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Deceptive Trade Practices-Consumer Protection Act

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DECEPTIVE TRADE PRACTICES–CONSUMER PROTECTION ACT

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I. INTRODUCTION

The Texas Deceptive Trade Practices–Consumer Protection Act (DTPA)[1] 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."[2] In the twenty-four years since the statute was enacted, the DTPA has been repeatedly amended by the Texas Legislature, which has variously sought to limit or expand the scope of consumer remedies. The latest revisions to the DTPA, enacted in 1995 by the 74th Texas Legislature, govern all causes of action accruing

1. TEX. BUS. & COM. CODE ANN. §§ 17.41 et seq. (Vernon 1994 & Supp. 1998) [hereinafter DTPA].
2. *Id.* § 17.44(a).

on or after September 1, 1995, and all causes of action, regardless of when they accrued, filed on or after September 1, 1996.[3] The 1995 amendments introduced new restrictions on the types of commercial conduct that may form the basis of a DTPA claim, especially in disputes between businesses and disputes involving the rendition of professional advice. The 1995 amendments also seek to exclude personal injury claims from the reach of the DTPA. Additionally, recent amendments to the Texas Civil Practice and Remedies Code significantly alter the rules governing contribution and proportionate responsibility in DTPA cases.[4]

This Survey examines judicial and legislative developments involving the DTPA from October 1, 1996, through September 30, 1997. The significant decisions during the Survey period involve consumer status, preemption, contractual privity, the proper measure of damages and defenses to DTPA claims.

II. APPLICATION OF THE 1995 AMENDMENTS TO THE DTPA

The 1995 amendments became effective on September 30, 1996.[5] During the Survey period, no federal cases, and only five Texas cases, were found that discussed the 1995 amendments.[6] Of those, only two, *America Online, Inc. v. Williams*[7] and *Stewart Title Guaranty Co. v. Aiello*[8] addressed substantive issues involving the 1995 amendments. The *America Online* and *Stewart Title* decisions are discussed in sections VII(C)(4)(b) and VII(B), respectively.

III. CONSUMER STATUS

A. INTRODUCTION

One of the most frequently contested issues in DTPA litigation is the plaintiff's status as a consumer. In order to recover under the DTPA, a

3. *See id.* § 17.42 historical note (Vernon Supp. 1998) [Act of May 19, 1995, 74th Leg., R.S., ch. 414, § 20(b), 1995 Tex. Gen. Laws 3004.

4. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.002(d) (Vernon Supp. 1998).

5. *See, e.g.*, DTPA § 17.42 (waiver); § 17.44 (construction of the DTPA); § 17.45(5) (unconscionable conduct); § 17.45(9) (definition of "knowing conduct"); § 17.46(b) (changes to the "laundry list"); § 17.49 (changes affecting, among other things, treatment of claims regarding professional services, personal injuries and written contracts and placing a limit of the cap on damages per transaction), § 17.50(b)(1) (actual damages and limitation on damages); § 17.50(c) (groundless and bad faith claims); § 17.505 (abatement, mediation and settlement), and § 17.56 (venue). *See generally* Eve L. Pouliot, *Deceptive Trade Practices and Consumer Protection Act*, 50 SMU L. REV. 1085 (1997) (discussing legislative changes).

6. *See* Stewart Title Guar. Co. v. Aiello, 941 S.W.2d 68, 74 (Tex. 1997) (noting, while not applying, limitation of article 21.21 of the Insurance Code by 1995 amendments); Bekins Moving & Storage v. Williams, 947 S.W.2d 568, 578 (Tex. App.—Texarkana 1997, n.w.h.) (only noting amendment to DTPA § 17.50(a)(1)); America Online, Inc. v. Williams, 958 S.W.2d 268 (Tex. App.—Houston [14th Dist.] 1997, no pet. h.) (discussing mandatory abatement provisions); Kessler v. Fanning, 953 S.W.2d 515 (Tex. App.—Fort Worth 1997, no pet. h.) (noting change to § 17.50 requiring consumer to prove reliance to his detriment).

7. 958 S.W.2d 268 (Tex. App.—Houston [14th Dist.] 1997, no pet. h.).

8. 941 S.W.2d 68 (Tex. 1997).

plaintiff must establish that he is a "consumer" as that term is defined in the statute.[9] To qualify as a consumer, the plaintiff must be an individual who seeks or acquires, by purchase or lease, goods or services and those goods or services must form the basis of the complaint.[10] Whether a plaintiff is a DTPA consumer is a question of law.[11]

B. The Consumer's Relationship to the Transaction

In *Arthur Andersen & Co. v. Perry Equipment Corp.*,[12] the Texas Supreme Court was asked to decide whether the request by a prospective purchaser of a company to have an independent auditor review the company's financial records would entitle that purchaser to consumer status.[13] The Court found that "[i]n determining whether a plaintiff is a consumer, our focus is on the plaintiff's relationship to the transaction."[14] While the plaintiff in *Arthur Andersen* did not pay for or lease the financial services it sought, the Court, reaffirming its holding in *Kennedy v. Sale*,[15] found that "the DTPA does not require the consumer to be an actual purchaser or lessor of the goods or services, as long as the consumer is the *beneficiary* of those goods or services."[16] In so holding, the Court limited the scope of its decision to situations in which the services were specifically required by the person claiming consumer status and intended to benefit that person.[17] The Court confirmed that a proper analysis of consumer status should focus on whether "the purchased goods or services are an objective of the transaction or merely incidental to it."[18]

C. Does the Transaction Involve Goods or Services?

An additional issue when determining consumer status under the DTPA is whether the plaintiff sought or acquired "by purchase or lease, any goods or services. . . ."[19] During the Survey period several cases turned on whether the plaintiff had sought or acquired a good or service in the transaction giving rise to the dispute.

In *Sells v. Six Flags Over Texas, Inc.*,[20] the plaintiffs' claim focused on the location of a gusset on which customers stepped when they exited the

9. *See* DTPA § 17.41.
10. *See id.* § 17.45(4).
11. *See* Hedley Feedlot, Inc. v. Weatherly Trust, 855 S.W.2d 826, 831 (Tex. App.—Amarillo 1993, writ denied).
12. 945 S.W.2d 812 (Tex. 1997).
13. *See id.* at 815.
14. *Id.* (citing Amstadt v. United States Brass Corp., 919 S.W.2d 644, 650 (Tex. 1996)).
15. 689 S.W.2d 890 (Tex. 1985).
16. *Arthur Andersen*, 945 S.W.2d at 815 (emphasis added) (citing Kennedy v. Sale, 689 S.W.2d 890 (Tex. 1985)).
17. *See Arthur Andersen*, 945 S.W.2d at 815.
18. *Id.* (quoting Hand v. Dean Witter Reynolds, Inc., 889 S.W.2d 483, 500 (Tex. App.—Houston [14th Dist.] 1994, writ denied)).
19. DTPA § 17.41.
20. No. CIV. A. 3:96-CV-1574-D, 1997 WL 527320, at *4-5 (N.D. Tex. Aug. 14, 1997).

"Barnstormer" airplane ride at the Six Flags Over Texas amusement park. Six Flags maintained that the plaintiffs did not qualify as DTPA "consumers" because they "did not seek or acquire, by purchase or lease, any goods or services" and because admission to the amusement park constitutes only a revocable license to enter the park. In finding that the plaintiffs were consumers, the court observed that "although the operator is not obligated to perform a service, once it does so, its conduct is subject to the DTPA."[21] While the ticket purchased by the plaintiffs was, under Texas law, a revocable license which did not require the park to undertake the provision of any particular service, the park was obligated to provide advertised attractions and was required to fulfill the representations made to its customers.[22] According to the court, Six Flags' argument failed "to account for the DTPA definition of 'consumer,' which is not necessarily coterminous with other principles of Texas law that govern statutory, contractual, or common law rights of parties."[23] The plaintiffs acquired consumer status by purchasing a ticket entitling them to receive the park's services, which necessarily included the ride that allegedly caused the plaintiffs' injuries[24] The court further noted that "when 'consumer' status is in doubt, the DTPA and the definition of a 'consumer' should be liberally construed to promote the underlying purpose of consumer protection."[25]

Finally, answering Six Flags' argument that conferring consumer status on the plaintiffs in this case could, in an analogous situation, make theater owners liable to their patrons should a movie advertisement fail to warn consumers or mislead them about the content of a movie, the court noted that "it is not proper to analyze the merits of a plaintiff's claim in terms of whether he is a 'consumer.' 'Consumer' status is an ineluctable element of a DTPA claim, but it does not alone confer a right of recovery on one who enjoys such status."[26]

In *Garza v. Bancorp Group*,[27] plaintiffs alleged that misrepresentations were made regarding options to purchase that were to have been included in equipment leases. The misrepresentations were claimed to be in violation of the Federal Fair Debt Collection Practices Act (FDCPA),[28] the Texas Debt Collection Practices Act (TDCPA),[29] and several provi-

21. *Id.* at *4-5.

22. *See id.* at *5.

23. *Id.*

24. *See id.*

25. *Id.* (citing Galveston County Fair & Rodeo, Inc. v. Kauffman, 910 S.W.2d 129, 137 (Tex. App.—El Paso 1995, writ denied)). *See also* Bussee v. Pacific Cattle Feeding Fund # 1, Ltd., 896 S.W.2d 807, 813 (Tex. App.—Texarkana 1995, writ denied).

26. *Sells*, 1997 WL 527320, at *5.

27. 955 F. Supp. 68 (S.D. Tex. 1996).

28. 15 U.S.C.A. § 1692, et seq. (West 1982 & Supp. 1996).

