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Deceptive Trade Practices - Consumer Protection Act

A. Michael Ferrill

Leslie Sara Hyman

DECEPTIVE TRADE PRACTICES—CONSUMER PROTECTION ACT

*A. Michael Ferrill**
*Leslie Sara Hyman***

TABLE OF CONTENTS

* B.B.A., St. Mary's University; J.D., Baylor University; Shareholder, Cox & Smith Incorporated, San Antonio, Texas.
** B.A., Brandeis University; J.D., Hastings College of the Law; Associate, Cox & Smith Incorporated, San Antonio, Texas.

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, regardless of when they accrued, filed on or after September 1, 1996. 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. Years after the amendments were enacted, the courts have begun to address these changes to the statute's coverage for professional services. However, five years after the amendments, there still are 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, 1999 through September 30, 2000. Noteworthy decisions during the Survey period address consumer status and defenses to DTPA claims.

II. CONSUMER STATUS

Several of the more interesting decisions during the Survey period involved 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 that form the basis of the plaintiff's complaint.[5] Whether a plaintiff qualifies for DTPA consumer status is a question of law.[6]

1. TEX. BUS. & COM. CODE ANN. §§ 17.41 et seq. (Vernon 1987 & Supp. 2001) [hereinafter DTPA].
2. *Id.* § 17.44(a).
3. *Id.* § 17.49(f), (g).
4. *See id.* § 17.50.
5. *Id.* § 17.45(4); Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 351-52 (Tex. 1987).
6. Hedley Feedlot, Inc. v. Weatherly Trust, 855 S.W.2d 826, 831 (Tex. App.—Amarillo 1993, writ denied).

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 it to relief.[7] *Banzhaf v. ADT Security Syst. Southwest, Inc.*[8] arose from an armed robbery of the Herman's Sporting Goods store in Richardson, Texas. During that robbery, which allegedly was committed by an employee and his accomplice, one employee was killed and another was seriously injured. The injured employee and the parents of the murdered employee brought suit against ADT, which had provided Herman's security system, alleging negligence, design defect and DTPA violations. ADT then filed a third-party claim against Herman's seeking contractual indemnification. The trial court granted ADT's motion for summary judgment.[9]

The plaintiffs appealed, arguing that the injured employee was a consumer and that ADT did not address the claim of the other employee's parents in its summary judgment motion. The Eastland Court of Appeals reversed as to the parents' claim, agreeing that ADT inexplicably failed to address that claim in its motion.[10] The court of appeals affirmed summary judgment in favor of ADT on the employee's claim.[11] The court recognized that when an employer purchases good or services for the benefit of an employee, that employee "acquires" the goods and services and thus is a consumer for DTPA purposes.[12] However, the particular security system selected by Herman's was designed only to protect Herman's premises and merchandise *after* the store closed and when no employees were present. Since the system was not for the benefit of Herman's employees, the employee was not a consumer.[13]

The San Antonio Court of Appeals also considered when a third-party beneficiary has consumer status in *Lukasik v. San Antonio Blue Haven Pools, Inc.*[14] Margaret Lukasik contracted with Blue Haven Pools to construct a swimming pool in her backyard. During the construction, Margaret contacted Blue Haven regarding acquisition of a pool alarm and was informed that Blue Haven did not sell such alarms. Blue Haven attempted to locate an alarm for the pool but was unable to do so. After the pool was completed, Kenneth and Christina Lukasik and their young children moved into a garage apartment behind Margaret's house. One of the children fell into the pool and drowned. The Lukasiks filed suit alleging that Blue Haven's failure to provide a pool alarm and misrepre-

7. 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. 28 S.W.3d 180 (Tex. App.—Eastland 2000, pet. denied).

9. *Id.* at 183.

10. *Id.* at 187.

11. *Id.*

12. *Id.*

13. *Id.*

14. 21 S.W.3d 394 (Tex. App.—San Antonio 2000, no pet.).

sentation regarding its ability to procure one constituted negligence, gross negligence and violations of the DTPA. Kenneth and Christina Lukasik also asserted a cause of action for wrongful death, and Christina and Margaret brought a bystander claim. Blue Haven filed a motion for summary judgment, which the trial court granted.[15]

The court of appeals affirmed. As to the DTPA claims by Kenneth and Christina Lukasik as individuals, the court held that the summary judgment evidence established that they never sought to acquire the pool alarm and that any transaction to acquire a pool alarm was not specifically required by, or intended to benefit them.[16] The court further held that Kenneth and Christina lacked DTPA standing as representatives of their child's estate because any cause of action the child could have pursued did not survive his death.[17] Finally, the court held that Margaret lacked consumer status because the undisputed summary judgment evidence showed that Blue Haven did not sell pool alarms and that the parties did not enter into any agreement or understanding as to a price of an alarm, how it would be purchased or paid for, or whether Margaret would pay Blue Haven or the supplier. Thus, Margaret failed to establish that she had a good faith intent and the capacity to purchase a pool alarm, let alone the necessary agreement to do so.[18] Because the summary judgment evidence established that the plaintiffs were not consumers under the DTPA, the court affirmed the summary judgment on that cause of action.[19]

A potential buyer of surplus paint sued the potential seller in *Malone v. E.I. du Pont de Nemours & Co.*[20] The buyer sent a letter to the seller stating that he was "interested" in buying surplus paint for $3 a gallon for sale in Lebanon. The buyer claimed that after he made several such purchases from the seller, each of which was made under a standard invoice form, the seller told him that the paint could not be shipped into Lebanon. Shortly thereafter, however, the seller sold the paint to someone else who sold it into Lebanon. The buyer and his middleman sued the seller for breach of contract, fraud, tortious interference with contract and DTPA violations alleging that the seller had agreed to sell him all of its surplus paint. The buyer and middleman later amended their petition to raise claims that some of the paint was defective and that the seller had committed "fraud in business." After the amendment, the plaintiffs' DTPA claims were based upon the complaints that the paint was defective and that the seller did not sell as much paint as it agreed to sell.

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15. *Id.* at 398.

16. *Id.* at 401-02.

17. *Id.* at 402.

18. *Id.* (citing Martin v. Lou Poliquin Ent., Inc., 696 S.W.2d 180, 184-85 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.)). The court also held that Margaret's purchase of the pool from Blue Haven did not establish consumer status because Margaret did not assert a DTPA claim with regard to the pool purchase. *Id.* at 403.

19. *Id.* at 403.

20. 8 S.W.3d 710 (Tex. App.—Fort Worth 1999, pet. denied).

The trial court granted summary judgment in favor of the seller and the Fort Worth Court of Appeals affirmed.[21] As to the DTPA claim regarding the amount of paint sold, the court of appeals held that the plaintiffs were not consumers because the goods sold—the paint—did not form the basis of the complaint.[22] The court held that "a DTPA plaintiff whose claim is not based on any fault in the goods, but merely complains of the seller's failure to sell as much as the plaintiff wanted to buy, is not a consumer."[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.

The plaintiffs in *Baily v. Gulf States Utils. Co.*[25] filed a suit for injunctive relief contending that Gulf States Utilities threatened to disconnect their electricity for non-payment of a disputed bill. They subsequently amended their petition to add Gulf States' successor-in-interest, Entergy Corporation, as a defendant and to seek damages for mental anguish arising from DTPA violations, oppressive conduct, negligence, intentional and negligent infliction of emotional distress and breach of the duty of good faith and fair dealing. The defendants filed a motion for summary judgment, arguing with respect to the DTPA claims that electricity was not the basis of the plaintiffs' claims and that electricity is neither a good nor a service. The trial court granted the motion.[26]

The Beaumont Court of Appeals reversed and remanded the plaintiffs' DTPA claims.[27] The court held that "[t]he means of making a consumer purchase is a transaction, so that deceptive practices in financing the transaction are actionable under the DTPA."[28] Because the deceptive practice allegedly arose directly from a transaction in which the plaintiffs purchased electricity, the only question remaining was whether electricity is a good. The court answered this question in the affirmative,[29] noting that the Texas Supreme Court has held that electricity is a "product" for purposes of products liability.[30] Because the plaintiffs were consumers of electric power, they were entitled to consumer status.[31]

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21. *Id.* at 715-16.
22. *Id.* at 715.
23. *Id.*
24. DTPA § 17.45.
25. 27 S.W.3d 713 (Tex. App.—Beaumont 2000, pet. denied).
26. *Id.* at 715.
27. *Id.* at 719.
28. *Id.* at 718.
29. *Id.*
30. *Id.* (citing Houston Lighting & Power Co. v. Reynolds, 765 S.W.2d 784, 785 (Tex. 1988)).
31. *Id.*; *see also* Boales v. Brighton Builders, Inc., 29 S.W.3d 159, 169 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (holding that home buyers contending that developer and builder made misrepresentations to induce them to buy their homes were con-

Money, on the other hand, is not a good or service, and a person who seeks only to borrow money therefore is not a DTPA consumer.[32] 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 the seller of the goods or services.[33] The Waco Court of Appeals examined this concept in *Burleson State Bank v. Plunkett,*[34] in which a bank was sued for common law and statutory fraud, breach of fiduciary duty, negligent misrepresentation and DTPA violations in connection with a construction loan transaction. The trial court denied the bank's motion for summary judgment on the DTPA claim, which had argued that the plaintiff was not a consumer.[35] Reversing, the Waco Court of Appeals held that the plaintiff's goal in his interaction with the bank was to assist homeowners with obtaining a construction loan and that the only thing sought by purchase or lease was the loan of money.[36] The court further held that the bank's ancillary services served no purpose other than facilitating the construction loan and thus were not an independent objective of the transaction.[37]

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 conduct was the producing cause of the plaintiff's damage.[38]

A. LAUNDRY LIST CLAIMS

DTPA section 17.46(b) contains, in 25 subparts, a nonexclusive list of actions that constitute "false, misleading or deceptive acts" under the statute.[39] Plaintiffs invoking these "laundry list"[40] claims are generally not required to prove or plead the defendant's state of mind or intent to deceive,[41] nor have plaintiffs always been required to show that they relied on the enumerated deceptions.[42] Whether a consumer should have

sumers because they were complaining about an aspect of the real estate and the transaction involved).

32. Riverside Nat'l Bank v. Lewis, 603 S.W.2d 169, 174-75 (Tex. 1980).

33. 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).

34. 27 S.W.3d 605 (Tex. App.—Waco 2000, pet. denied).

35. *Id.* at 614-15.

36. *Id.* at 615.

37. *Id.*

38. DTPA § 17.50(a)(1)-(3).

39. *Id.* § 17.46(b)(1)-(25).

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

41. Pennington v. Singleton, 606 S.W.2d 682, 689 (Tex. 1980). Several subsections explicitly involve an element of scienter. *See, e.g.*, DTPA § 17.46(b)(9), (10), (13), (16), (17) & (23).

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

to show reliance, however, remains the subject of debate.[43] Several significant cases involving "laundry list" claims were decided during the Survey period.

