Court's decision in *Kennedy v. Sale*, 689 S.W.2d 890 (Tex. 1985). In *Kennedy*, the court observed that the existence of contractual privity between the plaintiff and defendant is not a factor in deciding whether the plaintiff is a consumer as contemplated by the DTPA. *Id.* at 892-93. Instead, the court thought that such a determination should be determined by the plaintiff's relationship to the consumer transaction. *Id.* at 893. While the *Kennedy* plaintiff had not

to the consumer transaction to the extent that the purchaser intended for him to benefit from the purchase or lease of the good or service.⁸ Accordingly, a plaintiff who lacks privity to the consumer transaction can only attain DTPA consumer status if the purchaser intended that he acquire the benefit of the transaction.

As in years past, Texas courts have not allowed employees to attain consumer status for transactions their employers consummated.⁹ In *Clark Equipment Co. v. Pitner*,¹⁰ the Houston Court of Appeals reviewed a verdict awarded an employee for \$750,000. In this personal injury case,¹¹ Pitner brought suit against Clark, as designer and manufacturer of the forklift, and Southline, as the distributor, for DTPA violations as well as other claims. At trial, the court entered a judgment for Pitner.¹² Clark appealed the judgment.

In one of the points of error, Clark alleged that the evidence failed to support a finding that Pitner was a consumer for DTPA purposes. The Houston Court of Appeals noted that an employee qualifies as a consumer only if the employer's intended purpose for purchasing or leasing the good, in this instance the forklift, was to benefit the employee.¹³ The court further stated that if the employer's purchase or lease of the good or service was instead intended primarily for the benefit of the employer's business, and only benefits the employee incidentally, then the employee does not qualify as a DTPA consumer.¹⁴ The court reasoned that Pitner's employer had purchased the forklift for the ordinary opera-

purchased the group life insurance policy that formed the basis of his complaint, the supreme court held that he had "acquired" its benefits because his employer, the policy purchaser, intended that it provide him with coverage. *Id.* at 892. Because the plaintiff had acquired the benefits of the policy, the court held that he qualified as a DTPA consumer. *Id.*; see also *Wellborn v. Sears, Roebuck & Co.*, 970 F.2d 1420, 1426-27 (5th Cir. 1992) (holding that the son of a woman who bought a garage door opener for him was a consumer under the DTPA because her intended purpose in purchasing it was to benefit the son).

8. See *Kennedy*, 689 S.W.2d at 892-93.

9. See Eve L. Pouliot, *Deceptive Trade Practices and Consumer Protection Act, Annual Survey of Texas Law*, 49 SMU L. REV. 871, 876-77 (1996) (discussing *Figuroa v. West*, 902 S.W.2d 701 (Tex. App.—El Paso 1995, no writ) and *Nabors Loffland Drilling Co. v. Martinez*, 894 S.W.2d 70 (Tex. App.—San Antonio 1995, writ denied)) [hereinafter Pouliot, 1996 Annual Survey]; Eve L. Pouliot and William Christopher Carmody, *Deceptive Trade Practices Act, Annual Survey of Texas Law*, 48 SMU L. REV. 1113, 1115-16 (1995) (discussing *Brandon v. American Sterilizer Co.*, 880 S.W.2d 488 (Tex. App.—Austin 1994, no writ)) [hereinafter Pouliot & Carmody, 1995 Annual Survey].

10. 923 S.W.2d 117 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

11. As part of her employment, Pitner was driving a forklift. She was driving down a ramp when the forklift failed mechanically. She jumped off the runaway forklift and sustained injuries.

12. *Clark*, 923 S.W.2d at 121.

13. *Id.* at 128 (citing *Kitchener v. T.C. Trailers, Inc.*, 715 F. Supp. 798, 801 (S.D. Tex. 1988), *Brandon*, 880 S.W.2d at 492, and *Lara v. Lile*, 828 S.W.2d 536, 542 (Tex. App.—Corpus Christi 1992, writ denied)).

14. *Id.* (citing *Lara*, 828 S.W.2d at 542). *But cf.* *Lewis & Lambert Metal Contractors, Inc. v. Jackson*, 914 S.W.2d 584, 588 (Tex. App.—Dallas 1994), *vacated*, 938 S.W.2d 716 (Tex. 1997) (The court of appeals held that employees acquired repairs to employer's ventilation system by requesting the repairs and relying on the defendant's representations that the system was repaired and safe. The supreme court vacated the court of appeals judg-

tion of its business, and therefore any benefit Pitner enjoyed was merely incidental.¹⁵ Accordingly, under the intended beneficiary theory Pitner did not qualify as a consumer.¹⁶ The court sustained Clark's point of error and modified the \$750,000 judgment to eliminate treble damages, legal fees and costs that had been awarded pursuant to the DTPA.¹⁷