29. TEX. REV. CIV. STAT. ANN. art. 5069-11.01-.12 (Vernon 1987 & Supp. 1997), *repealed by* Act of May 24, 1997, 75th Leg., R.S., ch. 1008, § 6(a), 1997 Tex. Sess. Law Serv. 3601.

sions of the DTPA.[30] The leases were for the use of security equipment, cameras and recorders that were to be placed in two commercial stores in Laredo.[31] The leases, in fact, did not contain purchase options for the equipment.[32] The plaintiffs, however, alleged that the misrepresentations were made by the prior owner of the equipment, who later sold it along with the plaintiffs' lease to the defendant.[33] The court found that because the equipment was purchased for use in commercial establishments, and not for "personal, family, household or agricultural use" as required by section 17.46(b)(22) of the DTPA.[34] The court requested further briefing on other DTPA claims against the defendant to specifically address the issue of whether "invocation of the DTPA [can] overcome the express written language that the lease agreement controls over any prior oral representations or agreements."[35]

D. INTANGIBLE ITEMS

Intangibles have long been the subject of DTPA claims.[36] Recovery under the DTPA is not allowed for transactions that involve wholly intangible rights, such as accounts receivable or cash, when the intangibles are not obtained in association with actionable collateral services.[37] Generally, where the transaction that is the basis of the claim is not a "good," plaintiffs have tried to make the "service" associated with the provision of the intangible the basis of the actionable conduct.[38]

A recent example is *Clary Corp. v. Smith*,[39] which involved the issue of whether the purchase of a business distributorship could be the basis for a DTPA claim. The Fort Worth Court of Appeals affirmed the trial court's determination that alleged misrepresentations of existing fact regarding a distributorship were actionable under the DTPA.[40] The court noted that a business is generally regarded as an intangible, unless the purchase of the business also encompasses goods or services purchased for use in the

30. Specifically, plaintiffs alleged violations of DTPA § 17.46(a) (prohibiting "false, misleading, or deceptive acts or practices") and a series of "laundry list" violations, including §§ 17.46(b)(1),(2), (3), (5), (12), (22) & (23). *See Garza*, 955 F. Supp. at 70.

31. *See Garza*, 955 F. Supp. at 70.

32. *See id.*

33. *See id.* at 70.

34. *Id.* at 72. Summary judgment on other DTPA claims asserted against a Bancorp collection manager was granted due to lack of evidence. The court also granted summary judgment on the FDCPA and TDCPA claims because the transactions were entered into for business purposes. *See id.* at 71-72.

35. *Id.* at 72.

36. *See, e.g.*, English v. Fischer, 660 S.W.2d 521, 524 (Tex. 1983) (insurance proceeds not goods or services); Riverside Nat'l Bank v. Lewis, 630 S.W.2d 169, 174 (Tex. 1980) (cash not a good or service).

37. *See* Clary Corp. v. Smith, 949 S.W.2d 452, 464 (Tex. App.—Fort Worth 1997, pet. denied); *Riverside*, 630 S.W.2d at 174-75.

38. *See, e.g.*, Hand v. Dean Witter Reynolds, Inc.,, 889 S.W.2d 483, 500 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (plaintiff attempted to assert DTPA claim based on a failure to purchase an intangible).

39. 949 S.W.2d 452 (Tex. App.—Fort Worth 1997, pet. denied).

40. *See id.*

function of the business.[41] "In that event, if the plaintiff can show that the services purchased are clearly the objective of the transaction and not merely incidental to it, the transaction involves the transfer of 'goods or services' for DTPA purposes."[42]

The *Clary* court found that the distributorship agreement in that case conferred both goods and services upon the plaintiffs.[43] In holding that the "DTPA does not require the plaintiff himself to purchase or lease the goods or services to be a consumer, as long as the plaintiff's reliance on the defendant's misrepresentations concerning the goods or services caused the plaintiff's injuries. . . ." the Forth Worth Court ratified a potentially broader theory of standing in litigation involving purchases of intangibles than the Supreme Court's "objective of the transaction" theory recognized in *Arthur Andersen*.[44]

In *Palm Harbor Homes, Inc. v. McCoy*,[45] purchasers of a mobile home complained that they had been induced to agree to arbitrate their claims with a merchant who failed to disclose the existence of the arbitration clause to them. In denying the plaintiff's DTPA "failure to disclose" claims under section 17.46(b)(23), the court found that an arbitration agreement is an intangible item that cannot form the basis of a duty of disclosure under the DTPA.[46] Rather, the court held that an arbitration agreement is simply a contract to settle disputes in an alternate forum.[47]

IV. RELATIONSHIP OF THE PLAINTIFF AND DEFENDANT

In addition to establishing consumer status, a DTPA plaintiff also must show that a "false, misleading or deceptive act" occurred, and that such an act was the producing cause of the plaintiff's damage.[48] Recovery is also dependent upon showing that the plaintiff's relationship to the transaction entitles it to relief.[49]

A. PROFESSIONAL SERVICES

Section 17.49(c) of the 1995 amendments specifically prevents the application of the DTPA to claims "based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill."[50] This "exemption," however, does not protect "advice, judgment or opinion" that amounts to a material misrepresentation of fact, a failure to disclose information, unconscionable con-

41. *See id.* at 464.
42. *Id.* (citing Texas Cookie Co. v. Hendricks & Peralta, Inc., 747 S.W.2d 873, 876-77 (Tex. App.—Corpus Christi 1988, writ denied); Wheeler v. Box, 671 S.W.2d 75, 78 (Tex. App.—Dallas 1984, no writ).
43. *Clary*, 949 S.W.2d at 464-65.
44. *Compare id.* at 465-66 with *Arthur Andersen*, 945 S.W.2d at 815.
45. 944 S.W.2d 716 (Tex. App.—Fort Worth 1997, no writ).
46. *See id.* at 722.
47. *See id.*
48. DTPA § 17.50(a)(1)-(3).
49. *See* Amstadt v. United States Brass Corp., 919 S.W.2d 644, 650 (Tex. 1996).
50. DTPA § 17.49(c).

duct or breach of an express warranty.[51] No cases were found during the Survey period applying this new exemption.

As noted above,[52] the Texas Supreme Court in *Arthur Andersen & Co. v. Perry Equipment Corp.*[53] found that a DTPA claimant does not need to be the client purchasing professional services to qualify as a consumer. Rather, the test is whether the plaintiff was the intended beneficiary of the services and whether the complained-of services were the central objective of the transaction.[54]

In *Delp v. Douglas*,[55] the plaintiffs alleged that their attorneys inadequately reviewed and advised them regarding a settlement document concluding prior litigation. In partially reversing a directed verdict for the attorneys on some of the plaintiffs' DTPA claims, the Fort Worth Court of Appeals found that because there was evidence that the settlement document was poorly drafted and failed to adequately protect the plaintiffs' interests, a jury could infer that the attorneys had violated the DTPA in advising their clients to sign the document.[56] The court found it reasonable that a jury also could infer that the attorneys represented that the settlement document "had 'characteristics' or 'benefits that it did not have and that [the] agreement confers or involves rights, remedies, or obligations which it does not have or involve.'"[57] It is likely the result would be different for cases filed after September 1, 1996, under the newly-enacted section 17.49(c), due to that amendment's prohibition of DTPA actions based on professional services.[58]

In another case involving alleged attorney malpractice, *Garrett v. Giblin*,[59] the plaintiff complained that his attorney failed to timely bring a medical malpractice claim against one of his doctors following knee surgery. Garrett's attorneys had previously sent him a letter memorializing the fact that Garrett had a potential malpractice action which Garrett had instructed his attorneys not to pursue. Garrett acknowledged his agreement by signing the letter. Affirming the trial court's grant of the attorneys' motion for summary judgment, the Beaumont Court of Appeals found that Garrett had been fully informed by his attorneys that he had a "potential malpractice claim" against one of his doctors and that, in accordance with Garrett's instructions his attorneys had not pursued the claim.[60] Noting that the attorneys "simply followed the certain and definite instructions of their client," the court observed that if the attorneys actually had sued the physician contrary to the instructions of their client,

51. *See id.* § 17.49(c)(1)-(4).
52. *See supra* § III(B).
53. 945 S.W.2d 812 (Tex. 1997).
54. *See id.* at 815.
55. 948 S.W.2d 483 (Tex. App.—Fort Worth 1997, n.w.h.).
56. *See id.* at 496.
57. *Id.*
58. *See* DTPA § 17.49(c).
59. 940 S.W.2d 408 (Tex. App.—Beaumont 1997, no writ).
60. *See id.* at 410.

"they would have exposed themselves to the risk of a malpractice suit."[61] Essentially, the attorneys were in a no-win situation. In viewing the propriety of an attorney's actions, "[t]he attorney's negligence may consist . . . [of] disobeying a clients' lawful instruction, [or] in taking an action when not instructed by the client to do so. . . ."[62] Even if Garrett lacked full knowledge of all facts indicating his doctor's negligence, the "facts he knew . . . were sufficient to put him on inquiry which would have led to the discovery of facts demonstrating [the doctor's] alleged negligence."[63] The court concluded that the summary judgment evidence established that Garrett's attorneys did not violate the DTPA by misrepresenting the quality of their services or the obligations under their agreement with their client.[64] The evidence also did not show that the attorneys failed to disclose information pertinent to Garrett's DTPA claims or that they engaged in unconscionable conduct toward Garrett.[65]

B. Privity Requirements

Privity of contract is not required to establish DTPA consumer status.[66] Rather, as noted above, when determining whether a plaintiff may bring suit under the DTPA, Texas law focuses on the plaintiff's relationship to the transaction.[67]

The Texas Supreme Court in *Arthur Andersen & Co. v. Perry Equipment*[68] also addressed the issue of privity between parties to a lawsuit involving DTPA claims.[69] The Court found that an audit required by the purchaser, but paid for by the seller, prior to consummating the transaction was central to the purchaser's decision.[70] In support of this conclusion the Court noted that determining the business' financial condition was, in fact, the purchaser's primary objective in requesting audit.[71] Thus, it was inconsequential whether the purchaser or the seller had been in contractual privity with Arthur Andersen.[72]

DTPA privity requirements in the estate planning context were examined in *Vinson & Elkins v. Moran*.[73] In that case, the Texas Supreme

61. *Id.*
62. *Id.* (citing Zidell v. Bird, 692 S.W.2d 550, 553 (Tex. App.—Austin 1985, no writ)). *See also* Johnson v. Rancho Guadalupe, Inc., 789 S.W.2d 596, 598 (Tex. App.—Texarkana 1990, writ denied) (finding an attorney at law is a special agent, and only has authority to do that which he is employed to do).
63. *Garrett*, 940 S.W.2d at 410 (citing Rourke v. Garza, 530 S.W.2d 794, 803 (Tex. 1975)). Of benefit to attorneys everywhere, the court noted that a "lawyer owes no duty to foretell the future." *Id.*
64. *See id.*
65. *See id.*
66. *See* Amstadt v. United States Brass Corp., 919 S.W.2d 644, 649 (Tex. 1996).
67. *See* Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 352 (Tex. 1987).
68. 945 S.W.2d 812 (Tex. 1997).
69. *See supra* § III(b).
70. *See Arthur Andersen*, 945 S.W.2d at 815 (Tex. 1997).
71. *See id.*
72. *See id.*; *see also* Amstadt, 919 S.W.2d at 649.
73. 946 S.W.2d 381 (Tex. 1997).

