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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] The most recent amendments, enacted in 1995 by the 74th Texas Legislature, govern all causes of action accruing on or after September 1, 1995, and all causes of action filed on or after September 1, 1996, regardless of when they accrued. In enacting the 1995 amendments, the Legislature introduced new restrictions on the DTPA's applicability to nonresidential transactions involving large dollar amounts and to professional services. Few judicial decisions during the survey period involved these changes to the statute's coverage. Four years after the amendments, there are still no reported cases discussing the exclusion of 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)[3] from the statute's coverage.

This survey covers significant developments under the DTPA from October 1, 1998 through September 30, 1999. Noteworthy decisions during the survey period address consumer status, the proper measure of damages, and defenses to DTPA claims.

II. CONSUMER STATUS

Several of the more interesting decisions during the Survey period involve the requirement that the plaintiff be a "consumer" as that term is defined in the statute.[4] To qualify as a consumer, the plaintiff must be an individual who seeks or acquires, by purchase or lease, goods or services; further, those goods or services must form the basis of the plaintiff's com-

1. TEX. BUS. & COM. CODE ANN. §§ 17.41 et seq. (Vernon 1987 & Supp. 2000) [hereinafter DTPA].
2. *Id.* § 17.44(a).
3. *See id.* § 17.49(f), (g).
4. *See id.* § 17.50.

plaint.[5] Whether a plaintiff qualifies for DTPA consumer status is a question of law.[6]

A. The Plaintiff's Relationship to the Transaction

Consumer status under the DTPA depends upon a showing that the plaintiff's relationship to the transaction entitles him to relief.[7] In *Metropolitan Life Insurance Co. v. Haney*,[8] a life insurance agent brought DTPA claims against MetLife complaining of inaccurate policy illustrations generated by computer software that MetLife sold to its agents. Because Haney did not know how to use the software, he obtained the policy illustrations in question from a MetLife branch manager who generated them using the software.[9] After Haney prevailed at trial, MetLife appealed, arguing that the evidence was legally and factually insufficient to support a finding that Haney was a consumer under the DTPA. Haney responded that although he had not purchased the computer software, MetLife intended for the software to be purchased and used by its agents primarily for their benefit.

The San Antonio Court of Appeals recognized that when an employer purchases goods or services for the benefit of its employee, that employee has consumer status under the DTPA for claims arising from those goods or services.[10] Nevertheless, the court reversed the jury's verdict because the evidence showed that MetLife's goal in developing and selling the software was to increase the sales of its products, not to benefit its agents.[11] The court did not attempt to explain how the two motivations were inconsistent, and from the court's opinion they did not appear to be.

Another example is *Moritz v. Bueche*,[12] in which former law students of a defunct law school sued the father of the school's manager. The students alleged that the defendant and his son represented to them, among other things, that attendance at the school would qualify them to take the Texas bar exam, that the school soon would be qualified to confer juris doctor degrees, that law books had been or would be purchased, and that professional faculty would be hired. The trial court granted the defendant's motion for summary judgment, which argued that the students could not establish that they were consumers as to the father.[13]

5. *See id.* § 17.45(4); *see also* Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 351-52 (Tex. 1987).

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

7. *See* Amstadt v. United States Brass Corp., 919 S.W.2d 644, 650 (Tex. 1996); *see also* Sanchez v. Liggett & Myers, Inc., 187 F.3d 486, 491 (5th Cir. 1999) (holding that a "DTPA claim requires an underlying consumer transaction; there must be a nexus between the consumer, the transaction, and the defendant's conduct") (citing *Amstadt*, 919 S.W.2d at 650).

8. 987 S.W.2d 236 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

9. *See id.* at 238-39.

10. *See id.* at 242.

11. *See id.* at 243.

12. 980 S.W.2d 849 (Tex. App.—San Antonio 1998, no pet.).

13. *See id.* at 851.

Reversing, the San Antonio Court of Appeals held:

> Consumer status under the DTPA is defined by the plaintiff's relationship to the goods or services, not by his relationship to his opponent. It is enough that the defendant have a relationship to the transaction and enjoy the benefits of that transaction. While the Students have not conclusively proven that [the father] has done so, the evidence that some payments were sent to [the father's] business, that he personally thanked students for enrolling in the school, and that he assumed a management position in his son's absence pointed out evidence that raised a fact issue on this element of their DTPA claim.[14]

Although this language seems to confuse consumer standing with the principles that determine a defendant's liability in the absence of strict contractual privity, the result seems correct in light of the relationship between the plaintiffs, the transaction, and the defendant's conduct.[15]

Guest v. Cochran[16] involved a malpractice claim arising under the pre-1995 version of the DTPA. The plaintiff's parents had hired an attorney to perform estate planning services. After his parents' death, the plaintiff sued the attorney alleging, among other things, that the attorney was negligent and violated the DTPA by failing to include an estate planning mechanism to allow the estate to avoid paying taxes. Plaintiff also alleged that upon the death of the plaintiff's father, failing to advise the plaintiff's mother or the executors of his father's estate that the mother could disclaim a portion of her inheritance and thus avoid paying taxes. The trial court granted the attorney's motion for summary judgment, in which he argued that the plaintiff individually lacked privity and consumer status.[17] Affirming, the Houston Court of Appeals observed that the DTPA does not require contractual privity because the relevant inquiry is the plaintiff's relationship to the transaction.[18] The court also acknowledged that a plaintiff may be a consumer of legal services absent privity if a third party purchased the services for the plaintiff's benefit.[19] The court held, however, that "[a]ny benefit derived by the beneficiaries of a will from the estate work provided by an attorney is purely incidental."[20] Because the plaintiff's relationship to the will was one of beneficiary, he was not a consumer of the attorney's services, and summary judgment was properly granted.[21]

Finally, in *Flameout Design & Fabrication, Inc. v. Pennzoil Caspian*

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14. *Id.* at 855 (citations omitted).
15. *See Sanchez*, 187 F.3d at 491.
16. 993 S.W.2d 397 (Tex. App.—Houston [14th Dist.] 1999, no pet.). The 1995 amendments to the DTPA exempt from the application of the statute most claims arising from the rendition of legal services. *See id.* at 407 n.8. Because *Guest* was filed prior to September 1, 1996, those amendments did not apply. *See id.*
17. The plaintiff also raised claims in his capacity as co-independent executor of his parents' estate.
18. *See Guest*, 993 S.W.2d at 407.
19. *See id.*
20. *Id.* at 408.
21. *See id.*

Corp.,[22] a creative seller brought a DTPA claim against its buyer. Pennzoil Caspian Corp. ("PCC") contracted with the State Oil Company of the Azerbaijan Republic to install turbine-driven compressors and related equipment in the Caspian Sea and to operate and maintain the equipment after installation. Flameout was the parts supplier for the project. PCC purchased over one million dollars' worth of parts from Flameout before Flameout wrote to PCC stating that it would not accept any future orders from PCC. Flameout then sued PCC, asserting claims for breach of contract, anticipatory repudiation, DTPA violations, fraud, and negligent misrepresentation. Affirming the trial court's grant of summary judgment on the DTPA claim, the Houston Court of Appeals stated: "Flameout is undoubtedly a consumer as to *someone*. However, Flameout is not a consumer as to PCC. Under the alleged agreement, PCC was to consume goods supplied by Flameout. Furthermore, the goods purchased are not the basis of Flameout's complaint."[23]

B. Does the Transaction Involve Goods or Services?

An additional statutory issue when determining consumer status is whether the plaintiff sought or acquired "any goods or services."[24] During the Survey period, several cases turned on this issue.

Because money is not a good or service, a person who seeks only to borrow money is not a DTPA consumer.[25] When the extension of credit is incident to the sale of goods or services and the conduct of the creditor is intertwined in the sale, however, the borrower may be a consumer with respect to the creditor, as well as with the seller, of the goods or services.[26] The Corpus Christi Court of Appeals examined this concept in *Norwest Mortgage, Inc. v. Salinas*,[27] in which disappointed homeowners sued their builder and mortgagee. The builder introduced the homeowners to the mortgagee, which entered into a "Single Closing Construction Loan" with the homeowners, under which the mortgagee agreed to inspect and check the construction of the home, periodically advance funds to the builder based upon the inspector's reports of construction progress, and withhold construction payments until the builder obtained lien waivers from its subcontractors. The mortgagee did not comply with these requirements, and when the buyer ceased construction on the home, leaving the homeowners with an unfinished structure subject to significant liens, the homeowners sued under various theories, including the DTPA, and obtained a substantial jury verdict. On appeal, the mortgagee con-

22. 994 S.W.2d 830 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

23. *Id.* at 838 (emphasis in original); *see also* Essex Ins. Co. v. Blount, Inc., 72 F. Supp. 2d 772 (E.D. Tex. 1999) (holding that an insurance company with assets in excess of $25 million was not itself a consumer and could not assume the consumer status of its insured when insurer had already paid insured and was suing for its own benefit).

24. DTPA § 17.45(4).

25. *See* Riverside Nat'l Bank v. Lewis, 603 S.W.2d 169, 174-76 (Tex. 1980).

26. *See* Brown v. Bank of Galveston, 930 S.W.2d 140, 143 (Tex. App.—Houston [14th Dist.] 1996), *aff'd*, 963 S.W.2d 511 (Tex. 1998).

