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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)<sup>1</sup> was enacted in 1973 “to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.”<sup>2</sup> In this, the twenty-fifth anniversary of the law’s enactment, the DTPA has continued to show the effects of repeated amendment by the Texas Legislature. Following years of legislative and judicial expansion of consumer remedies, the trend in recent years has been contraction. The most recent amendments, enacted in 1995 by the 74th Texas Legislature, introduced new restrictions on the types of commercial conduct that may form the basis of a DTPA claim. The 1995 amendments, which govern all causes of action accruing on or after September 1, 1995 and all causes of action, regardless of when they accrued, filed on or after September 1, 1996, were examined in several judicial decisions during the Survey period.<sup>3</sup> Most notably, courts have begun to apply the new restrictions on DTPA claims in cases involving professional services.<sup>4</sup> The provisions of the 1995 amendments excluding from the statute’s coverage nonresidential transactions involving substantial dollar amounts (\$100,000 in cases involving a written contract and \$500,000 in all such cases irrespective of the existence of a contract) remain to be explored.<sup>5</sup>

This Survey of significant developments involving the DTPA covers the time period from October 1, 1997 through September 30, 1998. Noteworthy decisions during the Survey period address consumer status, the rela-

1. TEX. BUS. & COM. CODE ANN. §§ 17.41 *et seq.* (Vernon 1987 & Supp. 1999).

2. *Id.* § 17.44(a).

3. *See, e.g., infra* Parts III A and E.

4. *See infra* Part III A.

5. *See* § 17.42 historical note (Vernon Supp. 1999) [Act of May 19, 1995, 74th Leg., R.S., ch. 414 § 20(b), 1995 Tex. Gen. Laws 3004].

tionship of the plaintiff to the defendant, preemption, the proper measure of damages, and defenses to DTPA claims.

## II. CONSUMER STATUS

### A. INTRODUCTION

In order to recover under the DTPA, a plaintiff must establish that he is a "consumer" as that term is defined in the statute. 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.<sup>6</sup> Whether a plaintiff is a DTPA consumer is a question of law.<sup>7</sup>

### B. THE CONSUMER'S RELATIONSHIP TO THE DEFENDANT

In *Church & Dwight Co. v. Huey*,<sup>8</sup> the San Antonio Court of Appeals examined the liability of upstream manufacturers for breach of warranty. Huey won a bid to repaint the window frames of the historic Travis Building in San Antonio. To perform the job, Huey purchased a product called Armex Blast Media manufactured by Church & Dwight, but sold by San Antonio-based American Graffiti. Although the flyer published by Church & Dwight represented that the product rinsed away easily, "in fact it soaked into porous materials, such as brick, and seeped out, leaving white stains and crystal formations."<sup>9</sup> Huey sued Church & Dwight under the DTPA, claiming misrepresentation and breach of warranty. Church & Dwight invoked the Texas Supreme Court's decision in *Amstadt v. United States Brass Corp.*,<sup>10</sup> which held that upstream suppliers of component parts cannot be held liable under the DTPA if the claimed violation did not occur in connection with the consumer transaction giving rise to the claim.<sup>11</sup> Church & Dwight argued that because it was not connected to the transaction between Huey and American Graffiti, it could not be held liable to Huey under the DTPA.<sup>12</sup> Rejecting this contention, the San Antonio court noted that Church & Dwight's advertising reached Huey and induced him to buy Church & Dwight's product. The court reasoned that:

Church & Dwight's marketing efforts were incorporated into American Graffiti's marketing efforts, and they formed the basis for Huey's decision to use the product. When American Graffiti gave a demonstration of its technique to Huey, it passed along a brochure published by Church & Dwight, touting the benefits of its product.<sup>13</sup>

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6. See § 17.45(4).

7. *Hedley Feedlot, Inc. v. Weatherly Trust*, 855 S.W.2d 826, 831 (Tex. App.—Amarillo 1993, writ denied).

8. 961 S.W.2d 560 (Tex. App.—San Antonio 1997, no pet.).

9. *Id.* at 563-64.

10. 919 S.W.2d 644 (Tex. 1996).

11. See *id.* at 654.

12. See *Church & Dwight*, 961 S.W.2d at 563.

13. *Id.* at 565.

Huey most certainly “sought and acquired” Church & Dwight’s product based, in part, on the manufacturer’s representations. Further, just as in *Arthur Andersen & Co., v. Perry Equipment Corp.*,<sup>14</sup> Huey relied on the provider’s representations to make a business decision. Church & Dwight was connected to the transaction, because “Church & Dwight’s medium was the only subject of the transaction.”<sup>15</sup>

In another case dealing with the plaintiff’s relationship to the purchase at issue, *Chamrad v. Volvo Cars of North America*,<sup>16</sup> the plaintiff claimed that he was severely injured when an air bag in a Volvo station wagon failed to deploy during an accident. Chamrad’s DTPA claim against Volvo alleged breach of express warranties and misrepresentation.<sup>17</sup> However, the owner of the car was not Chamrad but rather his girlfriend, O’Connor. Chamrad claimed that prior to the purchase of the vehicle, he accompanied O’Connor to a Volvo dealership in San Francisco where they were informed of the qualities of Volvo’s air bags.<sup>18</sup> O’Connor later purchased the Volvo station wagon in question from a dealership in Victoria, Texas, paid for the car, and placed the title in her name.<sup>19</sup> Affirming summary judgment against Chamrad, the Fifth Circuit concluded that he “was no more than an incidental beneficiary of the purchase. In order to claim ‘consumer’ status, the underlying transaction must be consummated with an intent to benefit the claimant.”<sup>20</sup> Because Chamrad did not acquire by purchase or lease any goods or services that formed the basis of his complaint, he did not qualify as a consumer under the DTPA.<sup>21</sup>

### C. DERIVATIVE LIABILITY

In *Coffey v. Fort Wayne Pools, Inc.*,<sup>22</sup> homeowners contracted with a distributor selling swimming pool equipment and accessories manufactured by Fort Wayne Pools, Inc. (FWP). The distributor was an independent contractor who purchased components from FWP and then packaged those components along with those from other manufacturers to offer complete pool kits to consumers.<sup>23</sup> The contractor passed out FWP brochures and showed the consumers models of FWP pools prior to contracting with them. After entering into a contract to construct pools for several plaintiffs, the contractor commenced construction and received money from each of the plaintiffs.<sup>24</sup> The contractor failed to com-

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

15. *Church & Dwight*, 961 S.W.2d at 565-66 (emphasis in original).

16. 145 F.3d 671 (5th Cir. 1998).

17. *See id.* at 671-72.

18. *See id.*

19. *See id.* at 672.

20. *Id.* *See also* *Rodriguez v. Ed Hicks Imports*, 767 S.W.2d 187, 191 (Tex. App.—Corpus Christi 1989, no writ).

21. *See Chamrad*, 145 F.3d at 672.

22. 24 F. Supp. 2d 671, 674 (N.D. Tex. 1998).

23. *See id.* at 675.

24. *See id.*

plete the pool, and the plaintiffs sued, asserting breach of contract and DTPA causes of action against FWP for the actions of the contractor.<sup>25</sup> Although the plaintiffs admitted that FWP made no direct misrepresentations to them,<sup>26</sup> they claimed that FWP violated the DTPA by breaching express and implied warranties that their pools would be constructed “in a workmanlike manner, [by] falsely representing that the pools would be constructed in accordance with approved standards and by committing an unconscionable act.”<sup>27</sup> Granting FWP’s motion for summary judgment, the United States District Court for the Northern District of Texas concluded that plaintiffs could not “premise FWP’s alleged DTPA liability upon [the contractor’s] conduct.”<sup>28</sup> The court conducted a thorough review of the relationship between the contractor and FWP and found that there was no agency relationship under Texas law and that the contractor at all times acted independently of FWP’s direction.<sup>29</sup> The court emphasized that “consumers may not establish DTPA liability based on the mere existence of a relationship between the parties or the fact that the parties were ‘inextricably intertwined.’”<sup>30</sup> The court concluded that there could be no liability premised upon the independent contractor’s conduct absent an actual deceptive act committed by FWP.<sup>31</sup>

The pivotal question in *Universal Surety of America v. Central Electric Enterprises & Co.*,<sup>32</sup> was whether a subcontractor could claim DTPA consumer status in an action against a surety of the general contractor. Recognizing that a surety bond is not in all respects the same as an insurance policy, the San Antonio Court of Appeals observed that a third party who seeks insurance proceeds has the same objective as a subcontractor who seeks proceeds under a payment bond.<sup>33</sup> Accordingly, the court held that inasmuch as a third party claimant seeking proceeds under an insurance policy is not a “consumer” under the DTPA, neither is a third party seeking payment of proceeds under a payment bond.<sup>34</sup> Because the subcontractor did not seek goods or services from the surety or the general contractor, the surety bond did not give rise to consumer status under the DTPA.<sup>35</sup>

#### D. 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,

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25. *See id.* at 675-76.

26. *See id.* at 684 n.17.

27. *Id.*

28. *Id.*

29. *See id.* at 683.

30. *Id.* at 684.