The death of a goat named Pancho gave rise to the case of *Hight v. Dublin Veterinary Clinic*.[44] The goat's owners placed Pancho with a breeding facility "for the purpose of standing him at stud, collecting, storing and selling his semen."[45] An employee of the breeding facility notified the owners that Pancho's horns were growing into his head. The owners consented to a "tipping" of Pancho's horns. Pancho was anesthetized at a veterinary clinic and dehorned but 15 to 20 minutes after the procedure was completed, Pancho died. His body was burned without his owners' consent.

Pancho's owners sued the breeding facility, the veterinary clinic and the veterinarian for negligence, breach of contract, breach of warranty and DTPA violations.[46] Regarding the DTPA claims against the breeding facility, the owners asserted that the facility's owners "represented themselves as a reputable and established service company which was capable of caring for Pancho and standing him at stud . . . and providing reproductive services."[47] They then argued that, since Pancho died in the care of the breeding facility, it was not capable of caring for Pancho as it had represented and had taken an unconscionable course of action.[48]

The trial court granted summary judgment on the DTPA claims, and the Eastland Court of Appeals affirmed.[49] The court held that Pancho's owners had offered no evidence that the breeding facility was incompetent in providing genetic services or routine boarding and care and no evidence of any misrepresentations that encompassed the performance of veterinary care, surgical treatment or postoperative treatment.[50]

The San Antonio Court of Appeals considered the amount of evidence of a misrepresentation necessary to survive a "no evidence" summary judgment in *Gonzalez v. Temple-Inland Mortgage Corp.*[51] The Gonzalezes were notified in December of 1995 that their home mortgage was "severely past due." On January 18, 1996, the Gonzalezes received a notice of acceleration. The notice stated that the amount necessary to cure the default was $5,868.06 and that if the default was not cured within 20 days, the bank would accelerate the maturity date of the note and have the house sold at a foreclosure sale. The Gonzalezes responded to the notice of acceleration by asserting that the $5,868.06 was incorrect and that they only owed $3,670.53. They stated their intention to pay that

43. *See generally* Prudential Ins. Co. v. Jefferson Assocs. Ltd., 896 S.W.2d 156 (Tex. 1995).
44. 22 S.W.3d 614 (Tex. App.—Eastland 2000, pet. denied).
45. *Id.* at 617.
46. *Id.*
47. *Id.* at 624.
48. *Id.*
49. *Gonzalez*, 22 S.W.3d at 617.
50. *Id.* at 624.
51. 28 S.W.3d 622 (Tex. App.—San Antonio 2000, no pet.).

amount within the week and requested a correct summary of the payments owed. Instead, they received a notice of acceleration and foreclosure. The Gonzalezes paid the $5,868.06 under protest and filed suit against the bank and the mortgage company and one of its employees asserting various causes of action including unreasonable and negligent debt collection practices, duress and DTPA violations. The trial court granted the defendants' motion for summary judgment, which had argued that there was no evidence that they had misrepresented the amount of the debt due, and the Gonzalezes appealed.[52] The court of appeals reversed. The court found that the notice of foreclosure stated that as of January 1996, the amount necessary to cure the default was $5,868.06 but that the mortgage company admitted in its interrogatory responses that a portion of that amount was applied to the payments due in February and March 1996 and that $430.30 was held in "suspense."[53] The court held that this evidence was sufficient to raise a genuine issue of material fact as to whether the defendants had misrepresented the amount of debt due.[54]

In *MacIntire v. Armed Forces Benefit Ass'n*,[55] an insurance policy lapsed for failure to make premium payments before the insured died. The beneficiary nevertheless sought payment of the benefits and sued the insurer when it denied her request. The trial court granted summary judgment for the insurer and the beneficiary appealed, arguing that genuine issues of material fact existed as to each of her claims.[56] The San Antonio Court of Appeals affirmed. As to the beneficiary's DTPA claims, the court held that "an insurer who proves it had a reasonable basis for denying a claim, even if the finder eventually determines that basis to be erroneous, enjoys immunity from statutory bad faith under the Texas Insurance Code and the Texas Deceptive Trade Practices Act."[57] The court also held that the mere breach of an insurance contract does not give rise to an Insurance Code or DTPA claim.[58] Because the beneficiary did not offer evidence of damages beyond the denial of benefits, as a matter of law the insured could not be liable and was entitled to summary judgment.[59]

The defendants in *Helena Chemical Co. v. Wilkins*[60] argued that their statements to farmers regarding the quality of their sorghum seed amounted to nonactionable puffing. On appeal from a judgment in favor of the plaintiffs, the San Antonio Court of Appeals held that the knowledge possessed by the buyer and seller is important in determining whether statements amount to puffing. The question is whether the seller is asserting a fact of which the buyer is ignorant or merely stating an

52. *Id.* at 624-25.
53. *Id.* at 625.
54. *Id.*
55. 27 S.W.3d 85 (Tex. App.—San Antonio 2000, no pet.).
56. *Id.* at 87-88.
57. *Id.* at 92.
58. *Id.*
59. *Id.* at 92-93.
60. 18 S.W.3d 744 (Tex. App.—San Antonio 2000), *aff'd*, 47 S.W.3d 486 (Tex. 2001).

opinion or judgment on a matter on which the seller has no special knowledge and on which the buyer also is expected to have an opinion.[61] The court found that the defendants made written representations that the particular seed was better than the other seed brands that they sold and that they had special knowledge stemming from the seeds' performance in prior tests. Thus, the defendants' statements were actionable and judgment on the jury's verdict for the plaintiffs was affirmed.[62]

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."[63] Plaintiffs seeking to convert a breach of contract into a DTPA violation have frequently invoked this provision.[64]

In *Ken Petroleum Corp. v. Questor Drilling Corp.*,[65] the Texas Supreme Court discussed the effect of a void contract on a claim under this section of the DTPA.[66] Ken is an oil and gas operator that contracted with Questor to drill a well. The contract contained mutual indemnity provisions in which Ken agreed to indemnify Questor for injuries to Ken's employees, and Questor agreed to indemnify Ken for injuries to Questor's employees. The parties agreed to support their indemnity obligations with insurance, self-insurance or a combination of the two. A Questor employee was killed during the drilling of the well, and his survivors sued both Questor and Ken. Ken filed a cross-claim against Questor when Questor refused to provide indemnity. The parties settled the wrongful death suit, and Ken and its insurance underwriters then brought a separate action against Questor and its parent company alleging a breach of the indemnity agreement, breach of guaranty based on the certificate of insurance and DTPA violations. The defendants moved for summary judgment arguing that the indemnity provision was void under the 1991 version of the Texas Oilfield Anti-Indemnity Act[67] and that there was no DTPA violation as a matter of law because the claim was, in essence, a breach of

61. *Id.* at 756.
62. *Id.* at 756, 760
63. DTPA § 17.46(b)(12).
64. *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).
65. 24 S.W.3d 344 (Tex. 2000).
66. This case was actually two consolidated cases—Ken Petroleum Corp. v. Questor Drilling Corp., 976 S.W.2d 283 (Tex. App.—Corpus Christi 1998, pet. granted), and Weber Energy Corp v. Grey Wolf Drilling Co., 976 S.W.2d 766 (Tex. App.—Houston [1st Dist.] 1998, pet. granted). As the DTPA issues arose only in the *Ken Petroleum* case, only that case is discussed here.
67. The current version is located at sections 127.001-007 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE (Vernon 1997 and Supp. 2000).

contract claim and because there was no intentional misrepresentation.[68] The trial court granted summary judgment, and the Corpus Christi Court of Appeals reversed.[69]

The Texas Supreme Court recognized that a simple breach of contract generally does not give rise to a DTPA claim but that this does not automatically foreclose a DTPA claim when a contract or part of a contract is void by operation of law.[70] At the same time, the court recognized that the mere fact of a void contract does not give rise to a DTPA claim.[71] Because Ken failed to present any summary judgment evidence that Questor made any representations about the indemnity provisions, and the indemnity provisions themselves are agreements, not representations, summary judgment was appropriate.[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 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 that the consumer otherwise would not have entered.[73]

The State of Texas brought suit in *Rayford v. State*[74] under this provision against an ultrasound sonographer for using a fetal ultrasound scanner for nondiagnostic purposes. The State alleged that this use violated the Texas Food, Drug and Cosmetic Act ("FDCA")[75] and the DTPA. The trial court granted partial summary judgment in favor of the State on the FDCA claim.[76] After a trial on the merits, the trial court held that the sonographer had falsely advertised the device and violated the DTPA.[77] On appeal, the State supported its DTPA claim by arguing that the sonographer failed to disclose to the consumer that the use of the device was not approved and required a prescription. The Dallas Court of Appeals reversed the trial court's judgment, holding that even if those disclosures should have been made, the State had presented no evidence that the failure to disclose induced a consumer into a transaction she

68. *Ken Petroleum*, 24 S.W.3d at 356.
69. *Id.* at 357.
70. *Id.*
71. *Id.*
72. *Id.*
73. DTPA § 17.46(b)(23); *see also* Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 479 (Tex. 1995).
74. 16 S.W.3d 203 (Tex. App.—Dallas 2000, pet. denied).
75. TEX. HEALTH & SAFETY CODE ANN. § 431.001-.279 (Vernon 1992 and Supp. 2001).
76. *Rayford*, 16 S.W.3d at 205.
77. *Id.*

would not have entered had she known the information.[78]

The Corpus Christi Court of Appeals came to a similar conclusion in *Colonial County Mut. Ins. Co. v. Valdez*.[79] Hector Valdez purchased a car and arranged for car insurance from Colonial County Mutual Insurance. A few months later, he sold the car to his son, Rene Valdez, who arranged for financing from a bank. Hector told his insurance agent to expect a call from the bank about "changes" and "arrangements" for the insurance. The bank called the insurance agent to verify that "Mr. Valdez" had insurance and was told that he did. Hector never told Colonial or the insurance agent that he had sold the car, but Hector was never informed that he could only insure the car if he owned it. Colonial did not discover that Hector did not own the car until it was stolen and Hector made a claim. Colonial filed a lawsuit seeking a declaratory judgment that Hector did not have an insurable interest in the car. Colonial obtained a summary judgment, which was reversed on appeal.[80]

After Colonial obtained its summary judgment but before that judgment was reversed, Hector sued Colonial alleging violations of the Texas Insurance Code and the DTPA. The jury awarded Hector damages on both claims and Colonial appealed, arguing that the evidence was factually and legally insufficient to support the jury's findings.[81] Colonial argued that a mere nondisclosure of material information was insufficient to establish DTPA liability under section 17.46(b)(23), and the court of appeals agreed.[82] The court held that a failure to disclose is actionable under this section only if it is accompanied by the intent to induce the purchaser to buy.[83] Since Hector did not tell the company of his intention to sell the car and there was no evidence that Colonial failed to disclose with the intent to induce him to enter the contract, Hector was not entitled to recovery under section 17.46(b)(23).[84]