27. 999 S.W.2d 846 (Tex. App.—Corpus Christi 1999, no pet.).

tended that the homeowners were not DTPA consumers because their injuries were not sustained in connection with the lending of money.[28] The court held that the homeowners were consumers because the mortgagee was inextricably intertwined in the home purchase and because the homeowners' complaint—that the mortgagee failed to properly supervise funding during the construction of the home—demonstrated an injury in connection with the mortgage services obtained from the mortgagee.[29]

In another case involving real estate, *White v. Mellon Mortgage Co.*,[30] the plaintiff purchased property and assumed obligations under a note and deed of trust. The deed of trust obligated the borrower to pay annual premiums for private mortgage insurance. After nearly twenty years, White became concerned that she had been paying the mortgage insurance premiums unnecessarily. She sued the current holder and servicer of the note and deed of trust for DTPA violations, both directly and through the Texas Insurance Code, as well as on various other theories of recovery. The defendants moved for summary judgment, claiming that White was not a consumer. The trial court agreed, and the Tyler Court of Appeals affirmed, holding that "[a]n activity related to a loan transaction is a 'service' for DTPA purposes only if the activity at issue is, from the plaintiff's point of view, an objective of the transaction, not merely incidental to it."[31] The court then found that White was not a consumer because she did not seek the defendants' collection of the mortgage insurance premiums; in fact, she did not want to pay the premiums at all.[32]

Dewitt County Electric Cooperative, Inc. v. Parks[33] involved a rural easement for a utility right-of-way. Homeowners entered into a contract with the local electric cooperative for electrical service. In a separate instrument, the homeowners granted the cooperative an easement, which gave the cooperative certain rights with regard to trees located near the easement. Employees of the cooperative subsequently entered onto the property and removed two oak trees and substantially trimmed another. The homeowners sued the cooperative for damages alleging breach of contract, DTPA violations, and negligence. When the jury reached an impasse, the trial court directed a verdict for the cooperative, holding that the cooperative had not breached the easement contract and that the homeowners' other claims were barred because their action sounded only in contract.[34]

The court of appeals reversed and remanded for a new trial, holding that the easement contract was ambiguous and that two of the homeowners' DTPA claims and their negligence claims were cognizably indepen-

28. *See id.* at 854.
29. *See id.* at 855.
30. 995 S.W.2d 795 (Tex. App.—Tyler 1999, no pet.)
31. *Id.* at 801 (citing FDIC v. Munn, 804 F.2d 860, 865 (5th Cir. 1986)).
32. *See id.*
33. 1 S.W.3d 96 (Tex. 1999).
34. *See id.* at 99.

dent of the contract action.[35] Both parties filed petitions for review asking the Texas Supreme Court to reverse and render judgment. The cooperative argued that the homeowners were not consumers with respect to the easement.[36] Recognizing that "[i]n some cases, an easement grants only an interest in real property, and no service is provided by the holder of the easement to the grantor," the court found that the easement in question was executed in connection with a contract for electrical services.[37] Because the homeowners were consumers of the electrical service, they were entitled to consumer status.[38]

C. Good Faith Intention to Purchase

In addition to the requirements set forth in the statutory language, some courts have imposed the requirement that a DTPA consumer be one who in good faith initiates the purchasing process.[39] To "initiate the purchasing process" means to: (1) approach the seller as a willing buyer with the subjective intent of purchasing, and (2) possess "some credible indicia of the capacity to consummate the transaction."[40]

In *Holeman v. Landmark Chevrolet Corp.*,[41] seven would-be "consumers" brought DTPA claims against two automobile dealerships. Both dealerships had run advertisements stating that all offers would be accepted. The plaintiffs went to the dealerships and made offers to purchase vehicles for amounts ranging from $50 to $200, which the dealerships rejected. The jury found that the plaintiffs were not consumers, and on appeal the plaintiffs insisted that the DTPA had no requirement that the consumers sought to purchase in good faith.[42] The plaintiffs offered the example of involuntary consumer status conferred upon persons whose cars have been towed. The Houston Court of Appeals rejected this analogy, holding that towees are consumers because they actually *acquire* the towing services and *pay* for the towing.[43] Applying the good faith requirement, the court of appeals affirmed the trial court's judgment because the jury could have reasonably found that the plaintiffs were not acting in good faith—particularly because no one else made such low offers.[44] Although not addressed in the opinion, it appears that the case more properly could have been decided on the ground that the defendants' advertisements were obvious puffery.

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35. *See id.* at 99-100.
36. *See id.* at 104.
37. *Id.*
38. *See id.*
39. *See, e.g.*, Martin v. Lou Poliquin Enters., 696 S.W.2d 180, 184 (Tex. App.— Houston [14th Dist.] 1985, writ ref'd n.r.e.).
40. *Id.* at 184-85.
41. 989 S.W.2d 395 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).
42. *See id.* at 398-99.
43. *See id.* at 398.
44. *See id.* at 398-401.

D. When Is it Not Necessary to Be a Consumer?

Article 21.21 of the Texas Insurance Code affords an independent cause of action for an "unlawful deceptive trade practice" as defined by the DTPA.[45] Section 16(a) of article 21.21 specifically 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.[46]

While only a "consumer" may maintain an action directly under the DTPA, the consumer standing requirements of the DTPA were not generally incorporated into article 21.21, and consumer status is not always required of an article 21.21 plaintiff.[47] When a particular subsection of the DTPA expressly requires consumer status, however, that requirement applies to an article 21.21 claim premised on that subsection.[48]

In 1995, the Texas Supreme Court considered the question of whether DTPA section 17.46(b)(23), when incorporated into article 21.21, requires consumer status.[49] Section 17.46(b)(23) affords a cause of action for "the failure to disclose information concerning goods or services . . . intended to induce the consumer into a transaction."[50] The Texas Supreme Court held that the reference to a "consumer" and to "goods and services" indicated the necessity for consumer status independent of any other requirement.[51]

The Texas Supreme Court revisited this issue in *Crown Life Insurance Co. v. Casteel*,[52] a case involving claims by insurance policyholders against a life insurer and agent and a cross-claim by the agent against the insurer. The agent sold "Modified Vanishing Premium" life insurance for the insurance company. After several years, some of his clients complained that the premiums had not vanished and, in some cases, would never vanish. Two of those clients filed suit against the insurance company and agent asserting DTPA, article 21.21, and common law causes of action. The agent then filed a cross-action against the insurer, which included claims under DTPA provisions incorporated into article 21.21. The agent alleged that the insurer made misrepresentations in its policy illustrations provided to the agent and presented to his clients. The jury found for the insureds on their claims against the agent and insurer and for the agent

45. Tex. Ins. Code Ann. art. 21.21 (Vernon 1981 and Supp. 1999).
46. *Id.* § 16(a).
47. *See* Aetna Cas. & Sur. Co. v. Marshall, 724 S.W.2d 770, 772 (Tex. 1987).
48. *See* Transport Ins. Co. v. Faircloth, 898 S.W.2d 269, 273-74 (Tex. 1995).
49. *See id.* at 274.
50. DTPA § 17.46(b)(23).
51. *Faircloth*, 898 S.W.2d at 273.
52. 43 Tex. Sup. Ct. J. 348, 2000 WL 72142 (Tex. Jan. 27, 2000) (not designated for publication).

on his cross-action against the insurer. The trial court granted the insurer's motion for judgment notwithstanding the verdict on the agent's cross-action, in part because the agent was not a DTPA "consumer," and the court of appeals affirmed.[53]

Reversing, the Texas Supreme Court reaffirmed its holding that article 21.21 does not generally incorporate the DTPA's consumer standing requirement but that a specific enumerated deceptive act nevertheless may require consumer status.[54] The court then applied its reasoning in *Faircloth* to all DTPA claims brought under Article 21.21, holding that consumer status is required "to state a cause of action under Article 21.21 for the violation of a DTPA subsection if the subsection either (1) specifically involves a consumer transaction, or (2) involves the misrepresentation of 'goods or services' acquired by the plaintiff."[55]

Turning to the agent's particular claims, the court held that DTPA sections 17.46(b)(5),[56] 17.46(b)(7),[57] 17.46(b)(9),[58] and 17.46(b)(23) require consumer status because they deal with misrepresentations of "goods or services."[59] The court held that the agent was not a consumer for purposes of these claims because the claims arose from the policy illustration information he transmitted from the insurer to his clients and not from misrepresentations about goods or services the agent sought to acquire for himself.[60] Because the agent was not a consumer, his claims pursuant to sections 17.46(b)(5), 17.46(b)(7), 17.46(b)(9), and 17.46(b)(23) were barred.

The court reached a different conclusion with respect to the agent's claim under section 17.46(b)(12), which prohibits "representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law."[61] Because this language neither explicitly arises out of a consumer transaction nor involves misrepresentations of goods or services, the court held that consumer status was not required.[62]

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53. The agent admitted that he did have consumer status, but argued that such status was not required. *See id.* at *6.

54. *See id.* at *6.

55. *Id.*

56. Section 17.46(b)(5) prohibits "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have." DTPA § 17.46(b)(5).

57. Section 17.46(b)(7) prohibits "representing that goods or services are of a particular standard, quality, or grade . . . if they are of another." *Id.* § 17.46(b)(7).

58. Section 17.46(b)(9) prohibits "advertising goods or services with intent not to sell them as advertised." *Id.* § 17.46(b)(9).

59. *Crown Life*, 2000 WL 72142 at *7.

60. *See id.* at *7.

61. DTPA § 17.46(b)(12).

62. *See Crown Life*, 2000 WL 74142 at *7; *see also* Tweedell v. Hochheim Prairie Farm Mut. Ins. Ass'n, 1 S.W.3d 304, 308 (Tex. App.—Corpus Christi 1999, no pet.) (applying *Crown Life* and holding that in article 21.21 cases, claims under subsections 2 and 4 of DTPA section 17.46(b) require consumer status because they relate to misrepresentations concerning acquired goods and services, but claims under subsections 3 and 8 do not require consumer status because they do not relate to goods or services).

III. DECEPTIVE PRACTICES

In addition to establishing consumer status, a DTPA plaintiff also must show that a "false, misleading, or deceptive act," breach of warranty, or unconscionable action or course of action occurred, and that such act was the producing cause of the plaintiff's damage.[63]

A. LAUNDRY LIST CLAIMS

DTPA section 17.46(b) contains, in twenty-four subparts, a nonexclusive list of actions that constitute "false, misleading or deceptive acts" under the statute. Plaintiffs invoking these "laundry list"[64] claims are not required to prove or plead the defendant's state of mind or intent to deceive.[65] Nor have plaintiffs been required to show that they relied on the enumerated deceptions.[66] Whether a consumer should have to show reliance, however, remains the subject of debate.[67] Several significant cases involving "laundry list" claims were decided during the survey period.

1. § 17.46(b)(12)—Misrepresentation of Rights, Remedies, or Obligations

To maintain an action for misrepresentation under DTPA section 17.46(b)(12), a consumer must show that the defendant represented "that an agreement confers or involves rights, remedies, or obligations which it does not have or involve."[68] This provision has been frequently invoked by plaintiffs seeking to convert a breach of contract into a DTPA violation.[69]

Dewitt County Electric Cooperative, Inc. v. Parks[70] clarified the interaction between this section of the DTPA and the parties' rights under a contract. The plaintiff homeowners claimed that: (1) an easement agreement between themselves and a utility cooperative was itself a misrepresentation that their trees would not be cut, and (2) the cooperative's interpretation of the easement constituted an actionable representation that the easement gave the cooperative the right to cut down the trees,

63. DTPA § 17.50(a)(1)-(3).

64. The earliest located reported case that referred to the enumerated items listed under DTPA section 17.46(b) as a "laundry list" occurred in Mobile County Mutual Insurance Co. v. Jewell, 555 S.W.2d 903, 911 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.).