31. *See id.*

32. 956 S.W.2d 627, 628 (Tex. App.—San Antonio 1997, pet. denied).

33. *See id.* at 629.

34. *See id.*

35. *See id.*

any goods or services. . . ."<sup>36</sup> During the Survey period several cases turned on this issue.

*Sears, Roebuck & Co. v. Wilson*<sup>37</sup> involved the gratuitous bailment of an automobile awaiting repairs. The Wilsons approached Sears to perform repairs on their automobile. When the Wilsons' Sears credit line was not sufficient to pay for the repairs, the Sears representative allowed the Wilsons to leave the car on the Sears lot while they attempted to have their credit limit raised. The Sears representative promised that the car would be safely stored at night. The car was stolen, and the Wilsons sued, claiming that Sears' misrepresentation as to the safekeeping of the automobile amounted to a violation of the DTPA.<sup>38</sup> The Fort Worth Court of Appeals agreed. The prospective buyers approached the prospective seller with the good faith objective of purchasing services, they qualified as DTPA consumers.<sup>39</sup> In such a circumstance, "no money need change hands to establish consumer status,"<sup>40</sup> and the gratuitous bailment suffices as a service "furnished in connection with the sale or repair of goods."<sup>41</sup>

#### E. LIMITATION ON CONSUMER ASSETS

The DTPA contains an additional limitation on consumer status based on the assets of the plaintiff. 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" cannot claim consumer status under the DTPA.<sup>42</sup>

The amount of assets controlled by the plaintiff was a central issue in *NationsBank of Texas v. Akin, Gump, Hauer & Feld, L.L.P.*,<sup>43</sup> a legal malpractice case arising out of a law firm's representation of the estate of Texas oilman Noble Ginther. *NationsBank* addressed the issue of whether a court applying section 17.45(4) should consider the assets of a plaintiff acting in a representative capacity, or the assets of the real party in interest.<sup>44</sup> The Corpus Christi Court of Appeals held that in cases where a corporation acts in a representative capacity, such as a trustee or an executor, and when any compensation received for damages will not inure to the benefit of the representative, the trial court should consider only the assets of the entity being represented.<sup>45</sup>

[I]t is undisputed that it was Ginther, not NationsBank, who initially hired Akin Gump, and it was Ginther, not NationsBank, to whom

36. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987 & Supp. 1999).

37. 963 S.W.2d 166 (Tex. App.—Fort Worth 1988, no writ).

38. *See id.* at 168.

39. *See id.* at 170.

40. *Id.*

41. *Id.* (emphasis in original) (citing TEX. BUS. & COMM. CODE ANN. § 17.45(2) (Vernon 1987 & Supp. 1999)).

42. TEX. BUS. & COMM. CODE ANN. § 17.45(4) (Vernon 1987 & Supp. 1999).

43. 979 S.W.2d 385 (Tex. App.—Corpus Christi 1998, no pet. h.).

44. *See id.* at 390.

45. *See id.* at 391.

Akin Gump allegedly made misrepresentations and committed fraud. NationsBank is merely Ginther's successor in interest. We do not find this shift in interest to be dispositive of consumer status.<sup>46</sup>

The court concluded that "the relevant inquiries to be made in determining consumer status are: (1) to whom the representations were made; (2) who suffered damages from the representations; and (3) who was affected by the defendants' alleged misconduct."<sup>47</sup>

#### F. INTANGIBLES

Intangibles do not qualify as goods or services under the DTPA.<sup>48</sup> Nor is recovery under the DTPA allowed for transactions that involve wholly intangible rights, such as accounts receivable or cash, when the intangibles were not obtained in association with actionable collateral services.<sup>49</sup> Frequently, plaintiffs have attempted to make a "service" associated with the provision of the intangible, the basis of their DTPA claim.<sup>50</sup>

A recent example is *Hendricks v. Thornton*,<sup>51</sup> which involved claims by 127 investors against the accounting firm Grant Thornton International. The investors, many of whom were current or former professional athletes, invested in government securities trading programs offered by Hillcrest Securities Corporation. In its 1982 marketing brochures, Hillcrest listed Grant as a reference and invited potential investors to check on the reliability of Hillcrest and its principals by contacting Alexander Grant & Co., Grant's predecessor. Hillcrest's 1983 marketing materials also promised potential investors that Grant would verify the authenticity of the trades made by Hillcrest.<sup>52</sup>

Grant argued that the plaintiffs failed to qualify as DTPA consumers because they had not purchased goods or services from it.<sup>53</sup> Agreeing, the Beaumont Court of Appeals observed that although Grant performed tax accounting and auditing services similar to those deemed sufficient to support consumer status in *Arthur Andersen & Co. v. Perry Equipment Corp.*,<sup>54</sup> there was a critical difference between the two cases:

Unlike the Andersen case, however, there is no evidence of any contract between the investors and Hillcrest which called for an audit to be performed before any securities would be purchased by the inves-

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46. *Id.*

47. *Id.* at 392.

48. *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, 603 S.W.2d 169, 174 (Tex. 1980) (cash not a good or service).

49. *See* Clary Corp. v. Smith, 949 S.W.2d 452, 464 (Tex. App.—Fort Worth 1997, no writ). *See also* Riverside, 603 S.W.2d at 174-75.

50. *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 defendant's failure to purchase an intangible).

51. 973 S.W.2d 348 (Tex. App.—Beaumont 1998, no pet. h.).

52. *See id.*

53. *See id.* at 355.

54. 945 S.W.2d 812 (Tex. 1977).



tors; and there is no evidence that an audit by Grant or verification of trades by Grant was specifically intended to benefit the investors. The summary judgment evidence establishes that Grant's services were incidental to the transaction, and the investors' evidence does not raise a fact issue indicating that those services were an objective of the transaction between Hillcrest and appellants.<sup>55</sup>

The key factor distinguishing Grant from Arthur Andersen thus appears to be the fact that the purchasers in Grant had not required any audit services be performed as a condition to the transaction.<sup>56</sup>

### III. 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.<sup>57</sup> Recovery also is dependent upon a showing that the plaintiff's relationship to the transaction entitles it to relief.<sup>58</sup>

#### A. PROFESSIONAL SERVICES

As amended in 1995, DTPA excludes from the statute's coverage claims "based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill."<sup>59</sup> This "exemption," however, does not protect "advice, judgment or opinion" that amounts to a material misrepresentation of fact, a failure to disclose information, unconscionable conduct, or breach of an express warranty.<sup>60</sup> The first reported judicial decisions applying this provision appeared during the Survey period.

In *Cadle Co. v. Sweet & Brousseau, P.C.*,<sup>61</sup> a former law firm client brought legal malpractice and DTPA claims against the firm and its attorneys, complaining of the attorneys' failure to respond to written discovery in prior litigation.<sup>62</sup> The law firm filed a motion for partial summary judgment on the DTPA claims, arguing that DTPA section 17.49(c) exempted them from liability. In one of the first applications of this new provision, the law firm was granted summary judgment dismissing the plaintiff's DTPA claims.<sup>63</sup>

In *Latham v. Castillo*,<sup>64</sup> the Texas Supreme Court considered whether an attorney's affirmative misrepresentations to his client can be an unconscionable action under the DTPA. In prior litigation, Latham allegedly

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55. *Hendricks*, 973 S.W.2d at 356-57.

56. *See id.*

57. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)-(3) (Vernon 1987 & Supp. 1999).

58. *See Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 650 (Tex. 1996).

59. *See* TEX. BUS. & COMM. CODE ANN. § 17.49(c) (Vernon 1987 & Supp. 1999).

60. *Id.* §17.49(c)(1)-(4).

61. 1998 WL 101749 (N.D. Tex., Mar. 3, 1998).

62. *See id.* at \*1.

63. The court noted that the plaintiff failed to respond properly to the defendant's motion. *See id.*

64. 972 S.W.2d 66 (Tex. 1998).

told the Castillos that he had filed and was actively prosecuting a medical malpractice claim on their behalf. In fact, the statute of limitations ran on the claim without suit being filed. The Castillos filed suit against the attorney alleging that he committed malpractice and violated the DTPA by failing to prosecute the claim as represented. The trial court entered a directed verdict against the Castillos on all claims because they failed to present evidence that, but for Latham's negligence, they would have won the medical malpractice suit.<sup>65</sup> Finding that "attorneys can be found to have engaged in unconscionable conduct by the way they represent their clients," the Texas Supreme Court reversed the directed verdict.<sup>66</sup> The court acknowledged that it is not enough for a DTPA plaintiff merely to prove an unconscionable action or course of action; the defendant's conduct also must be the producing cause of the plaintiff's damage.<sup>67</sup> Although the plaintiffs failed to present evidence that Latham's actions caused an economic injury, there was evidence that his actions caused mental anguish damages, which were recoverable.<sup>68</sup>

It is axiomatic that mental anguish damages are actual damages recoverable at common law for "some common law torts . . . , and by analogy for knowing violations of certain statutes such as the Deceptive Trade Practices Act." Therefore, the Castillos do not have to first prove that they have suffered economic damages in order to recover mental anguish damages.<sup>69</sup>

Accordingly, though the Castillos' simple negligence claims failed to show injury proximately related to the alleged unconscionable conduct, their DTPA claim for mental anguish damages survived.