Finally, last year's Survey reported on the case of *Nwaigwe v. Prudential Property and Casualty Ins. Co.*,[85] in which the owner of a rent house purchased a fire insurance policy from Prudential. The owner indicated to the insurance agent that the house would not be vacant for more than thirty consecutive days a year. The owner signed an insurance application acknowledging that the coverage was subject to the policy terms, but the owner never obtained a copy of the policy. The policy was issued and, despite the owner's representations to the agent, the house was unoccupied for several months prior to a fire, which destroyed the premises. The insurer denied coverage based upon a clause in the policy excluding cov-

78. *Id.* at 210-11.
79. 30 S.W.3d 514 (Tex. App.—Corpus Christi 2000, no pet.).
80. *Id.* at 516-17.
81. *Id.* at 517.
82. *Id.* at 517-18.
83. *Id.* at 518.
84. *Id.* The Insurance Code claim is discussed *infra* Part III.B.
85. No. 04-98-0037-CV, 1999 WL 343774 (Tex. App.—San Antonio May 28, 1999, no pet.).

erage for a building 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.[86]

The trial court granted summary judgment dismissing the DTPA claim. In the decision reported last year, 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). In support of this conclusion, the court curiously opined that, in order to prove that they disclosed the vacancy clause, the defendants must show that they had discussed it with the plaintiff or had provided it to him in writing.[87] Perhaps recognizing the bizarre consequences of its analysis—that a contacting consumer who fails for whatever reason to obtain a copy of the parties' contract is free to later assert a DTPA claim based upon the "nondisclosure" of contract terms that operate against his interests—the court of appeals granted the insurance company's motion for rehearing and withdrew its prior opinion.[88]

In its new opinion, the court of appeals found that no specific misrepresentations were made to the owner and that, to the extent knowledge of the 60-day vacancy clause might have been material to the owner's decision to purchase the policy, "it lost its materiality when [the owner] represented to Prudential that his property would not be unoccupied for more than thirty consecutive days per year.[89] The court held that, under the circumstances, Prudential had no duty to advise the owner of the vacancy exclusion.[90] The court further held that a mistaken belief about the scope or availability of insurance coverage is not actionable under the DTPA or the Insurance Code and that Prudential was entitled to summary judgment on those claims.[91]

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.[92] To be actionable under the DTPA, an implied warranty must be recognized by the common law or created by statute.[93] A DTPA plaintiff raising a breach of warranty claim therefore must show: (1) consumer status,

86. *Id.*

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

88. Nwaigwe v. Prudential Property and Casualty Ins. Co., 27 S.W.3d 558 (Tex. App.—San Antonio 2000, pet. denied). Last year's Survey criticized the court of appeals' "uncritical application" of § 17.46(23) on this point. *See* 55 SMU L. REV. 865, 875-77 (Summer 2000).

89. *Nwaigwe*, 27 S.W.3d at 560.

90. *Id.*

91. *Id.* at 560-61.

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

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

(2) existence of the warranty, (3) breach of the warranty, and (4) that the breach was a producing cause of the plaintiff's damages.[94]

The Houston Court of Appeals examined this type of DTPA claim in *Johnston v. McKinney Am., Inc.*[95] In that case a lessor of computer equipment sued the lessee under the pre-1995 version of the DTPA for past due rental payments. The lessee, who operated a chiropractic clinic, counterclaimed alleging breach of contract, negligent misrepresentation and DTPA violations and seeking rescission of the contract and a declaratory judgment that it was void. After a bench trial, the court entered judgment in favor of the lessor on the past due rentals claim and entered a take nothing judgment on the lessee's counterclaims.[96]

On appeal, the lessee argued that the evidence showed as a matter of law that the lessor had breached its implied warranty of merchantability because the computer system was unmerchantable. The court of appeals held that the common law implied warranty of merchantability applied to a lease of goods.[97] The court found that the warranty was breached because the undisputed evidence showed that the computer system was defective and unsuitable for the ordinary purposes for which it was used at the time it left the lessor.[98] Finally, because the breach caused damages to the lessee, the court of appeals held that the lessee had established breach of the implied warranty of merchantability as a matter of law.[99]

B. Incorporation of the DTPA into the Texas Insurance Code

Numerous statutes incorporate various sections of the DTPA or permit recovery for their violation via the DTPA.[100] One of the most frequently invoked of these "borrowing" statutes is Article 21.21 of the Texas Insurance Code.[101] During the Survey period, several plaintiffs invoked this provision to allege deceptive acts by insurers in connection with insurance claims.

Hector Valdez, the plaintiff in *Colonial County Mut. Ins. Co. v. Valdez*,[102] had better luck with his Insurance Code claim than with his DTPA claim. Colonial County Mutual Insurance did not inform him that

94. Johnston v. McKinney Am., Inc., 9 S.W.3d 271, 282 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).
95. *Id.*
96. *Id.* at 275.
97. *Id.* at 282-83.
98. *Id.* at 283.
99. *Id.*
100. Statutes either incorporating provisions of the DTPA or permitting recovery for their violation via the DTPA include: Tex. Occ. Code Ann. §§ 351.604, 702.403; Tex. Prop. Code Ann. §§ 41.007, 59.005, 221.024, 221.071, 222.011; Tex. Bus. & Com. Code Ann. § 35.74(c); Tex. Health & Safety Code Ann. § 164.013; Tex. Ins. Code Ann. art. 21.21; Tex. Rev. Civ. Stat. art. 4413(36), 5221a-7, 5221 a-8, 5221f, 9020; and Tex. Transp. Code Ann. § 684.086.
101. Tex. Ins. Code Ann. art. 21.21 (Vernon 1981 and Supp. 2001).
102. 30 S.W.3d 514 (Tex. App.—Corpus Christi 2000, no pet.). *See supra* notes 79-84 and accompanying text.

he would no longer have an insurable interest in his car if he sold the car to his son. The jury awarded Hector damages on his Insurance Code and DTPA claims and Colonial appealed, arguing that the evidence was factually and legally insufficient to support the jury's findings.[103] The court of appeals held that Colonial's failure to disclose was not actionable under the DTPA since there was no evidence that Colonial acted with the intent to induce Hector to enter the contract.[104] Colonial argued that the same logic should preclude an Insurance Code claim for failure to disclose, but the court disagreed. The Insurance Code prohibits the making of any misrepresentation relating to an insurance policy by: (1) making an untrue statement of material fact, (2) failing to state a material fact that is necessary to make other statements not misleading, considering the circumstances under which the statements are made, (3) making any statement in such a manner as to mislead a reasonably prudent person to a false conclusion of a material fact, (4) making a material misstatement of law, or (5) failing to disclose the full terms of the policy.[105] The court found that Colonial had failed to disclose that transfer of title would void insurance coverage and held that a statement of that material fact was necessary to make the terms in the policy showing coverage to be effective not misleading.[106] The court also held that Colonial's failure to disclose would have misled a reasonably prudent person to the false conclusion that the car was covered after the transfer and that Colonial had failed to disclose the full terms of the policy.[107] Thus, Colonial was liable under three Insurance Code definitions.[108]

Texas Farmers Ins. Co. v. Cameron[109] arose from a fire that destroyed a residence and most of the contents. The evidence of arson was overwhelming, and the homeowners were not present at the time of the fire and had alibis. The homeowners made a claim under their homeowner's insurance policy, which the insurance company denied on the grounds that it had a "good faith belief" that the homeowners either started the fire themselves or instructed someone else to start the fire and that the homeowners made misrepresentations when the insurance company was investigating the claim. The homeowners sued the insurance company for breach of contract, breach of the duty of good faith and fair dealing and violations of the Insurance Code and DTPA. A jury found in favor of the homeowners and awarded damages.[110]

On appeal, the insurance company argued that the evidence was factually insufficient to support the jury's verdict. The Dallas Court of Appeals examined the evidence and found that there was no evidence

103. *Id.* at 517.
104. *Id.* at 517-18.
105. TEX. INS. CODE ANN. art. 21.21, § 4(11)(a) – (e) (Vernon 1981 and Supp. 2001).
106. *Colonial Country Mut.*, 30 S.W.3d at 521.
107. *Id.*
108. *Id.*
109. 24 S.W.3d 386 (Tex. App.—Dallas 2000, pet. denied).
110. *Id.* at 391.

implicating the homeowners in the fire, that they had not removed their valuable or sentimental property from the home prior to the fire, that payment of the policy limits would represent a net financial loss, that the adjuster failed to investigate discrepancies in the inventory lists prepared and that the insurer had failed to interview the homeowners' alibi witnesses.[111] The court held that this evidence was sufficient to support the jury's finding that the insurance company breached its duty of good faith and fair dealing, engaged in an unfair claims settlement practice, and acted knowingly or intentionally in violation of the DTPA and Insurance Code.[112]

C. Unconscionability

DTPA §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."[113] In *Johnston v. McKinney Am., Inc.*,[114] discussed above, the lessor under a computer assignment lease sued the lessee under the pre-1995 version of the DTPA for past due rental payments. The lessee, who operated a chiropractic clinic, counterclaimed alleging, *inter alia*, DTPA violations. The lessee presented evidence at a bench trial that, despite making $24,171.30 in rental payments, it received no benefit from the equipment and, in fact, lost $33,376 in insurance claims. The lessee also presented evidence that it paid $2,000 to two computer experts in attempts to repair the equipment but was informed that it could not be fixed. The trial court nevertheless entered judgment in favor of the lessor for the past due rental payment and entered a take nothing judgment against the lessee on his counterclaims, and the lessee appealed.[115]

The Houston Court of Appeals explained that under the applicable version of the DTPA, an unconscionable action was defined as an act or practice that "results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration."[116] Economic loss alone may support recovery on this type of unconscionability, and a plaintiff may maintain a DTPA unconscionability claim even if the seller made no specific misrepresentation.[117] The court of appeals found that the evidence established gross-disparity unconscio-

111. *Id.* at 396.
112. *Id.*
113. 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." TEX. BUS. & COM. CODE ANN. § 17.45(5) (Vernon 1987).
114. 9 S.W.3d 271 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). *See supra* notes 95-99 and accompanying text.
115. *Id.* at 275, 279.
116. *Id.* at 278.
117. *Id.* (citing Teague v. Bandy, 793 S.W.2d 50, 54 (Tex. App.—Austin 1990, writ denied)).

nability as a matter of law.[118]

The San Antonio Court of Appeals considered unconsionability allegations against insurance agents in *Reyna v. Safeway Managing Gen. Agency for State and County Mut. Fire Ins. Co.*,[119] which arose from an automobile accident and the ensuing litigation. The case began as a declaratory judgment action by one of the automobile liability insurers. Numerous subsequently-added claims and cross-claims among various parties were settled and the parties were realigned with the insured as plaintiff, the insurer as third-party plaintiff, the injured parties as intervenors and the insurance agents as defendants. The insured alleged that he had been harmed in the underlying litigation by the agents' failure to forward certain papers to the insurer. A jury trial resulted in a verdict in favor of the plaintiff, insurer and injured on claims of breach of contract, breach of fiduciary duty and violations of the DTPA and Insurance Code. The agents appealed, arguing that their actions had not been unconscionable.[120]