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

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

67. *See, e.g.*, Prudential Ins. Co. of Am. v. Jefferson Assoc., Ltd., 896 S.W.2d 156 (Tex. 1995).

68. DTPA § 17.46(b)(12).

69. *See, e.g.*, Adler Paper Stock, Inc. v. Houston Refuse Disposal, Inc., 930 S.W.2d 761, 764-65 (Tex. App.—Houston [1st Dist.] 1996, writ denied); Century 21 Real Estate Corp. v. Hometown Real Estate Co., 890 S.W.2d 118, 125 (Tex. App.—Texarkana 1994, writ denied); Garrison Contractors, Inc. v. Liberty Mut. Ins. Co., 927 S.W.2d 296, 300 (Tex. App.—El Paso 1996), *aff'd*, 966 S.W.2d 482 (Tex. 1998).

70. 1 S.W.3d 96 (Tex. 1999); *see supra* notes 33-38 and accompanying text.

when in fact the easement conferred no such right.[71] The Texas Supreme Court examined the easement contract and found that it unambiguously authorized the cooperative to remove trees from the right-of-way and trim trees growing within the right-of-way. The court then held that its interpretation of the contract barred the homeowners' section 17.46(b)(12) claims because DTPA claims may not arise from actions that are permissible under a contract between the parties.[72]

2. *§ 17.46(b)(23)—Failure to Disclose*

Section 17.46(b)(23) is perhaps the broadest "laundry list" provision, as it permits a consumer to premise a DTPA claim on the allegation that the defendant failed to disclose information to the consumer prior to consummation of the transaction. To maintain an action for failure to disclose under this section, a consumer must show that the defendant failed to disclose information concerning goods or services, which was known at the time of the transaction, and that the nondisclosure was motivated by the intent to induce the consumer into a transaction into which the consumer otherwise would not have entered.[73]

The Texas Supreme Court also discussed this provision in *Dewitt County Electric Cooperative*.[74] The homeowners argued, and the cooperative conceded, that the cooperative had failed to disclose its policy of clearing all trees and shrubs from a utility right-of-way. The court held that this failure to disclose was not actionable under section 17.46(b)(23) because "it is not a DTPA violation if one party to an agreement fails to inform the other party that it intends to exercise rights that the agreement expressly confers."[75]

The dangers of an uncritical application of DTPA section 17.46(23) are illustrated by *Nwaigwe v. Prudential Property and Casualty Insurance Co.*[76] In that case, the owner of a rent house approached an insurer inquiring about fire coverage. According to the San Antonio Court of Appeals, the owner indicated to the agent that the house would not be vacant for more than thirty consecutive days a year.[77] The owner signed an insurance application acknowledging that the coverage was subject to the policy terms, but the owner evidently never obtained a copy of the policy. The policy was issued and, contrary to the owner's representations to the agent, the house was unoccupied for more than sixty days prior to a fire, which destroyed the premises. The insurer denied coverage based upon a clause in the policy that excluded coverage for a build-

71. *See id.* at 103.
72. *See id.*
73. *See* DTPA § 17.46(b)(23); *see also* Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 479 (Tex. 1995).
74. 1 S.W.3d 96 (Tex. 1999); *see supra* notes 33-38 and accompanying text.
75. *Id.* at 103-04.
76. No. 04-98-00037-CV, 1999 WL 343774 (Tex. App.—San Antonio May 28, 1999, no pet.).
77. *See id.* at *2.

ing vacant for sixty days preceding the loss. The owner sued the insurer and agent under various theories, including a DTPA claim based upon the defendants' alleged failure to disclose the vacancy clause.[78]

The trial court granted summary judgment dismissing the DTPA claim. The court of appeals reversed, holding that the summary judgment evidence failed to negate as a matter of law a nondisclosure claim under DTPA section 17.46(b)(23).[79] In support of this conclusion, the court opined that, in order to prove that they disclosed the vacancy clause, "the defendants were required to show they had discussed it with [the plaintiff] or had provided it to him in writing."[80]

The court of appeals opinion appears flawed on several levels. First and most importantly, it fails to explain how the defendants could have *intended* to induce the plaintiff to purchase the policy by omitting disclosure of the vacancy clause when, as the opinion acknowledges, the owner affirmatively represented to the agent that the house would not be vacant for more than thirty days. Indeed, based upon the facts recited by the court of appeals, it would seem impossible for the defendants to have intended to induce the owner into purchasing the policy by failing to disclose the sixty day vacancy clause when the plaintiff had advised the defendants that the house would not be vacant for even half that time.[81] Second, and relatedly, based upon the insured's representation to the agent, it is difficult to see how the vacancy clause could have been material, since the plaintiff's own allegations negate the proposition that the plaintiff would not have entered into the transaction had the vacancy clause been disclosed.

More profoundly troubling, however, are the logical consequences of the court of appeals' analysis. Under the statute's express terms, if a seller in possession of material information fails to disclose that information for the purpose of inducing a consumer transaction, DTPA section 17.46(b)(23) is available to an aggrieved consumer who, but for the omission, would not have entered into the transaction.[82] In *Nwaigwe*, however, there was no suggestion of a "failure to disclose" in any but the most literal sense, and no suggestion whatsoever of an intent to induce the plaintiff through such nondisclosure. Indeed, there is a studied ambiguity in the court of appeals' discussion as to why the insured did not receive a copy of the policy—indeed, as to whether the insured ever

78. *See id.*

79. *See id.*

80. *Id.* (citing, *inter alia*, Parkins v. Texas Farmers Ins. Co., 645 S.W.2d 775, 776 (Tex. 1983)).

81. In consecutive sentences the court's opinion states that the plaintiff informed the agent that the house "would not be vacant for more than thirty consecutive days per year," and then goes on to assert that the "parties did not discuss whether the house would be vacant for a longer term or whether the policy would cover a vacant house." *Id.* at *2.

82. *See* DTPA § 17.46(b)(23); *see also* Liptak v. Pensabene, 736 S.W.2d 953, 957 (Tex. App.—Tyler 1987, no writ) (permitting recovery under DTPA § 17.45(23) when defendants failed to disclose termite infestation in order to induce the plaintiffs to purchase property, which plaintiffs would not have purchased had they been aware of termite problems).

asked for a copy or questioned why he did not receive one. Given the manifest lack of materiality of the vacancy clause at the time the policy was issued, the court of appeals opinion stands for the breathtaking proposition that a contracting consumer who fails for whatever reason to obtain a copy of the parties' contract may later assert a DTPA claim based upon the "nondisclosure" of contract terms that operate against his interests.

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.[83] To be actionable under the DTPA, an implied warranty must be recognized by the common law or created by statute.[84]

The Texas Supreme Court examined this type of DTPA claim in *Rocky Mountain Helicopters, Inc. v. Lubbock County Hospital District*.[85] In that case, a hospital sued a helicopter maintenance company for negligence and DTPA violations stemming from a fuel spill and the subsequent cleanup. The jury found that the maintenance company had engaged in a false, misleading or deceptive act or practice. On appeal, the maintenance company argued that the requirements for the extension of an implied warranty of good and workmanlike performance of services (upon which the DTPA violation presumably was premised) were not present. The Texas Supreme Court agreed, noting that it had recognized an implied warranty for services only when the services related to the repair or modification of existing goods.[86] The court also noted that an implied warranty that services would be performed in a good and workmanlike manner arises only when there is a compelling need, and that compelling need is not present when the consumer has other adequate remedies.[87] Here, the hospital had adequate remedies (in fact, the hospital also had raised a negligence claim).[88] The court therefore held that "Texas law does not recognize an implied warranty that services incidental to helicopter maintenance will be performed in a good and workmanlike manner."[89]

B. Incorporation of the DTPA into the Texas Insurance Code

Numerous statutes incorporate various sections of the DTPA or permit

83. *See* Parkway Co. v. Woodruff, 901 S.W.2d 434, 438 (Tex. 1995); DTPA § 17.50(a)(2).
84. *See Parkway*, 901 S.W.2d at 438 (citing La Sara Grain Co. v. First Nat'l Bank of Mercedes, 673 S.W.2d 558, 565 (Tex. 1984)).
85. 987 S.W.2d 50 (Tex. 1998).
86. *See id.* at 52-53.
87. *See id.* at 53.
88. *See id.*
89. *Id.*

recovery for their violation via the DTPA.[90] One of the most frequently invoked of these "borrowing" statutes is article 21.21 of the Texas Insurance Code.[91] During the survey period, several plaintiffs invoked article 21.21 to allege deceptive acts by insurers in connection with insurance claims.

The Texas Supreme Court examined an insured's attempt to characterize an insurer's pre-approval of surgery as an actionable misrepresentation in *Provident American Insurance Co. v. Castaneda.*[92] Castaneda's father purchased a health insurance policy covering his family. The policy excluded coverage for a sickness that manifests within thirty days of the effective date of the policy and for diseases of certain internal organs, including the gallbladder, unless the loss occurred more than six months after the effective date.[93] Three days after the thirty-day period expired, Castaneda was diagnosed with a hereditary condition that is customarily treated by removal of the gallbladder. The insurer pre-approved the surgery and the gallbladder was removed, but the insurer later denied the insured's claims based upon a policy exclusion involving the timing of the illness's manifestation.[94] The insured then sued, alleging violations of the DTPA and article 21.21 of the Insurance Code.

The court held that the insurer's pre-approval was not an actionable representation under either the Insurance Code or the DTPA because at the time the insurer authorized the surgery, it had not been given material facts regarding the pre-existing nature of the insured's condition.[95] The court also held that there was no evidence that the insured relied upon the pre-approval to her detriment, particularly as removal of the gallbladder was the only known cure for her condition.[96]

Lane v. State Farm Mutual Automobile Insurance Co.[97] involved a mother's insurance claim arising from the death of her child. The plaintiff and the child's father were estranged and the child had been living with his grandparents when he died in an automobile accident. State Farm issued the grandparents a check under their automobile insurance policy.

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90. Statutes either incorporating provisions of the DTPA or permitting recovery for their violation via the DTPA include: TEX. PROP. CODE ANN. §§ 41.007, 59.005, 221.024, 221.071, 222.011 (Vernon 1995 & Supp. 2000); TEX. BUS. & COM. CODE ANN. § 35.74(c) (Vernon 1987); TEX. HEALTH & SAFETY CODE ANN. § 164.013 (Vernon 1992 & Supp. 2000); TEX. INS. CODE ANN. art. 21.21 (Vernon 1981 & Supp. 2000); TEX. REV. CIV. STAT. ANN. arts. 4413(36)(E), 4552-5.09, 4552-5.11, 4552-5.18, 5221a-7, 5221a-8, 5221f, 5521*l*, 9020 (Vernon 1962, 1976 & Supp. 2000); and TEX. TRANSP. CODE ANN. § 684.086 (Vernon 1999 & Supp. 2000).