In *City of Garland v. Booth*,<sup>70</sup> the City of Garland brought an action against attorneys who had been disqualified from representing the City's opponents in a prior lawsuit. As part of the settlement in that prior lawsuit, the City's opponents assigned any claims they had against their attorneys to the City.<sup>71</sup> The attorneys had been disqualified from representing the City's opponents because a former partner of the law firm had drafted the agreement at issue in the prior lawsuit for the City.<sup>72</sup> The law firm claimed that the assignment of a legal malpractice cause of action between the parties in the underlying litigation was in violation of public policy.<sup>73</sup> The Dallas Court of Appeals noted that public policy concerns against assignment of legal malpractice causes of action between parties in underlying litigation include the following: (1) the demeaning

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65. *See id.* at 67.

66. *Id.* at 68.

67. *See id.* at 69; *see also* TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon 1987 & Supp. 1999).

68. *See Latham*, 972 S.W.2d at 69.

69. *See id.* (quoting *City of Tyler v. Likes*, 962 S.W.2d 489, 495 (Tex. 1997)).

70. 971 S.W.2d 631, 632 (Tex. App.—Dallas 1998, no pet. h.).

71. *See id.*

72. *See id.*

73. *See id.* at 634 (citing *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 318 (Tex. App.—San Antonio 1994, writ ref'd)).

of the legal profession by a market in malpractice claims; (2) the risk of collusion between assignor and assignee; (3) the risk that assignment of legal malpractice claims could deter attorneys from zealous representation of their clients; (4) the possibility that such assignments could cause legal services to be less available, especially to clients with inadequate insurance or assets; and (5) the illogical reversal of roles inherent in allowing a party to sue the adverse party's attorney.<sup>74</sup> Reviewing the facts in *City of Garland*, the court found that all of these public policy concerns were present and upheld the trial court's finding that the assignment was barred as a matter of law.<sup>75</sup>

## B. AGENCY RELATIONSHIPS

Typically, a principal may be held liable under the DTPA for the misrepresentations of its employees or agents under general agency principles.<sup>76</sup> During the survey period, the Texas Supreme Court addressed agency liability in the context of the sale of limited partnership interests.

In *Insurance Company of North America v. Morris*,<sup>77</sup> the principal issue on appeal was whether an insurance surety was liable to investors who made loan commitments based on misrepresentations by a broker/dealer of limited partnership interests in oil and gas partnership programs.<sup>78</sup> Commonwealth Enterprises, Inc. was engaged in the business of "structuring and syndicating interests in limited partnerships formed for the exploration, drilling, development, and production of oil and gas."<sup>79</sup> Commonwealth obtained a commitment from the Insurance Company of North America (INA) to issue surety bonds guaranteeing the limited partners' promissory notes issued to fund the purchase of their partnership interests.<sup>80</sup> The administrative general partner and managing broker/dealer of two of the limited partnership units exaggerated the prospects and potential awards of the programs while, at the same time, minimizing the risks and misrepresenting the returns on past Commonwealth programs.<sup>81</sup> In doing so, they "touted the fact that INA had thoroughly reviewed the . . . programs, suggesting that INA's approval and underwriting of the programs meant that they were trustworthy, solid investments expected to generate two- and three-fold returns with a minimum of risk."<sup>82</sup> However, the private placement memoranda

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74. See *City of Garland*, 971 S.W.2d at 633 (citing *Zunga*, 878 S.W.2d at 317-18).

75. See *id.* at 634 (finding, among other reasons, that "[t]he possibility that an attorney's billing practices, correspondence with the client or lack thereof, or strategic decision . . . could be used as a bargaining chip in settlement negotiations could deter attorneys from zealous advocacy on behalf of their clients" *Id.*).

76. See, e.g., *Henry S. Miller Corp. v. Bynum*, 836 S.W.2d 160 (Tex. 1992); *Light v. Wilson*, 663 S.W.2d 813 (Tex. 1983).

77. 981 S.W.2d 667 (Tex. 1998).

78. See *id.* at 669-670.

79. *Id.* at 670.

80. See *id.*

81. See *id.* at 670.

82. *Id.*

accompanying the offerings contained conspicuous notices informing investors that dealers and salesmen were not authorized to give information or make representations on behalf of any entities except for those specifically set forth in the offering memorandum.<sup>83</sup> The limited partners subsequently defaulted on their promissory notes, demand was made upon INA on its surety bonds, and INA in turn demanded reimbursement from the investors pursuant to promissory notes and indemnification agreements that had been assigned to INA. When the investors did not pay, INA sued.<sup>84</sup> The investors counterclaimed, alleging that INA was jointly responsible for the fraud and misrepresentations made by the investment advisors who solicited the investors' purchases of the partnership interests.<sup>85</sup> At trial, the jury found that INA was liable for unconscionable acts in violation of DTPA section 17.50(a)(3).<sup>86</sup> The court of appeals affirmed, finding that the brokers and representatives who had engaged in the offensive conduct were dual agents of INA and Commonwealth. The appeals court relied on two theories of agency – "common law agency and statutory agency under Article 21.02 of the Texas Insurance Code."<sup>87</sup>

Reversing the appeals court's agency finding, the Texas Supreme Court found no evidence that the wrongdoers' authority as soliciting agents extended to making misrepresentations concerning the quality of the investments.<sup>88</sup> The court drew a distinction between soliciting agents and agents who would have actual authority to make representations on behalf of their principal.<sup>89</sup> The court next reviewed Texas law regarding the status of a plaintiff as a consumer where the consumer's complaints center around services corollary to an investment. The court concluded that the investors were consumers of at least some of INA's services, and that INA therefore was potentially liable for the alleged unconscionable actions of the sales agents.<sup>90</sup> However, because those actions were not within the scope of the authority granted the sales agents, INA could not be held liable under the DTPA for those actions.<sup>91</sup>

In *Tweedell v. Hochheim Prairie Farm Mutual Insurance Ass'n*,<sup>92</sup> a group of independent insurance agents brought DTPA claims against an insurer alleging that the insurance company had made misrepresentations to them regarding contracts that set forth their status as sales representatives and agents for the company.<sup>93</sup> Hochheim had terminated the

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83. *See id.*

84. *See id.*

85. *See id.*

86. *See id.* at 671.

87. *Insurance Co. of North America v. Morris*, 928 S.W.2d 133, 144 (Tex. App.—Houston [14th Dist.] 1996), *rev'd* 981 S.W.2d 667 (Tex. 1998).

88. *See Morris*, 981 S.W.2d at 672.

89. *See id.*

90. *See id.*

91. *See id.* at 677.

92. 962 S.W.2d 685 (Tex. App.—Corpus Christi 1998, no pet. h.).

93. *See id.* at 686.

agents' contracts and refused to renew policies issued by the agents because of high losses under the policies.<sup>94</sup> Hochheim filed a counterclaim alleging that the agents did not have standing as consumers and had filed their DTPA claims in bad faith.<sup>95</sup> The agents did not claim that Hochheim misrepresented the coverage available under the terms of the policies, but rather that it misrepresented the agents' contractual status with Hochheim.<sup>96</sup> The Corpus Christi Court of Appeals found that because the insurance agents had not "sought or acquired goods or services by purchase or lease" from Hochheim as required by DTPA section 17.45, the agents did not qualify as consumers.<sup>97</sup>

#### IV. CLAIMS UNDER ENUMERATED DTPA CAUSES OF ACTION

##### A. INTRODUCTION

The DTPA contains a number of enumerated sections, violation of which triggers liability under the statute. DTPA claims generally involve one or more of the following:

- (1) "laundry list" claims under section 17.46(b), defining the scope of "false, misleading or deceptive acts" prohibited by the statute;<sup>98</sup>
- (2) "unconscionable" actions or courses of action;
- (3) breach of express or implied warranties;
- (4) insurance code violations; and
- (5) violations of various statutes incorporating the DTPA.<sup>99</sup>

##### B. LAUNDRY LIST CLAIMS

DTPA section 17.46(b) contains twenty-four subparts. Plaintiffs invoking these "laundry list"<sup>100</sup> claims are not required to prove or plead the defendant's state of mind or intent to deceive;<sup>101</sup> nor have plaintiffs been required to show that they relied on the alleged deceptions.<sup>102</sup> However,

94. *See id.*

95. *See id.*

96. *See id.* at 687.