Court held that the beneficiaries of an estate did not have standing to assert DTPA claims against attorneys employed by executors to assist them in the administration of the estate.[74] The Court reasoned that "it is the executors, not the beneficiaries, who are empowered to hire and consult with an attorney and to act on the attorney's advice on behalf of the estate."[75] Under the Probate Code, "executors hire attorneys to represent themselves, not the beneficiaries, in carrying out the administration of the estate."[76]

The Court found that the executors had hired Vinson & Elkins because of the size of the estate in question.[77] Finding nothing unusual in Vinson & Elkins' representation, the Court concluded that "[a]ny benefit of this 'purchase' would obviously extend to the beneficiaries in the form of a more orderly administration. Possible benefits to beneficiaries were not the main goal of the relationship but were only incidental to hiring the attorneys."[78] Because the beneficiaries' benefit was "merely incidental" to the purchase of services, the Court held that they could not maintain a DTPA action.[79] "Public policy weighs against conferring consumer status on estate beneficiaries."[80]

In *Keightley v. Republic Insurance Co.*,[81] the plaintiff was an assignee of rights under an insurance contract. The Austin Court of Appeals held that the plaintiff was not entitled to consumer status because he had not purchased or leased goods from the insurance company.[82] The court distinguished an assignee such as the plaintiff from an "intended beneficiary" under an insurance contract, holding that, in order to be a consumer, "the circumstances must justify a conclusion that the contracting parties *intended* that the stranger have the use and benefit of the goods or services furnished under the contract."[83] The plaintiff, as an assignee, had neither participated in nor been contemplated under the original contract.[84]

In *Apple Imports, Inc. v. Koole*,[85] an automobile owner delivered her car to an automobile dealer for the purpose of determining the vehicle's trade-in value. The dealer, prior to consummating any transaction with

74. *See id.* at 408.

75. *Id.*; *see also* Huie v. DeShazo, 922 S.W.2d 920, 925 (Tex. 1996) (holding that trustee is empowered to hire attorney); TEX. PROB. CODE ANN. § 242 (Vernon 1980).

76. *Vinson & Elkins*, 946 S.W.2d at 408.

77. *See id.*

78. *Id.*

79. *See id.* Note that § 17.49(c) of the 1995 amendments would appear to prevent suits, such as this, seeking "damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion or similar professional skill."

80. *Vinson & Elkins*, 946 S.W.2d at 408.

81. 946 S.W.2d 124 (Tex. App.—Austin 1997 n.w.h.).

82. *See id.* at 128. The original insurance company, National County Mutual Fire Insurance Company, had reinsured the original insurance contract with Republic Insurance. *See id.* at 126.

83. *Id.* at 128 (emphasis in original).

84. *See id.*

85. 945 S.W.2d 895 (Tex. App.—Austin 1997, writ denied).

the owner, sold the automobile to a third party, and the original owner sued. The Austin Court of Appeals held that the planned trade-in was intended to form part of the consideration for the purchase of a new car and, therefore, was an integral part of a consumer transaction.[86] In so holding, the court made the determination as to whether the plaintiff qualified as a DTPA consumer by looking at the transaction solely from the plaintiff's perspective.[87] Because the plaintiff's complaint arose out of a single transaction involving the attempted purchase of a new car and because she intended that the trade-in was to be part of the consideration for the new vehicle, the court found that there was evidence to support a finding that there had been an "implied representation" by the dealer that was actionable under the DTPA's laundry list provisions.[88]

C. Employer/Employee and Agency Relationships

Typically, an employee-plaintiff has been accorded consumer status under the DTPA only when the employee purchased goods or services intended primarily for the employee's own benefit.[89] During the Survey period, several cases addressed this issue.

In *Garner v. Corpus Christi National Bank*,[90] a bank employee complained that he sought retirement benefits from his employer during employment, claiming that such benefits are "goods" or "services" under the DTPA. The Corpus Christi Court of Appeals disagreed, finding that the bank did not adopt its retirement benefits package for the employee's benefit.[91] Summary judgment therefore was properly granted because the employee failed to provide any evidence that he had sought or acquired goods or services.[92]

In *GTE Mobilnet of South Texas v. Telecell Cellular, Inc.*,[93] cellular telephone sales agents complained of unfair treatment under the terms of their agency agreements. The agents sought DTPA consumer status, arguing that their claims were based on the acquisition of telephones, administrative and advertising services, and airtime coupons from GTE Mobilnet. The Houston Court of Appeals refused to confer consumer status on the agents, however, finding that the aforementioned items were not the goods and services complained about in their pleadings;

86. *See id.* at 898.
87. *See id.* (citing Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705, 707 (Tex. 1983)).
88. *See Apple Imports*, 945 S.W.2d at 898.
89. *See, e.g.*, Kennedy v. Sale, 689 S.W.2d 890, 892 (Tex. 1985) (employee complaining of misrepresentations concerning group insurance policy provisions was consumer, even though employer purchased policy, because he "acquired" policy benefits "by purchase" through employer); Brandon v. American Sterilizer Co., 800 S.W.2d 488, 491 (Tex. App.—Austin 1994, no writ) (toxic gas leak at place of employment was not basis for DTPA claim).
90. 944 S.W.2d 469 (Tex. App.—Corpus Christi 1997, no writ).
91. *See id.* at 476.
92. *See id.*
93. 955 S.W.2d 286 (Tex. App.—Houston [1st Dist.] 1997, writ denied).

rather, their actual complaint focused on alleged breaches of the agency agreement between the parties.[94] Citing *Central Texas Hardware, Inc. v. First City, Texas-Bryan, N.A.*,[95] the court found that the proffered "goods and services" were "merely ancillary" to the plaintiffs' actual complaint and could not form the basis of a DTPA claim.[96]

D. Derivative Liability

Investors in a failed California limited partnership brought suit against "every business remotely related to the transaction" in *Cogan v. Triad American Energy*.[97] The defendants included the lending bank, the loan officer, insurance brokers, loan underwriters, accountants and other investors.[98] Claiming violations of the DTPA, the plaintiffs argued that the defendants duped them into entering into a real estate transaction. On appeal of the denial of the plaintiffs' DTPA claim, the United States District Court for the Southern District of Texas found that "[t]he DTPA does not attach derivative liability to a defendant based on innocent involvement in a business transaction."[99] Additionally, because the evidence showed that the partnership was formed under California law, involved a California business venture and "virtually every operative fact occurred outside of the state of Texas," the DTPA claims failed because the DTPA requires that the "trade or commerce" in question "directly or indirectly affect the people of this state."[100]

V. CLAIMS UNDER ENUMERATED DTPA CAUSES OF ACTION

A. Introduction

The DTPA contains a number of enumerated sections, violation of which triggers potential liability under the statute. The enumerated sections are not, however, the exclusive bases for DTPA claims.[101]

DTPA claims generally involve one or more of the following allegations:

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94. *See id.* at 288-89.

95. 810 S.W.2d 234 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

96. *See GTE Mobilnet*, 955 S.W.2d at 293.

97. 944 F. Supp. 1325 (S.D. Tex. 1996).

98. *See id.* at 1327.

99. *Id.* at 1336 (citing Charles E. Beard, Inc. v. Cameronics Tech. Corp., 729 F. Supp. 528, 532 (E.D. Tex. 1989), *aff'd*, 939 F.2d 280 (5th Cir. 1991) (a plaintiff cannot hold multiple defendants liable under the DTPA by showing them to be "inextricably intertwined;" the mere existence of a "relationship" between the parties does not establish DTPA liability)).

100. *Cogan*, 944 F. Supp. at 1335. *See also* Tex. Bus. & Comm. Code Ann. § 17.45(6) (Vernon 1994).

101. DTPA § 17.43 provides that the DTPA provisions are not the exclusive remedies available to consumers. The enumerated provisions of § 17.46(b) are, however, the exclusive remedy for "false, misleading, or deceptive acts or practices" brought under § 17.50(a)(1). *See* DTPA § 17.46(d).

(1) laundry list claims under § 17.46(b) defining the scope of "false, misleading or deceptive acts" prohibited under the statute;[102]
(2) unconscionable actions or courses of action by a person;
(3) breach of express or implied warranties;
(4) insurance code violations under Article 21.21; and
(5) violations of various statutes incorporating the DTPA.[103]

B. Laundry List Claims

Section 17.46(b) of the DTPA contains twenty-four subparts. Plaintiffs invoking these "laundry list"[104] claims are not required to prove or plead the defendant's state of mind or intent to deceive the plaintiff.[105] Nor have plaintiffs been required to show that they relied on the alleged deceptions or misrepresentations.[106] The issue of whether a consumer should have to show reliance, however, remains the subject of debate.[107] Several significant cases involving "laundry list" claims were reported during the Survey period.