2. *Step 2: Do the Goods or Services Purchased or Leased Form the Basis of the Plaintiff's DTPA Complaint?*

After the plaintiff meets the first requirement of the *Melody Home* analysis, he must go on to show that the good or service purchased forms the basis of his complaint. Texas courts have developed a narrow view of what constitutes a good or service.¹⁸ Courts require that the good or service the plaintiff complains of is the primary good or service that the consumer sought or acquired in the underlying transaction. The consumer must meet this requirement in order to have a valid DTPA claim.¹⁹

a. *An Authorized Dealership Agreement Did Not Provide a DTPA Service*

In *Fisher Controls International, Inc. v. Gibbons*,²⁰ the court of appeals reviewed whether Gibbons had acquired the actual services he complained of in his petition. Fisher manufactured and distributed valves and instruments. Gibbons acquired Alaska Controls, Inc. (ACI), which was the sales representative for Fisher products in Alaska. Upon acquiring ACI, Gibbons secured a three-year contract with Fisher allowing ACI to continue to be the sales representative of Fisher products. At the end of that three year period, Fisher refused to renew their agreement for sev-

ment without reviewing the merits, and remanded to the trial court for entry of judgment in accordance with the settlement agreement of the parties. *Id.* at 716.).

15. *Clark*, 923 S.W.2d at 128.

16. *Id.*

17. *Id.*

18. The DTPA defines a good as "tangible chattles or real property purchased or leased for use." DTPA § 17.45(1). See *Swenson v. Engelstad*, 626 F.2d 421, 428 (5th Cir. 1980) (holding that stock certificates are not goods); *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 173-75 (Tex. 1980) (holding that an applicant who seeks nothing more than money from a lending institution is not a DTPA consumer because money is not a good); *Hand v. Dean Witter Reynolds Inc.*, 889 S.W.2d 483, 497-98 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (an option contract is not a good); *Johnson v. Walker*, 824 S.W.2d 184, 187 (Tex. App.—Fort Worth 1991, writ denied) (an agreement to become an insurance sales agent is not a good or service, but merely the intangible right to sell defendant's product); *Portland Sav. & Loan Ass'n v. Bevill, Bresler & Schulman Gov't Sec., Inc.*, 619 S.W.2d 241, 245 (Tex. Civ. App.—Corpus Christi 1981, no writ) (certificates of deposit are not goods); *Snyders Smart Shop, Inc. v. Santi, Inc.*, 590 S.W.2d 167, 170 (Tex. Civ. App.—Corpus Christi 1979, no writ) (accounts receivable are not a good); see also Joel W. Reese, Note, "Consumer" Status Under the Deceptive Trade Practices Act Requires a Borrower to Base its Claim on the Underlying Goods or Services: *Central Texas Hardware, Inc. v. First City, Texas-Bryan*, 810 S.W.2d 234 (Tex. App.—Houston [14th Dist.] 1991, writ denied), 23 TEX. TECH. L. REV. 593 (1992).

19. *Texas Cookie Co. v. Hendricks & Peralta*, 747 S.W.2d 873, 876-77 (Tex. App.—Corpus Christi 1988, writ denied).

20. 911 S.W.2d 135 (Tex. App.—Houston [1st Dist.] 1995, writ requested).

eral reasons. Gibbons sued Fisher for fraud and DTPA violations. After a jury trial, the trial court entered a judgment for Gibbons for approximately \$4.62 million.²¹

On appeal, the court reviewed Gibbons' consumer status. The court noted that Gibbons purchased an intangible property right when he entered into the Representative Agreement which allowed ACI to act as Fisher's sales representative.²² The court distinguished Gibbons' Representative Agreement from a "franchise" agreement. One typically associates a franchise agreement with the collateral services contemplated by such an agreement.²³ The court found that any such collateral services Fisher agreed to provide under the Representative Agreement were merely incidental to the transaction and not a primary objective of their agreement.²⁴ Because the court held that the services of which Gibbons complained, the right to renew his agreement with Fisher, was not the primary service sought or acquired by ACI in the underlying Representative Agreement transaction, ACI did not qualify as a consumer under the DTPA.²⁵

b. Money Is Not a Good For DTPA Purposes

In *Maginn v. Norwest Mortgage, Inc.*,²⁶ the Maginns applied for a mortgage loan from Norwest. On May 18, 1993, Norwest informed their real estate agent that the couple's credit report was acceptable, but that final approval of their loan was contingent on a number of different factors. The Maginns claimed that Norwest told them that their loan for more than \$100,000 would be made by the end of June. On June 23, 1993, however, Norwest informed the couple's real estate agent that their loan had been declined.