The court of appeals affirmed.[121] The court first reviewed the evidence presented, which showed that in addition to failing to forward the legal papers, the agents had altered documents and files in an attempt to show that they *had* forwarded the papers.[122] The agents also assured the insured that the legal papers had been sent. The court held that this series of actions could have been found by the jury to have the tendency to deceive an ordinary person and that the jury could have found that the agents took advantage of the insured's lack of knowledge, amounting to unconscionable conduct.[123]

IV. DETERMINING THE MEASURE OF DAMAGES

A prevailing plaintiff in a DTPA action may recover economic damages.[124] 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.[125]

A. ACTUAL DAMAGES

The plaintiff in *Checker Bag Co. v. Lee Washington*[126] was a manufacturer and seller of pre-packaged cotton candy. In early 1996, a problem developed with the candy's shelf life. The plaintiff blamed the problems on the packaging and sued the bag manufacturer for DTPA violations and breach of contract. The evidence at trial indicated that the plaintiff

118. *Id.* at 279.
119. 27 S.W.3d 7 (Tex. App.—San Antonio 2000, pet. granted, judgm't vacated w.r.m.).
120. *Id.* at 14-15.
121. *Id.* at 23-24.
122. *Id.*
123. *Id.*
124. DTPA § 17.50(b)(1).
125. *Id.*
126. 27 S.W.3d 625 (Tex. App.—Waco 2000, pet. denied).

had to change the bags used for the cotton candy several times for various reasons. Finally, Checker Bag recommended a particular bag and represented that it would provide a certain level of moisture protection. Because of the shelf-life problem, the plaintiff lost customers including a contract to sell his cotton candy to some Blockbuster Video stores. The jury found that Checker Bag violated the DTPA and breached its contract with the plaintiff and awarded damages.[127]

Checker Bag appealed arguing that the jury's award of damages for both lost profits and injury to business reputation constituted an impermissible double recovery.[128] The Waco Court of Appeals determined that recovery for both lost profits and injury to business reputation may be duplicative but is not necessarily so.[129] The court then held that the plaintiff's recovery was not necessarily duplicative since the plaintiff had divided his damages into two separate markets—Blockbuster Video customers and all other customers.[130]

The defendant home sellers in *Blackstock v. Dudley*,[131] who were accused of failing to disclose severe plumbing problems in connection with the sale of their home, appealed a jury verdict against them and the trial court's calculation of damages. The court awarded the buyers the difference between the value of the home at the time of the sale and the price paid for it, as well as their reasonable and necessary out-of-pocket expenses. The Amarillo Court of Appeals modified the damages award, observing that successful DTPA plaintiffs may elect to receive *either* out-of-pocket damages or benefit of the bargain damages, because to receive both would amount to a prohibited double recovery.[132] When repair costs are involved, the plaintiff may recover damages for repair costs and *post-repair* diminution in value but may not recover repair costs when the diminution in value is calculated pre-repair.[133] Applying the law to the facts before it, the court held that the jury question inquired about the difference in value between the house when it was purchased and the price paid for it—a pre-repair diminution in value—and that allowing the home buyers to recover both the diminution and the repair costs would amount to a double recovery.[134]

B. Mental Anguish Damages

Several courts examined the evidence required to recover mental anguish damages under the DTPA. In *Colonial County Mut. Ins. Co. v.*

127. *Id.* at 630-33.
128. *Id.* at 641.
129. *Id.*
130. *Id.* The court also held that although the jury was not instructed to avoid including any amount for lost profits in its award for damage to business reputation, Checker Bag had waived any argument regarding the jury charge. *Id.* at 641-42.
131. 12 S.W.3d 131 (Tex. App.—Amarillo 1999, no pet.).
132. *Id.* at 135 (citing Bankston Nissan, Inc. v. Walters, 754 S.W.2d 127, 128 (Tex. 1988)).
133. *Id.* (citing Ludt v. McCollum, 762 S.W.2d 575 (Tex. 1988)).
134. *Id.* at 135-36.

Valdez,[135] discussed above, the plaintiff alleged that Colonial failed to inform him that he would no longer have an insurable interest in his car if he sold it to his son. The jury awarded damages on Insurance Code and DTPA claims and Colonial appealed, arguing in part that the evidence was insufficient to support the jury's award of mental anguish damages.[136] The Corpus Christi Court of Appeals held that an award of damages for mental anguish is appropriate where there is direct evidence of the nature, duration and severity of the plaintiff's anguish which establishes a substantial disruption in the person's daily routine.[137] The court held that the plaintiff's testimony that he felt deceived, "very mad," and powerless and that this affected his health in the form of high blood pressure and sleeping disorders was sufficient to support the jury's award.[138]

The San Antonio Court of Appeals considered the evidence of mental anguish necessary to survive a "no evidence" summary judgment in *Gonzalez v. Temple-Inland Mortgage Corp.*, also discussed above.[139] The court of appeals held that a plaintiff seeking mental anguish damages must offer evidence of the nature, duration, and severity of any mental anguish sufficient to show a substantial disruption of the plaintiff's daily routine.[140] The court held that the evidence presented by the plaintiffs—that their daily routine was substantially disrupted as a result of "mental sensations of painful emotions, in the forms of grief, indignation, stress, fear, loss of sleep, depression and duress"—was too conclusory to raise a genuine issue of material fact as to whether they could recover mental anguish damages.[141]

The San Antonio Court of Appeals also considered mental anguish damages in *Reyna v. Safeway Managing Gen. Agency for State and County Mut. Fire Ins. Co.*[142] As discussed above,[143] *Reyna* arose from an automobile accident and the ensuing litigation. After the personal injury suit was concluded, the insured alleged that he had been harmed in that litigation by the insurance agents' failure to forward certain papers to the insurer. A jury trial resulted in the plaintiff's favor.[144]

Affirming, the court of appeals examined the plaintiff's testimony that as a result of the underlying proceedings he was concerned for his credit and avoided making purchases, and he was concerned that he could be forced into bankruptcy or that his wages would be garnished, leaving him without the funds necessary to pay his child support and thus subject to

135. 30 S.W.3d 514 (Tex. App.—Corpus Christi 2000, no pet.). *See supra* notes 78-83 and 101-103 and accompanying text.
136. *Id.* at 525.
137. *Id.* at 526.
138. *Id.*
139. 28 S.W.3d 622 (Tex. App.—San Antonio 2000, no pet.). *See supra* notes 51-54 and accompanying text.
140. *Id.* at 326.
141. *Id.*
142. 27 S.W.3d 7 (Tex. App.—San Antonio 2000, pet. granted, judgm't vacated w.r.m.).
143. *See supra* notes 119-23 and accompanying text.
144. *Id.* at 23.

incarceration. He was also concerned that his job was in jeopardy. The San Antonio court concluded that taken together this evidence was legally sufficient to support the jury's award of $25,000 for mental anguish.[145]

As discussed above, the plaintiffs in *Texas Farmers Ins. Co. v. Cameron*[146] were accused by their homeowners insurer of being involved in starting a fire that destroyed their residence and most of its contents.[147] On appeal from a judgment in the plaintiffs' favor, the insurance company argued that the evidence was insufficient to support the jury's award of damages for mental anguish. The husband's only testimony about his mental state was that he "felt bad" when the insurer accused him of being an arsonist because the insurer was saying that he was "some type of criminal" and that it made him mad that the insurer persisted in accusing him of arson. The court of appeals held that this evidence was legally insufficient to support the jury's award of damages for mental anguish.[148] The wife, on the other hand, testified that she was "terrified" at the accusation, took time off from work, walked the floor at night and could not sleep, and took prescription medication for her insomnia. She further testified that she had dramatically reduced her participation in church activities. The court held that this evidence was legally and factually sufficient to support the jury's finding that the wife had suffered compensable mental anguish.[149]

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.[150] This is only partially correct, since several DTPA provisions expressly require proof of intentional conduct.[151] 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.[152] Other courts

145. *Id.*

146. 24 S.W.3d 386 (Tex. App.—Dallas 2000, pet. denied). *See supra* notes 109-12 and accompanying text.

147. *Id.* at 391.

148. *Id.* at 394-95.

149. *Id.* at 396-97; *see also* Burleson State Bank v. Plunkett, 27 S.W.3d 605, 617-18 (Tex. App.—Waco 2000, pet. denied) (*supra* notes 34-37 and accompanying text) (holding that testimony that the plaintiff construction contractor was unable to sleep, and suffered from headaches, diarrhea, vomiting and depression, that this had affected his work and thus, he had not been able to build houses was sufficient to support jury's award of $10,000 in damages); Blackstock v. Dudley, 12 S.W.3d 131, 138 (Tex. App.-Amarillo 1999, no pet.) (*supra* notes 131-34 and accompanying text) (holding that under the 1986 version of the DTPA, it was appropriate to apply prejudgment interest to mental anguish damages that had accrued as of the time the petition was filed).

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

151. *See, e.g.*, DTPA § 17.46(b)(9), (10), (13), (16), (17) & (23).

152. *See, e.g.*, Ins. Co. of N. Am. v. Morris, 928 S.W.2d 133, 154 (Tex. App.—Houston [14th Dist.] 1996), *aff'd in part, rev'd in part*, 981 S.W.3d 667 (Tex. 1998); *see also* Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980) (recognizing that a primary purpose of the DTPA

have recognized a variety of defenses to DTPA claims.[153] Additionally, both the courts and the legislature have carved out exemptions from the DTPA's reach.

A. The DTPA's Exclusion for Most Professional Services

The 1995 amendments to the DTPA limited the ability of a plaintiff to bring a DTPA claim arising from professional services.[154] Section 17.49(c) provides that "[n]othing in this subchapter shall apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill." The exemption does not apply to an express misrepresentation of a material fact that cannot be characterized as advice, judgment or opinion.[155]

The first reported case to apply this amendment was *Cole v. Central Valley Chemicals, Inc.*[156] The Coles purchased a herbicide after the defendant's salesman told them that it would provide better weed control and cost less than the herbicides the plaintiffs had used in the past. When the herbicide failed to control the weeds, leading to a reduced corn yield and monetary loss, the plaintiffs sued for negligent misrepresentation and DTPA violations. The trial court granted the defendant's motion for summary judgment holding, in part, that the plaintiffs' claims were precluded by the DTPA's exclusion of professional services, and the plaintiffs appealed.[157]

The court of appeals reversed.[158] The defendant had argued that the exclusion applied because the Coles sought professional advice from the salesman, who was an agronomist. The Coles countered that they went to the defendant's business seeking an herbicide, not professional advice. The Coles argued that the logical result of construing the salesman's recommendation as a professional service would be to preclude DTPA claims whenever the consumer purchases a product based upon a salesman's advice. The court of appeals agreed, holding that the Coles' claim was based upon the purchase of the herbicide, not on the rendering of a professional service.[159]

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was to relieve consumers of common law defenses while providing a cause of action for misrepresentation).