97. *Id.* Because insurance agents' contractual status with insurance companies is addressed under Insurance Code § 21.21, the court allowed the agents to maintain their claims under the Insurance Code. *See id.*

98. TEX. BUS. & COM. CODE ANN. § 17.46(b) (Vernon 1987 & Supp. 1999). There are 24 enumerated laundry list items, which generally proscribe particular types of misrepresentations or omissions. *See id.*

99. Statutes incorporating provisions of the DTPA include: TEX. PROP. CODE ANN. §§ 41.005, 41.007, 59.005, 221.024; TEX. BUS. & COMM. CODE ANN. §§ 18.11, 35.74(c); TEX. CIV. PRAC. & REM. CODE ANN. §§ 3.0002, 41.002(b)(1), 77.003(b); TEX. GOV'T CODE ANN. § 2006.012; TEX. HEALTH & SAFETY CODE §§ 162.012, 164.013; TEX. INS. CODE ANN. art. 9.48, 21.07-4, 21.21, 21.21-2; TEX. REV. CIV. STAT. ANN. art. 4413(3-6)(e), 4512(j), 4552-5.11(f), 4552-5.18(d), 4896-1, 5069-11.11, 5069-13.03, 5069-16.15, 5221f, 5521L, 5521a-7, 5949, 6573a, 6701(g)-2, 8880, 9020; and TEX. TRANSP. CODE § 684.086.

100. The earliest located reported case reference to the enumerated items listed under DTPA section 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).

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

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

the issue of whether a consumer should have to show reliance remains the subject of debate.<sup>103</sup> Several significant cases involving “laundry list” claims were reported during the survey period.

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

The defendant’s 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 under DTPA section 17.46(b)(23), the plaintiff must show that the defendant “fail[ed] to disclose information concerning . . . services which was known at the time of the transaction.”<sup>104</sup>

The proof required to sustain a claim under section 17.46(b)(23) was addressed in several cases involving an “as is” clause in a real estate sales contract. In *Pairett v. Gutierrez*,<sup>105</sup> the purchasers of a house brought DTPA claims against the sellers, complaining of defects discovered in the foundation of the house after its purchase. The defendants argued that the sales contract contained an “as is” clause, which precluded any causal connection between the defendants’ actions and the plaintiff’s DTPA claims.<sup>106</sup> The court recalled the general proposition that “[u]nder the DTPA, a seller has no duty to disclose to a buyer defects of which a seller is unaware.”<sup>107</sup> However, should the seller be aware of material facts that are undiscoverable by the buyer in the exercise of ordinary care, the seller does have a duty to disclose such facts.<sup>108</sup> Reversing a summary judgment in favor of the defendants, the court noted that an “as is” agreement does not bind a buyer if proof of fraudulent misrepresentation or concealment of information by the seller is shown.<sup>109</sup> The court concluded that the “as is” language contained in a standard Texas Real Estate Commission Property Condition Addendum clause was not sufficient to conclusively preclude the plaintiffs from showing reliance or causation on the seller’s representations.<sup>110</sup> According to the Austin Court of Appeals, in order to successfully invoke an “as is” clause in a sales contract, the seller must prove that the clause contains language conclusively precluding the buyer from relying on any representations or knowledge of the seller and that the buyer is relying solely on his own inspection of the premises.<sup>111</sup>

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

104. TEX. BUS. & COM. CODE ANN. § 17.46(b)(23) (Vernon 1987 & Supp. 1999); see also *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 479 (Tex. 1995).

105. 969 S.W.2d 512 (Tex. App.—Austin 1998 no pet. h.).

106. See *id.* at 514.

107. *Id.* at 515 (citing *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 479 (Tex. 1995)).

108. See *id.*

109. See *id.* at 516 (citing *Prudential Ins. Co. of America*, 896 S.W.2d at 161).

110. See *id.* at 516-17; see also *Smith v. Levine*, 911 S.W.2d 427, 430-33 (Tex. App.—San Antonio 1995, writ denied).

111. See *Pairett*, 969 S.W.2d at 516-17.

In *Erwin v. Smiley*,<sup>112</sup> the plaintiffs likewise complained about misrepresentations and a failure to disclose information regarding a house they had purchased. Relying on an "as is" clause in the Property Condition Addendum attached to the sales contract, the defendant claimed that even if it had made oral misrepresentations or failed to disclose material facts, such actions or failures could not have been the producing cause of the plaintiffs' damages.<sup>113</sup> Applying DTPA section 17.50(a)(1), the Eastland Court of Appeals found that the defendant's actions were not the producing cause of the plaintiffs' injuries.<sup>114</sup> "To show actual causation in fact requires proof that an act or omission was a substantial factor in bringing about the injury which would not have otherwise occurred."<sup>115</sup> The court determined that "the validity of the 'as is' agreement is determined in light of the sophistication of the parties, the terms of the 'as is' agreement, whether the 'as is' clause was freely negotiated, whether it was an arm's length transaction, and whether there was a knowing misrepresentation or concealment of a known fact."<sup>116</sup> Because the jury failed to find that any alleged misleading or deceptive acts or practices were made knowingly, the defendant's conduct did not fall within DTPA section 17.50. Additionally, because the evidence showed that both buyer and seller were similarly situated, that the transaction was arm's-length, that both parties were represented by counsel, that there was no special relationship between the parties, and that the "as is" provision was freely negotiated, rather than mere boilerplate language in a preprinted earnest money contract form,<sup>117</sup> the court determined that "as is" provision should be enforced.<sup>118</sup> In so holding, the Eastland court focused on the fact that the seller made the buyer aware that the sale was on an "as is" basis, as well as the fact that the buyer consulted his attorney before signing the earnest money contract.<sup>119</sup> In contrasting the *Pairett* and *Erwin* cases, it appears that the extent of actual negotiations between the parties regarding the "as is" nature of the sale will largely determine whether an "as is" clause in a Texas Real Estate Commission contract will be upheld in defense of DTPA claims by a disappointed homeowner.

## 2. Section 17.50 – Breach of Express or Implied Warranties

Although a DTPA claim may be based upon the breach of an express

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112. 975 S.W.2d 335 (Tex. App.—Eastland 1998, no pet. h.).

113. *See id.* at 338.

114. *See id.*

115. *Id.* (citing *McClure v. Allied Stores of Texas, Inc.*, 608 S.W.2d 901, 903 (Tex. 1980)).

116. *Id.* (citing *Prudential Ins. Co. of America*, 896 S.W.2d at 160-62).

117. While the "as is" language excerpted in the opinion was from a pre-printed form, the court referred to other negotiations regarding the "as is" nature of the sale. *Erwin*, 975 S.W.2d at 338.

118. *See id.* at 339.

119. *See id.*

or implied warranty, the DTPA does not itself create any warranties.<sup>120</sup> To be actionable under the DTPA, a warranty must be recognized by the common law or created by statute.<sup>121</sup>

In *Trinity Universal Insurance Co. v. Bleeker*,<sup>122</sup> an insured sued his liability insurer to recover for the insurer's refusal to accept oral and written settlement offers that allegedly were within the policy limits.<sup>123</sup> The insurance company claimed that its failure to communicate the alleged offers did not injure the insured because the offers did not include a full release of all claims against the insured.<sup>124</sup> The Texas Supreme Court found that the insurance company's failure to inform its insured of alleged offers that did not dispose of all claims against the insured could not be a producing cause of damage to the insured because the insured put forth no evidence that: (1) he would have accepted the offer if he had been informed of them; and (2) the offers disposed of all claims against the insured.<sup>125</sup> Even though the insurance company erred in not informing the insured of the offers, there was no causal connection between the insurance company's failure to inform the insured of the settlement offers and any damage suffered by the insured.<sup>126</sup>

### C. INCORPORATION OF THE DTPA INTO THE TEXAS INSURANCE CODE

Among the most common of DTPA claims arising from other statutory duties are those brought under Article 21.21 of the Texas Insurance Code.<sup>127</sup> 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.<sup>128</sup>

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120. See *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 438 (Tex. 1995); see also TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon 1987 & Supp. 1999).

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

122. 966 S.W.2d 489 (Tex. 1998).

123. See *id.* at 491; see also § 17.50(a)(3). 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. See generally *American Physicians Ins. Exchange 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).

124. See *Trinity Universal*, 996 S.W.2d at 491.

125. See *id.*

126. See *id.*

127. TEX. INS. CODE ANN. § 21.21 (Vernon 1998).

128. See *id.* § 16(a); see *Keightley v. Republic Ins. Co.*, 946 S.W.2d 124, 127 (Tex. App.—Austin 1997, no writ).



During the Survey period several DTPA plaintiffs invoked Article 21.21 to complain of alleged unfair or bad faith handling of their insurance claims.