The couple brought suit against Norwest on a variety of claims, including DTPA violations. The trial court, however, granted summary judgment on their DTPA claim because the couple did not qualify as a DTPA consumer.²⁷ The Maginns appealed, alleging that they were consumers because of the various banking services they sought ancillary to their loan application.²⁸

To support their ancillary services argument, the couple relied on *Herndon v. First National Bank of Tulia*.²⁹ In *Herndon*, the loan appli-

21. *Id.* at 137.

22. *Id.* at 139. "The purchaser of such an intangible business right is usually not a 'consumer' under the DTPA, unless qualifying 'collateral services' are an *objective of the transaction* and not merely incidental to the purchase." *Id.* (citing *Texas Cookie Co.*, 747 S.W.2d at 876-77) (emphasis added). "In other words, the goods or services acquired must form the basis of the DTPA claim." *Id.* (citing *Cameron*, 618 S.W.2d at 539).

23. *Id.*

24. *Id.*

25. *Id.*

26. 919 S.W.2d 164 (Tex. App.—Austin 1996, no writ).

27. *Id.* at 165.

28. *Id.* at 166.

29. 802 S.W.2d 396 (Tex. App.—Amarillo 1991, writ denied).

cant claimed to have sought a number of financial services from the lender, such as advice on when, where, and whether to obtain financing, as well as how to structure any such financing. The *Herndon* court concluded that the bank's financial advice constituted services for DTPA purposes.³⁰

Because a loan is not normally considered a good or service for DTPA purposes,³¹ the Austin Court of Appeals had to determine whether Norwest's actions in evaluating the couple's credit history and assisting in the closing of the home's sale constituted "services" as contemplated by the DTPA.³² The court had previously determined that "the key principle in determining consumer status is that the goods or services purchased must be an *objective* of the transaction, not merely incidental to it."³³ The court then drew a distinction between this case and the *Herndon* case.

The *Maginn* court found that financial advice on when, where, and whether to borrow for business operation and how to structure any such financing is not typically incidental to a loan, but more likely an independent objective of any loan.³⁴ In the case at bar, however, the court determined that the ancillary services acquired by the Maginns served no purpose other than to facilitate the loan process.³⁵ Norwest's services were merely incidental to the loan and did not form the basis of the underlying consumer transaction. Thus, the couple did not qualify as DTPA consumers, and the court of appeals affirmed the trial court's summary judgment on the DTPA claim.³⁶

B. PROPER DEFENDANT—THE SELLER/LESSOR

1. *An Upstream Supplier is Not a Proper Defendant Unless It Made the Alleged Misrepresentations in Connection With the Consumer Transaction*

Once again, the Texas Supreme Court denied indirect purchasers a DTPA remedy.³⁷ Last year, the supreme court held that indirect purchasers could not use the DTPA as an end run around the antitrust laws.³⁸ This year it held that an indirect purchaser cannot reach up into the chain of production and sue entities who never made any representations directly to him.³⁹

30. *Id.* at 399.

31. *Riverside Nat'l Bank*, 603 S.W.2d at 174-75.

32. *Maginn*, 919 S.W.2d at 166.

33. *Id.* (citing *First State Bank v. Keilman*, 851 S.W.2d 914, 929 (Tex. App.—Austin 1993, writ denied) (emphasis in original)).

34. *Maginn*, 919 S.W.2d at 167.

35. *Id.*

36. *Id.*

37. See Pouliot & Carmody, *1995 Annual Survey*, *supra* note 9, at 1119-21 (discussing cases involving indirect purchaser arguments).

38. *Abbott Lab., Inc. v. Segura*, 907 S.W.2d 503, 505-07 (Tex. 1995); see also Pouliot, *1996 Annual Survey*, *supra* note 9, at 879-81 (discussing *Segura* decision).

39. *Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996).

In *Amstadt*, the supreme court reviewed three cases brought by homeowners against the manufacturers and suppliers of polybutylene plumbing systems for negligence and violations of the DTPA.⁴⁰ In each case the court of appeals had held that United States Brass Corporation and the other defendants could be held liable for DTPA violations concerning their polybutylene plumbing systems. The court of appeals had determined that a link existed between the representations made about the systems and the use of the systems in the plaintiffs' homes—the defendants were “inextricably intertwined” with the homebuilders.⁴¹ Noting that the Legislature created the DTPA to protect consumers in their transactions and to encourage them to litigate claims that otherwise would not be economically feasible, the Texas Supreme Court clarified that the defendant's alleged misrepresentations must have occurred in connection with a consumer transaction.⁴² Because none of the defendant's alleged misconduct occurred in connection with a consumer transaction—the homeowner's purchase of a home, the court reversed the court of appeals, keeping in line with its new trend towards limiting the ever-expanding DTPA.⁴³