1. Section 17.46(b)(23)—Failure to Disclose

The failure to disclose information to the consumer prior to consummation of the transaction is alleged in a great number of laundry list claims. To maintain an action for failure to disclose information under section 17.46(b)(23) of the DTPA, the plaintiff must show that the defendant "failed to disclose information concerning . . . services which was known at the time of the transaction."[108]

The proof required to sustain a claim under section 17.46(b)(23) was addressed in *Rizkallah v. Connor*,[109] which involved alleged unauthorized and unnecessary repairs to an automobile. When Connor refused to continue payment for the repairs, the repair shop repossessed the car. Connor brought suit alleging that the shop violated DTPA section 17.46(b)(23) by failing to disclose information regarding the repairs. The trial court granted Connor's motion for summary judgment when the re-

102. *See* DTPA § 17.46(b). There are 24 enumerated laundry list items, which generally proscribe particular types of misrepresentations or failures to disclose information. *See id.*

103. Statutes incorporating provisions of the DTPA include: TEX. PROP. CODE ANN. §§ 41.007, 59.005, 221.024 (Vernon 1995 & Supp. 1998); TEX. BUS. & COMM. CODE ANN. § 35.74(c) (Vernon 1987); TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.002, 41.002(b)(1), 77.003(b) (Vernon 1997); TEX. GOV'T CODE ANN. § 2006.012 (Vernon 1998); TEX. HEALTH & SAFETY CODE ANN. §§ 162.012, 164.013 (Vernon 1992 & Supp. 1998); TEX. INS. CODE ANN. arts. 9.48, 21.07-4, 21.21, 21.21-2 (Vernon Supp. 1998); TEX. REV. CIV. STAT. ANN. arts. 4512j, 4552-5.11(f), 4552-5.18(d), 5221f, 5221L, 5221a-7, 6573a, 9020 (Vernon Supp. 1998); and TEX. TRANSP. CODE ANN. § 684.086 (Vernon 1998).

104. The earliest located reported case reference to the enumerated items listed under DTPA § 17.46(b) as a "laundry list" occurred in Mobile County Mut. Ins. Co. v. Jewell, 555 S.W.2d 903, 911 (Tex. Civ. App.—El Paso 1977, writ ref'd).

105. *See* Pennington v. Singleton, 606 S.W.2d 682, 689 (Tex. 1980).

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

107. *See generally* Prudential Ins. Co. v. Jefferson Assoc., 896 S.W.2d 156 (Tex. 1995).

108. DTPA § 17.46(b)(23). *See also* Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 479 (Tex. 1995).

109. 952 S.W.2d 580 (Tex. App.—Houston [1st Dist.] 1997, n.w.h.).

pair shop failed to respond. The shop appealed, arguing that there had been insufficient evidence to support summary judgment. Agreeing, the Houston Court of Appeals observed that, to be entitled to summary judgment under section 17.46(b)(23), a plaintiff must prove:

> 1. defendant did not disclose information concerning services to plaintiff;
> 2. which information was known by defendant at the time of the transaction with plaintiff;
> 3. the information was intended to induce plaintiff into a transaction; and
> 4. plaintiff would not have entered the transaction had defendant disclosed the information.[110]

Because Connor's summary judgment evidence failed to support these elements, the trial court's grant of summary judgment was reversed.[111]

In *Gillespie v. Century Products Co.*,[112] the alleged failure to disclose involved the use and operation of consumer products. A five month old infant was killed in a car accident while riding in a baby car seat manufactured by the defendant. Although the plaintiff styled its complaint as a "failure to warn," the true nature of the complaint was that the warning was inadequate. Because the plaintiffs had not even heeded the allegedly deficient warning, however, the key issue for the San Antonio Court of Appeals was "whether a manufacturer's failure to give adequate instructions for the safe use of its product can be the cause of an injury which would not have occurred if the instructions the manufacturer did give had not been ignored."[113] Answering this question in one negative, the court held that to recover under the DTPA, plaintiffs were required to show that "'but for' [the defendant's] failure to provide adequate warning labels on the seat and the shipping box and its failure to provide an instruction book, [the child's] death would not have occurred."[114] Applying this test, the court reasoned:

> In the instance of no warning, it is presumed that proper warnings would have been heeded. However, no presumption arises that a plaintiff "would have heeded a better warning when, in fact, he paid no attention to the warning given, which if followed would have prevented his injuries." If following the warnings and instructions actually provided would have prevented the injury despite the label's inadequacy, the deficiency could not be the cause of any injury. In such a case, the plaintiff may have a different cause of action against the manufacturer (e.g. deficient construction), but not one for failure-to-warn.[115]

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110. *Id.* at 589 (citing DTPA § 17.46(b)(23)).
111. *See Rizkallah*, 952 S.W.2d at 589.
112. 936 S.W.2d 50 (Tex. App.—San Antonio 1996, no writ).
113. *Id.* at 52 (quoting General Motors Corp. v. Saenz, 873 S.W.2d 353, 354 (Tex. 1993)).
114. *Gillespie*, 936 S.W.2d at 52; *see also* Union Pump Co. v. Allbritton, 898 S.W.2d 773, 775 (Tex. 1995).
115. *Gillespie*, 936 S.W.2d at 52 (citations omitted).

The court concluded that the adequacy of the manufacturer's warnings was irrelevant because, due to the plaintiffs' failure to heed any warnings, there was no evidence of a causal link between the alleged inadequate warnings and the child's death.[116]

2. *Section 17.45(5)—Unconscionable Actions Resulting in Gross Disparity in Value*

In transactions involving the purchase or lease of goods or services, one who engages in an unconscionable course of action which adversely affects a consumer is subject to liability under the DTPA.[117] The DTPA defines an unconscionable action as "an act or practice which, to a person's detriment: (A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or (B) results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration."[118] The DTPA defines "knowingly" as actual awareness of the falsity, deception, or unfairness of the act or practice.[119] The DTPA further provides that "knowingly" may be inferred when there are objective manifestations that indicate the person acted with actual awareness.[120]

In *State Farm Lloyds v. Nicolau*,[121] the Texas Supreme Court found no proof of unconscionable action by an insurer even though it had wrongly denied the insured's claims for repairs to the foundation of their home. State Farm paid for plumbing repairs and investigation costs but excluded coverage for foundation repairs. Denying review of the plaintiffs' unsuccessful claim that there had been a gross disparity between the value plaintiffs received and the consideration paid for their insurance policy, the Court found that the standard upon which gross disparity claims should be based was "whether the disparity between what the [homeowners] paid for insurance and the amounts they received under the policy was 'glaringly noticeable, flagrant, complete and unmitigated.'"[122] Citing its previous holding in *Chastain v. Koonce*,[123] the Court found that the determination of whether there has been a violation of section 17.45(5) must be based on objective evidence.[124] Viewing the transaction as a whole, State Farm's actions in paying for some repairs and engineering reports and in investigating the claim was enough to defeat the plaintiffs'

116. *See id.* at 53.

117. *See* Flenniken v. Longview Bank and Trust Co., 661 S.W.2d 705, 707 (Tex. 1983); LaBella v. Charlie Thomas Chevrolet, 942 S.W.2d 127, 134 (Tex. App.-Amarillo 1997, writ denied).

118. DTPA § 17.45(5); *see also* State Farm Lloyds v. Nicolau, 951 S.W.2d 441, 451 (Tex. 1997).

119. *See* DTPA § 17.45(9).

120. *See id.* § 17.45(9).

121. 951 S.W.2d 444 (Tex. 1997).

122. *See id.* at 451 (quoting Chastain v. Koonce, 700 S.W.2d 579, 583 (Tex. 1985)).

123. 700 S.W.2d 579 (Tex. 1985).

124. *See Nicolau*, 951 S.W.2d at 451.

claims.[125]

Arguello v. Conoco,[126] involved an attempt to append a DTPA claim of unconscionable action onto civil rights claims.[127] The plaintiffs alleged that Conoco discriminated in providing services to Hispanic and African-American customers. The plaintiffs did not allege damages due to any unfair advantage taken under any provisions of the DTPA, but complained that they were subjected to unequal treatment solely based on their race. In denying the DTPA claims, the Northern District of Texas found that complaints based on a consumer's minority status are not actionable under the DTPA. "The DTPA is particularly unsuited to claims of discrimination because the statute is designed to remedy economic, not racial, disparities and because 'unconscionability' is defined by the objective result of the transaction, not the defendant's intent or knowledge."[128]

3. *Section 17.50—Breach of Express or Implied Warranties*

Although a DTPA claim may be based upon the breach of an express or implied warranty, the DTPA does not itself create any warranties.[129] To be actionable under the DTPA, a warranty must be recognized by the common law or created by statute.[130]

In *Bay Colony Ltd. v. Trendmaker, Inc.*,[131] a partner in a failed real estate venture alleged that the defendant's representations about its future involvement in the venture gave rise to an express warranty that was breached when the venture failed.[132] The United States Court of Appeals for the Fifth Circuit affirmed the district court's finding that the plaintiff presented "nothing more than possible breaches of contract or non-actionable puffing."[133] The alleged misrepresentations of future involvement with the project were so vague as to preclude enforcement under the DTPA.[134] Additionally, the plaintiff's complaints regarding alleged misrepresentations and breaches of warranty had been expressly waived by the entirety clause contained in the written agreement between the parties. The court found that evidence of such statements "made during negotiations but not embodied in the contract cannot serve as the

125. *See id.*

126. No. CIV.A 3:97-CV-0638H 1997 WL 446433 (N.D. Tex. July 21, 1997).

127. Plaintiffs made civil rights claims under 42 U.S.C. § 1981 (1994) (the Civil Rights Act of 1866), 42 U.S.C. § 1985(3) (1994) (civil conspiracy) and 42 U.S.C. § 2000a (1994) (Title II (Public Accommodations) of the Civil Rights Act of 1964). *See Arguello*, 1997 WL 446433, at *1.

128. *Arguello*, 1997 WL 446433, at *4 (citing McClung v. Wal-Mart, 866 F. Supp. 306, 310 (N.D. Tex. 1994); Sergeant Oil & Gas Co. v. National Maintenance & Repair, Inc., 861 F. Supp. 1351, 1364 (S.D. Tex. 1994)).

129. *See* Parkway Co. v. Woodruff, 901 S.W.2d 434, 438 (Tex. 1995); *see also* DTPA § 17.50(a)(2).