153. *See, e.g.*, Ostrow v. United Bus. Machs., Inc., 982 S.W.2d 101, 105 (Tex. App.—Houston [1st Dist.] 1998, no pet.) ("We hold a DTPA claim arising out of a contract may be barred by accord and satisfaction."); Johnson v. McLeaish, No. 05-94-01673-CV, 1995 WL 500308, at *10 (Tex. App.—Dallas Aug. 23, 1995, writ denied) (applying illegality/public policy affirmative defense to DTPA claims); Keriotis v. Lombardo Rental Trust, 607 S.W.2d 44, 46 (Tex. App.—Beaumont 1980, writ ref'd n.r.e) (applying statute of frauds to DTPA claims).

154. See DTPA § 17.49(c).

155. *Id.* at § 17.49(c)(1).

156. 9 S.W.3d 207 (Tex. App.—San Antonio 1999, pet. denied).

157. *Id.* at 210.

158. *Id.*

159. *Id.*

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

A breach of contract unaccompanied by a misrepresentation or fraud is not a false, misleading or deceptive act and thus does not violate the DTPA.[160] During the Survey period, several cases examined this limitation on the DTPA's reach. The plaintiff in *Riddick v. Quail Harbor Condominium Ass'n*[161] purchased a condominium from the defendant. By the terms of the Condominium Declaration, which controlled the operations of the condominium association, the plaintiff owned only the inner finished surfaces and the interior walls, floors, ceilings, doors and windows. The plaintiff was responsible for repairs and maintenance of the interior. The foundation, roof, exterior of the unit and ground under the unit were designated as "common elements" and were jointly owned by all of the owners of the units. Only the association was authorized to perform maintenance and repairs on the common elements. Shifting soil caused the foundation to move, which caused cracks in the interior and exterior walls of the plaintiff's unit. The association hired an engineering firm, which stabilized the foundation. The plaintiff alleged that the association's failure to repair the cracked walls and interior damage violated the DTPA and was a breach of contract.

The trial court granted partial summary judgment for the condominium association on the DTPA claim and the Houston Court of Appeals affirmed.[162] The court held that the plaintiff's failure to bring forward any evidence of a misrepresentation or other "false, misleading or deceptive acts" was fatal to the DTPA claim.[163]

The plaintiff in *Frost Nat'l Bank v. Heafner*[164] sued her bank for allowing $10,000 to be withdrawn from her account pursuant to forged checks. She alleged that the bank was liable for negligence, spoliation of evidence, breach of the duty of good faith, breach of contract and a violation of the DTPA. After a jury verdict in the plaintiff's favor, the bank appealed, arguing that the DTPA allegation was nothing more than a breach of contract claim.[165] The plaintiff contended that the claims were different because her breach of contract claim alleged that the bank breached the deposit account agreement by paying the forged checks and

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

161. 7 S.W.3d 663 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

162. *Id.* at 669-71.

163. *Id.* at 670-71. Curiously, the court of appeals held that the absence of evidence of a misrepresentation and the fact that the plaintiff's claim was one for breach of contract only, meant that the trial court did not err in finding that the plaintiff was not a consumer. *Id. See also* Ken Petroleum Corp. v. Questor Drilling Corp., 24 S.W.3d 344 (Tex. 2000) (*supra* notes 65-72 and accompanying text) (holding a DTPA claim might arise from a void contract but the mere fact that a contract was void did not establish an actionable misrepresentation).

164. 12 S.W.3d 104 (Tex. App.—Houston [1st. Dist.] 1999, pet. denied).

165. *Id.* at 111.

by not following its error resolution procedure, while the basis of her DTPA claim was that the bank misrepresented the safety and security of deposited funds, safeguards to prevent unauthorized withdrawals and the attributes of the services it offered. She also argued that the bank misrepresented her right to share in the results of its investigation into the forgeries. The Houston Court of Appeals rejected the plaintiff's argument and reversed, holding that the plaintiff's assertions amounted to nothing more than a complaint that the bank did not comply with the terms of the deposit account agreement.[166]

The Fort Worth Court of Appeals considered claims arising from a nonjudicial foreclosure sale of a home in *Key v. Pierce.*[167] The homeowners executed a deed of trust in favor of a mortgage company and then defaulted on their obligation. At the mortgage company's request, the substitute trustee posted the property for nonjudicial foreclosure. The notice stated that the property would be sold to the highest bidder. When the plaintiff, who was the highest bidder at the foreclosure sale, tendered his payment, he was told that he could not buy the property after all because the homeowners had declared bankruptcy.[168] The next day, the substitute trustee discovered that the homeowners had not, in fact, declared bankruptcy. He reposted the property but the mortgage company was the highest bidder at the second sale.

The plaintiff brought suit against the mortgage company, the substitute trustee, the substitute trustee's employer and the employer's parent company and the couple who purchased the property from the mortgage company, seeking a declaratory judgment awarding him title to the property. The plaintiff also sought a constructive trust based on fraud and unconscionable conduct and damages for misrepresentation and DTPA violations. The DTPA claims were premised on the argument that the defendants misrepresented that they would perform under the posted notice. The trial court granted summary judgment in favor of the plaintiff on his claim for a declaratory judgment but against the plaintiff on his other claims.[169] The court of appeals affirmed holding, as to the DTPA claim, that the plaintiff's injury was actionable under contract law and not the DTPA because it was the nonperformance, not the statements, that caused the harm.[170]

166. *Id.* at 111-12; *see also* Dickey v. Club Corp. of Am., 12 S.W.3d 172 (Tex. App.—Dallas 2000, pet. denied) (holding that country club members' purported DTPA claim was nothing more than a complaint about the club's ability to make and enforce rules governing use of the golf course, and thus was merely a breach of contract claim not actionable under the DTPA).

167. 8 S.W.3d 704 (Tex. App.—Fort Worth 1999, pet. denied).

168. The substitute trustee's employer told him that the homeowners had declared bankruptcy.

169. 8 S.W.3d at 707.

170. *Id.* at 709-10.

C. Preemption and Exemption From the DTPA

Several statutory schemes and common law doctrines bar DTPA claims either expressly or by implication or affect a plaintiff's procedures for bringing DTPA claims. During the Survey period, several cases examined these limitations on the DTPA's reach.

1. Federal Insecticide, Fungicide and Rodenticide Act

The Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") regulates the content and format of labeling for herbicides and requires that all herbicides be registered with the Environmental Protection Agency.[171] FIFRA preempts common law tort suits that are based solely upon claims relating to labeling.[172] As discussed above, the plaintiffs in *Cole v. Cent. Valley Chems., Inc.*[173] purchased a herbicide from the defendant after the salesman told them that the herbicide would provide better weed control and cost less than the herbicides the plaintiffs had used in the past. When the herbicide failed to control the weeds, leading to a reduced corn yield and monetary loss, the plaintiffs sued for negligent misrepresentation and DTPA violations. The trial court granted the defendant's motion for summary judgment holding, in part, that the plaintiffs' claims were preempted by FIFRA.[174]

The plaintiffs appealed, arguing that their claims were not based on the herbicide's label or its failure to warn but on the failure of the product to perform in accordance with the salesman's representations. The San Antonio Court of Appeals examined the plaintiffs' petition and found that the plaintiffs' claims arose from the salesman's representations. The court held that because the plaintiffs' claims were not related directly or indirectly to labeling, FIFRA did not preempt them.[175]

2. Texas Motor Vehicle Commission Code

The Texas Motor Vehicle Commission Code[176] was enacted to govern the distribution and sale of motor vehicles through licensing and regulating vehicle manufacturers, distributors and dealers.[177] The Code provides that the Texas Motor Vehicle Commission ("TMVC") shall carry out the duties and functions conferred upon it by the Code. If the TMVC determines that the Code, or any TMVC rule or order, has been violated, it may levy a civil penalty, issue cease and desist orders or injunctions or institute a lawsuit in the name of the State of Texas,[178] but it may not

171. *E.g.*, Quest Chem. Corp. v. Elam, 898 S.W.2d 819, 820 (Tex. 1995).
172. *Id.*
173. 9 S.W.3d 207 (Tex. App.—San Antonio 1999, pet. denied). *See supra* notes 156-59 and accompanying text.
174. *Id.* at 209-10.
175. *Id.*
176. Tex. Rev. Civ. Stat. Ann. art. 4413(36) (Vernon 1976 & Supp. 2001).
177. *E.g.*, David McDavid Nissan, Inc. v. Subaru of Am., Inc., 10 S.W.3d 56, 64 (Tex. App.—Dallas 1999), *rev'd*, ___ S.W.3d ___; 44 Tex. Sup. C. J. 779 (Tex. 2001).
178. Tex. Rev. Civ. Stat. Ann. art. 4413(36), § 6.01-.03 (Vernon Supp. 2001).

award damages to parties.[179] The Dallas Court of Appeals examined the relationship between the Code and the DTPA in *David McDavid Nissan, Inc. v. Subaru of Am., Inc.*[180] McDavid, an automobile dealership, sued Subaru alleging that Subaru orally consented to the dealership's relocation and then refused to allow the relocation. McDavid terminated its Subaru dealership agreement and sued under various theories including the Code and the DTPA. Subaru moved for summary judgment on the ground that McDavid was barred from bringing its claims because it failed to raise those claims before the TMVC.[181]

Section 6.06(a) of the Code provides that a person who has sustained actual damages as a result of a violation of the Code may maintain an action:

> pursuant to the terms of [the DTPA] and shall be entitled to all procedures and remedies provided for therein. In any action brought under [section 6.06(a)] . . . a judgment rendered pursuant to [section 6.06(a)] shall pay due deference to the findings of fact and conclusions of law of the [TMVC] contained in a final order which forms the basis of the action.[182]

The Dallas Court of Appeals held that section 6.06(a) evinced a legislative intent that the TMVC have primary jurisdiction to determine whether the Code was violated before a party may bring a DTPA action in court for damages resulting from the violation.[183] Thus, the court held that McDavid was required to present its Code/DTPA claims to the TMVC and obtain findings that Subaru violated the Code before bringing its DTPA claims in court.[184] The court then rendered judgment, dismissing McDavid's DTPA claim for lack of jurisdiction.[185]

In a decision issued outside the Survey period, the Texas Supreme Court reversed, holding that the TMVC had primary jurisdiction, not exclusive jurisdiction over McDavid's DTPA claims and that the trial court should have abated its proceeding rather than dismissing for lack of jurisdiction.[186] This opinion will be fully discussed in next year's Survey.

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179. *See* Kawasaki Motors Corp. USA v. Tex. Motor Vehicle Comm'n, 855 S.W.2d 792, 797 (Tex. App.—Austin 1993, no writ).

180. 10 S.W.3d 56 (Tex. App.—Dallas 1999), *rev'd* ___ S.W.3d ___, 44 Tex. Sup. Ct. J. 779 (Tex. 2001).

181. At the time of the events giving rise to McDavid's claims, the Code provided that the TMVC was vested with the "general and original power and jurisdiction to regulate all aspects of the distribution and sale of new motor vehicles" and that "all aspects of the distribution and sale of motor vehicles" were governed "exclusively" by the provisions of the Code. *Id.* at 64-65.

182. TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.06(a) (Vernon Supp. 2001).

183. 10 S.W.3d at 68-69.

184. *Id.* at 69.