In *State Industries v. Corbitt*,⁴⁴ a homeowner sued the manufacturers of both his water heater and drain valve for damage caused by the valve's failure. At trial, the jury found in favor of the homeowner, Mr. Corbitt.⁴⁵

40. *Knowlton v. United States Brass Corp.*, 864 S.W.2d 585 (Tex. App.—Houston [1st Dist.] 1993), *rev'd sub nom.*, *Amstadt v. United States Brass Corp.*, 919 S.W.2d 644 (Tex. 1996); *Barrett v. United States Brass Corp.*, 864 S.W.2d 606 (Tex. App.—Houston [1st Dist.] 1993), *rev'd sub nom.*, *Amstadt v. United States Brass Corp.*, 919 S.W.2d 644 (Tex. 1996); *United States Brass Corp. v. Andraus*, No. 01-89-00614-CV (Tex. App.—Houston [1st Dist.] Aug. 19, 1993) (not designated for publication) 1993 WL 313208, *rev'd sub nom.*, *Amstadt v. United States Brass Corp.*, 919 S.W.2d 644 (Tex. 1996).

41. *Andraus*, 1993 WL 313208 at *7; *Barrett*, 864 S.W.2d at 621; *Knowlton*, 864 S.W.2d at 594. The concept of “inextricably intertwined” or “tie-in” relationships originated in cases attempting to hold lenders liable for DTPA violations. See *Qantel Business Sys., Inc. v. Custom Controls Co.*, 761 S.W.2d 302, 305 (Tex. 1988) (explaining that a “tie-in” or “inextricably intertwining” between seller and lender may cause plaintiff to be a consumer with respect to both the financing company and the seller of the goods). The theories focus on the fact that both the lender and the seller benefit from the underlying transaction.

42. *Amstadt*, 919 S.W.2d at 649 (citing *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535 (Tex. 1981)) (The Act is designed to protect consumers from any deceptive trade practices made in connection with the purchase or lease of any goods or services) (emphasis in original). The court stated that “[w]hile our words have varied, the concept has been consistent: the defendant's deceptive trade act or practice is not actionable under the DTPA unless it was committed in connection with the plaintiff's transaction in [purchasing/leasing] goods or services.” *Id.* at 650 (emphasis in original).

43. *Id.* at 650-52. The court went on to note the homeowners still had a DTPA cause of action against the seller of their homes, General Homes, and that General Homes had an action for contribution and indemnity against the defendants. *Id.* at 652 (citing DTPA § 17.555). Therefore, it concluded that the Legislature intended for consumers to have recourse under the DTPA against those with whom they have engaged in a consumer transaction; then to the extent that liability attaches upstream in the chain of supply, the seller may seek contribution or indemnity from them. *Id.* This decision allows the consumer immediate relief against the seller while limiting the expansive reach of the DTPA, and is in keeping with the efforts to restore the DTPA back to its original purpose—to provide a remedy for the wronged small consumer.

44. 925 S.W.2d 304 (Tex. App.—Houston [1st Dist.] 1996, no writ).

45. *Id.* at 306.

The manufacturers appealed. Having recently been overruled on this point, the Houston Court of Appeals found that the manufacturers were upstream suppliers whose alleged misconduct did not occur in connection with Mr. Corbitt's purchase of his home, and reversed the portion of the judgment awarded for DTPA violations.⁴⁶

2. *A Proper Defendant Must Have Received Benefits From the Underlying Consumer Transaction*

While a plaintiff may be able to establish "consumer" status with regard to a transaction, he cannot necessarily "sue anyone when the deal goes bad."⁴⁷ The defendant must have sought to enjoy the benefits of the transaction.⁴⁸ In *English*, the plaintiff failed to establish that the bank sought to enjoy any benefits from his purchase of cattle because the evidence established that the seller had merely listed the bank as a reference.⁴⁹ Because the bank had not sought any benefits from the cattle purchase transaction, the court affirmed the propriety of the trial court's summary judgment dismissing English's DTPA claims.⁵⁰

III. ACTIONABLE CONDUCT UNDER THE DTPA

A. DTPA ACTION OR BREACH OF CONTRACT

1. *Breach of Contract or a False, Misleading or Deceptive Act?*

During the Survey period, the Texas Supreme Court clarified the distinction between a breach of contract and a false, misleading or deceptive act or practice under the DTPA. In *Crawford v. Ace Sign, Inc.*,⁵¹ a Yellow Pages representative made certain promises to the president of Ace Sign during its negotiations to renew the company's advertisement. Crawford, the representative, told Ace Sign's president that if he paid in full now, the company's advertisement would appear in the 1989-90 directory. While Ace Sign paid in full, the advertisement did not appear in the 1989-90 directory. Ace Sign sued Crawford and Southwestern Bell not only for breach of contract and negligence, but also for violations of the DTPA.⁵²

On appeal, Crawford and Southwestern Bell claimed that Ace Sign only had a claim for breach of contract and not for DTPA violations. In deciding whether the plaintiff's claim amounts to just a breach of con-

46. *Id.* at 311 (citing *Amstadt*, 919 S.W.2d at 646, 648).