In *State Farm Fire & Casualty Insurance Co. v. Vandiver*,<sup>129</sup> a homeowner brought suit against State Farm seeking damages arising from the destruction of her home by fire for which State Farm denied coverage, claiming that the plaintiff had committed arson. The trial court entered a judgment for the plaintiff, and on appeal State Farm argued that no cause of action existed for the plaintiff's claim of unfair claims practices. Acknowledging that the Texas Supreme Court recognized this theory of recovery in *Vail v. Texas Farm Bureau Mutual Insurance Co.*,<sup>130</sup> State Farm argued that the Texas Supreme Court implicitly overruled this aspect of *Vail* in *Allstate Insurance Co. v. Watson*.<sup>131</sup> Although the *Watson* court declined to extend *Vail* to third-party claimants and specifically held that "Vail remains the law as to claims for alleged unfair claim settlement practices brought by insured against their insurers,"<sup>132</sup> State Farm argued that this latter holding was "mere dicta."<sup>133</sup> The court rejected this argument, noting that the *Watson* court expressly limited its holding to third-party claims, and that the legislature afforded insureds a private cause of action for unfair claim settlement in 1995 amendments to Article 21.21, section 4, of the Insurance Code.<sup>134</sup> However, the court did agree with State Farm that *Watson* specifically modified *Vail* in one respect. Noting that Article 21.21, section 16 of the Insurance Code "provides a private cause of action for any practice defined by section 17.46 of the DTPA as an unlawful deceptive trade practice,"<sup>135</sup> the court concluded that "[b]ecause unfair claim settlement practices are not listed in section 17.46 as deceptive practices they are not actionable under Article 21.21, Section 16(a)."<sup>136</sup> The *State Farm* court thus recognized that the Texas Supreme Court's decision in *Watson* limits its earlier decision in *Vail* as regards the application of the DTPA to alleged unfair claims settlement practices.<sup>137</sup>

In *Grunbaum v. American Express Assurance Co.*,<sup>138</sup> the plaintiff was a corporate cardholder with American Express Travel Related Services Company who was covered under a total disability policy offered by American Express Assurance Company (AEAC). AEAC had given Grunbaum a summary of policy benefits, which differed from the actual terms of the full policy in that the full policy contained greater limitations

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129. 970 S.W.2d 731 (Tex. App.—Waco 1998, no pet. h.).

130. 754 S.W.2d 129, 132-36 (Tex. 1988).

131. 876 S.W.2d 145 (Tex. 1994) (on rehearing).

132. *Id.* at 149.

133. *State Farm*, 970 S.W.2d at 739.

134. *See id.* at 739.

135. *Id.* at 741 (emphasis in original) (citing *Watson*, 876 S.W.2d at 149 & TEX. INS. CODE ANN. § 21.21 (Vernon 1998)).

136. *Id.* (citing *Watson*, 876 S.W.2d at 149).

137. *See id.*

138. 1998 WL 59491 (N.D.Tex., Feb. 6, 1998).

on recovery.<sup>139</sup>

Grunbaum lost his right eye in a 1995 accident. Late that same year, due to an unrelated disease, he lost most of the visual capacity of his left eye.<sup>140</sup> Consequently, Grunbaum was no longer able to work in his chosen profession of photography,<sup>141</sup> and filed claims under the AEAC policy for disability benefits.<sup>142</sup> AEAC denied his claims based on policy limitations providing that the total disability must arise within thirty days after the accident causing the injury. AEAC's defense was that the initial eye injury in June 1995 did not cause the ultimate total disability, which had in fact been caused by the disease in Grunbaum's left eye.<sup>143</sup> Grunbaum brought claims for alleged misrepresentations under the Insurance Code<sup>144</sup> and DTPA. The DTPA claims were based on the disparity between the summary of benefits provided by AEAC and the actual terms contained in the policy.<sup>145</sup> The court dismissed Grunbaum's Insurance Code and DTPA claims finding that AEAC had acted in good faith and within the terms of the policy.<sup>146</sup> However, the court found that Grunbaum's claims for misrepresenting the terms of the insurance policy were not bad faith claims, but rather were based on variations between the policy and the summary of benefits provided to Grunbaum.<sup>147</sup> As a result, the court allowed Grunbaum to maintain his statutory misrepresentation claims despite the fact that his breach of contract claims failed as a matter of law.<sup>148</sup> Therefore, Grunbaum's claims under Texas Insurance Code article 21.21 and the DTPA were allowed to survive despite the fact that AEAC had acted within the terms of the insurance policy in denying coverage.<sup>149</sup>

Finally, in a case delineating the status of an excess insurer's ability to bring DTPA claims, *National Union Fire Insurance Co. v. Insurance Co. of North America*,<sup>150</sup> an excess insurer brought an equitable subrogation suit against the primary insurance carrier and insurance defense counsel, seeking to recoup monies it paid on an insured's behalf because the defendants mishandled the insured's defense. Rejecting the excess insurer's attempt to convert an equitable subrogation claim into something more, the Houston Court of Appeals held that an excess insurer cannot recover punitive damages in an equitable subrogation suit, nor can it recover for gross negligence or violations of the DTPA or the Insurance Code.<sup>151</sup> The court reasoned that:

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139. *See id.* at \*1.

140. *See id.*

141. *See id.*

142. *See id.*

143. *See id.*

144. TEX. INS. CODE ANN. § 21.55 (Vernon 1998).

145. *See Grunbaum*, 1998 WL 59491, at \*3.

146. *See id.* at \*12.

147. *See id.*

148. *See id.* at \*11.

149. *See id.*

150. 955 S.W.2d 120 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).

151. *See id.* at 134.

limiting an excess carrier to a negligence claim is logical because of the nature of equitable subrogation. . . . [E]quitable subrogation gives indemnity and no more. Because we have held that an excess carrier cannot . . . recover statutory or punitive damages, allowing it to bring claims for gross negligence or violations of the DTPA or Insurance Code would be pointless.<sup>152</sup>

## V. DETERMINING THE MEASURE OF DAMAGES

### A. REQUIREMENT OF "KNOWING CONDUCT"

In *St. Paul Surplus Lines Insurance Co. v. Dal-Worth Tank Co.*,<sup>153</sup> an insured complained of its liability insurer's failure to defend and indemnify the insured in a prior lawsuit. The claim resulted in the entry of a default judgment against the insured and an eventual declaration of bankruptcy. The insured's DTPA theory was that, as a result of the insurance company's actions, it suffered a decline in its "credit reputation."<sup>154</sup> While it was undisputed that the insured had strong credit prior to the bankruptcy, the insured failed to put forth any evidence that any alleged decline in reputation injured it in any way. The Texas Supreme Court found that while there was evidence that the insurance company acted negligently and in violation of the DTPA, there was no evidence that such actions were false, deceptive, or unfair.<sup>155</sup> Accordingly, there was no evidence that the insurance company acted knowingly in the actions complained of by the insured.<sup>156</sup> The court thus concluded that although the insured was entitled to damages under negligence causes of action, mere negligence did not entitle the insured to statutory treble damages under the DTPA.<sup>157</sup>

### B. CALCULATION OF ADDITIONAL DAMAGES

In *Cimino v. Raymark Industries, Inc.*,<sup>158</sup> a certified class of plaintiffs brought claims arising out of personal injury and wrongful death injuries against several manufacturers of asbestos-containing insulating products and some of their suppliers. After liability and actual damages issues were decided in the trial court, issues regarding the proper application of additional damages under DTPA section 17.50(e) arose. The primary issue was whether the DTPA multiplier should be applied not only to actual damages awarded by the jury but also to prejudgment interest subsequently awarded by the court.<sup>159</sup> The Fifth Circuit, in a review of conflicting opinions by the Texas appellate courts, held the following:

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152. *Id.*

153. 947 S.W.2d 51 (Tex. 1998).

154. *Id.* at 53.

155. *See id.* at 54.

156. *See id.*

157. *See id.*

158. 151 F.3d 297 (5th Cir. 1998).

159. *See id.* at 324.

[t]here are no mandatory punitive damages, and whether to award them, and how much to award, is a question for the jury (subject to review for excessiveness). . . the most reasonable view of the verdict . . . [is that it] does not reflect [an] intention to have the multipliers . . . apply to anything other than 'actual damages' or 'compensatory damages' as defined in the court's charge.<sup>160</sup>

The court concluded that "[t]he most reasonable interpretation of the verdict [is that] the jury intended the multiplier to apply only to actual or compensatory damages as found by them, not to something else."<sup>161</sup> Thus, prejudgment interest would not be applied to the DTPA multiplier or punitive damages.<sup>162</sup>

### C. ATTORNEYS' FEES

In *Standard Fire Insurance Co. v. Stephenson*,<sup>163</sup> an insured sought DTPA damages because of an alleged bad faith denial of a life insurance claim. The jury found for the plaintiff on both her DTPA and bad faith claims.<sup>164</sup> The plaintiff elected to recover damages for bad faith practices prescribed under the Texas Insurance Code in addition to attorneys' fees under the DTPA.<sup>165</sup> The insurance company argued that the plaintiff's election to accept damages under her bad faith claims precluded her claim for attorneys' fees under the DTPA.<sup>166</sup> Rejecting this argument, the Beaumont Court of Appeals held that "[b]ecause of the remedial policies underlying the DTPA, a party is entitled to recover attorney's fees for the successful prosecution of a DTPA claim, even if recovery is on another theory."<sup>167</sup>

## VI. 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.<sup>168</sup> Some courts have held that certain common law defenses, such as estoppel and ratification, are not available to combat DTPA claims.<sup>169</sup> Other courts have recognized a variety of defenses to DTPA claims.

160. *Id.* at 325.

161. *Id.*

162. *See id.* at 325.

163. 963 S.W.2d 81 (Tex. App.—Beaumont 1997, no pet.).

164. *See id.* at 84.

165. *See id.* at 92; *see also* TEX. INS. CODE ANN. § 21.21 (Vernon 1998).

166. *Id.*

167. *Id.* (citing *Orkin Exterminating Co. v. Williamson*, 785 S.W.2d 905, 913 (Tex. App.—Austin 1990, writ denied)).