130. *See Woodruff*, 901 S.W.2d at 438 (citing La Sara Grain v. First Nat'l Bank, 673 S.W.2d 558, 565 (Tex. 1984)).

131. 121 F.3d 998 (5th Cir. 1997).

132. *See id.* at 1002.

133. *Id.* at 1004.

134. *See id.* at 1005.

basis of a DTPA warranty claim, given that disavowal."[135] Under this analysis, although a consumer can effectively waive the right to seek DTPA remedies only under the strict conditions specified in the DTPA,[136] a consumer can contractually "disavow" reliance on representations made prior to entering into the contract.[137]

In *LaBella v. Charlie Thomas, Inc.*,[138] an automobile lessee asserted DTPA claims against a local automobile dealer and Mercedes Benz of North America, alleging that the defendants refused to make or authorize necessary repairs for his leased automobile, thereby breaching express and implied warranties. The plaintiff complained that repairs were begun on his automobile to determine the source of a mechanical problem, but that once it was determined that the problem was related to misuse of the vehicle, the dealer refused to do any further work until paid in cash for the work undertaken to that point.[139] Relying on the Texas Supreme Court's ruling in *Melody Home Manufacturing Co. v. Barnes*,[140] the Amarillo Court of Appeals found that because the dealership had started repairs on the automobile, there was an implied warranty to complete the repairs in a good and workmanlike manner.[141] "[R]epairmen are not required to guarantee the results of their work, but are required to repair or modify existing goods in this good and workmanlike manner."[142] Once repairs are undertaken, failure to complete them may be a breach of the implied warranty of good and workmanlike performance actionable under the DTPA.[143]

In contrast, in *Drury v. Baptist Memorial Hospital System*,[144] the San Antonio Court of Appeals expressly disavowed application of an implied warranty of workmanlike performance in the context of the provision of medical services.[145] Relying upon *Dennis v. Allison*,[146] the court distinguished *Melody Home* as involving an implied warranty to remedy defects, which is not applicable "in a professional services setting involving the exercise of professional judgment."[147] The court also found that the plaintiff's DTPA claims regarding medical services were preempted by the Texas Medical Liability and Insurance Improvement Act.[148]

In another case dealing with a purported implied warranty, *Sells v. Six*

135. *Id.*
136. *See* DTPA § 17.42.
137. *See Bay Colony*, 121 F.3d at 1005.
138. 942 S.W.2d 127 (Tex. App.—Amarillo 1997, writ denied).
139. *See id.* at 135.
140. 741 S.W.2d 349 (Tex. 1987).
141. *See LaBella*, 942 S.W.2d at 134-35.
142. *Id.* at 135 (quoting *Melody Home*, 741 S.W.2d at 355).
143. *See LaBella*, 942 S.W.2d at 134-35.
144. 933 S.W.2d 668 (Tex. App.—San Antonio 1996, writ denied).
145. *See id.* at 676.
146. 698 S.W.2d 94 (Tex. 1985).
147. *Drury*, 933 S.W.2d at 677.
148. *See id.*; *infra* § VII(C).

Flags Over Texas, Inc.,[149] the United States District Court for the Northern District of Texas found that Texas law does not recognize an implied warranty that "a[n amusement park] ride is safe."[150] Such a claim merely sounds in negligence.[151]

4. *Section 17.46(b)(12)—False, Misleading or Deceptive Acts or Practices*

Unlike other laundry list provisions, claims under section 17.46(b)(12) have generally been restricted to parties standing in a direct contractual relationship.[152] In *First American Title Insurance Co. of Texas v. Willard*,[153] a home purchaser alleged that, in performing a title search and issuing title insurance to the lender, First American failed to note a blanket gas line easement across the property. At trial, First American conceded liability under the terms of the title insurance policy for failing to except the gas line easement.[154] In reviewing the jury's DTPA findings under section 17.46(b)(12), the court noted that the jury had found that First American's false and misleading actions had been a producing cause of the plaintiff's damages. In order to state a claim under section 17.46(b)(12), the alleged misrepresentations "must have been uttered with reference to the terms of the underlying contract between the parties."[155] The evidence, however, showed that the title insurance policy had been entered into between the lender and First American. There was no evidence of a contractual arrangement between the purchaser and First American, no evidence of any false and misleading actions toward the purchaser by First American Title, and no evidence that the insurance had been issued for the purchaser's benefit or that he relied on it.[156] As a result, the court concluded that the title insurer owed no duty to the purchaser.[157]

C. Incorporation of the DTPA Into the Texas Insurance Code

1. *Article 21.21*

Among the most common of DTPA claims arising out of the violation of statutory duties are those brought pursuant to article 21.21 of the Texas

149. No. CIV.A3:96-CV-1574-D, 1997 WL 527320 (N.D. Tex., Aug. 14, 1997); *see also supra* § III(c).
150. *Id.* at *3-4.
151. *See id.* at *4.
152. *See, e.g.*, Best v. Ryan Auto Group, Inc., 786 S.W.2d 670, 672 (Tex. 1990) (holding that § 17.46(b)(12) requires proof of an agreement between the parties); Home Sav. Ass'n Serv. Corp. v. Martinez, 788 S.W.2d 52, 57 (Tex. App.—San Antonio 1990, writ denied) (holding that misrepresentations must relate to an underlying contract between the parties).
153. 949 S.W.2d 342 (Tex. App.—Tyler 1997, writ denied)
154. *See id.* at 350.
155. *Id.* at 353 (citing *Home Sav. Ass'n*, 788 S.W.2d at 57).
156. *See id.*
157. *See id.*

Insurance Code.[158] Section 16(a) of that article provides:

> Any person who has sustained actual damages caused by another's engaging in an act or practice declared in Section 4 of this Article to be . . . unfair or deceptive acts or practices in the business of insurance or in any practice specifically enumerated in a subdivision of Section 17.46(b), Business & Commerce Code, as an unlawful deceptive trade practice may maintain an action against the person or persons engaging in such acts or practices.[159]

During the Survey period, several DTPA plaintiffs invoked article 21.21 to complain of bad faith handling of their insurance claims.

Texas courts have recognized that the failure of an insurance company to notify its insured of a settlement offer may be the basis of a DTPA claim.[160] In *Trinity Universal Insurance Co. v. Bleeker*,[161] however, the court recognized an additional evidentiary burden plaintiffs must bear beyond showing the insurer's failure to notify its insured of settlement offers. Notwithstanding an insurer's failure to disclose oral and written settlement offers to its insured, the Corpus Christi Court of Appeals held that no DTPA liability could attach because the evidence failed to show that acceptance of the offer would have prevented the insured's damages.[162] "At a minimum, [the insured] needed to prove that informing [him] of the settlement offer would have led to the offer being accepted."[163]

2. *Legislative Change Affecting the Application of Article 21.21 to the DTPA*

The 1995 amendments to article 21.21 added language that limits insured parties' DTPA claims to those that are "specifically enumerated in a subdivision of Section 17.46(b)" of the DTPA.[164] In a footnote to *Stewart Title Guaranty Co. v. Aiello*,[165] the Texas Supreme Court expressly recognized this newly-enacted limitation on claims under article 21.21.[166] In so holding, the Court overruled its previous decision in *Vail v. Texas Farm Bureau Mutual Insurance Co.*,[167] in which it had refused to limit the availability of DTPA "bad faith" claims under the Insurance Code to those set forth in the "laundry list."[168]

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158. TEX. INS. CODE ANN. art. 21.21 (Vernon Supp. 1998).
159. *Id.* § 16(a); Keightley v. Republic Ins. Co., 946 S.W.2d 124, 127 (Tex. App.—Austin 1997) *opinion withdrawn*, 1997 WL 420787 (Tex. App.—Austin, Jul. 24, 1997, n.w.h.) (quoting TEX. INS. CODE ANN. art. 21.21 (Vernon Supp. 1998)).
160. *See generally* American Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 847 n.11 (Tex. 1994); Ecotech Int'l, Inc. v. Griggs & Harrison, 928 S.W.2d 644, 649 (Tex. App.—San Antonio 1996, writ denied).
161. 944 S.W.2d 672 (Tex. App.—Corpus Christi 1997, writ dism'd by agr.).
162. *See id.* at 679.
163. *Id.*
164. TEX. INS. CODE ANN. art. 21.21 § 16(a) (Vernon Supp. 1998).
165. 941 S.W.2d 68 (Tex. 1997).
166. *See id.* at 72 n.2.
167. 754 S.W.2d 129 (Tex. 1988).
168. *Stewart Title*, 941 S.W.2d at 72 n.2.

VI. DETERMINING THE MEASURE OF DAMAGES

A. REVIEW OF DUPLICATIVE DAMAGE AWARDS

In *Waite Hill Services, Inc. v. World Class Metal Works, Inc.*,[169] an insured complained of the denial of a property damage claim, alleging breach of contract, deceptive trade practices, violations of the Texas Insurance Code, and breach of the duty of good faith and fair dealing.[170] The jury found for the insured on all of its causes of action, and the chief issue on appeal was the measure of damages. The Fort Worth Court of Appeals reviewed Texas law governing the situation where damages are awarded under both breach of contract and DTPA theories for the same conduct. Typically, "actual damages"[171] allowed under the DTPA have been "construed to mean those damages that are recoverable at common law."[172] The Fort Worth Court of Appeals compared DTPA damages to contract damages, which historically have been intended "to put a plaintiff monetarily in the position he would have had if the contract had been performed."[173] While the Texas Supreme Court has recognized that plaintiffs may seek both DTPA and contract damages, it had done so with the caveat that the plaintiff, if successful on both theories, would elect whichever affords the greatest recovery.[174] In the event a plaintiff fails to make such an election, the trial court may make the election, awarding the prevailing party the greatest recovery.[175] Applying these principles, the Fort Worth Court of Appeals noted that although the liability issues submitted to the jury on the breach of contract and DTPA claims were erroneous, the jury's answers "clearly indicate the jury's intent to find separate damages for both DTPA violations and a different cause of action such as breach of contract," and were not reversible.[176] The court of appeals allowed the recovery of potentially duplicative damages under contract law and under the DTPA solely because of the defendant's failure to object to the erroneous submission.[177] However, in reversing on review, the Texas Supreme Court found that error is preserved as long as the objecting party requests the trial court to require a recovering party to elect between duplicative damages.[178]

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169. 935 S.W.2d 197 (Tex. App.—Fort Worth 1996), *rev'd*, 959 S.W.2d 182 (Tex. 1998).