91. *See* TEX. INS. CODE ANN. art. 21.21 (Vernon 1981 & Supp. 2000).

92. 988 S.W.2d 189 (Tex. 1999).

93. *See id.* at 191.

94. *See id.* at 191-92.

95. *See id.* at 199-200.

96. *See id.* at 200; *see also* Frazer v. Texas Farm Bureau Mut. Ins. Co., 4 S.W.3d 819, 823 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (holding that although insurance agent's alleged failure to honor promise to increase insured's coverage limits might constitute negligence or a breach of contract, it was not a "false, misleading or deceptive act" within the meaning of the DTPA).

97. 992 S.W.2d 545 (Tex. App.—Texarkana 1999, pet. denied).

In addition, because underinsured motorist coverage benefits were available to the child's parents, State Farm located the child's father and offered to settle by paying half of the policy limits to the father and half to the plaintiff. The child's father accepted the offer and State Farm issued checks accordingly. The mother sued State Farm under article 21.21 alleging that State Farm "fraudulently relied on false information and representations" in settling her claim.[98]

State Farm moved for summary judgment on the article 21.21 claim, arguing that article 21.21 requires the same predicate for recovery as a bad faith claim and that because it was not guilty of bad faith, it was entitled to judgment on the article 21.21 claim as well.[99] The trial court granted the motion but the Texarkana Court of Appeals reversed. Although acknowledging that a defense to a bad faith claim also is a defense to extracontractual claims that merely recharacterize the bad faith claim, the court found that the tortious acts alleged here differed from the plaintiff's bad faith claim and thus were not barred by a finding of no bad faith.[100]

In contrast, the United States District Court for the Southern District of Texas in *Douglas v. State Farm Lloyds*[101] broadly opined that "in order to establish a statutory violation under the Insurance Code or the DTPA, the elements necessary to demonstrate an insurer's breach of the common law duty of good faith and fair dealing must be proven."[102] In that case, homeowners brought claims against their insurer for breach of contract, breach of the duty of good faith and fair dealing and violations of the Insurance Code and DTPA. Finding that the homeowners failed to carry their summary judgment burden on their bad faith claims, the court concluded that summary judgment was appropriate on their DTPA and Insurance Code claims as well.[103] The court's rationale, however, was narrower than the literal scope of its ruling. As the court explained, "when an insured joins claims under the Texas Insurance Code and the DTPA with a bad faith claim, all asserting a wrongful denial of policy benefits, if there is no merit to the bad faith claim, there can be no liability on either of the statutory claims."[104] Accordingly, although the court used quite broad language, it was faced only with DTPA and Insurance Code claims stemming from the insurer's denial of an insurance claim. Such a situation seemingly is distinguishable from that in *Lane*, where the plaintiff raised DTPA and Insurance Code claims arising from actions separate from the insurer's denial of her claim.[105]

98. *Id.* at 553. The meaning of this rather odd allegation is not explained in the opinion.

99. *See id.*

100. *See id.* at 553-54.

101. 37 F. Supp. 2d 532 (S.D. Tex. 1999).

102. *Id.* at 544.

103. *See id.* at 544-45.

104. *Id.* at 544 (citing Higginbotham v. State Farm Mut. Auto. Ins. Co., 103 F.3d 456, 459 (5th Cir. 1997)).

105. *See supra* notes 97-100 and accompanying text.

C. Opinions

During the survey period, the Texas Supreme Court revisited the vexing issue of the applicability of the DTPA to professional services in *Douglas v. Delp*.[106] The plaintiff sued her attorneys for legal malpractice arising from their representation of her in a prior business dispute. She also alleged that by encouraging her to enter into a settlement agreement on her underlying claims, the attorneys violated the DTPA. The trial court granted a directed verdict on all claims and the Fort Worth Court of Appeals reversed and remanded. Reversing the court of appeals' decision, the Texas Supreme Court declared that "statements of opinion alone are generally insufficient to rise to the level of actionable misrepresentations under the DTPA."[107] At trial, the plaintiff had not identified any particular misrepresentations, but testified only that the attorneys advised her to sign the settlement agreement. The court assumed that a misrepresentation could be inferred from that advice, but held that such a representation constituted, at most, nonactionable opinion because it was so vague that the jury would have no standard by which to measure its accuracy.[108] This approach seems at odds with the 1995 amendment to DTPA section 17.49(c), limiting the DTPA's applicability in the professional context to misrepresentations that "cannot be characterized as advice."[109]

D. Unconscionability

DTPA section 17.45(5) defines an "unconscionable action or course of action" as "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree."[110] The plaintiff in *Ballestros v. Jones*[111] alleged that her attorney acted unconscionably, as well as committed legal malpractice, during his representation of her during an action for common law marriage and divorce. The plaintiff based her claims on the contention that the attorney obtained an inadequate settlement and charged her an excessive fee. The jury agreed, finding that the attorney was negligent and had acted unconscionably. The trial court entered a

106. 987 S.W.2d 879 (Tex. 1999). It appears from the court's opinion that the case was decided under the pre-1995 version of the DTPA. *See id.* at 881 (noting that suit was filed in 1991).

107. *Id.* at 886.

108. *See id.*; *see also* Griggs v. State Farm Lloyds, 181 F.3d 694, 701 (5th Cir. 1999) (holding that insurance agent's alleged representation that insurer would handle claims "professionally" and that agent would monitor the progress of insured's claim were nonactionable puffery rather than actionable representations of specific material fact); In re R & C Petroleum, Inc., 236 B.R. 355, 361 (Bankr. E.D. Tex. 1999) (noting that the DTPA's exclusion for professional services does not apply to an "express misrepresentation of a material fact that cannot be characterized as advice, judgment or opinion").

109. DTPA § 17.49(c)(1).

110. DTPA § 17.45(5). Prior to the 1995 amendments, the definition also included an act or practice that "results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration." DTPA § 17.45(5).

111. 985 S.W.2d 485 (Tex. App.—San Antonio 1998, pet. denied) (en banc).

judgment notwithstanding the verdict on the DTPA claim on the ground that there was insufficient evidence of unconscionable acts.

Sitting en banc, the San Antonio Court of Appeals agreed. Applying the pre-1995 amendment version of the DTPA, the court held that the parties' contingency fee contract was both valid and enforceable and thus not unconscionable.[112] The court found that the remaining conduct complained of was, at most, negligence that could give rise to a legal malpractice claim but did not rise to the higher level of culpability required for a violation of the DTPA.[113]

IV. DETERMINING THE MEASURE OF DAMAGES

A prevailing plaintiff in a DTPA action may recover economic damages.[114] If the trier of fact finds that the defendant acted "knowingly," the plaintiff also may recover damages for mental anguish and additional statutory damages up to three times the amount of economic damages.[115]

A. Requirement of "Knowing Conduct"

The court in *Bayliner Marine Corp. v. Elder*[116] examined the sufficiency of the evidence that the defendant's conduct was done knowingly. The plaintiff purchased a boat from Bayliner. He had problems with the boat and Bayliner replaced it with a second boat. The second boat also had problems and the plaintiff sued Bayliner under the DTPA. At trial, the jury instruction stated that "'Knowingly' means actual awareness of the falsity, deception, or unfairness of the conduct in question or actual awareness of the conduct constituting a failure to comply with a warranty. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness."[117]

The jury found that Bayliner had acted knowingly and awarded the plaintiff $30,000 in extra statutory damages. On appeal, Bayliner argued that the evidence was both legally and factually insufficient to support the jury's finding of knowing behavior. Plaintiff's counsel had elicited testimony from Bayliner's senior service manager and from a mechanic employed by the boat dealer from whom the plaintiff had purchased the boat. Bayliner's employee testified that Bayliner had installed larger engines in the plaintiff's type of boat without conducting any testing. The mechanic testified that he believed the boat had a design flaw. Based upon this testimony, the court of appeals held that the evidence was both legally and factually sufficient to support the jury's finding that Bayliner acted knowingly.[118]

112. *See id.* at 497.
113. *See id.* at 497-98.
114. *See* DTPA § 17.50(b)(1).
115. *Id.*
116. 994 S.W.2d 439 (Tex. App.—Beaumont 1999, pet. denied).
117. *Id.* at 443.
118. *See id.* at 444.

B. MENTAL ANGUISH DAMAGES

The Texas Supreme Court examined the evidence required to recover mental anguish damages under the DTPA in *Gunn Infiniti, Inc. v. O'Byrne*.[119] The plaintiff purchased an automobile from the defendant dealership, which repeatedly assured him that the automobile was new and had never been damaged. When the plaintiff discovered that the automobile had, in fact, been damaged, repaired and repainted, he sued alleging fraud and violations of the DTPA. The jury returned a verdict for the plaintiff, which included $10,000 in mental anguish damages. On appeal, the dealership contended that the evidence was legally insufficient to support an award of mental anguish damages. The San Antonio Court of Appeals affirmed.

Reversing, the Texas Supreme Court recited its rule that plaintiffs seeking mental anguish damages must introduce "direct evidence of the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in the plaintiffs' daily routine."[120] Applying this test, the court held that the plaintiff's testimony that he was ridiculed by his friends and felt "a constant mental sensation of pain or a rude awakening" from not getting the car he expected and anguish over the car's unreliability was legally insufficient to support an award of mental anguish damages.[121] The court emphasized that, "[s]imply because a plaintiff says he or she suffered mental anguish does not constitute evidence of the nature, duration, and severity of any mental anguish that is sufficient to show a substantial disruption of one's daily routine."[122]

V. DTPA DEFENSES AND EXEMPTIONS

The DTPA has been characterized as a "strict liability" statute, requiring only proof of a misrepresentation, without regard to the offending party's intent.[123] This is only partially correct, since several DTPA provisions expressly require proof of intentional conduct.[124] Some courts have gone so far as to hold that common law defenses, such as estoppel and ratification, are not available to combat DTPA claims.[125] Other courts have recognized a variety of defenses to DTPA claims.[126] Additionally,

119. 996 S.W.2d 854 (Tex. 1999).

120. *Id.* at 860.

121. *Id.* at 860-61.