168. *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 dismissed).

169. *See, e.g., Insurance Co. of North America v. Morris*, 928 S.W.2d 133, 154 (Tex. App.—Houston [14th Dist.] 1996, no writ); *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 misrepresentation).

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

In *Coffey v. Fort Wayne Pools, Inc.*,<sup>170</sup> homeowners who were injured when an independent pool contractor defaulted on his obligations, asserted DTPA claims against Fort Wayne Pools, which supplied components for the pools. These claims were based upon statements made by Fort Wayne's employees after the contractor had failed to finish construction.<sup>171</sup> The Fort Wayne employees allegedly assured the plaintiffs that Fort Wayne would do "whatever is necessary to make sure they were satisfied."<sup>172</sup> Rejecting the plaintiffs' attempt to impose DTPA liability, the court emphasized that "it is well-settled that 'the mere failure to perform a promise does not constitute a misrepresentation actionable under the DTPA unless it can be shown that at the time the promise was made, the party making the promise had no intentions of fulfilling the promise.'"<sup>173</sup> Additionally, and in any event, the alleged misrepresentation could not be a producing cause of the plaintiffs' damages, which were caused by the original contractor.<sup>174</sup> Finally, because the plaintiffs' essential complaint was that their pools were not installed in a timely fashion, they could not "premise a DTPA claim on the non-performance of a contract."<sup>175</sup> This case is a further illustration of the limitations on upstream liability that courts have continued to place on DTPA claims following the decision in *Amstadt v. U.S. Brass Corp.*<sup>176</sup>

In *Parks v. DeWitt County Electric Cooperative, Inc.*,<sup>177</sup> a landowner and his wife brought DTPA claims against an electric cooperative that cut down trees on an electric utility easement through their property. The electric cooperative admitted that it had an undisclosed policy of clearing electric utility easement rights-of-way at its discretion.<sup>178</sup> However, the plaintiffs alleged that the cooperative had affirmatively represented to them that it would not cut down any trees on the easement.<sup>179</sup> The cooperative argued that the plaintiffs' DTPA misrepresentation claims arose solely out of the performance of the contract for the easement between the parties; therefore they were not independently valid DTPA claims.<sup>180</sup> Reversing the trial court's grant of summary judgment in favor of the cooperative, the Corpus Christi Court of Appeals found that because there was some evidence of misrepresentation by the cooperative regarding plaintiffs' rights under the contract, the DTPA claims should not have

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170. 24 F. Supp. 2d 671 (N.D. Tex. 1998).

171. *See id.* at 685.

172. *Id.*

173. *Id.* at 686 (citing *Bay Colony, Ltd. v. Trendmaker, Inc.*, 121 F.2d 998, 1006 (5th Cir. 1997)).

174. *See id.*

175. *Id.*

176. 919 S.W.2d 644, 649 (Tex. 1995).

177. 962 S.W.2d 707 (Tex. App.—Corpus Christi 1998, pet. granted).

178. *See id.* at 712.

179. *See id.*

180. *See id.* at 711-12.

been dismissed.<sup>181</sup> Because the misrepresentations were made, independent of the contract terms, “regarding the Co-op’s right under the contract to ‘cut down’ trees on appellants’ property, the DTPA claim was independently actionable.”<sup>182</sup>

## B. PREEMPTION AND EXEMPTION FROM THE DTPA

### I. Medical Claims

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

The Medical Liability and Insurance Improvement Act (MLIIA) was enacted in response to “a medical malpractice insurance crisis.”<sup>183</sup> Regarding DTPA claims, section 12.01(a) of the MLLIA provides:

Notwithstanding any other law, no provision of Section 17.41-17.63 [of 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.<sup>184</sup>

In *Mulligan v. Beverly Enterprises-Texas, Inc.*,<sup>185</sup> the representative of a nursing home patient sued the owner/operator of a nursing home for malpractice. The plaintiff’s claims included violations of the DTPA based on the nursing home’s alleged knowing misrepresentations about the services it would provide and the actual care received at the facility. The plaintiff claimed that the deficient services and care provided by the nursing home breached express warranties in violation of the DTPA.

Affirming the trial court’s grant of summary judgment, the Houston Court of Appeals held that the Medical Liability and Insurance Improvement Act barred the plaintiff’s claims.<sup>186</sup> The court found that the underlying nature of the allegations was that a health care provider was negligent, and that such claims could not be recast as a DTPA action to avoid the limitations set forth in the Medical Liability Act.<sup>187</sup>

A conclusion that the representations and warranties were breached requires a determination of whether the nursing home failed to meet the standard of medical care . . . and, therefore, the underlying nature of the claim is one of negligence. . . . As repeatedly stated by the Supreme Court . . . claims that a health care provider was negligent may not be recast as DTPA actions to avoid the standards set forth in the Medical Liability Act.<sup>188</sup>

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181. *See id.* at 712.

182. *Id.*

183. TEX. REV. CIV. STAT. ANN. art. 4590 (Vernon Supp. 1997).

184. *Id.* § 12.01(a).

185. 954 S.W.2d 881 (Tex. App.—Houston [14th Dist.] 1997, no pet.).

186. *See id.* at 884.

187. *See id.* at 883-84.

188. *Id.* at 883 (citing *Soroklit v. Rhodes*, 889 S.W.2d 239 (Tex. 1994); *Walden v. Jeffery*, 907 S.W.2d 446 (Tex. 1995) & *Gormley v. Stover*, 907 S.W.2d 448 (Tex. 1995)).

In *Angeles v. Brownsville Valley Regional Medical Center*,<sup>189</sup> the parents of a stillborn fetus brought DTPA claims against a hospital for the failure to dispose of the fetus in a "respectful" manner.<sup>190</sup> The plaintiffs also claimed that the hospital's conduct constituted an unconscionable action or course of action.<sup>191</sup> Affirming dismissal of the plaintiffs' DTPA claims, the Corpus Christi Court of Appeals found that because there was no contract or charge for the handling of the stillborn fetus, the plaintiffs did not qualify as DTPA consumers.<sup>192</sup> The court recognized that normally someone in the plaintiffs' position could be considered a consumer of medical services provided by the hospital and the arrangements for the fetus could be said to be associated with such services. However, because in this case there was no "purchase," the supplying of medical services was expressly exempted from the DTPA under Texas Revised Civil Statutes, article 4590i, section 12.01(a). According to the court, the plaintiffs could not be considered consumers of medical services, or services incidental to medical services, because there was no purchase or lease of those medical services about where the complaint was made.<sup>193</sup>

b. Application of the "Learned Intermediary Doctrine"

The "learned intermediary doctrine" is one peculiar to cases involving the duty to warn owed by a medical products manufacturer.<sup>194</sup> 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."<sup>195</sup> 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.<sup>196</sup>

In *Bean v. Baxter Healthcare Corp.*,<sup>197</sup> the Houston Court of Appeals applied the learned intermediary doctrine to a case involving breast implant removal surgery. On appeal, the plaintiffs argued that the learned intermediary doctrine had been recognized by the Texas intermediate appellate courts but not by the Texas Supreme Court, and that the intermediate courts have not extended it to medical devices.<sup>198</sup> Rejecting this argument, the Houston Court of Appeals noted that the Texas Supreme

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189. 960 S.W.2d 854 (Tex. App.—Corpus Christi 1997, pet. denied).

190. *Id.* at 856.

191. *See id.* at 857.

192. *See id.* at 859; *see also* TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987 & Supp. 1999).

193. *See Angeles*, 960 S.W.2d at 859.

194. *See, e.g. In re Norplant Contraceptive Prod. Liab. Litig.*, 955 F. Supp. 700, 703 (E.D. Tex. 1997).

195. *Id.* (citing *Alm v. Aluminum Co. of America*, 717 S.W.2d 588, 591-92 (Tex. 1986)).

196. *See id.*

197. 965 S.W.2d 656 (Tex. App.—Houston [14th Dist.] 1998, no. pet. h.).

198. *See id.* at 660.

Court has cited with approval intermediate court decisions applying the doctrine in the prescription drug context<sup>199</sup> and has twice refused writ in two cases applying the doctrine, finding no reversible error.<sup>200</sup> The court also noted that although no Texas intermediate court had extended the doctrine to medical devices, no court had refused to do so either, and other jurisdictions have applied the doctrine to medical devices.<sup>201</sup> Finding that the prerequisites for application of the doctrine were present, the court of appeals affirmed the trial court's judgment.<sup>202</sup>

### c. MDA Claims

*Worthy v. Collagen Corp.*<sup>203</sup> involved a DTPA claim against a manufacturer of Zyderm, a collagen implant material, alleging that the plaintiff was injured when she was injected with Zyderm<sup>204</sup> products to remove skin defects.<sup>205</sup> Zyderm has been classified as a Class III medical device by the Food and Drug Administration pursuant to the Medical Device Amendments of 1976 to the Food, Drug and Cosmetic Act (the MDA).<sup>206</sup> The manufacturer argued that section 360K(a) of the MDA<sup>207</sup> preempted the plaintiff's DTPA claim.<sup>208</sup> Reviewing the United States Supreme Court's opinion in *Medtronic, Inc. v. Lohr*,<sup>209</sup> the Texas Supreme Court agreed.