170. *See id.*

171. DTPA § 17.50 provides that a prevailing consumer may obtain "actual damages."

172. *Waite Hill*, 935 S.W.2d at 201.

173. *Id.* (citing Chrysler Corp. v. Schuenemann, 618 S.W.2d 799, 805 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.)).

174. *See id.* at 201; *see also, e.g.*, Brown v. American Transfer & Storage Co., 601 S.W.2d 931, 939 (Tex. 1980).

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

176. *Waite Hill*, 935 S.W.2d at 202.

177. *See id.*; TEX. R. CIV. P. 278.

178. *See Waite Hill*, 959 S.W.2d at 184. Additionally, the Supreme Court found that the recovering party had failed to offer any evidence of, nor did it submit a distinct request for, tort damages. *See id.*

VII. DEFENSES UNDER THE DTPA

The DTPA has been characterized as a "strict liability" statute, requiring only proof of a misrepresentation, without regard to the offending party's intent.[179] Some courts have held that certain common law defenses, such as estoppel and ratification, are not available to combat DTPA claims.[180] Other courts have recognized a variety of defenses to DTPA claims.

A. Good Faith Defense to Insurance Code DTPA Claims

The plaintiffs in *Higginbotham v. State Farm Mutual Insurance Co.*[181] and *Ruch v. State Farm Fire and Casualty Co.*[182] each appealed summary judgments on their bad faith claims under the DTPA and Insurance Code.[183] Applying nearly identical analyses, the courts in both cases examined the "good faith" defense available to insurers when denying insurance claims. Under Texas law, when an insurer has denied an insurance claim, the insured bears the burden of showing that the insurer had no reasonable basis for the denial of the claim.[184] "A cause of action for breach of the duty of good faith and fair dealing exists when the insurer has no reasonable basis for denying or delaying payment of a claim or when the insurer fails to determine or delays in determining whether there is any reasonable basis for denial.[185] Plainly put, an insurer will not be faced with a tort suit for challenging a claim of coverage if there was any reasonable basis for denial of that coverage."[186] The evidence showed that, in each case, State Farm had conducted a thorough investigation into the insured's claims and raised bona fide issues as to the viability of the claims under the terms of each policy.[187] Each court reviewed the summary judgment evidence and found that, as a matter of law, the evidence supported the trial court's finding that State Farm did not act in bad faith and was entitled to summary judgment on the DTPA and Insurance Code claims.[188]

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

180. *See, e.g.*, Insurance Co. of N. Am. v. Morris, 928 S.W.2d 133, 154 (Tex. App.—Houston [14th Dist.] 1996, writ granted); *see also* Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980) (recognizing that a primary purpose of the DTPA was to relieve consumers of common law defenses while providing a cause of action for misrepresentations).

181. 103 F.3d 456 (5th Cir. 1997).

182. No. CIV.A.3:96-CV-20400, 1997 WL 452743 (N.D. Tex., July 31, 1997).

183. *See Higginbotham*, 103 F.3d at 458; *Ruch*, 1997 WL 452743 at *3.

184. *See Higginbotham*, 103 F.3d at 459; *Ruch*, 1997 WL 452743 at *3.

185. *Higginbotham*, 103 F.3d at 459 (citing Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987)).

186. *Id.* at 460 (citing Emmert v. Progressive County Mut. Ins., 882 S.W.2d 32 (Tex. App.—Tyler 1994, writ denied)).

187. *See id.* at 459-60; *Ruch*, 1997 WL 452743, at *4.

188. *See Higginbotham*, 103 F.3d at 460; *Ruch*, 1997 WL 452743, at *4.

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

During the Survey period, the Texas Supreme Court, in *Crawford v. Ace Sign, Inc.*,[189] considered the overlap between the DTPA and contract law, concluding that an allegation of breach of contract, without more, does not violate the DTPA.[190] The court determined that representations that a party would fulfill its contractual obligations which were later unfulfilled did not constitute an actionable misrepresentation under the DTPA.[191] In *Perez v. Alcoa Fujikura, Ltd.*,[192] the United States District Court for the Western District of Texas adopted the reasoning of *Ace* in denying a DTPA claim that was based on nothing more than a failure to perform a contractual promise.[193]

In *Stewart Title Guaranty Co. v. Aiello*,[194] the Texas Supreme Court examined a dispute involving the terms of a settlement agreement covering a previous lawsuit over Stewart Title's provision of title insurance. Noting that a suit arising from an agreed judgment sounds in contract rather than tort, the Court held that the insured parties were entitled only to the contract remedies generally available when enforcing a contract.[195] The parties' prior insurer-insured relationship did not allow the plaintiffs to extend the insurer's duty of good faith and fair dealing beyond the execution of the judgment.[196] "[T]he good faith duty ended when the release was signed."[197] Because the plaintiffs' bad faith claims failed, their DTPA claims based on article 21.21 also failed.[198]

The Amarillo Court of Appeals reached a similar conclusion in *Escajeda v. Cigna Insurance Co. of Texas*.[199] Concluding that the plaintiff's DTPA claim was founded on a disagreement over the interpretation of a settlement, the court held that such a contractual dispute does not provide the basis for a DTPA claim.[200]

C. PREEMPTION AND EXEMPTION FROM THE DTPA

1. Medical Claims

a. Medical Liability and Insurance Improvement Act

The Medical Liability and Insurance Improvement Act (MLIIA) was

189. 917 S.W.2d 12 (Tex. 1996).
190. *See id.* at 14.
191. *See id.*
192. 969 F. Supp. 991 (W.D. Tex. 1997)
193. *See id.* at 1010.
194. 941 S.W.2d 68 (Tex. 1997).
195. *See id.* at 71-72.
196. *See id.*
197. *Id.* at 72 (quoting Torchia v. Aetna Cas. & Sur. Co., 804 S.W.2d 219, 224 (Tex. App.—El Paso 1991, writ denied)).
198. *See id.*
199. 934 S.W.2d 402 (Tex. App.—Amarillo 1996, no writ).
200. *See id.* at 407.

enacted in response to "a medical malpractice insurance crisis."[201] Regarding DTPA claims, section 12.01(a) of the MLIIA provides:

> Notwithstanding any other law, no provisions of Sections 17.41-17.63, Business & Commerce Code [the DTPA], shall apply to physicians or health care providers as defined in Section 1.03(3) of this Act, with respect to claims for damages for personal injury or death resulting, or alleged to have resulted, from negligence on the part of any physician or health care provider.[202]

Drury v. Baptist Memorial Hospital System,[203] involved the application of this section to DTPA claims brought by a patient who received blood other than that banked specifically for her prior to surgery. Noting that the plaintiff's complaint arose out of the alleged negligence on the part of health care providers engaged in the transfusion of blood, the San Antonio Court of Appeals concluded that her DTPA claims were barred by the MLIIA.[204]

Allegations of breach of contract, negligence and DTPA violations against a medical association were involved in *Campbell v. MacGregor Medical Ass'n*.[205] Following her husband's treatment at a medical clinic and his subsequent death, the plaintiff brought suit alleging that the professional association promised emergency treatment, did not disclose that it had no emergency facilities or emergency physicians, and did not disclose that emergency referrals to other hospitals would involve expenses not covered by the insurer.[206] Holding that these complaints were not defeated by the MLIIA, the Dallas Court of Appeals noted that, while a plaintiff cannot recast negligence claims against a physician or health care provider into DTPA, warranty, or contract claims in order to avoid the MLIIA, the plaintiff's allegations were not that the association deviated from accepted standards of care, which would trigger MLIIA preemption. Rather, the plaintiff claimed that the association knowingly misled the patient regarding the services available.[207]

b. Application of the "Learned Intermediary Doctrine"

In *In re Norplant Contraceptive Products Liability Litigation*,[208] the plaintiffs claimed that both consumers and prescribing physicians were not adequately warned of the side effects associated with the use of the Norplant contraceptive device.[209] The United States District Court for the Eastern District of Texas noted that "[i]n a failure to warn case, the plaintiff must show that the warning was defective and that this failure to

201. TEX. REV. CIV. STAT. ANN. art. 4590, § 1.02(a)(5) (Vernon Supp. 1998).
202. *Id.* § 12.01(a).
203. 933 S.W.2d 668 (Tex. App.—San Antonio 1996, writ denied).
204. *See id.* at 676.
205. No. 01-94-01277-CV, 1997 WL 201845 (Tex. App.—Houston [1st Dist.] April 24, 1997, writ requested).
206. *See id.* at *6.
207. *See id.*
208. 955 F. Supp. 700 (E.D. Tex. 1997).
209. *See id.* at 702.

warn was the producing cause of the plaintiff's injury."[210] The court then reviewed the "learned intermediary doctrine," which is a doctrine peculiar to cases involving a prescription drug manufacturer's duty to warn.[211] Under Texas' interpretation of this doctrine, "when a drug manufacturer properly warns a prescribing physician of the dangerous propensities of its product, the manufacturer is excused from warning each patient who receives the drug. The doctor stands as a learned intermediary between the manufacturer and the ultimate consumer."[212] The physician's knowledge of the warnings operates to protect the manufacturer and serves to shift the duty of explaining risks to the physician unless the warnings provided to the physician are inadequate or misleading.[213] Applying these principles, the court found that the basis for the plaintiffs' DTPA claims was a failure to warn or disclose information which, under the learned intermediary doctrine, could not be pursued against the prescription drug manufacturer.[214]