122. *Id.* at 861. The court also noted that mental anguish arising from the car's unreliability was not causally connected to the dealership's misrepresentations. *Id.*

123. *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).

124. *See, e.g.*, DTPA §§ 17.46(b)(9), (10), (13), (16), (23).

125. *See, e.g.*, Insurance Co. of North Am. 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).

126. *See, e.g.*, Ostrow v. United Bus. Mach., Inc., 982 S.W.2d 101, 105 (Tex. App.—Houston [1st Dist.] 1998, no writ) ("We hold a DTPA claim arising out of a contract may be barred by accord and satisfaction."); Johnson v. McLeaish, No. 05-94-01673-CV, 1995 WL 500308, at *10 (Tex. App.—Dallas Aug. 23, 1995, writ denied) (not designated for

both the courts and the legislature have carved out exemptions from the DTPA's reach.

A. "Mere" Breach of Contract Not Actionable Under the DTPA

In addition to its claim of an implied warranty, the plaintiff in *Rocky Mountain Helicopters, Inc. v. Lubbock County Hospital District*[127] argued that the defendant misrepresented the characteristics of the helicopter maintenance services it agreed to perform under the parties' contract.[128] In that contract, the defendant agreed to indemnify the hospital for losses arising from the defendant's willful or negligent acts. Rejecting this claim as a matter of law, the Texas Supreme Court held that the defendant's failure to indemnify the hospital was at most a breach of contract and was not actionable under the DTPA.[129]

B. Preemption and Exemption From the DTPA

Certain statutory schemes and common law doctrines bar DTPA claims either expressly or by implication. During the survey period, several cases examined these limitations on the DTPA's reach.[130]

1. Smoke Detector Act

The Texas Smoke Detector Act provides for liability if a landlord fails to install a smoke detector at the time of a tenant's initial occupancy of a dwelling.[131] The plaintiffs in *Pruit v. Orr*[132] sued under various theories including the DTPA for injuries their children received from a fire in a rental home the plaintiffs were visiting. Affirming the trial court's grant of summary judgment for the defendant, the court of appeals followed a decision of the San Antonio Court of Appeals[133] and held that under the facts of the case, the Texas Smoke Detector Act preempts claims for breach of the warranty of habitability.[134]

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publication) (applying illegality/public policy affirmative defense to DTPA claims); Keriotis v. Lombardo Rental Trust, 607 S.W.2d 44, 46 (Tex. App.—Beaumont 1980, writ ref'd n.r.e.) (applying statute of frauds to DTPA claims).

127. 987 S.W.2d 50 (Tex. 1998); *see supra* notes 85-89 and accompanying text.

128. *See Rocky Mountain Helicopters*, 987 S.W.2d at 53.

129. *See id.*

130. *See also* Sanchez v. Liggett & Myers, Inc., 187 F.3d 486, 491 (5th Cir. 1999) (holding DTPA claims barred by section 82.004 of the Texas Civil Practice & Remedies Code); Duzich v. Marine Office of Am. Corp., 980 S.W.2d 857, 872 (Tex. App.— Corpus Christi 1998, pet. denied) (holding DTPA claims not preempted by Ship Mortgage Act, 46 U.S.C. §§ 31321 et seq.).

131. *See* Tex. Prop. Code. Ann. §§ 92.251 et seq. (Vernon 1995 & Supp. 2000).

132. 991 S.W.2d 312 (Tex. App.—Fort Worth 1999, pet. denied).

133. *See* Garza-Vale v. Kwiecien, 796 S.W.2d 500, 503 (Tex. App.—San Antonio 1990, writ denied).

134. *See Pruit*, 991 S.W.2d at 314.

2. 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."[135] Regarding DTPA claims, section 12.01(a) of the MLLIA provides:

> Notwithstanding any other law, no provisions of Section 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.[136]

If a plaintiff's DTPA claim is not based upon a breach of the accepted standard of medical care, however, the claim is not barred by the MLIIA.[137] The Texas Supreme Court applied these principles in *MacGregor Medical Association v. Campbell*.[138] The plaintiff ingested a contaminated beverage and was taken to the defendant's medical center. The medical center staff examined the plaintiff, assured him that he would be fine, and advised him to take Maalox. The plaintiff continued to experience severe stomach problems and sued the medical center alleging negligence, DTPA violations, breach of contract and breach of warranty.[139] Regarding the DTPA claims, the plaintiff alleged that the medical center's employees delayed examining the plaintiff for almost an hour after he arrived at the medical center.[140] The plaintiff also alleged that the medical center falsely represented that it would provide "the best health services possible" and "qualified personnel and resources" and that the plaintiff was fine and needed only Maalox, and failed to advise the plaintiff of possible complications from his injury.[141] The Texas Supreme Court held that the essence of these claims was that the medical center failed to provide quality medical care.[142] Because successful proof of this claim would require proof of the applicable standard of care, the court held that the plaintiff's claims were barred by the MLIIA.[143]

The Texas Supreme Court also applied this doctrine during the reporting period in *Earle v. Ratliff*,[144] in which a patient sued the surgeon who had performed his two back surgeries. The plaintiff alleged that the surgeon violated the DTPA by telling him that: (1) he needed surgery; (2) he would get "95% better" and would be able to return to work; (3) the devices the surgeon would implant in the plaintiff were safe, approved for

135. TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.02(a)(5) (Vernon Supp. 2000).
136. *Id.* § 12.01(a).
137. *See* Sorokolit v. Rhodes, 889 S.W.2d 239, 242 (Tex. 1994).
138. 985 S.W.2d 38 (Tex. 1998).
139. The plaintiff died during the proceedings, so his wife continued in her individual capacity and as representative of her husband's estate. *See id.* at 39.
140. *See id.* at 40.
141. *Id.*
142. *See id.* at 41.
143. *See id.*
144. 998 S.W.2d 882 (Tex. 1999).

such use, and would remain in place permanently; and (4) the plaintiff's pain was to be expected but would get better. The court held that these representations all related to the surgeon's treatment of the plaintiff and could be summarized as claims that the surgeon did not meet the applicable standard of care.[145] Because such a claim sounds in negligence, the court held that summary judgment was proper on the plaintiff's DTPA claims.[146]

In *Wright v. Fowler*,[147] the plaintiff sued his cosmetic surgeon, the surgeon's professional association and others for injuries related to silicone cheek implants. The suit was brought under theories of strict liability, breach of warranty and negligence. After the defendants filed a motion for summary judgment on all causes of action, the plaintiff filed an amended petition, newly claiming that the actions described in his original petition also constituted medical malpractice and misrepresentations in violation of the DTPA.[148] Affirming the trial court's grant of summary judgment, the Fort Worth Court of Appeals held that the MLIIA barred the plaintiff's claims.[149] Although generally, the relevant sections of the DTPA do not require proof of intent or knowledge, the court held that because the MLIIA bars DTPA claims based on negligence, a plaintiff who asserts a misrepresentation claim against a health care provider must plead that the defendant's misrepresentation was made intentionally or knowingly.[150] The plaintiff's failure to plead knowing or intentional conduct or seek treble damages indicated that his claim actually was grounded in negligence and that he had improperly attempted to recast his health care liability claim as a DTPA claim to avoid the MLIIA's strict two-year limitations period.[151]

b. Application of the "Learned Intermediary Doctrine"

The "learned intermediary doctrine" is one peculiar to cases involving a medical product manufacturer's duty to warn.[152] 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."[153] The physician's knowledge of the

145. *See id.* at 893.
146. *See id.*
147. 991 S.W.2d 343 (Tex. App.— Fort Worth 1999, no pet.)
148. The plaintiff alleged violations of DTPA sections 17.46(b)(5) and 17.46 (b)(7). *See id.* at 353 n.14.
149. *See id.* at 352-53.
150. *See id.* at 353.
151. *See id.*; *see also* Nguyen v. Kim, 3 S.W.3d 146 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (holding that plaintiff's DTPA claims that physician failed to perform appropriate procedure and failed to obtain informed consent were barred by the MLIIA).
152. In re Norplant Contraceptive Prod. Liability Litigation, 165 F.3d 374, 376 (5th Cir. 1999).
153. Alm v. Aluminum Co. of Am., 717 S.W.2d 588, 591-92 (Tex. 1986).

warning operates to protect the manufacturer and serves to shift the duty of explaining risks to the physician unless the warning provided to the physician is inadequate or misleading.[154] If a warning was given but was defective, the plaintiff may recover by proving that the failure to warn was a producing cause of the plaintiff's injury.[155]

The United States Court of Appeals for the Fifth Circuit applied this doctrine in two DTPA cases during the reporting period. In the first case, *In re Norplant Contraceptive Products Liability Litigation*,[156] five women who had suffered side effects from their use of the contraceptive Norplant sued the parent company of the manufacturer. The defendant obtained summary judgment based on the learned intermediary doctrine.[157] On appeal, the plaintiffs argued that the doctrine was inapplicable to DTPA claims because many Texas cases decline to apply common law defenses and doctrines that affect the burden of proof in DTPA cases.[158] Rejecting this argument, the Fifth Circuit noted that some common law doctrines are applicable to the DTPA and that in three cases, Texas courts of appeals had specifically applied the learned intermediary doctrine to the DTPA.[159]

> We therefore make an *Erie* guess that the Texas Supreme Court would hold that the learned intermediary doctrine is not a common law defense but instead a common law doctrine . . . that establishes the degree to which a prescription drug manufacturer is liable for an end user's reliance on the effects of a prescription drug. Because we hold that the learned intermediary doctrine is not a common law defense . . . [the plaintiffs'] argument that the district court incorrectly applied it to the DTPA fails.[160]

The court also rejected the plaintiffs' invitation to follow the Oklahoma Supreme Court's holding that there is an exception to the learned intermediary doctrine in cases where the federal Food and Drug Administration has provided recommended warnings.[161] The court found the Oklahoma court's reasoning to be "puzzling" and recognized that "the FDA has explicitly stated that its regulation should not affect civil tort liability for drug manufacturers."[162] The court also noted that there was no FDA mandated labeling for Norplant.[163]

The Fifth Circuit examined the learned intermediary doctrine again in *Porterfield v. Ethicon, Inc.*[164] In that case, a patient whose injuries alleg-

154. *See id.* at 592.
155. *See* Stewart v. Janssen Pharmaceutica, Inc., 780 S.W.2d 910, 911 (Tex. App.—El Paso 1989, writ denied).
156. 165 F.3d 374 (5th Cir. 1999).
157. *See id.* at 376.
158. *See id.* at 377.
159. *See id.* at 378.
160. *Id.*
161. *See id.* at 379 (discussing Edwards v. Basel Pharmaceuticals, 933 P.2d 298 (Okla. 1997)).
162. *In re Norplant*, 165 F.3d at 379.
163. *See id.* at 379-80.
164. 183 F.3d 464 (5th Cir. 1999).