47. *English v. Union State Bank*, 911 S.W.2d 829, 834 (Tex. App.—Corpus Christi 1995) (emphasis in original), *rev'd*, 40 Tex. Sup. Ct. J. 234, 1997 WL 7275 (Tex. Jan. 10, 1997) (not released for publication). The supreme court determined that the court of appeals did not have jurisdiction to hear the appeal. Thus, it dismissed the appeal, making the trial court's judgment final.

48. *Id.* (citing *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 707 (Tex. 1983)).

49. *Id.*

50. *Id.*

51. 917 S.W.2d 12 (Tex. 1996).

52. *Id.* at 13.

tract, a court must decide whether: (1) the claim is for breach of duty created solely by the contract rather than a duty otherwise imposed by law; and (2) the injury is only the economic loss to the subject matter of the contract itself.⁵³ On review, the supreme court held that Crawford's statements "were nothing more than representations that the defendants would fulfill their contractual duty to publish, and the breach of that duty sounds only in contract."⁵⁴ Accordingly, Ace Sign failed to establish a DTPA claim.

2. Breach of Contract or Breach of an Express Warranty?

During the Survey period, the Houston Court of Appeals reviewed whether the facts presented in *Humble National Bank v. DCV, Inc.*,⁵⁵ arose to a breach of warranty or a breach of contract. DCV banked with Humble National Bank. In 1988, DCV's bookkeeper, John Bingman, began stealing from the company. He would prepare DCV checks payable to the Humble National Bank, bring the checks to the bank, and have the bank exchange them for cashier's checks payable to ABCA, Inc., a company created by Bingman. When DCV discovered the embezzlement scheme, it filed suit against the bank for its alleged participation in the scheme. DCV sued the bank for breach of contract, conversion, negligence, and violations of the DTPA.⁵⁶ The trial court entered judgment for DCV based on the jury's finding that the bank breached an express warranty under the DTPA.⁵⁷ The bank appealed.

The DTPA neither contains warranties nor defines the term.⁵⁸ A warranty must be established independent of the DTPA.⁵⁹ One establishes that an express warranty existed if he can prove that the "seller ma[de] an affirmation of fact or a promise to the purchaser, which [was] relate[d] to the sale and warrant[ed] a conformity to the affirmation as promised."⁶⁰ Accordingly, the court first had to determine whether the bank made any express warranties to DCV.

DCV's argument relied on the language of the bank's policy regarding resolutions. A resolution gives authority to an individual to act on behalf of the corporation in its transactions with the bank. Because Bingman did not have authority to act on its behalf, DCV alleged that the bank had failed to honor its resolution policy. DCV alleged that the language used in the policy created an express warranty. The court analyzed the language and determined that it "merely referred to the basis upon which

53. *Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494-95 (Tex. 1991).

54. *Crawford*, 917 S.W.2d at 14.

55. 933 S.W.2d 224 (Tex. App.—Houston [14th Dist.] 1996, n.w.h.).

56. *Id.* at 228.

57. *Id.*

58. *Enterprise-Laredo Assoc. v. Hachar's Inc.*, 839 S.W.2d 822, 830 (Tex. App.—San Antonio) (citing *La Sara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558, 565 (Tex. 1984)), writ denied *per curiam*, 843 S.W.2d 476 (1992).

59. *Id.*

60. *Id.* (citing *McCrea v. Cubilla Condominium Corp. N.V.*, 685 S.W.2d 755, 757 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

the Bank agreed to determine who was authorized to act on the company's behalf."⁶¹ As such, the court held that the contract created the duty to honor the company's resolution, and that the Humble National Bank's failure to honor the resolution caused DCV only economic damages.⁶² Accordingly, it held that DCV's cause of action stemmed from breach of contract and not from breach of an express warranty, which would have given rise to a DTPA claim.⁶³

IV. PRODUCING CAUSE

In order to recover damages under the DTPA, the consumer must prove that the defendant's conduct was the producing cause of his damage.⁶⁴ A producing cause is "an efficient, exciting or contributing cause, which in a natural sequence, produced injuries or damages."⁶⁵ While the law does not require reliance or foreseeability,⁶⁶ some causal connection must exist between the deceptive act and the damage suffered.⁶⁷ A producing cause is a substantial factor which brings about an injury and without which the injury would not have occurred.⁶⁸