Recognizing that "Congress did not intend FDA approval of a device to insulate the manufacturer from all liability for injuries resulting from its use," the Texas Supreme Court acknowledged that "it seems equally clear that Congress did not intend FDA approval as merely a precondition for marketing the device."<sup>210</sup> Surveying decisions from other states and federal circuits, the court found that following the *Medtronic* decision, "most courts have continued to hold that federal requirements on Zyderm preempt most state claims of personal injuries caused by the product."<sup>211</sup> The FDA's pre-marketing approval and review of Zyderm contained conclusions that the product was "safe and effective" and prohibited the manufacture or marketing of the product in a manner inconsistent with conditions set by the FDA. Accordingly, the court concluded

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199. *See id.* at 662; *see also Alm*, 717 S.W.2d at 588.

200. *See Bean*, 965 S.W.2d at 662-63 (citing *Kahn v. Velsicol Chem. Corp.*, 711 S.W.2d 310, 313 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *Gravis v. Parke-Davis & Co.*, 502 S.W.2d 863, 870 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.)).

201. *See Bean*, 965 S.W.2d at 663.

202. *See id.*

203. 967 S.W.2d 360 (Tex. 1998).

204. Zyderm is a cosmetic use product made from a purified form of bovine dermal collagen, a natural protein, that provides structural support for skin, muscles, tendons, and bones. *See id.* at 362.

205. *See id.*

206. *See id.*

207. 21 U.S.C. §360k(a) (West Supp. 1988).

208. *See Bean*, 965 S.W.2d at 362.

209. 518 U.S. 470 (1996).

210. *Worthy*, 967 S.W.2d at 369.

211. *Id.* at 376 (citations omitted).



that "the FDA's requirements concerning Zyderm are entitled to preemptive effect under the MDA. . . ." <sup>212</sup> Because the plaintiff's claim, in sum, was that Zyderm, as approved by the FDA, was unsafe rather than that it was manufactured, marketed, or used on her in any way other than as approved by the FDA, her claim contradicted the FDA's specific findings and was thus preempted. The court went on to conclude that "even if the federal requirements for Zyderm could be viewed as not directly conflicting with a judgment favorable to Worthy in her action, claims like hers 'stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" and thus, for this additional reason, were preempted. <sup>213</sup>

Less than one month after the Texas Supreme Court delivered its opinion in *Worthy*, the Beaumont Court of Appeals reached a different result in *Herring v. Telectronics Pacing Systems, Inc.* <sup>214</sup> In that case, the estate of a pacemaker recipient filed a lawsuit against the manufacturer alleging that the pacemaker was defective and not of the quality promised. <sup>215</sup> Acknowledging that the MDA contains language preempting state law claims, the court characterized the manufacturer as having taken the "absolutist position" that, as a matter of law, "no person injured by a pacemaker can ever sue the manufacturer." <sup>216</sup> Rejecting that position, the court agreed with the plaintiff's observation that the manufacturer "never attempted to show how state laws under which [plaintiff's] claims were brought would impose requirements different from those imposed by the MDA." <sup>217</sup> Finding no conflict between any federal requirement identified by the manufacturer and any of the plaintiff's claims, the Beaumont court reversed the trial court's summary judgment for the manufacturer and remanded the case for further proceedings. <sup>218</sup>

The Beaumont court's decision in *Herring* is difficult, if not impossible to reconcile with the Texas Supreme Court's *Worthy* opinion. In a footnote, the *Herring* court professed "serious concerns with certain factual representations" contained in the *Worthy* opinion, <sup>219</sup> but avoided any se-

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212. *Id.*

213. *Id.* at 377 (quoting *Medtronic*, 518 U.S. at 507).

214. 964 S.W.2d 753 (Tex. App.—Beaumont 1998, pet. denied).

215. *See id.* at 754.

216. *Id.* at 757-58.

217. *Id.* at 757.

218. *See id.* at 758.

219. *Id.* at 755 n.2. Writing for a unanimous court in *Worthy*, Justice Hecht engaged in a lengthy analysis of the three separate opinions in *Medtronic*. As Justice Hecht noted, Justice Stevens' *Medtronic* opinion was joined in part by a five-member plurality. Justice Breyer wrote an opinion concurring in part with Justice Stevens' opinion and Justice O'Connor wrote a concurring and dissenting opinion joined by three other justices. Additionally, Justice Breyer noted his agreement with Justice O'Connor's conclusion that a state common law duty, as well as a state statute, rule, regulation, or other administrative action, can be preempted by the MDA. *See Worthy*, 967 S.W.2d at 370. Although the Beaumont court in *Herring* quarrels with Justice Hecht's "alignment of Justice Breyer with Justice O'Connor's lead minority opinion so as to place the [*Medtronic's*] minority views on its interpretation of the congressional intent of § 360k(a)," (*Herring*, 964 S.W.2d at 755 n.2 (emphasis in original)) Justice Breyer's express agreement with Justice O'Connor on this

rious effort to elaborate.<sup>220</sup> Instead, the Beaumont court offered the assertion that “a careful reading of [*Worthy*] leads us to conclude that our subsequent analysis of [*Medtronic*] is sound, and that [*Worthy*] is distinguishable from the facts and circumstances of [this] case, which is much closer to the circumstances in [*Medtronic*].”<sup>221</sup> The Beaumont court made no effort to support this loosely articulated conclusion. This appears to be plainly inappropriate given the *Worthy* court’s holding that, even absent a direct conflict between FDA requirements and a judgment upon the plaintiff’s claims, such claims “stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,”<sup>222</sup> and therefore are preempted for that additional reason.<sup>223</sup>

## 2. *Offers of Settlement and Failure to Provide Notice Required by the DTPA*

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.”<sup>224</sup> Rather, a DTPA pleading is “sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim.”<sup>225</sup> 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 that person of the consumer’s complaint and the amount of damages claimed, including attorneys’ fees.<sup>226</sup> In line with the legislature’s intent that notice be given sixty days prior to filing a claim, the DTPA also affords a defendant the same time period in which to make a reasonable settlement offer.<sup>227</sup> 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,

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point suggests that Justice Hecht counted the votes correctly. See *Medtronic*, 518 U.S. at 503-05; *Worthy*, 967 S.W.2d at 370.

220. See *Herring*, 964 S.W.2d at 755 n.2.

221. *Id.*

222. *Worthy*, 967 S.W.2d at 377 (quoting *Medtronic*, 518 U.S. at 507).

223. Additionally, the premise underlying the Beaumont court’s rationale—that the facts of *Herring* are much “closer” to *Medtronic* than to *Worthy* (see *Herring*, 964 S.W.2d at 755 n. 2)—seems particularly questionable. Unlike both *Worthy* and *Herring*, the United States Supreme Court’s decision in *Medtronic* did not involve the FDA’s premarket approval, or “PMA,” process, but rather involved a so-called “§ 510(k) notification” process. See *Medtronic*, 518 U.S. at 470. As Justice Stevens noted in *Medtronic*, the PMA process is a “rigorous” one in which manufacturers submit detailed information on their devices, which the FDA then reviews, spending an average of 1200 hours on each submission. In contrast, a § 510(k) review is completed in an average of only 20 hours. See *id.*; see also *Worthy*, 967 S.W.2d at 370.

224. *Brown v. Henderson*, 941 S.W.2d 190, 192 (Tex. App.—Corpus Christi 1996, no writ); see also *Holland Mortgage & 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); and *Weitzel v. Barnes*, 691 S.W.2d 598 (Tex. 1985).

225. *Brown*, 941 S.W.2d at 193.

226. See TEX. BUS. & COM. CODE ANN. § 17.505(a) (Vernon 1987 & Supp. 1999).

227. See *id.* § 17.5052(a).

whichever is less.<sup>228</sup>

In *America On-Line, Inc. v. Williams*,<sup>229</sup> subscribers to an online computer service brought a class action against the service provider alleging a violation of the DTPA. On appeal from the trial court's order certifying the class, American On-Line complained that the trial court abused its discretion by certifying the class during the mandatory abatement period afforded by the DTPA when a plaintiff fails to give pre-suit notice to the defendant.<sup>230</sup> The Houston Court of Appeals agreed, reversing the certification decision because of the failure to give proper notice. The court found that the class notice tendered in the case was not the same as notice on behalf of an individual named consumer and did not afford AOL the defensive protections contained in the DTPA.<sup>231</sup>

The DTPA notice in class actions should contain the specific allegations and demand by the named plaintiffs and include a demand that the defendant settle with others similarly situated. The defendant is not then entitled to be relieved of liability unless it not only offers to settle with the named plaintiffs but also with others similarly situated.<sup>232</sup>

Examining a defendant's responsibility to make a "reasonable" settlement offer under the DTPA, the court in *Gunn Infiniti, Inc. v. O'Byrne*,<sup>233</sup> found that the purchaser of an automobile, which was not in the condition as represented by the seller at the time of sale, had no duty to accept a settlement offer that failed to fully compensate him for all damages incurred. The plaintiff purchased from defendant what he was told was a new and undamaged car.<sup>234</sup> Later he discovered that it was significantly damaged and repaired prior to the sale.<sup>235</sup> The dealer repeatedly offered to replace the vehicle but was unable to produce an exact duplicate meeting the plaintiff's specifications at the time of the original sale.<sup>236</sup> When the plaintiff brought suit, the dealership claimed that the plaintiff had breached his duty to mitigate damages by refusing to accept the automobile dealership's settlement offers.<sup>237</sup> The court found that, because those offers all failed to fully compensate the buyer for damages incurred due to the sale of the defective automobile, the plaintiff had no duty to mitigate his damages.<sup>238</sup>

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228. *See id.* § 17.5052(g).