185. *Id.*

186. Subaru of Am., Inc. v. David McDavid Nissan, Inc., ___ S.W.3d ___, 44 Tex. Sup. Ct. J. 779 (Tex. 2001).

3. *The Carmack Amendment*

The Carmack Amendment governs a motor carrier's liability to a shipper, consignor, holder of bill of lading or buyer for the loss of, or damage to, an interstate shipment of goods.[187] The Amendment subjects the motor carrier to absolute liability for "actual loss or injury to property."[188] If a transaction is governed by the Amendment, state statutory and common law claims involving the transaction are preempted.[189] The plaintiff in *Tallyho Plastics, Inc. v. Big M Constr. Co.*[190] sued a construction company and a trucking company and its driver under various theories including the DTPA for damage its plastic injection molding machine received when the truck hauling the machine from Nebraska to Texas was involved in an accident. The construction company was hired to install the machine when it arrived in Texas. During the negotiations, the parties discussed the transportation of the machine. The construction company contacted a broker and an agreement was reached that the shipping company would transport the machine. Reversing the trial court's judgment in favor of the plaintiff on its statutory and common law causes of action, the Tyler Court of Appeals held that the construction company was acting as a broker, as that term is defined in the Carmack Amendment, and that the plaintiff's state statutory and common law causes of action therefore were preempted.[191]

4. *The "Learned Intermediary Doctrine"*

The "learned intermediary doctrine" is one peculiar to cases involving a medical product manufacturer's duty to warn.[192] 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."[193] The physician's knowledge of the warning operates to protect the manufacturer and serves to shift to the physician the duty of explaining risks to the consumer unless the warning provided to the physician is inadequate or misleading.[194] 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.[195]

The plaintiff in *Wyeth-Ayerst Labs. Co. v. Medrano*[196] offered several

187. 49 U.S.C. § 13101 et seq. (Supp. IV 1994).
188. *See* Mo. Pacific R.R. Co. v. Elmore & Stahl, 377 U.S. 134, 137 (1964).
189. Accura Sys., Inc. v. Watkins Motor Lines, Inc., 98 F.3d 874, 876 (5th Cir. 1996).
190. 8 S.W.3d 789 (Tex. App.—Tyler 1999, no pet.).
191. *Id.* at 793.
192. *In re* Norplant Contraceptive Prods. Liab. Litig., 165 F.3d 374, 376 (5th Cir. 1999).
193. Alm v. Aluminum Co. of Am., 717 S.W.2d 588, 591-92 (Tex. 1986) (citations omitted).
194. *Id.* at 592.
195. *See* Stewart v. Janssen Pharmaceutical, Inc., 780 S.W.2d 910, 911 (Tex. App.—El Paso 1989, writ denied).
196. 28 S.W.3d 87 (Tex. App.—Texarkana 2000, no pet.).

theories why the learned intermediary doctrine should not apply to her product liability claims. First, she argued that the doctrine should not apply to claims involving prescription contraceptives because the patient makes the decision as to which contraceptive she will use and the intermediary merely abides by that decision. The Texarkana Court of Appeals rejected this argument, holding that the doctrine applies even when a physician makes no independent judgment in prescribing and administering the prescription drug.[197] The court held that this result was just because the prescription drug can reach the patient only by way of a learned intermediary.[198] The plaintiff next argued that the doctrine should not apply because she was counseled by an advanced practice nurse who worked for her gynecologist. The court held that since Texas law permits advanced practice nurses to prescribe medication and treat patients without the supervision of a physician, they qualify as learned intermediaries.[199] Finally, the plaintiff argued that the doctrine should not apply to her DTPA claims because it is a common law defense. The court recognized that common law defenses may not be applied to bar DTPA claims,[200] but it held that the learned intermediary doctrine "is used to show to whom a defendant, usually a prescription drug manufacturer, owes the duty to adequately warn," and that even when the doctrine applies, the manufacturer still has a duty to warn and can be held liable to the patient if the warning it gave was inadequate.[201] Because assertion of the doctrine does not by itself indicate that the plaintiff has no case, the court held that it is not properly characterized as a "defense" and thus applies to DTPA claims.[202] Turning to the plaintiff's claim, the court held that the defendant was entitled to a directed verdict based upon the nurse's testimony that the additional warnings the plaintiff thought were lacking would not have affected her decision to prescribe the contraceptive to the plaintiff.[203]

D. "As Is" Clauses

An "as is" agreement generally negates the causation element of a DTPA claim.[204] The plaintiffs in *Fletcher v. Edwards*[205] entered into a contract to purchase a lot which obligated them to accept the property "in its present condition." The plaintiffs contended that the real estate agent told them that water service to the property had been disconnected

197. *Id.* at 92.
198. *Id.*
199. *Id.* at 93.
200. *Id.* at 94.
201. *Wyeth-Ayerst*, 28 S.W.3d at 94.
202. *Id.*
203. *Id.* at 95. *See also* Dyer v. Danek Med., Inc., 115 F. Supp. 2d 732, 740-42 (N.D. Tex. 2000) (applying the learned intermediary doctrine to the plaintiffs' claim of failure to warn arising from a spinal fixation device).
204. *E.g.*, Fletcher v. Edwards, 26 S.W.3d 66, 75 (Tex. App.—Waco 2000, pet. denied) (citing Prudential Ins. Co. of Am. v. Jefferson Assocs., 896 S.W.2d 156, 161-62 (Tex. 1995)).
205. 26 S.W.3d 66 (Tex. App.—Waco 2000, pet. denied).

but could be reestablished. At the closing, the plaintiffs signed an "Acceptance of Title" that contained an "as is" clause. When the plaintiffs discovered that water service was not available to the property, they sued the real estate agent, his employer and other defendants for statutory and common law fraudulent inducement, negligent misrepresentation and DTPA violations.[206] The defendants filed a motion for summary judgment, alleging, in part, that the "as is" clauses in the original contract and the Acceptance of Title barred the plaintiffs' claims. The plaintiffs argued that "as is" clauses do not apply in DTPA suits, but the trial court granted the motion.[207]

On appeal, the plaintiffs failed to raise their argument that "as is" clauses do not apply to DTPA suits so the Waco Court of Appeals limited its review to whether the clauses were legally sufficient to entitle the defendants to summary judgment.[208] The court first acknowledged that while an "as is" agreement generally negates the causation element of a DTPA claim, such an agreement does not bind a buyer who is fraudulently induced into entering the agreement unless the agreement expresses the parties' intent to waive fraudulent inducement claims or disclaims reliance on the particular representations in dispute.[209] Because the plaintiffs alleged that the real estate agent made misrepresentations to induce them to enter into the real estate contract and because when the plaintiffs entered into the agreements they were not attempting to resolve the instant dispute, were not represented by counsel, and were not "sophisticated business players," the court held that the agreements did not establish the defendants' entitlement to summary judgment as a matter of law.[210] If followed, such casuistic reasoning would lend to the abrogation of the "as is" defense to DTPA claims.

E. Causation

Liability under the DTPA is limited to actions that are a producing cause of the plaintiff's damages.[211] Unlike the doctrine of proximate cause, producing cause does not require that the injury be foreseeable.[212] "Producing cause" has been defined as "an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of."[213] When determining whether the actions complained of are the producing cause of a plaintiff's damages, courts look to whether the alleged cause is a substantial factor that brings about the plaintiff's

206. The plaintiffs subsequently nonsuited their claims against all defendants other than the real estate agent and his employer. *Id.* at 72.
207. *Id.* at 73.
208. *Id.* at 75.
209. *Id.*
210. *Id.* at 76-77 (distinguishing Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171 (Tex. 1997)).
211. Doe v. Boys Club of Greater Dallas, Inc., 907 S.W.2d 472, 478 (Tex. 1995).
212. *E.g.*, Hycel, Inc. v. Wittstruck, 690 S.W.2d 914, 922 (Tex. App.—Waco 1985, writ dism'd).
213. Union Pump Co. v. Allbritton, 898 S.W.2d 773, 775 (Tex. 1995).

injury, without which the injury would not have occurred.[214]

The causal connection between the alleged wrong and the plaintiff's injury must not be broken by an intervening or superseding cause.[215] Proof that a new and independent basis exists for the plaintiff's injuries may negate a claim that the defendant's actions were a producing cause of those injuries.[216] During the Survey period, two cases examined the concept of intervening or superseding cause. *Blackstock v. Dudley*[217] arose from the sale of a home with allegedly undisclosed severe plumbing problems. The buyers sued the sellers and the real estate agent claiming various DTPA violations during the sale process. The jury found that the sellers had engaged in false, misleading or deceptive acts and awarded damages to the buyers and the sellers appealed arguing, in part, that the buyers' reliance upon a professional home inspection was a "new and independent basis" for the purchase that superseded the allegedly wrongful acts as a matter of law. The Amarillo Court of Appeals rejected this argument because the inspection did not, and could not have, uncovered the plumbing problem and the buyers had no knowledge of the defects.[218]

The plaintiff in *Bartlett v. Schmidt*[219] sued the sellers of real estate, their broker, and two title companies alleging that the defendants were aware that he intended to use the property for commercial purposes and yet failed to inform him that the property was restricted for residential use. The Corpus Christi Court of Appeals reversed a jury verdict in favor of the plaintiff against the broker, holding that even if the broker's statement that there were no restrictions on the property was a cause of the plaintiff's damage, the plaintiff's decision to execute an earnest money contract and his review of the title commitment were "new and independent" causes of his injuries.[220]

The San Antonio Court of Appeals applied the concept of producing cause in *MacIntire v. Armed Forces Benefit Ass'n,*[221] in which a beneficiary under a lapsed insurance policy nevertheless sought payment of the benefits and sued the insurer when the insurer denied her request. Affirming the trial court's grant of summary judgment for the insurer, the San Antonio Court of Appeals held that the producing cause of the policy's lapse was the insureds' failure to pay the premiums and that the insurer's alleged billing errors were not a substantial factor especially in

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

215. *E.g.*, Dubow v. Dragon, 746 S.W.2d 857, 860 (Tex. App.—Dallas, 1998, no pet.).

216. *Id.*

217. 12 S.W.3d 131 (Tex. App.—Amarillo 1999, no pet.). *See supra* notes 131-34 and accompanying text.

218. *Id.* at 133-34; *see also* Fernandez v Schultz, 15 S.W.3d 648 (Tex. App.—Dallas 2000, no pet.) (holding that reliance on a professional inspection report does not relieve a house seller of liability for misrepresentations about termite infestation when the misrepresentations are one of several producing causes).

219. 33 S.W.3d 35 (Tex. App.—Corpus Christi 2000, pet. filed).

220. *Id.* at 40.