edly resulted from polypropylene mesh surgically implanted in her abdomen to repair a hernia sued the mesh manufacturer. Invoking the learned intermediary doctrine, the manufacturer moved for summary judgment on the patient's DTPA implied warranty of merchantability claim. Although there was evidence that the warning given was defective, the Fifth Circuit held that the plaintiff failed to present evidence that the failure to warn was a "producing cause" of her injury, as required under the doctrine.[165] The plaintiff's surgeon testified that he had not read the defective warning, but instead relied upon surgical literature and upon his and his colleagues' experience in determining that the benefits of using the mesh outweighed the risks. Because the surgeon "was aware of the possible risks of using the mesh but decided to use it anyway," the court held that the inadequate warning was not a producing cause of the plaintiff's injuries.[166]

C. Settlement Offers and Mitigation

The DTPA permits a defendant to limit its damages by making a reasonable settlement offer.[167] The settlement offer must include an offer to pay both damages for the plaintiff's claim and an amount of money to compensate the plaintiff for the plaintiff's reasonable and necessary attorneys' fees incurred prior to the date of the offer.[168] If the plaintiff rejects the offer, and after trial the court finds that the amount offered for damages is the same as, substantially the same as, or more than the damages found by the trier of fact, the plaintiff may recover only the lesser of the amount tendered in the settlement offer or the amount of damages found by the trier of fact.[169] The court must then determine the amount of reasonable and necessary attorneys' fees required to compensate the plaintiff for fees incurred before the rejected settlement offer was made. If the court finds that the amount offered to compensate the plaintiff for attorneys' fees is the same as, substantially the same as, or more than the amount of reasonable and necessary attorneys' fees incurred by the plaintiff as of the date of the offer, the plaintiff's recovery is limited to recovery of the amount of fees tendered in the offer.[170]

The Texas Supreme Court clarified the interaction between the DTPA, settlement offers and a plaintiff's common law duty to mitigate damages in *Gunn Infiniti, Inc. v. O'Byrne*.[171] In that case, the plaintiff sought an automobile with particular specifications. He purchased an automobile from the defendant dealership, which repeatedly but falsely assured him that the automobile was new and had never been damaged. When the plaintiff discovered that the automobile had, in fact, been damaged, re-

165. *Id.* at 467-68.
166. *Id.* at 468.
167. *See* DTPA § 17.5052 (Vernon Supp. 2000).
168. *See id.* § 17.5052(d).
169. *See id.* § 17.5052(g).
170. *See id.* § 17.052(h).
171. 996 S.W.2d 854 (Tex. 1999). *See supra* notes 119-22 and accompanying text.

paired, and repainted, the dealer offered to replace the vehicle but was unable to produce an exact duplicate. The dealer then made several additional settlement offers, all of which the plaintiff rejected. When the plaintiff brought suit, the dealership claimed that the plaintiff had breached his duty to mitigate damages by refusing to accept the dealership's settlement offers. The trial court declined to instruct the jury on mitigation of damages, and the San Antonio Court of Appeals affirmed.[172]

Before the Texas Supreme Court, the plaintiff argued that the settlement offer provisions of the DTPA foreclosed the application of common law mitigation of damages principles. The court rejected this argument, holding that a plaintiff in a DTPA case has a duty to mitigate damages because "[n]othing in the DTPA evidences a legislative intent to withdraw mitigation of damages as an affirmative defense, even when a defendant alleges that the consumer failed to mitigate by failing to accept the defendant's offer to mitigate. Nor does the concept of mitigation inherently conflict with the DTPA."[173] Applying the rule of mitigation of damages to the facts of the case, however, the court rejected the dealership's contention that it was entitled to a jury instruction on mitigation. The court held that a defendant is entitled to such an instruction based on its own offer to the plaintiff only when the offer was unconditional and thus a true offer to mitigate rather than an offer to settle.[174] Because the dealership's offers required that O'Byrne release his claims, the offers were not true offers to mitigate and the dealership was not entitled to a jury instruction on mitigation.[175]

D. CAUSATION

Liability under the DTPA is limited to actions that are a producing cause of the plaintiff's damages.[176] Unlike the doctrine of proximate cause, a showing of producing cause does not require that the injury be foreseeable.[177] "Producing cause" has been defined as "an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of."[178] When determining whether the actions complained of are the producing cause of a plaintiff's damages, courts look to whether the alleged conduct is a substantial factor that brings about the plaintiff's injury, without which the injury would not have occurred.[179]

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172. *See Gunn Infiniti*, 996 S.W.2d at 856.
173. *Id.* at 856-57.
174. *See id.* at 859-60.
175. *See id.*
176. *See* Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 478 (Tex. 1995).
177. *See* Hycel, Inc. v. Wittstruck, 690 S.W.2d 914, 922 (Tex. App.—Waco 1985, writ dism'd).
178. Union Pump Co. v. Allbritton, 898 S.W.2d 773, 775 (Tex. 1995).
179. *See* Prudential Ins. Co. of America v. Jefferson Assocs., Ltd., 896 S.W.2d 156, 161 (Tex. 1995).

While the DTPA's "producing cause" element does not require that the plaintiff's damages be foreseeable, the defendant's actions or omissions nevertheless must be a "cause in fact" of the plaintiff's injury,[180] "a substantial factor in bringing about injury which would not otherwise have occurred."[181] In *Roberts v. Healey*,[182] this test was held to preclude a plaintiff's DTPA claims in a case arising out of domestic violence. The woman had engaged the defendant attorney to represent her in her divorce. The woman told the attorney about her estranged husband's drug use and that he had threatened her. The attorney prepared and filed an application for a restraining order but, despite numerous requests, never made an effort to obtain the court's entry of a signed protective order. Eventually, the estranged husband broke into the woman's apartment, killed their two children and shot and wounded his mother-in-law. The woman and her mother then sued the attorney, alleging that his failure to obtain a protective order constituted negligence, breach of contract and violations of the DTPA. The attorney obtained summary judgment on the plaintiffs' negligence and DTPA claims because the attorney's actions were not the "cause in fact" of the plaintiffs' injuries.[183] The court held that, "[a]t some point in the causal chain, the defendant's conduct may be too remotely connected with the plaintiff's injury to constitute legal causation."[184] If a defendant's conduct does nothing more than "furnish the condition that makes the plaintiff's injury possible," legal causation is absent.[185] Applying this theory to the facts of the case, and viewing the facts in the light most favorable to the plaintiffs, the court held that, at most, the failure to get a protective order created a condition that made the murder possible and was thus not the legal cause of the plaintiffs' injuries.[186]

In *Higbie Roth Construction Co. v. Houston Shell & Concrete*,[187] the Houston Court of Appeals recognized that there are limits to the concept of "producing cause" under the DTPA. A construction company sued a cement company and its subcontractor, claiming that the subcontractor's negligence resulted in injury to the construction company's employee, which in turn resulted in higher workers' compensation premiums. Affirming the trial court's summary judgment dismissing the DTPA claim, the court noted that "producing cause" requires that the defendant's ac-

180. *See* Roberts v. Healey, 991 S.W.2d 873, 878 (Tex. App.—Houston 1999, pet. denied).

181. *Prudential*, 896 S.W.2d at 161.

182. *See Roberts*, 991 S.W.2d at 873.

183. *See id.* at 878-80.

184. *Id.* at 879 (citing *Union Pump Co.*, 898 S.W.2d at 775).

185. *Id.*

186. *See id.*; *see also* Rocky Mountain Helicopters, Inc. v. Lubbock County Hosp. Dist., 987 S.W.2d 50, 53-54 (Tex. 1998) (rejecting a DTPA claim based upon the defendant's failure to abide by its written policy for training employees because, while there was some evidence that the company failed to abide by its policy, there was no evidence that the plaintiff was aware of the policy and thus, no evidence that a misrepresentation was a producing cause of damages to the plaintiff).

187. 1 S.W.3d 808 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

tions be both a cause-in-fact and a substantial factor of the plaintiff's injuries.[188] Given the "multiplicity of factors" that inform an insurer's decision to raise insurance premiums, the court concluded that, as a matter of law, the construction company's damages were too remote to be actionable under the DTPA.[189]

The plaintiff in *Etheridge v. Oak Creek Mobile Homes, Inc.*[190] purchased a mobile home that, when delivered, did not conform to the specifications she had ordered and had numerous defects that were never properly repaired. The plaintiff sued the mobile home manufacturer and dealer for violations of the DTPA and common law misrepresentation.[191] At trial, she testified that the mobile home dealer had informed her that the mobile home was a "Cadillac" and, after the problems developed, assured her that he would see that the repairs were taken care of properly. After the plaintiff prevailed at trial, the dealer sought a judgment notwithstanding the verdict on the ground that his actions were not a producing cause of the plaintiff's damages.[192] The Beaumont Court of Appeals determined that the plaintiff's testimony amounted to more than a scintilla of evidence that the dealer's acts were the producing cause of the plaintiff's damages.[193] But because the plaintiff was not allowed to testify as to damages, the appeals court reversed and remanded the case for a new trial.[194]

In some situations, the plaintiff's burden of proving producing cause is aided by a presumption. In *Stewart v. Transit Mix Concrete & Materials Co.*,[195] the plaintiff was injured by concrete he had purchased to repair his driveway. He sued the concrete manufacturer under the DTPA and other theories for failure to warn that the concrete could cause burns upon contact with the skin. The invoice for the concrete contained warnings for various products but did not expressly reference the product the plaintiff purchased. The manufacturer moved for summary judgment, contending there was no evidence of causation.[196]

The Texarkana Court of Appeals noted that in failure-to-warn cases in which no warning is provided, the plaintiff is entitled to a presumption that the warning would have been followed had it been provided.[197] When a warning is given but arguably is inadequate, no presumption arises if the warning given would have prevented the plaintiff's injuries

188. *Id.* at 814.
189. *Id.*
190. 989 S.W.2d 412 (Tex. App.—Beaumont 1999, no pet.).
191. *See id.* at 414.
192. *Id.* at 419.
193. *See id. See also* Norwest Mortgage, Inc. v. Salinas, 999 S.W.2d 846, 859 (Tex. App.— Corpus Christi 1999, no pet.) (holding that mortgagee's failure to obtain lien waivers before disbursing funds and failure to properly supervise disbursement of funds was a producing cause of damages suffered by homeowners whose home was left unfinished by builder).
194. *See Etheridge*, 989 S.W.2d at 419.
195. 988 S.W.2d 252 (Tex. App.—Texarkana 1998, pet. denied).
196. *See id.* at 254.
197. *See id.* at 256.