A. CRIMINAL CONDUCT IS A SUPERSEDING CAUSE OF DAMAGE

In *Wheaton Van Lines v. Mason*, the Fort Worth Court of Appeals reviewed a \$1.3 million judgment to determine if Wheaton Van Lines' (Wheaton) involvement was the producing cause of Mason's damage.⁶⁹ In *Wheaton*, Mason moved from one apartment to another within the same complex. Aware of Wheaton's reputation as a national company, he looked in the Yellow Pages until he found their name. However, Absolute De-Lux, a local moving company, paid for and placed the advertisement Mason found. Absolute De-Lux had an agency contract with Wheaton which allowed it to take orders for *interstate* moves on behalf of Wheaton and perform *intrastate* and local moves itself. Since Mason's move was local, Absolute De-Lux and its employees performed his move.

After the move, Mason discovered that a box of musical compact discs (box of CDs) was missing. He notified Absolute De-Lux. Absolute De-Lux performed an investigation and found that two of its employees had seen another employee, Michael Mullinax, with the box of CDs shortly after the move. The next time Mullinax contacted Absolute De-Lux he was in jail in another city on unrelated charges. He merely called to ask

61. DCV, 933 S.W.2d at 234 (citing *Enterprise-Laredo*, 839 S.W.2d at 831).

62. *Id.*

63. *Id.*

64. *Weitzel v. Barnes*, 691 S.W.2d 598, 600 (Tex. 1985).

65. *Rourke v. Garza*, 530 S.W.2d 794, 801 (Tex. 1975). There can, however, be more than one producing cause of damages. *Id.*

66. *See Allied Towing Serv. v. Mitchell*, 833 S.W.2d 577, 582 (Tex. App.—Dallas 1992, no writ).

67. *Weitzel*, 691 S.W.2d at 602-03.

68. *Boys Clubs*, 907 S.W.2d at 478.

69. 925 S.W.2d 722 (Tex. App.—Fort Worth 1996, writ denied).

that his paycheck be sent to his wife. While Absolute De-Lux agreed to send the check to his wife, they also told him that they wanted the box of CDs returned and that this check would be his last because they were firing him for theft of Mason's box of CDs.

Approximately one week later, Mullinax pounded on the door of Mason's new apartment. As Mason desperately called 911, Mullinax broke down the door and attacked him with a butcher knife. Mullinax cursed Mason for accusing him of stealing the box of CDs. Mason had left the phone off the hook so that 911 could trace and record his call. When the police arrived they arrested Mullinax, who was later convicted of attempted murder. Mason sued Absolute De-Lux and Wheaton for the attack, alleging negligent hiring and violations of the DTPA. The trial court entered judgment for Mason on the basis of his DTPA claims.⁷⁰

On appeal, Wheaton claimed that the evidence was insufficient to support the jury's finding that its alleged false, misleading and deceptive act was the producing cause of Mason's injuries. Noting that "[a]t some point in the causal chain, the defendant's conduct may be too remotely connected with the plaintiff's injury to constitute legal causation,"⁷¹ the court analyzed whether Wheaton's involvement was too attenuated of a connection. The court held that "the criminal act of Michael Mullinax exacting his vicious revenge on Mason seven days after being terminated from Absolute De-Lux and eleven days after moving Mason was an intervening cause sufficient to break the chain of causation between Wheaton's misrepresentations, if any, and Mason's personal injuries."⁷²

In *Cianfichi v. White House Motor Hotel*,⁷³ the wife of a hotel guest who was murdered while staying at the hotel sued the hotel for negligence and DTPA violations. In *Cianfichi*, Mr. Cianfichi checked into the White House Hotel. He left the hotel and walked to the nearby Astrodome to watch a baseball game. The next morning, as he was getting ready to leave the hotel, he was shot by two unidentified gunmen. He crawled to the phone in his room and called the front desk for help. The clerk called 911. An ambulance brought Mr. Cianfichi to the hospital, but he died in surgery. His wife sued the hotel for DTPA violations, alleging that the signs which the hotel had posted on the premises misrepresented the adequacy of its security services.⁷⁴

The evidence showed that Mr. Cianfichi was a long-haul trucker who traveled often. While the evidence did not establish that he saw the security signs, it did show that he liked to stay at the White House Hotel because of its proximity to the ballpark. In fact, he had stayed at the hotel

70. *Id.* at 726.

71. *Id.* at 728.