2. *Federal Cigarette Legislation*

During the Survey period, the Texas Supreme Court dealt with the application of the DTPA to damages related to cigarette use in *American Tobacco Co. v. Grinnell*.[215] The survivors of a smoker alleged that American Tobacco failed to disclose information about the dangers of smoking and made deceptive representations in advertising its cigarettes.[216] The Court found that because the Federal Cigarette Labeling and Advertising Act (FCLAA) and the Public Health Cigarette Smoking Act (PHCSA)[217] were enacted prior to the effective date of the DTPA, they preempt claims of failure to disclose information in cigarette advertising or promotional materials.[218] The Court also held that deceptive representation claims under the DTPA are preempted by the FCLAA and the PHCSA because advertising content and warnings for tobacco products are governed by those statutes.[219]

3. *RCLA Claims*

The Residential Construction Liability Act (RCLA) specifically preempts application of the DTPA where the two statutes conflict.[220] By its terms, the RCLA applies to "any action to recover damages resulting

210. *Id.* at 703 (quoting Rolen v. Burroughs Wellcome Co., 856 S.W.2d 607, 609-10 (Tex. App.—Waco 1993, writ denied)).
211. *In re Norplant*, 955 F. Supp. at 703.
212. *Id.* (quoting Alm v. Aluminum Co. of Am., 717 S.W.2d 588, 591-92 (Tex. 1986)).
213. *See In re Norplant*, 955 F. Supp. at 703.
214. *See id.* at 709.
215. 951 S.W.2d 420 (Tex. 1997).
216. *See id.* at 425. The plaintiffs alleged violations of DTPA §§ 17.46(b)(5),(7) and (23). *See id.*
217. Both Acts are codified at 15 U.S.C. §§ 1331-1340 (West Supp. 1997).
218. *See Grinnell*, 951 S.W.2d at 440.
219. *See id.*
220. *See* TEX. PROP. CODE ANN. § 27.004 (Vernon Supp. 1997).

from a construction defect."[221] In the only reported RCLA case during the Survey period discussing the DTPA, *O'Donnell v. Roger Bullivant of Texas, Inc.*,[222] the plaintiffs gave notice of their claim under DTPA section 17.505, which provides for sixty days notice prior to filing suit. The court found that the DTPA notice letter was sufficient to put the defendants on notice of RCLA claims that were based on the same conduct as their DTPA claims.[223]

4. Failure to Provide Notice Required by the DTPA

a. Putting a Defendant on Notice of a DTPA Claim

Generally, a petition "does not need to set forth the formal title of the DTPA or indicate the specific sections in order to allege a DTPA claim."[224] Rather, a DTPA pleading is "sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim."[225] In *Brown v. Henderson*, an automobile owner brought suit in a justice of the peace court complaining of "unauthorized work and failure to use diligence in proper care" of the plaintiff's automobile.[226] The petition "sought 'Triple Damages AND The Maximum Amount of Two-Thousand-Five-Hundred-Dollars And NO Cents Allowed IN Small Claims Court Under Texas Law, ($2,500.00), (TEXAS CONSUMER FRAUD LAW) [sic].'"[227] The justice court denied relief. The owner thereafter filed a separate action in county court alleging claims under the DTPA and complaining of false, fraudulent, misleading, and deceptive conduct in connection with repairs made to his vehicle. On appeal of a summary judgment finding that the DTPA claims were collaterally estopped and barred by res judicata because of the justice court's prior judgment, the Corpus Christi Court of Appeals concluded that the justice court pleading was sufficient to allege a claim for relief under section 17.50 of the DTPA, had been "finally adjudicated in the justice court" and was "barred by res judicata in any subsequent suit brought on the same grounds."[228]

b. Notice Under DTPA Section 17.505

As a prerequisite to filing suit under the DTPA, a consumer must give at least sixty days prior written notice to the person to be sued, advising

221. *Id.* § 27.002.
222. 940 S.W.2d 411 (Tex. App.—Fort Worth 1997, writ denied).
223. *See id.* at 419. RCLA § 27.004(b) allows for a forty-five day notice period prior to filing suit.
224. Brown v. Henderson, 941 S.W.2d 190, 193 (Tex. App.—Corpus Christi 1996, no writ). *See also* Holland Mortgage and Inv. Corp. v. Bone, 751 S.W.2d 515, 519 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); U.S. Steel Corp. v. Fiberglass Specialties, Inc., 638 S.W.2d 950, 955 (Tex. App.—Tyler 1982, no writ); Weitzel v. Barnes, 691 S.W.2d 598 (Tex. 1985).
225. *Brown*, 941 S.W.2d at 192.
226. *Id.* at 191.
227. *Id.* (emphasis in original).
228. *Id.* at 193.

that person of the consumer's complaint and the amount of damages claimed, including attorneys' fees.[229]

In *America Online, Inc. v. Williams*,[230] the Houston Court of Appeals found that the newly-enacted automatic abatement provisions under DTPA section 17.50(b)(1) apply to lawsuits, specifically including class action lawsuits, filed after September 1, 1996, and that the defendant had sufficiently complied with the requirements of the DTPA to be entitled to automatic abatement without hearing.[231] In so holding, the court rejected the plaintiffs' argument that abatement was not required because they also sought relief under provisions of the DTPA other than section 17.50(b)(1).[232] The court found there was no "due order" of pleading required for an abatement and that abatement is automatic under the 1995 amendments.[233] Accordingly, the court reversed the class action designation of the plaintiffs that occurred during what should have been the abatement period, finding that the defendant had not received proper notice necessary from the plaintiffs. The case was automatically abated, without necessity of hearing, for sixty days after notice from the originally named plaintiffs.[234]

All other decisions during the Survey period that addressed the notice period were in cases filed prior to September 1, 1996. In *K.C. Roofing Co. v. Abundis*,[235] the defendant argued that the trial court erred in trebling damages and awarding attorneys' fees because there was no evidence that the defendant was given notice of the plaintiffs' claims under DTPA section 17.505.[236] The plaintiffs admitted that they did not give sixty days written notice of their claims, but relied on the exception permitting the filing of suit when necessary to prevent the expiration of the statute of limitations.[237] The defendant filed an unverified plea in abatement but never set the matter for hearing.[238] The court found that

229. *See* DTPA § 17.505(a).

230. 958 S.W.2d 268 (Tex. App.—Houston [14th Dist.] 1997, no pet. h.). The decision was issued on November 20, 1997, after the end of the Survey period. It is included here because of its significance in being the first reported decision applying the 1995 amendments.

231. *See id.* at *9.

232. *See id.*

233. *See id.* at *8.

234. *See id.* at *9-10.

235. 940 S.W.2d 375 (Tex. App.—San Antonio 1997, writ denied).

236. *See id.* at 377. The defendant also complained that proper notice was not received pursuant to § 38.002 of the Texas Civil Practice and Remedies Code, or § 27.004 of the Texas Property Code. Under the latter provision, a plaintiff seeking damages arising from a "construction defect" must give written notice to the contractor at least sixty days before filing suit. TEX. PROP. CODE ANN. § 27.004(a) (Vernon Supp. 1998).

237. *See* DTPA § 17.505(b); *see also* TEX. PROP. CODE ANN. § 27.004(c) (Vernon Supp. 1998) (similar exception).

238. *See Abundis*, 940 S.W.2d at 378. In order to trigger the automatic abatement provisions in the version of the DTPA in effect at that time, a verified plea was required. DTPA § 17.505(d) (Vernon Supp. 1996). Under the 1995 amendments to the DTPA, however, the abatement period is now automatic without the necessity of verified pleadings. *Compare* DTPA § 17.505(d) (Vernon Supp. 1996) *with* § 17.505(d) (Vernon Supp. 1998).

> [w]here there is some evidence of notice, or legal excuse for failing to give notice, and no effort on the part of the party contesting these facts to get a hearing or finding, Rule 279 of the Texas Rules of Civil Procedure requires that the omitted issue of notice under the DTPA be deemed as found by the trial court in support of its judgment.[239]

5. *Offers of Settlement*

In line with the Legislature's intent that notice be given sixty days prior to filing a claim, the DTPA also affords a defendant that same time period in which to make a reasonable settlement offer.[240] If the amount tendered in the settlement offer is the same or substantially the same as the actual damages found at trial, the consumer may not recover an amount in excess of the amount tendered in the settlement offer or the amount of actual damages found by the trier of fact, whichever is less.[241]

In *Cain v. Pruett*,[242] the defendant made such a pre-suit settlement offer. The court, however, found that the offer did not conform to the requirements of section 17.505(c) because it did not include language agreeing to reimburse the plaintiffs for their reasonable attorneys' fees.[243] The court concluded that settlement offers that fail to meet the express statutory guidelines governing such offers will not limit a plaintiff's ultimate recovery of damages or attorneys' fees awarded at trial.[244]

6. *Limitations*

DTPA claims are subject to a two-year statute of limitations.[245] A DTPA claim accrues when "the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice."[246] In *Harrison County Finance*

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239. *Abundis*, 940 S.W.2d at 378; *see also* TEX. R. CIV. P. 279; Cielo Dorado Dev., Inc. v. Certainteed Corp., 744 S.W.2d 10, 11 (Tex. 1988); Hines v. Hash, 843 S.W.2d 464 (Tex. 1992) (holding that in order to trigger the DTPA notice period the abatement must be heard by the court).

240. *See* DTPA.

241. *See id.* § 17.505(d).

242. 938 S.W.2d 152 (Tex. App.—Dallas 1996, no writ).

243. *See id.* at 157.

244. *See id.* The court noted however that the settlement offer would have an effect on the calculation of prejudgment interest on any damages found by the trier of fact under article 5069-1.05. *See id.* at 157-58.

245. *See* DTPA § 17.565.

246. Eshelman v. Shield, 764 S.W.2d 776, 777 (Tex. 1989); *see also* Harrison County Fin. Corp. v. KPMG Peat Marwick, LLP, 948 S.W.2d 941, 947 (Tex. App.—Texarkana 1997, pet. granted).