had it been read and heeded.[198] This is arises because the warning, although inadequate, could not have been the cause in fact of the harm.[199] In this case, the summary judgment evidence raised a fact issue regarding whether a warning was given that applied to the product purchased by the plaintiff.[200] The court therefore was unable to determine as a matter of law whether the plaintiff could avail himself of the presumption, and remanded the case to the trial court for further proceedings.[201]

E. Statute of Frauds

In one DTPA case decided during the reporting period, a defendant argued that the plaintiffs' claims were barred by the statute of frauds. In *Moritz v. Bueche*,[202] former law students sued under the DTPA alleging that the defendant and his son made misrepresentations to them. The defendant argued that his alleged promise to give financial assistance to the law school amounted to a promise to answer for the debt of another and thus was unenforceable because it was not in writing.[203] The San Antonio Court of Appeals concluded that the statute of frauds was inapplicable because the plaintiffs' claims were for statutory DTPA violations. Although some Texas courts have applied the statute of frauds to certain DTPA claims, the courts doing so "look at the relationship of the alleged promise to the purpose of the statute of frauds and the nature of the damages sought."[204] In the case before the court, the students did not seek contract damages, i.e., the benefit of their bargain. Rather, they sought return of their tuition, fees, time and income, damages for mental anguish, and exemplary damages. The court held that those damages indicated that the suit was not one to enforce a debt and that such claims were not barred by the statute of frauds.[205]

F. Waiver

The DTPA specifically limits the circumstances in which parties can effectively waive the statute's protections.[206] A waiver is void as contrary to public policy unless it is conspicuous, in bold-face type, and identified as a waiver, and the consumer has signed the waiver and was represented

198. *See id.*
199. *See id.*
200. *See id.* at 257.
201. *See id.* at 257-58.
202. 980 S.W.2d 849 (Tex. App.—San Antonio 1998, no pet.); *see supra* notes 12-14 and accompanying text.
203. *See id.* at 856.
204. *Id.*
205. *See id.* The court alternatively held that the statute of frauds was inapplicable because the students alleged that the defendant had an interest in the outcome of the school and because the students were alleging promises to them, not promises to guarantee another's debt. *See id.*; *see also* Munawar v. The Cadle Co., 2 S.W.3d 12, 16-18 (Tex. App.—Corpus Christi 1999, pet. denied) (holding that neither the doctrine of merger nor the use of a special warranty deed precludes a DTPA claim arising from a sale of real estate).
206. *See* DTPA § 17.42(a) (Vernon Supp. 2000).

by counsel in seeking or acquiring the goods or services at issue.[207]

The defendant in *Arthur's Garage, Inc. v. Racal-Chubb Security Systems, Inc.*,[208] sought summary judgment on the plaintiff's DTPA claims based upon a contractual limitation of liability. The defendant was the corporate successor to a company that had installed security and fire alarm systems in the plaintiff's commercial garage. After acquiring the predecessor alarm company, the defendant continued to service the maintenance contracts for the garage's alarm systems. Thereafter a fire at the garage failed to trigger the smoke detectors but eventually set off the burglar alarms. The garage sustained in excess of $450,000 in damages.[209]

The garage sued, alleging breach of contract, negligence, breach of implied and express warranties and violations of the DTPA.[210] The garage alleged that the defendant had violated the DTPA by making material misrepresentations, breaching express and implied warranties, and engaging in an unconscionable course of conduct.[211] The defendant moved for summary judgment arguing, among other things, that the garage's damages were contractually limited to $350 by a clause in the installment contracts for the alarm systems.[212]

The Dallas Court of Appeals held that a limitation of liability clause like the one in the contracts between the parties[213] is insufficient to waive liability for DTPA "laundry list" violations or an "unconscionable action or course of action."[214] Turning to the garage's warranty claims, the court recognized that there is an exception to the "no waiver" rules for DTPA claims premised on breach of an express or implied warranty.[215] Limitation of liability clauses are enforceable against DTPA express warranty claims "because the warranty becomes part of the basis of the bargain between the parties."[216] Thus, summary judgment was appropriate on the garage's DTPA express warranty claim.[217] An implied warranty claim, in contrast, is subject to a limitation of liability clause only if it is one that can be disclaimed under the common law or the statute creating it.[218] Because the implied warranty claim at issue—the implied warranty that work or services would be performed in a good and workmanlike

207. *See id.*
208. 997 S.W.2d 803 (Tex. App.—Dallas 1999, no pet.).
209. *See id.* at 807.
210. *See id.*
211. *See id.*
212. *See id.* at 807-08.
213. Although the clause in the contract was defined as "Liquidated Damages and Indemnification," the court held that it was really a limitation of liability as it limited liability to $350 rather than fixing liability at a specific amount or at a specific percentage of a service charge. *See id.* at 809-10.
214. *Id.* at 811.
215. *Id.* at 812.
216. *Id.* (citing Southwestern Bell Tel. Co. v. FDP Corp., 811 S.W.2d 572, 576-77 (Tex. 1991)).
217. *See id.* at 812, 814.
218. *See id.* at 812.

manner—may not be waived or disclaimed,[219] the court held that the limitation of liability clause was not effective against the DTPA implied warranty claim.[220]

G. NOTICE

Before filing a DTPA claim, the consumer must notify the defendant in writing of the consumer's complaint as well as the amount of economic damages, damages for mental anguish, and attorneys' fees and other expenses.[221] If a consumer files suit without providing the required notice, the defendant is entitled to abatement of the action until sixty days after proper notice is sent.[222]

The Texas Supreme Court examined the adequacy of notice in a class action context in *In re Alford Chevrolet-Geo*.[223] Buyers of vehicles had brought a class action suit against 636 motor vehicle dealerships alleging that by passing on their inventory taxes to consumers as an itemized charge, the dealerships had committed fraud, conspiracy and DTPA violations. As the buyers had not sent DTPA notices before filing suit, the dealerships filed pleas in abatement. The buyers then sent belated notices demanding that the dealerships reimburse any consumer who paid an itemized inventory or similar tax since January 1, 1994. The notice also required reimbursement of expenses. The trial court denied the dealerships' motion to abate, and the dealerships sought mandamus relief in the Texas Supreme Court, arguing that the belated notices were inadequate because they sought relief for the class, not just the named plaintiffs.[224]

The Texas Supreme Court denied mandamus relief.[225] The court first noted that as originally enacted in 1973, the DTPA specifically authorized a plaintiff to give notice on behalf of an uncertified class.[226] Although this provision has been repealed, the court agreed with the several commentators who have suggested that the legislature's likely motive for the change was the court's own revision of the Texas civil procedure rule governing class actions.[227] The court then rejected the dealerships' argument that the legislature intended to abolish DTPA class actions.[228] The court found no evidence of such a legislative intent, holding that "the DTPA permits a consumer to provide preliminary notice on behalf of a putative

219. *See id.* at 812-13 (citing Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 355 (Tex. 1987)).
220. *Arthur's Garage*, 997 S.W.2d at 812-13. The court nevertheless held that summary judgment was appropriate on the claim because there was no evidence that the defendant ever repaired or modified the smoke detector. *See id.* at 813-14.
221. *See* DTPA § 17.505(a).
222. *See id.* § 17.505(d)-(e).
223. 997 S.W.2d 173 (Tex. 1999).
224. *See id.* at 176.
225. *See id.* at 185.
226. *See id.* at 177.
227. *See id.*
228. *See id.* 177-78.

class."[229] As the buyers had served adequate notice, the dealerships' motions to abate were properly denied,[230] and their request for mandamus relief was similarly denied.[231]

H. LIMITATIONS

Under the DTPA's limitations provision, an "action must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or should in the exercise of reasonable diligence have discovered the occurrence of the false, misleading, or deceptive act or practice."[232]

The Texas Supreme Court examined DTPA limitations in *KPMG Peat Marwick v. Harrison County Housing Finance Corp.*[233] The plaintiff, a county housing finance corporation, contracted for auditing services from the defendant accounting firm in connection with a series of bonds issued by the plaintiff. The plaintiff had sued the trustee of the bonds for wrongdoing in a prior suit but lost on summary judgment. The plaintiff then sued the accounting firm, alleging that it had failed to disclose the trustee's wrongdoing, and raised claims of negligence and DTPA violations. The trial court granted the defendant's motion for summary judgment on limitations grounds but the Texarkana Court of Appeals reversed, holding that the defendant had not presented conclusive evidence that the plaintiff had discovered or should have discovered the wrongful act more than two years prior to filing suit.[234] The court of appeals held that a claim does not accrue until the plaintiff knows not only of the injury but also of the "specific nature of each wrongful act that may have caused the injury."[235] The Texas Supreme Court rejected this accrual test, applied the rule that a DTPA claim accrues when the plaintiff knew or should have known of the wrongfully caused injury, and reversed.[236] The court held that once the plaintiff was aware of the harm suffered, the plaintiff should have investigated why its auditor failed to discover or report the mismanagement that caused the harm.[237]

The Corpus Christi Court of Appeals examined the effect of the DTPA's limitations period on claims brought by insureds against their

229. *Id.* at 177-78.

230. Pursuant to DTPA section 17.505, the dealerships' plea in abatement had automatically abated the action. By the time the trial court ruled, more than sixty days had passed since the dealerships received adequate, if belated, DTPA notices. Thus, no further abatement was necessary. *See id.*

231. *See id.* at 179.

232. DTPA § 17.565.

233. 988 S.W.2d 746 (Tex. 1999).

234. *See id.* at 747.

235. *Id.* at 749.