72. *Id.* at 729. Noting the similarities between the *Boys Clubs* case and the one at bar, the court also stated that Wheaton's involvement may have furnished "an attenuated condition that made the injury possible;" however, Mullinax's actions were a superseding cause of the damage. *Id.*

73. 921 S.W.2d 441 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

74. *Id.* at 442.

six or seven times prior to the hotel's posting of the signs and installation of its security cameras. Accordingly, the court found that the evidence failed to support a finding that the signs were a substantial factor in bringing about Mr. Cianfichi's death.⁷⁵ Because the signs were not found to be a producing cause of his death, the court of appeals affirmed the trial court's refusal to submit jury questions on the DTPA.⁷⁶

V. PREEMPTION

The Texas Supreme Court reviewed the issue of preemption in *Redman Homes, Inc. v. Ivys*.⁷⁷ In *Redman Homes*, the Ivys' brought suit against Redman when an electrical fire destroyed the Redman mobile home that they had purchased. Redman provided its customers with a written limited warranty covering the home's plumbing, heating, and electrical system as well as pre-installed appliances for one year. Because the fire occurred within the Ivys' first year of ownership, they brought suit. A jury found against Redman on the Ivys' claims of negligence and DTPA violations.⁷⁸ Redman appealed, alleging that the National Manufactured Home Construction and Safety Standards Act (NMHCSSA) preempted the couple's state law claims.⁷⁹ The court of appeals rejected this argument, and the supreme court reviewed this decision.⁸⁰

The NMHCSSA requires a mobile home manufacturer to obtain a certificate of compliance, which certifies that the home complies with the federal standards promulgated by the Department of Housing and Urban Development. The manufacturer must obtain this certificate before it can transport or sell the mobile home. Redman contended that because the Ivys' mobile home possessed a certificate of compliance and because the NMHCSSA preempts state law claims, the Ivys could not obtain a judgment under state law. The court evaluated the NMHCSSA's specific preemption clause to determine whether it indeed preempted the Ivys' state law claims.⁸¹

Because the Ivys' claim did not allege that Redman should have adhered to a higher standard than that imposed by Federal law, the court stated that the "plain language of the NMHCSSA does not sustain

75. *Id.* at 444 (citing *Boys Clubs*, 907 S.W.2d at 481).

76. *Id.* "Like the plaintiffs in *Boys Clubs*, Mr. Cianfichi's relationship with the hotel developed independently from the alleged misrepresentation." *Id.*

77. 920 S.W.2d 664 (Tex. 1996).

78. *Id.* at 666.

79. *Id.*

80. *Id.*

81. *Id.* The NMHCSSA contains the following express preemption clause:

Whenever a Federal manufactured home construction and safety standard established under this [chapter] is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

42 U.S.C.S. § 5403(d) (Law. Co-op. 1989 & Supp. 1996).

Redman's position."⁸² Further, the NMHCSSA contains a savings clause which preserves common-law causes of action.⁸³ Finally, the Texas Supreme Court held that "the Ivys' claims do not frustrate Congress's intent in enacting the NMHCSSA, which was to improve quality and to reduce personal injuries and property damage resulting from accidents involving mobile homes."⁸⁴ Accordingly, the supreme court affirmed the court of appeals rejection of Redman's preemption argument.⁸⁵

In *Worthy v. Collagen Corp.*,⁸⁶ the Dallas Court of Appeals reviewed a similar issue. Worthy underwent plastic surgery where the doctor injected her with a cosmetic device known as Zyderm. Collagen manufactures Zyderm, which is a collagen implant material. Complaining that she suffered damage from the injection, Worthy filed suit against Collagen. The trial court awarded Collagen summary judgment, agreeing that the Medical Device Act (MDA) preempted Worthy's claims.⁸⁷

On appeal, the Dallas Court of Appeals addressed whether the MDA preempted Worthy's claims, a question of first impression in Texas.⁸⁸ The MDA contains a specific preemption clause.⁸⁹ Worthy claimed that Zyderm was not safe and fit for the ordinary purpose of its intended use and therefore, Collagen, its manufacturer, had misrepresented its product in violation of the DTPA. Because her claims sought to require Collagen to either meet a requirement different from or in addition to the premarket approval requirements imposed by the MDA, the court held that her claims fell under those meant to be preempted by section 360k(a) of the MDA.⁹⁰ Accordingly, the court of appeals affirmed the trial court's summary judgment on this issue.⁹¹

VI. WAIVER

The Tyler Court of Appeals reviewed the waiver issue as it relates to

82. *Redman Homes*, 920 S.W.2d at 666.

83. *Id.* at 667 (citing 42 U.S.C. § 5409(c)) (stating that "[c]ompliance with any Federal manufactured home construction or safety standard issued under this [chapter] does not exempt any person from any liability under common law)."

84. *Id.* (citing 42 U.S.C. § 5401).

85. *Id.* at 666-67.

86. 921 S.W.2d 711 (Tex. App.—Dallas 1995, writ granted).

87. *Id.* at 713.

88. *Id.* at 715.