221. 27 S.W.3d 85 (Tex. App.—San Antonio 2000, no pet.). *See supra* notes 55-59 and accompanying text.

the absence of any evidence that the beneficiary was misled by the alleged errors.[222]

The plaintiff in *Hou-Tex, Inc. v. Landmark Graphics*[223] was an oil and gas company that drilled a dry hole after its geological contractor used software called SeisVision to help choose the drilling site. A bug in SeisVision caused a miscalculation that resulted in the hole being drilled hundreds of feet from the site where it should have been drilled. The contractor reported the bug to the owner and licensor of SeisVision and was told that the owner had known about the bug for almost a year and had corrected the bug in a newer version of the software but had not sent the newer version to all of its clients. The oil and gas company sued SeisVision's owner for the costs of drilling the dry hole and asserted claims of negligence, breach of warranty, negligent misrepresentation and violations of the DTPA. The trial court granted summary judgment in favor of the software owner.[224]

The oil and gas company appealed, and the software owner argued that the DTPA does not impose vicarious liability on a defendant based on an innocent involvement in a business transaction. The court of appeals first recognized that DTPA liability will not be imposed merely because a defendant introduced a product into the stream of commerce.[225] "The DTPA is not intended to reach upstream manufacturers when their misrepresentations are not communicated to the consumer."[226] The court construed the summary judgment evidence as showing a deceptive act on the part of the software owner but held, without using the term "causation," that to avoid summary judgment there must be some evidence that someone communicated the deception to the oil and gas company. Because the oil and gas company offered no evidence to controvert the software owner's evidence that it had no communication with the company and because there was no evidence that the oil and gas company even knew about the defect until the software failed, the court affirmed the summary judgment.[227]

As discussed above, the plaintiff in *Checker Bag Co. v. Lee Washington*[228] was a manufacturer and seller of pre-packaged cotton candy. In early 1996, a problem developed with the shelf-life of the candy. The plaintiff first closely examined and monitored his production equipment

222. *Id.* at 92-93.
223. 26 S.W.3d 103 (Tex. App.—Houston [14th Dist.] 2000, no pet.).
224. *Id.* at 106.
225. *Id.* at 111 (citing Amstadt v. United States Brass Corp., 919 S.W.2d 644, 650 (Tex. 1996)).
226. *Id.*
227. *Id.* at 111-12; *see also* Dagley v. Haag Eng'g Co., 18 S.W.3d 787, 791-92 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (holding that engineering firm hired by an insurer was not liable to the insureds for the insurer's allegedly wrongful denial of the insureds' claims absent evidence that any alleged misrepresentation were made to insureds and absent evidence of a special relationship between the engineering company and insureds).
228. 27 S.W.3d 625 (Tex. App.—Waco 2000, pet. denied). *See supra* notes 126-30 and accompanying text.

and facility, and he then conducted interviews to determine if the candy had been properly stored. Finally, he switched bags and the shelf-life problems ceased.

The jury found that the manufacturer had violated the DTPA and breached its contract with the plaintiff.[229] The manufacturer appealed arguing, among other things, that the evidence was insufficient to support the jury's finding that its misrepresentation about the quality of the bags was a producing cause of the plaintiff's injury.[230] The Waco Court of Appeals determined that there was some evidence from which the jury could find that the decreased shelf-life was the result of the lower moisture barrier provided by the bags and that the plaintiff would not have purchased those bags absent the manufacturer's representations about their quality and characteristics.[231]

The plaintiffs in *Helena Chem. Co. v. Wilkins*[232] were farmers who purchased sorghum seed from the defendants. They claimed to have relied upon the defendants' promotional literature stating that the seed had "excellent dryland yield potential." When two years' crops suffered from reduced yield, the plaintiffs sued alleging that the defendants had breached express and implied warranties, committed fraud and violated the DTPA. A jury found for the plaintiffs on their warranty and DTPA claims and the defendants appealed, arguing that the evidence was neither legally nor factually sufficient to support the plaintiffs' claims.[233] The San Antonio Court of Appeals held that testimony by the plaintiffs' expert that the particular sorghum seed was not suitable for dry land farming constituted sufficient evidence in support of the jury's verdict as to causation.[234]

F. WAIVER

The DTPA specifically limits the circumstances in which parties can effectively waive the statute's protections.[235] A waiver is void as contrary to public policy unless it is in conspicuous bold-face type and identified as a waiver, and the consumer has signed the waiver and was represented by counsel in seeking or acquiring the goods or services at issue.[236]

In *Johnston v. McKinney Am., Inc.*,[237] a computer lessor sued the lessee for past due rental payments. The lessee, who operated a chiropractic clinic, counterclaimed alleging breach of contract, negligent misrepresentation and violations of the DTPA and seeking rescission of the

229. *Id.* at 630.
230. *Id.* at 635.
231. *Id.* at 636.
232. 18 S.W.3d 744 (Tex. App.—San Antonio 2000), *aff'd*, 47 S.W.3d 486 (Tex. 2001). *See supra* notes 60-62 and accompanying text.
233. *Id.* at 748.
234. *Id.* at 755.
235. DTPA § 17.42(a)-(e).
236. *Id.* at (a), (c).
237. 9 S.W.3d 271 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). *See supra* notes 95-99 and 114-18 and accompanying text.

contract and a declaratory judgment that the contract was void. After a bench trial, the trial court entered judgment in favor of the lessor on the past due rentals claim and entered a take nothing judgment on the lessee's counterclaims.[238]

On appeal, the lessee argued that the lessor breached its implied warranty of merchantability because the computer system was not merchantable. The lease agreement contained a disclaimer of warranty, but the lessee argued that the disclaimer was void as a matter of law under section 17.42 of the Texas Business and Commerce Code.[239] The Houston Court of Appeals held that the disclaimer complied with section 2.316 of the Business and Commerce Code and thus did not offend the "no waiver" provision of the DTPA.[240]

G. 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 have discovered, the occurrence of the false, misleading or deceptive act or practice.[241]

Two decisions during the Survey period examined the effect of the existence of public records on the DTPA limitations provision. The Corpus Christi Court of Appeals, sitting en banc, examined the issue in *Lopez v. Martin*.[242] The plaintiff intervenor Lopez operated a trucking business from his home and needed appropriately-zoned property for parking his trucks. He located a property and contracted the listed real estate agent. Lopez's brother and sister-in-law purchased the property for his benefit. As part of the process of obtaining a loan, they were required to have the property appraised. The appraisal indicated that the property had full utilities. Three years after the sale closed, Lopez attempted to obtain electrical power for the property but the utility company refused because it determined that the property was unplatted.

Asserting that without electricity the property could not be improved as planned, Lopez and his brother and sister-in-law sued the appraiser and the real estate agency, its owner and its employee alleging negligence, gross negligence, statutory and common law fraud, misrepresentation, spoliation of evidence and DTPA violations.[243] The jury found that the defendants had violated the DTPA and held them liable for negligent

238. *Id.* at 275.

239. Section 17.42 provides that a waiver of the DTPA's protections is contrary to public policy and is unenforceable unless the waiver is in writing and is signed by the consumer, the consumer is not in a significantly disparate bargaining position and the consumer is represented by a lawyer in seeking or acquiring the goods or services. DTPA § 17.42.

240. *Johnston*, 9 S.W.3d at 280 (citing Southwestern Bell Tel. Co. v. FDP Corp., 811 S.W.2d 572, 576-77 (Tex. 1991)).

241. DTPA § 17.565.

242. 10 S.W.3d 790 (Tex. App.—Corpus Christi 2000, pet. denied).

243. *Id.* at 791.

misrepresentation, negligence and statutory and common law fraud.[244] The jury also found, however, that the plaintiffs had been in possession of sufficient information to discover the wrongful acts more than two years before filing suit, which resulted in a take-nothing judgement because limitations barred the suit.[245]

Lopez appealed, arguing in part that the evidence was insufficient to support the finding that more than two years prior to filing suit he had been in possession of sufficient facts to cause an ordinarily prudent person to investigate whether the property had the utilities necessary to support his intentions for the property. The court of appeals held that the evidence was both legally and factually sufficient to support the jury's findings. The court first explained that the discovery rule requires a party to "exercise reasonable care and diligence to discover facts, conditions, or circumstances which would cause a reasonable person to make an inquiry leading to the discovery of the injury."[246] Because the Corpus Christi platting ordinance and the local government code prohibit the connection of utilities to unplatted land, the court explained that the plaintiffs' awareness of sufficient facts to lead to further inquiry about the effect of the platting ordinance would tend to show adequate notice.[247]

The court then examined the evidence presented at trial. The record reflected that none of the closing documents described the property as platted or gave a legal description of the property by referring to a plat and that one of the closing officers of the title company testified that she had advised one of the plaintiffs that the property was not listed in the plat records. One of the closing documents stated "if the property is not platted, I have been informed that I should seek advice of my attorney to determine if there would be any difficulty improving the property."[248] One of plaintiff's contemporaneously-made handwritten notes indicated a need to call officials in the City Planning Office to discuss "platting." The court held that this evidence was sufficient to establish possession, more than two years prior to filing suit, of sufficient facts to cause a person of reasonable prudence to conduct further investigation into whether the property was platted and whether there would be difficulty connecting utilities to the property.[249]

Three judges dissented.[250] The dissent found that even if the plaintiffs were informed at the closing that the land was unplatted, there was no evidence that they should have been aware of the significance of unplatted land with regard to utilities.[251] The dissent cited further testimony from the closing agent acknowledging that she had no independent recol-

244. *Id.*
245. *Id.*
246. *Id.* at 792.
247. *Id.*
248. *Id.*
249. *Id.* at 793-94.
250. *Id.* at 795-98.
251. *Id.* at 795.

lection of the transaction but merely indicated that it was her "procedure" to tell a buyer whether the property was described in "field notes" and not filed for record.[252] The dissent believed that neither these references nor the fact that the closing documents suggested contacting an attorney regarding improvements to the property demonstrated that the plaintiffs should have known that the property was unplatted, let alone that they should have inquired about a lack of utilities.[253] The dissent would have reversed the jury's findings because the "overwhelming weight and preponderance of the evidence" showed that the plaintiffs did not know, and should not have known, of the property's lack of utilities until they sought to put a security light on the property and were informed, first by the power company and then by the city planning department, that the property had no utilities.[254]

The San Antonio Court of Appeals held that public deed records do not always give rise to constructive notice in *Salinas v. Gary Pools, Inc.*[255] Homeowners filed suit against a swimming pool contractor that installed their pool on a public easement. The suit was filed more than ten years after the pool was installed but less than two years after the homeowners discovered the problem. The trial court granted the contractor's motion for summary judgment on the defense of limitations and the homeowners appealed.[256] The San Antonio Court of Appeals reversed and remanded,[257] holding that the doctrine of constructive notice of real property records does not apply to constitute notice to plaintiffs alleging DTPA violations.[258] Because the homeowners produced summary judgment evidence showing that they were not aware of the easement and did not discover that their pool was constructed on the easement, the court held that the contractor had failed to negate application of the discovery rule and summary judgment was inappropriate.[259] The court observed, however, that a fact issue remained regarding whether the homeowners had exercised due diligence in discovering the alleged DTPA violation.[260]

Kanon v. Methodist Hosp.[261] arose from alleged problems with a medical device called a Proplast implant, which is used to relieve temporomandibular joint problems. A woman who had received a Proplast

252. *Id.* at 796-97.