229. 958 S.W.2d 268 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).

230. *See id.* at 270.

231. *See id.* at 276.

232. *Id.*

233. 963 S.W.2d 787 (Tex. App.—San Antonio 1998, pet. granted).

234. *See id.* at 790.

235. *See id.*

236. *See id.*

237. *See id.* at 791-92.

238. *See id.* at 793; *see also* TEX. BUS. & COM. CODE ANN. § 17.505(a) & (c) (Vernon 1987 & Supp. 1999).

## C. 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, without which the injury would not have occurred.<sup>239</sup> To sustain a DTPA claim, the plaintiff's showing of producing cause does not require a finding that the injury was foreseeable.<sup>240</sup> "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."<sup>241</sup>

In *Brown v. Bank of Galveston*,<sup>242</sup> a bank foreclosed on a home purchaser's interim financing note. The purchaser sued under the DTPA alleging that the bank's foreclosure resulted in the loss of the purchaser's permanent financing.<sup>243</sup> Assuming without deciding that the home purchaser was a consumer, the Texas Supreme Court determined that the bank's acts either were not the producing cause of the alleged damages or could not give rise to a violation of the DTPA.<sup>244</sup> Because the damages that were found by the jury, the difference in the completed value of the house and/or the cost to complete the house, were not damages arising from the actions of the bank, the court found that there could not have been a DTPA violation by the bank as a matter of law.<sup>245</sup> Because the bank's actions were not the producing cause of damages and the plaintiff asserted no other basis for damages against the bank, the plaintiff did not qualify as a consumer under the DTPA.<sup>246</sup>

## D. WAIVER

DTPA section 17.42 provides that an attempted waiver of the provisions of the DTPA is void as a matter of law, unless the waiver is in writing, the parties are in similar bargaining positions, and the consumer is represented by counsel in the purchase.<sup>247</sup>

In *Bakhico Co. Ltd. v. Shasta Beverages, Inc.*,<sup>248</sup> the plaintiff purchased over 100,000 cans of Shasta soda for sale in Russia.<sup>249</sup> The soda was damaged in transport so as to make it undistributable.<sup>250</sup> The plaintiff sued Shasta, which brought third-party DTPA claims against the manufacturer

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

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

241. *Rourke v. Garza*, 530 S.W.2d 794, 801 (Tex. 1975).

242. 963 S.W.2d 511 (Tex. 1988).

243. See *id.* at 513.

244. See *id.* at 513-14.

245. See *id.* at 514.

246. See *id.* at 514-15.

247. See TEX. BUS. & COM. CODE ANN. § 17.42 (a) (Vernon 1987 & Supp. 1999). Additionally, for a waiver to be enforceable, subsections 17.42(b) and (c), as amended in 1995, require the selection of the consumer's attorney to be independent of the defendant and require certain explicit language and conspicuous print size in the waiver.

248. No. 3:94-CV-1780-H, 1998 WL 614647 (N.D. Tex. Sept. 3, 1998)

249. See *id.*

250. See *id.*

of the cans, Reynolds Metal Company.<sup>251</sup> Reynolds argued that Shasta's contract with Reynolds contained a clause waiving any claims against Reynolds if it failed to give Reynolds notice of the claim within twelve months following the date of filling the cans.<sup>252</sup> It was undisputed that the claim was not brought within the agreed time limit. After deciding that a choice-of-law clause giving preference to Virginia law was invalid, the United States District Court for the Northern District of Texas considered whether the waiver clause in the contract precluded Shasta's DTPA claims.<sup>253</sup> Relying upon DTPA section 17.42,<sup>254</sup> the court found that "the contractual limitation of liability agreement did not bar Shasta's indemnification claims under the DTPA."<sup>255</sup>

*Ostrow v. United Business Machines, Inc.*,<sup>256</sup> also involved an asserted waiver of DTPA rights. Ostrow purchased a computer from United Business Machines in 1993. Ostrow was unable to use the computer, and after a consultant was unable to fix it, she returned the computer to UBM for repair. UBM returned the computer to Ostrow claiming that there was nothing wrong with it. When Ostrow again unsuccessfully tried to use the computer, she returned it to UBM and asked for a refund. After some discussion, Ostrow signed a document titled "Full Payment and Release," and was refunded the purchase price of the computer less a 15% restocking fee. UBM gave Ostrow a check for the refund. Written on the front of the check was "full payment and release" and on the back was written "[e]ndorsement or deposit of this check represents a release of all claims by Ostrow & Associates against UBM."<sup>257</sup> Ostrow endorsed and deposited the check and thereafter sued UBM in small claims court seeking damages for violations of the DTPA and for fraud.

Ostrow claimed that the release was a waiver of her DTPA rights and therefore was unenforceable under section 17.42(a).<sup>258</sup> Rejecting this argument, the court explained:

We do not believe Ostrow's is the sort of situation from which the DTPA seeks to protect consumers. To hold otherwise would effectively bar consumers and retailers from settling any disputes without consulting an attorney and beginning a quasi litigious process. We hold a DTPA claim arising out of a contract may be barred by accord and satisfaction.<sup>259</sup>

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251. *See id.* at \*1.

252. *See id.* at \*2. Shasta's third-party claim against Reynolds claimed contribution or, in the alternative, indemnity, should the plaintiff establish that the cans in fact were defective. *See id.*

253. *See id.* at \*4.

254. Reynolds did not present evidence that Shasta failed to qualify as a "consumer" under the DTPA. *See id.* at \*4, n.6.

255. *Id.* at \*6.

256. 982 S.W.2d 101 (Tex. App.—Houston [1st Dist.] 1998, no. pet.).

257. *See id.* at 103.

258. *See id.*

259. *Id.* at 105.

The distinction between the *Ostrow* and *Shasta* decisions may not have as much to do with the size or bargaining position of the plaintiff as with the timing of the alleged waiver. In *Ostrow*, the claimed “waiver” was entered into after the complained-about transaction while the *Shasta* waiver was contained in the parties’ contract. These cases suggest that when the consumer is aware of the facts constituting the claimed DTPA violation at the time the waiver clause is agreed to, the clause may survive a section 17.42 challenge.

## VII. CONCLUSION

Reported decisions during the Survey period confirm and extend a trend noted in last year’s Survey—namely, the courts’ reluctance to embrace theories of DTPA liability that extend beyond “traditional” consumer transactions or relationships. Yet the first decisions to interpret and apply the 1995 amendments do not suggest a lack of nuance in distinguishing qualifying transactions from those beyond the statute’s reach. Evidently sympathetic to the Legislature’s concern over the potential mischief inherent in uncritical application of the DTPA’s provisions to professional services, the Texas Supreme Court’s *Latham* decision<sup>260</sup> nonetheless recognized—and effectuated—the legislative judgment that professionals who engage in fraud, unconscionable conduct, or breach of express warranty should not by virtue of their professional status alone be exempt from the DTPA’s proscriptions.

In the evolving caselaw dealing with privity between the parties, a leit-motif is likewise beginning to emerge. Although it is settled that the DTPA’s coverage does not depend upon strict contractual privity between the plaintiff and defendant, it is equally clear that more than proof of some relation to a common transaction, or “but-for” causality, is required to invoke the statute’s protections. In many cases, the plaintiff may legitimately claim to have relied on information provided by the defendant, although no direct relationship or communication between the two can be shown. Comparison of the opinions in *Arthur Andersen*<sup>261</sup> and *Hendricks*<sup>262</sup> suggests that applicability of the DTPA to such cases may turn upon two factors: (1) whether the plaintiff’s contract with the seller was conditioned upon the defendant’s provision of information or other services; and (2) whether the defendant was aware of such a condition at the time the services were performed.

In this past year, the courts thus appear to have continued a trend of limiting DTPA liability to those defendants who have exerted a direct influence on the plaintiff’s decision to enter into a consumer transaction.

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260. *Latham v. Castillo*, No. 96-0986, 972 S.W.2d 66 (Tex. 1998); *see also supra* Part III A.

261. *See Arthur Andersen & Co. v. Perry Equip. Co.*, 945 S.W.2d at 812; *see also supra* Part II E.

262. *See Hendricks v. Thornton*, 973 S.W.2d 348 (Tex. App.—Beaumont 1998, no. pet. h.); *see also supra* Part II E.

Court decisions in the upcoming year bear watching to ascertain what effect the 1995 amendments' limits on DTPA claims involving substantial monetary transactions will have on both the number and success of claims brought by plaintiffs.