236. *See id.*

237. *See id.* at 750. *See also* Esquivel v. Murray Guard Inc., 992 S.W.2d 536, 541 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (holding that limitations begin to run when the fact of injury is known, not when the alleged wrongdoers are identified).

insurers in *Pena v. State Farm Lloyds*[238] and *Duzich v. Marine Office of America Corp.*[239] In *Pena*, the insureds brought suit against their homeowner's insurer for breach of contract, bad faith, unfair settlement practices and violation of the DTPA. The trial court granted summary judgment for the insurer and the plaintiffs appealed arguing, among other things, that their claims were not time-barred. The Corpus Christi Court of Appeals agreed. The court held that limitations begin to run in connection with a DTPA claim arising from denial of coverage on the date the coverage is denied, but timely claims for additional payments may restart the limitations period.[240] Because the insureds had made several related claims on their policy, the court held the relevant date for limitations purposes was the date the insureds' additional claims were finally denied.[241] Since that date was less than two years before suit was filed, the insureds' claims were not barred.[242] Applying the same test to a different set of facts in *Duzich*, the court held that the plaintiff's claims were barred by limitations because the final denial of the insured's claims occurred more than two years prior to suit, and the plaintiff was unable to identify any particular misrepresentations or deceptive actions that occurred within the applicable limitations period.[243]

I. PERSONAL JURISDICTION

In two decisions handed down during the survey period, the Houston and San Antonio Courts of Appeals underscored the principle that DTPA claims are subject to the same due process analysis generally applicable to attempts by Texas plaintiffs to obtain personal jurisdiction over nonresidents. In *C-Loc Retention Systems, Inc. v. Hendrix*,[244] the Houston Court of Appeals rejected an attempt by a Texas buyer of "bulkheading materials" to obtain jurisdiction over a Michigan seller. At the time of the purchase, the plaintiff and defendant had traded several telephone calls and faxes. The defendant shipped the goods F.O.B. Michigan, and after problems arose with the materials, the defendant sent a representative to Texas to examine the goods and report back. Rejecting the buyer's claim that these facts established specific jurisdiction, the Houston court held that although the shipment F.O.B. Michigan was not itself determinative, this fact, combined with the defendant's lack of advertising in Texas or other activities directed toward the state, failed to establish the necessary minimum contacts with Texas to assert personal jurisdiction. In so holding, the court characterized the trip by the seller's representative as an "isolated-occurrence" in relation to the plaintiff's

238. 980 S.W.2d 949 (Tex. App.—Corpus Christi 1998, pet. ext. filed).
239. 980 S.W.2d 857 (Tex. App.—Corpus Christi 1998, pet. denied).
240. *See Pena*, 980 S.W.2d at 954.
241. *See id.*
242. *See id.*
243. *See Duzich*, 980 S.W.2d at 869.
244. 993 S.W.2d 473 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

complaint.[245] Inasmuch as the plaintiff attempted to establish specific jurisdiction rather than general jurisdiction over the defendant, this explanation seems less than wholly satisfactory. The absence of any deceptive acts arising during the Texas visit would, on the other hand, support the court's conclusion.

Lastly, the plaintiff in *Klenk v. Bustamante*[246] brought an action for legal malpractice and DTPA violations against his former employer's corporate attorneys, who were located at the company's New York headquarters. The trial court denied the attorneys' special appearance, and the San Antonio Court of Appeals reversed. The court held that the attorneys' long-distance representation of the plaintiff did not constitute sufficient contact with Texas even if the attorneys communicated with, and provided legal advice to, the plaintiff in Texas via telephone.[247]

VI. CONCLUSION

In this millennium year,[248] the reported DTPA decisions illustrate the changing nature of the Texas economy. Of the 44 decisions selected for this annual review, 21 involved services, 10 involved insurance and 10 involved consumer goods. The statistical predominance of cases involving services is consistent with past years. Of the 74 cases reported in the two immediately preceding surveys, only 10 involved consumer goods, compared to 32 involving services and 13 involving insurance.[249] The transformation of Texas—like the United States generally—to a service economy is powerfully reflected in the case law.

It is possible to overstate the significance of such statistics. One might reasonably expect cases involving "garden variety" fraud in "traditional" consumer transactions to be less likely to produce published appellate opinions (and to be selected for this survey) than those involving novel theories of liability or defense. Indeed, the short history of DTPA jurisprudence might be written as one of constant tension between the forces of expansion and retrenchment. To cite a recent example, a plausible case can be made that the 1995 exemption for professional services was made necessary by overly-expansive applications of the DTPA's definitional provisions. According to this line of argument, it strains the common meaning of the terms "false, misleading or deceptive" to embrace advice, opinions, or the exercise of judgment, which by nature are subjective and generally incapable of being empirically proven "true" or

245. *Id.* at 479.
246. 993 S.W.2d 677 (Tex. App.—San Antonio 1998, no pet.).
247. *See id.* at 682-83.
248. Technically, this could be characterized as a "false, misleading or deceptive" statement. *See* DTPA § 17.46 (Vernon 1987). Because under the Gregorian Calendar there is no year zero, the first year of the calendar ended at the end of 1 A.D., and the first century elapsed at the end of 100 A.D. By extension, the Third Millennium and the 21st century will begin at zero hours GMT on January 1, 2001. *See* Royal Observatory of Greenwich, *Special Information Leaflet No. 29: "The New Millennium,"* <http://www.rog.nmm.ac.uk/leaflets/new_mill.html>.
249. The balance of cases involved real estate and non-consumer goods.

"false." Just as the expression of an opinion is not generally considered to be a "false statement," and hence not actionable as defamation,[250] rendering advice or expressing of an opinion should not normally qualify as "false, misleading or deceptive," as the court properly recognized in *Douglas v. Delp*.[251]

Relatedly, comparison of the decisions in *Griggs v. State Farm Lloyds*[252] and *Holeman v. Landmark Chevrolet Corp.*[253] decisions suggests that pretrial dismissal of claims involving obvious "puffery" could avoid protracted litigation over such vexing issues as whether the plaintiff's offer to enter into a consumer transaction was made in "good faith," a requirement nowhere found in the DTPA, yet one that some courts have found necessary to filigree onto the standing inquiry in order to avoid absurd results.[254]

The current crop of cases indicates that the question of consumer standing is one that continues to bedevil the courts. A recurring scenario involves a plaintiff not in contractual privity with the defendant.[255] Proceeding from the premise that contractual privity is not a prerequisite to DTPA standing, some courts have suggested that the relationship between the plaintiff and defendant is irrelevant to the standing determination.[256] The logical fallacy in such dicta was recognized by the Supreme Court in *Amstadt v. U.S. Brass Corp.*,[257] in which the court held that there must be a "connection between the plaintiffs, their transactions, and the defendants' conduct."[258] Other decisions recognize that the relationships of *both* plaintiff and defendant to the transaction in issue are relevant to consumer standing.[259]

Causation of damages is another subject that deserves more exacting scrutiny in the standing analysis. Although it is said that foreseeability is not an element of producing cause under the DTPA,[260] it is equally true

250. *See generally* RESTATEMENT (SECOND) OF TORTS § 566 (1977). An exception to this rule is a defamatory opinion that implies the existence of underlying defamatory facts. *See id.*

251. 987 S.W.2d 879, 884-85 (Tex. 1999).

252. 181 F.3d 694, 701-02 (5th Cir. 1999).

253. 989 S.W.2d 395 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

254. *See id.* at 398.

255. *See, e.g.*, Moritz v. Bueche, 980 S.W.2d 849, 855 (Tex. App.—San Antonio 1998, no pet.); Guest v. Cochran, 993 S.W.2d 397, 407 (Tex. App.—Houston [14th Dist.] 1999, no pet.); Flameout Design Fabrication, Inc. v. Pennzoil Caspian Corp., 994 S.W.2d 830, 838 (Tex. App.— Houston [1st Dist.] 1999, no pet.).

256. *See, e.g., Moritz*, 980 S.W.2d at 855.

257. 919 S.W.2d 644 (Tex. 1996); *see also Flameout*, 994 S.W.2d at 838.

258. *Amstad*, 919 S.W.2d at 650 (citing Birchfield v. Texarkana Mem'l Hosp., 747 S.W.2d 361, 368 (Tex. 1987) for the proposition that "a plaintiff establishes standing to sue under the DTPA in terms of her relationship to a transaction"). *See also* Sanchez v. Liggett & Myers, Inc., 187 F.3d 486, 491 (5th Cir. 1999).

259. *See* Flenniken v. Longview Bank & Trust Co., 661 S.W. 2d 705, 707 (Tex. 1983); Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 541 (Tex. 1981); Inglish v. Union State Bank, 911 S.W.2d 829, 834 (Tex. App.—Corpus Christi 1995), *rev'd on other grounds*, 945 S.W.2d 810 (Tex. 1997).

260. *See* Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 816 (Tex. 1997).

that DTPA damages cannot be too remote.[261] Stated another way, the requirement that a producing cause be an "efficient" or "exciting" cause[262] necessarily implies a more "proximate" relationship than mere but-for causation.

Because the universe of possible relationships between DTPA plaintiffs and defendants is so vast, it is not surprising that efforts to fashion standing rules of general applicability frequently have produced irrational results. A more profitable inquiry might be to focus upon the parties' relationship in light of the DTPA's stated purpose—*i.e.*, 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."[263] An analogue to such an approach is found in the principles that govern standing under the antitrust laws—another statutory scheme with a stated purpose of advancing consumer welfare.[264] It is generally accepted that, at a minimum, antitrust standing requires proof of (1) injury-in-fact, (2) "by reason of" that which made the conduct an antitrust violation, (3) proximity to the violation, and (4) reasonably quantifiable damages.[265] The first and fourth requirements are self-explanatory; the second requires that the injury not only be caused by the violation but also that it be caused by that which made the defendant's conduct unlawful (*i.e.*, that redress of the injury would promote the statute's purpose),[266] and the third requires that the plaintiff's injury not be too remote from the conduct constituting the violation.[267]

Like the antitrust laws, the DTPA may be read to require proof of injury caused by the violation that matches the rationale for the violation, and a relationship between the defendant's conduct and the plaintiff's injury. If the plaintiff's injury is not caused by the defendant's conduct, "but for" causation is absent. If the plaintiff's injury is not caused "by reason of" that which makes the defendant's conduct unlawful, the requirement that the plaintiff's injury be "in connection with" the violation likewise should be deemed absent. And if the plaintiff's injury is too remote from the alleged violation, standing should be denied. Such an analytical approach serves to rationalize the DTPA standing inquiry by avoiding the artificial (and sometimes contradictory) classifications involved in parsing the pseudo-privity and foreseeability issues that continue to confound standing analysis in DTPA cases.

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261. *See id.*
262. *See* Rourke v. Garza, 530 S.W.2d 794, 801 (Tex. 1975).
263. DTPA § 17.44 (1973).
264. *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (describing the Sherman Act as a "consumer welfare prescription").
265. *See* 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 360 (1995) [hereinafter AREEDA]; *see also* Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 542-44 (1983).
266. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).
267. See *Associated Gen. Contractors*, 459 U.S. at 542-44; AREEDA, *supra* note 263, ¶ 360.