> The discovery rule is designed to prevent injustice by delaying accrual "in circumstances where 'it is difficult for the injured party to learn of the negligent act or omission.'" The discovery rule therefore would be feckless if it did not delay accrual until discovery of "the negligent act or omission." This conclusion is not irreconcilable with the "nature of the injury" cases. The "discovery of the possibility of some injury" is not equivalent to the discovery of the nature of an injury. A party does not discover the "nature" of his injury until he discovers its general cause.

Id. (citations omitted).

Corp. v. KPMG Peat Marwick, LLP, the Texarkana Court of Appeals observed that the discovery rule does not apply to most express warranty claims.[247] Reinstating the plaintiffs' claims, the court confirmed that section 17.565 makes DTPA claims subject to the discovery rule.[248]

In *Hartman v. Urban*,[249] the Corpus Christi Court of Appeals enforced the express command of the DTPA that its provisions "apply only to acts or practices occurring after the effective date of this subchapter,"[250] and found that the discovery rule did not apply where the alleged wrong occurred prior to the statute's enactment.[251] Although the plaintiffs argued that an erroneous plat filed in the county clerk's records constituted a "continuing misrepresentation," the court concluded that "the presence of [the] plat at the county clerk's office constituted neither an 'act' nor a 'practice.'"[252] In so holding, the court reasoned that, for purposes of the DTPA, a "'continuing misrepresentation' . . . involves actual, active assurances and reassurances of something by the party sued."[253] The defendants' filing of the plat prior to the effective date of the DTPA therefore was not actionable under the statute. The court concluded that "[t]he substantive rights and duties of a party pursuant to an agreement are those under the law as it existed at the time the agreement was made. A subsequent law that changes those rights and duties would violate the Texas Constitution's prohibition against ex post facto laws."[254]

D. No Producing Cause

When determining whether the actions complained of are the producing cause of a plaintiff's damages, courts look to whether the alleged cause is a substantial factor that brings about the plaintiff's injury and without which the injury would not have occurred.[255] To sustain a DTPA claim, the plaintiff's showing of producing cause does not require a finding that the injury was foreseeable.[256] "Producing cause" has been defined as "an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of, if any."[257]

In *Kessler v. Fanning*,[258] the plaintiffs hired an inspection service to review the condition of a home prior to purchase. The inspection failed to

247. *See Harrison County*, 948 S.W.2d at 948.
248. *See id.* at 943.
249. 946 S.W.2d 546 (Tex. App.—Corpus Christi 1997, n.w.h.).
250. DTPA § 17.63 (Vernon 1987).
251. *See Hartman*, 946 S.W.2d at 551.
252. *Id.*
253. *Id.*; *see* Padre Island Inv. Corp. v. Sorbera, 677 S.W.2d 90, 94 (Tex. App.—San Antonio 1984, writ dism'd) (continuing misrepresentations require active assurances to the complaining party).
254. *Hartman*, 946 S.W.2d at 551 (citing Cape Conroe Ltd. v. Specht, 525 S.W.2d 215, 219-20 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ)).
255. *See* Prudential Ins. Co. v. Jefferson Assocs., 896 S.W.2d 156, 161 (Tex. 1995).
256. *See* Hycel, Inc. v. Wittstruck, 690 S.W.2d 914, 922 (Tex. App.—Waco 1985, writ dism'd).
257. Rourke v. Garza, 530 S.W.2d 794, 801 (Tex. 1975).
258. 953 S.W.2d 515 (Tex. App.—Fort Worth 1997, writ denied).

include the surrounding property and drainage on the lot upon which the home was located. The sellers did not disclose any drainage problems and the purchasers did not discover drainage problems until some time well after the purchase when the house flooded. The record supported a finding that, but for the seller's failure to disclose the drainage problems, the purchase would not have occurred.[259] As a result, the Fort Worth Court of Appeals concluded that there was evidence showing that the defendants' failure to disclose was a substantial factor in the plaintiffs' decision to buy the house, which led to their injury.[260]

E. "PUFFING"

The DTPA does not specifically mention opinion or "puffing" as a defense.[261] In addition to questions regarding the producing cause of a plaintiff's injuries, the Fort Worth Court of Appeals in *Kessler*, also addressed the "puffing" defense.[262] Previously, the Texas Supreme Court found that misrepresentations are actionable under the DTPA "so long as they are of a material fact and not merely 'puffing' or opinion."[263] "Although a 'puffing' or 'opinion' defense often pertains to warranty cases, courts have . . . allowed an 'opinion' defense in misrepresentation claims brought under [DTPA subsections 17.46(b)(5) and (7)]."[264] The *Kessler* court noted that courts

> have generally considered three factors in determining whether a statement is opinion or actionable misrepresentation: 1) the specificity versus vagueness of the statement, 2) the comparative knowledge of the buyer and the seller, and 3) whether the representation pertains to a past or current event or condition versus a future event or condition.[265]

The court concluded that the "puffing" defense was unavailable because the sellers had superior knowledge of the condition of the property and the alleged acts or omissions were not vague or so pertaining to a future event or condition as to be mere opinion or puffing.[266] Rather, the seller's statements concerned items clearly within their knowledge and within their experience as property owners.[267]

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259. *See id.* at 519.

260. *See id.*

261. *See* Humble Nat'l Bank v. DCV, Inc., 933 S.W.2d 224, 229 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

262. *See id.* at 519.

263. Pennington v. Singleton, 606 S.W.2d 682, 687 (Tex. 1980).

264. *Kessler*, 953 S.W.2d at 519 (citing *Humble Nat'l Bank*, 933 S.W.2d at 229-30; Hedley Feedlot, Inc. v. Weatherly Trust, 855 S.W.2d 826, 838-39 (Tex. App.—Amarillo 1993, writ denied) (op. on reh'g); Parks v. U.S. Home Corp., 652 S.W.2d 479, 484 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd w.o.j.)).

265. *Kessler*, 953 S.W.2d at 520.

266. *See id.*

267. *See id.*

F. Application of Proportionate Responsibility Under the DTPA

As an additional part of tort reform litigation, the 1995 Legislature added the DTPA to the list of torts and statutory violations for which defendants may seek proportionate responsibility for a plaintiff's damage claims.[268] Texas Civil Practice and Remedies Code section 33.002(h), effective for claims accruing after September 1, 1995, and for actions filed after September 1, 1996, specifically applies the proportionate responsibility statute to the DTPA.[269]

During the Survey period, the defendant in *Waite Hill Services, Inc. v. World Class Metal Works, Inc.*[270] sought to invoke the new proportionate liability law. Noting that the lawsuit was filed prior to the effective date of the 1995 amendments, the court observed that under the prior law, "common-law defenses such as contributory negligence could not defeat recovery on causes of action asserted under the DTPA or Texas Insurance Code."[271] The comparative liability statute in effect at the time of the filing of that lawsuit exempted all actions brought under the DTPA except for those specifically authorized by DTPA section 17.50. "Effective September 1, 1995, an amendment to section 33.002 made the comparative liability statute available in an action brought under the DTPA, but not in a cause of action, like that of [the defendant], that accrued before September 1, 1995 and on which suit was filed before September 1, 1996."[272]

VIII. VENUE

In a case that should serve as a caveat to those drafting choice of forum clauses, the Fifth Circuit Court of Appeals recently administered a narrow construction of such clauses. In *Thompson and Wallace of Memphis, Inc. v. Falconwood Corp.*,[273] the court dealt with the applicability of a contractual choice of law clause to a DTPA claim.[274] The parties had entered into various contracts for the financing of purchases of cotton. The plaintiff argued that a choice-of-law provision applying to the "agreement and its enforcement" required the application of New York law and precluded application of the Texas DTPA.[275] Rejecting this argument,

268. *See* TEX. CIV. PRAC & REM. CODE ANN. § 33.002(h) (Vernon Supp. 1998).

269. *See id.* § 33.001. The statute provides that "a claimant may not recover damages if his percentage of responsibility is greater than 50 percent." *Id.*

270. 935 S.W.2d 197 (Tex. App.—Fort Worth 1996), *rev'd*, 959 S.W.2d 182 (Tex. 1998) (on other grounds).

271. *Id.* at 202.

272. *Id.* (citing Act of May 17, 1995, 74th Leg., R.S., ch. 414, §§ 17, 20, 1995 Tex. Gen. Laws 3003-04 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 33.002 (Vernon Supp. 1998)). Application of the new comparative responsibility scheme to DTPA claims also was briefly discussed in Lewis & Lambert Metal Contractors, Inc. v. Jackson, 914 S.W.2d 584, 589 (Tex. App.—Dallas 1994) *vacated by agr.*, 938 S.W.2d 716 (Tex. 1997).

273. 100 F.3d 429 (5th Cir. 1996).

274. *See id.* at 432-33.

275. *Id.* at 432-33.

the court found that because the choice-of-law provision was narrowly drawn and did not specifically include tort or statutory causes of action, it did not apply to the plaintiff's DTPA claims.[276]

The *Falconwood* court next applied the Texas choice-of-law standards set forth in *Duncan v. Cessna Aircraft Co.*[277] Under that analysis, because the contacts and relationship of the parties were so attenuated to Texas, Texas was not the state with the "most significant relationship" to the events, thus precluding application of the DTPA to the lawsuit.[278] In sum, the narrow drafting of the contract allowed for institution of a Texas DTPA claim, but the facts of the case did not.

IX. CONCLUSION

The present incarnation of the DTPA was fashioned to present a more favorable business climate while continuing to offer substantial protection to traditional consumers. Even prior to widespread implementation of the 1995 amendments, Texas courts appear to have closed the door to many plaintiffs seeking consumer status under the DTPA. The challenge for Texas courts in the years to come will be to give effect to the legislature's intent to curb excessive applications of the DTPA without denying legitimate consumers the significant benefits that the DTPA offers in comparison to common law remedies.

276. *See id.* at 433; *see also, e.g.*, Caton v. Leach Corp., 896 F.2d 939, 943 (5th Cir. 1990); Busse v. Pacific Cattle Feeding Fund # 1, Ltd., 896 S.W.2d 807 (Tex. App.—Texarkana 1995, writ denied).

277. 665 S.W.2d 414, 420 (Tex. 1984).

278. 100 F.3d at 433.