253. *Lopez*, 10 S.W.3d at 796-97. The dissent also argued that the majority opinion overstated the evidence with respect to the sister-in-law's handwritten notes. According to the dissent, the only evidence presented was that the notes were made during the process of purchasing the property and not at the closing and that the notes did not indicate a need to call city officials regarding platting but merely twice contained the name of the city planner and the city planning office's telephone number—once next to the phrase "I-2 Light Industrial" and once next to the single word "plated" [sic]. *Id.* at 797.

254. *Id.* at 798.

255. 31 S.W.3d 333 (Tex. App.—San Antonio 2000, no pet.).

256. *Id.* at 334-35.

257. *Id.* at 335.

258. *Id.* at 337 (citing Lightfoot v. Weissgarber, 763 S.W.2d 624, 627 (Tex. App.—San Antonio 1989, writ denied)).

259. *Id.*

260. *Id.*

261. 9 S.W.3d 365 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

implant and her husband sued various defendants involved with the implant including Methodist Hospital. The hospital moved for summary judgment on limitations grounds, arguing that the wife was aware of the problem with the Proplast implant more than two years prior to filing suit. The plaintiffs argued that while they knew of the problems with the implant more than two years prior to filing suit, limitations had not run because, due to a variety of misrepresentations, their discovery of the hospital's involvement in the manufacturing, development and sale of the implant had come less than two years prior to filing suit. The trial court granted summary judgment in favor of the hospital, and the Houston Court of Appeals affirmed.[262] The court held that limitations begins to run on a DTPA claim when the plaintiff discovers an injury and its general cause, not the exact cause in fact and the specific parties responsible.[263] Thus, even if the plaintiffs did not discover the hospital's involvement until later, upon discovery of the injury they were under a duty to undertake further investigation to discover the nature of the damage and the parties responsible.[264]

In *Pecan Valley Nut Co., Inc. v. E.I. du Pont de Nemours & Co.*,[265] the owners of commercial pecan orchards sued a fungicide manufacturer and its distributors for damages to their pecan trees caused by the fungicide. The defendants moved for summary judgment on limitations grounds because the plaintiffs had last applied the fungicide to their orchards more than two years prior to filing suit. The trial court granted the motion and the Eastland Court of Appeals reversed in part.[266] The court held that a DTPA cause of action accrues when the plaintiff knew, or should have known, of the "wrongfully caused injury."[267] In other words, accrual is tolled until the plaintiff discovers, or should have discovered, "the injury and that it was likely caused by the wrongful acts of another."[268] The court held that the defendants failed to carry their burden of conclusively establishing that the plaintiffs' causes of action accrued more than two years before suit was filed.[269] Although the plaintiffs were aware more than two years prior to filing suit that *something* was wrong with their pecan trees, they presented evidence that they did not know that there was a problem with the fungicide and that the symptoms commonly resulted from natural causes and therefore were not suggestive of an injury caused by the fungicide. Summary judgment in favor of the defendants was thus improper.[270]

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262. *Id.* at 367.

263. *Id.* at 370 (citing Bayou Bend Towers Council of Co-Owners v. Manhattan Const. Co., 866 S.W.2d 740, 743 (Tex. App.—Houston [14th Dist.] 1993, writ denied)).

264. *Id.* at 370-71.

265. 15 S.W.3d 244 (Tex. App.—Eastland 2000, pet. granted).

266. *Id.* at 246.

267. *Id.* at 247 (citing KPMG Peat Marwick v. Harrison County Hous. Fin. Corp., 988 S.W.2d 746, 749 (Tex. 1999)).

268. *Id.* at 248 (quoting Childs v. Haussecker, 974 S.W.2d 31, 41 (Tex. 1998)).

269. *Id.*

270. *Id.*

VI. AWARD OF ATTORNEYS' FEES TO DEFENDANT

Section 17.50(c) of the DTPA provides that a defendant is entitled to recover its attorneys' fees incurred in defending against a DTPA claim if the claim is groundless or brought in bad faith or for purposes of harassment.[271] Under section 17.50(c), "groundless" means a claim having no basis in law or fact, and not warranted by any good faith argument for the extension, modification, or reversal of existing law.[272] In determining whether a claim is groundless, a court should determine "whether the totality of the tendered evidence demonstrates an arguable basis in fact and law for the consumer's claim."[273] A suit is brought in bad faith if it is motivated by a malicious or discriminatory purpose.[274] Whether a suit is groundless or brought in bad faith is a question of law.[275]

The Houston Court of Appeals examined this provision in *Riddick v. Quail Harbor Condominium Ass'n*.[276] As noted above, the plaintiff purchased a condominium from the defendant and sued when shifting soil under the slab foundation of the condominium caused the foundation to move, causing cracks in the interior and exterior walls of the plaintiff's unit, which the condominium association did not repair. The plaintiff contended that he had consumer status by virtue of his payment of maintenance fees. The trial court granted partial summary judgment on the plaintiff's DTPA claim because the plaintiff presented no evidence of misrepresentations and because the plaintiff offered no evidence to refute the defendant's evidence that the claim was barred by limitations. Finding the plaintiff's DTPA claim to have been brought in violation of section 17.50(c), the trial court awarded the defendant $22,558.80 in attorneys' fees.[277] On appeal, the plaintiff argued that there was no evidence that his DTPA claim was groundless and brought in bad faith.

The Houston Court of Appeals reversed. The plaintiff had acknowledged in his brief that no Texas cases existed holding that a condominium owner's payment of maintenance fees to a condominium association was sufficient to be a "purchase" for DTPA purposes. The plaintiff argued that since the issue had not been decided, his case was not groundless and was warranted by a good faith argument for the extension, modification or reversal of existing law. The plaintiff also argued that a specific misrepresentation was not required for a DTPA unconscionability claim and that, despite failing to offer evidence to refute the defendant's limitations defense, the plaintiff had made a good faith argument that limitations did

271. DTPA § 17.50 (Vernon Supp. 2001).

272. Donwerth v. Preston II Chrysler-Dodge, Inc., 775 S.W.2d 634, 637 (Tex. 1989).

273. Splettstosser v. Myer, 779 S.W.2d 806, 808 (Tex. 1989).

274. Central Texas Hardware, Inc. v. First City, Texas-Bryan, N.A., 810 S.W.2d 234, 237 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

275. *Donwerth*, 775 S.W.2d at 637.

276. 7 S.W.3d 663 (Tex. App.—Houston [14th Dist.] 1999, no pet.). *See supra* notes 161-63 and accompanying text.

277. *Id.* at 677.

not bar his claim due to the defendant's continuing reassurances that repairs were in progress.

The court of appeals agreed. First, the court held that the plaintiff "made a good-faith argument for the extension, modification, or reversal of existing law concerning the open question of his consumer status, and his DTPA action was not groundless, nor brought in bad faith for these reasons."[278] The court then held that the possibility that a DTPA unconscionability claim could exist absent a misrepresentation and that a "continuing misrepresentation" could extend limitations prevented the plaintiff's action from being groundless even though the plaintiff did not prevail on either argument.[279]

VII. CONCLUSION

This year's crop of DTPA cases, like last year's, contains relatively few disputes involving "garden variety" consumer goods. Of the 36 appellate decisions selected for this year's survey, only four involved products purchased by consumers; of those, two involved swimming pools and two involved medical products. The real estate and insurance industries again were well represented, with eight and seven decisions respectively, and various other services accounted for another six opinions. Contract disputes and goods purchased for commercial purposes rather than for personal, family or household use accounted for the balance of the cases examined in this year's review. In application, the DTPA evidently has evolved from a consumer protection law into a business torts statute principally employed by commercial plaintiffs. Only in the real estate and insurance areas does the DTPA continue to have a meaningful consumer nexus, at least as reflected in the reported decisions.[280]

Several themes identified in last year's survey continue to receive attention from the courts. Decisions such as *Hou-Tex*,[281] *Dagley*[282] and *Bartlett*[283] confirm that causation and privity are areas of DTPA jurisprudence that would benefit from further doctrinal clarification. Such cases may be viewed as part of a broader judicial movement to ascertain the proper boundaries of the DTPA. Five decisions discussed in this survey involved efforts by plaintiffs to transform what were essentially contract disputes into DTPA violations.[284] Several others attempted to clarify

278. *Id.* at 678.

279. *Id.* at 678-69.

280. As suggested in last year's survey, this may in part be explained by the fact that traditional consumer transactions are less likely to involve either novel legal issues or large monetary amounts and thus are less likely than disputes involving business consumers to receive appellate attention. *See* 53 SMU L. REV. 865, 896 (Summer 2000).

281. Hou-Tex, Inc. v. Landmark Graphics, 26 S.W.3d 85 (Tex. App—San Antonio 2000, no pet.).

282. Dagley v. Haug Eng'g Co., 18 S.W.3d 787 (Tex. App—Houston [14th Dist.] 2000, no pet.).

283. Bartlett v. Schmidt, 33 S.W.3d 35 (Tex. App—Corpus Christi 2000, pet. filed).

284. *See* Dickey v. Club Corp. of Am., 12 S.W. 3d 172 (Tex. App—Dallas 2000, pet. denied); Ken Petroleum Corp. v. Questor Drilling Corp., 24 S.W. 3d 344 (Tex. 2000); Frost

when mental anguish damages are recoverable in a DTPA case—with results difficult to reconcile.[285]

Finally, the *Wyeth*[286] court grappled with an issue that has long confounded efforts to rationalize the DTPA's original mission of leveling the playing field between consumers and merchants with the statute's use in purely commercial disputes. Like the erroneous notion that intent is never an element of a DTPA claim,[287] the bald assertion often found in the case law that common law defenses are unavailable in DTPA claims is overdue for critical examination. Eliding an opportunity to explore the boundaries of this proposition, the *Wyeth* court instead purported to distinguish between a legal principle that defeats the plaintiff's claim and one that indicates "that the plaintiff has no case."[288] Whatever this distinction may mean, such sophistics are poor substitutes for a critical examination of whether, in light of the parties' relationship and reasonable expectations, recognition of particular offensive and defensive theories would promote the DTPA's original policy of protecting consumers against those with overweening bargaining power, or would serve as a bludgeon in commercial disputes between otherwise evenly matched and sophisticated businesspersons.

Nat'l Bank v. Heafner, 12 S.W.3d 104 (Tex. App.—Houston [1st Dist.] 1999 pet. denied); Riddick v. Quail Harbor Condominium, Ass'n 7 S.W.3d 663 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

285. *Compare* Colonial County Mut. Ins. Co. v. Valdez, 30 S.W.3d 514 (Tex. App.—Corpus Christi 2000, no pet.); Gonzalez v. Temple-Inland Mtg. Corp., 28 S.W.3d 622 (Tex. App.—San Antonio 2000, no pet. h.); Reyna v. Safeway Managing General Agency for State and County Mut. Fire Ins. Co., 27 S.W.3d 7 (Tex. App.—San Antonio 2000, pet. granted, judgm't vacated w.r.m.).

286. *See* Wyeth-Arherst Labs., Co. v. Medrano, 28 S.W. 3d 87 (Tex. App.—Texarkana 2000, no pet.).

287. *See supra* notes 150-51 and accompanying text.

288. *See Wyeth*, 28 S.W.3d at 94.