89. 21 U.S.C.S. § 360k(a) (Law Co-op. 1984 & Supp. 1996). The section provides that absent the grant of an exemption,

no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—

(1) which is different from, or in addition to, any requirement applicable under this [chapter] to the device, and

(2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this [chapter].

Id.

90. *Worthy*, 921 S.W.2d at 717.

91. *Id.*

DTPA claims.⁹² G. Richard Goins Construction Company (GCC) purchased an undeveloped lot in a planned residential community called the Pinnacle Club from S.B. McLaughlin Associates (SBMA). SBMA was the owner and primary developer of the Pinnacle Club. When SBMA failed to develop the Pinnacle Club as expected, GCC filed suit against it, alleging DTPA violations.⁹³

While the jury found that SBMA had violated the DTPA causing GCC \$174,000 in actual damages, it also found that GCC either waived its right to recover under the DTPA and/or brought suit after the statute of limitations had expired.⁹⁴ As a result, the trial court entered a take nothing judgment. GCC appealed.⁹⁵

GCC argued that it could not have waived its DTPA cause of action. Under the applicable provision, a consumer's waiver is generally contrary to public policy, and therefore, void and unenforceable.⁹⁶ Accordingly, the court of appeals sustained GCC's point of error on the waiver issue.⁹⁷ However, because the court found merit in SBMA's defense of limitations, it affirmed the trial court's judgment.⁹⁸

The issue of waiver also arose in the Houston Court of Appeals.⁹⁹ In *Rosen*, the plaintiff Richard Rosen participated in an amateur drag race. During the race, his car flipped over and burst into flames. Rosen sued both the National Hot Rod Association and the Houston Raceway Park, alleging negligence, gross negligence and DTPA violations.¹⁰⁰ The defendants moved for summary judgment on all of Rosen's claims because he had executed a release and indemnity agreement before participating in the race.¹⁰¹ The trial court granted summary judgment, and Rosen appealed.¹⁰²

92. *G. Richard Goins Constr. Co. v. S.B. McLaughlin Assocs., Inc.*, 930 S.W.2d 124 (Tex. App.—Tyler 1996, writ denied).

93. *Id.* at 126.

94. *Id.* at 126-27.

95. *Id.* at 127.

96. DTPA § 17.42. "This anti-waiver provision of the DTPA applies to both waiver occurring during a transaction and post-transaction waiver by conduct." *G. Richard Goins Constr.*, 930 S.W.2d at 127 (citing *Poe v. Hutchins*, 737 S.W.2d 574, 580 (Tex. App.—Dallas 1987, writ ref'd n.r.e.)). Note however, that the outcome may have been different under the amended DTPA provision, which allows a consumer to waive its DTPA rights under specified conditions. DTPA § 17.42. A consumer can now execute a valid waiver of its DTPA rights, as long as the waiver meets the following requirements: (1) it is in writing; (2) the consumer signed it; (3) the consumer was not in a significantly disparate bargaining position; and (4) legal counsel represented the consumer in the transaction in question. DTPA § 17.42(a)(1-3). While the facts do not reveal whether a written waiver existed in this case or whether legal counsel represented GCC in the transaction, the GCC/SBMA transaction occurred prior to the 1996 amendment. Thus, the amended provision is inapplicable.

97. *G. Richard Goins Constr.*, 930 S.W.2d at 127.

98. *Id.* at 127-29.

99. *Rosen v. National Hot Rod Ass'n*, No. 14-94-00775-CV (Tex. App.—Houston [14th Dist.] Dec. 21, 1995, writ denied) (not designated for publication), 1995 WL 755712.

100. *Id.* at *1.

101. *Id.*

102. *Id.*

While Rosen correctly contended that his DTPA claim was not subject to the defense of waiver, he never raised this defense in the trial court. Because the court of appeals found that the Defendants' Motion for Summary Judgment encompassed all of Rosen's claims, including the DTPA, it held that he erred in failing to raise this issue in his Response to Defendants' Motion for Summary Judgment.¹⁰³ Accordingly, the court affirmed the trial court's judgment.¹⁰⁴

VII. CONCLUSION

During the Survey period, courts once again heard several DTPA claims. In *Amstadt*,¹⁰⁵ the Supreme Court of Texas stood firm in its refusal to acknowledge an indirect purchaser as a DTPA consumer. This decision falls right in step with the current trend of both the courts and the legislature toward limiting the expansive reach of the DTPA. Accordingly, one should anticipate such narrowing interpretations of the statute in the year to come.

103. *Id.* at *3.

104. *Id.* The moral of this story is age old and timeless: Always assert every possible argument into a response to a motion for summary judgment that may be applicable.

105. 907 S.W.2d at 503; see *supra* notes 39-43 and accompanying text.

