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Deceptive Trade Practices - Consumer Protection Act

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DECEPTIVE TRADE PRACTICES—CONSUMER PROTECTION ACT

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I. INTRODUCTION

THE Texas Deceptive Trade Practices—Consumer Protection Act ("DTPA")[1] was enacted in 1973 "to protect consumers against false, misleading and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection."[2] As reported last year, the 77th Texas Legislature enacted two sets of amendments in 2001. There are still no reported decisions addressing these changes.

Effective September 1, 2001, DTPA section 17.46 was amended to include two new laundry list violations. Section 17.46(b)(18) now provides that the term "false, misleading, or deceptive acts or practices" also includes "advertising, selling, or distributing a card which purports to be a prescription drug identification card issued under Section 19A, Article 21.07-6, Insurance Code, in accordance with rules adopted by the commissioner of insurance, which offers a discount on the purchase of health care goods or services from a third party provider, and which is not evidence of insurance coverage."[3] This provision contains three exceptions. Because of the addition of this particular laundry list violation, it should be noted that the numbering for the other violations that follow section 17.46(b)(18) has shifted slightly.

The Legislature also added section 17.46(b)(26), effective June 1, 2002. New section 17.46(b)(26) provides that "selling, offering to sell, or illegally promoting an annuity contract under Chapter 22, Acts of the 57th Legislature, 3rd Called Session, 1962 (Article 6228a-5, Vernon's Texas Civil Statues), with the intent that the annuity contract will be the subject of a salary reduction agreement, as defined by that Act, if the annuity contract is not an eligible qualified investment under that Act," constitutes a deceptive trade practice.[4]

This Survey covers significant developments under the DTPA from October 1, 2001, through November 1, 2002, including noteworthy decisions on the identification of the proper defendant, preemption and exemption from the DTPA, as well as defenses to DTPA claims.

II. CONSUMER STATUS

In order to bring a DTPA claim, a plaintiff must fit into the statutory definition of "consumer."[5] To qualify as a consumer, the plaintiff must first be an individual who seeks or acquires, by purchase or lease, goods or services; second, those goods or services must form the basis of the

1. TEX. BUS. & COM. CODE ANN. § 17.41-17.63 (Vernon 2002) [hereinafter DTPA].
2. *Id.* § 17.44(a).
3. *Id.* § 17.46(b)(18).
4. *Id.* § 17.46(b)(26).
5. *See id.* § 17.50.

plaintiff's complaint.[6] Consumer status under the DTPA depends upon a showing that the plaintiff's relationship to the transaction entitles him to relief.[7] Whether a plaintiff qualifies for DTPA consumer status is a question of law.[8]

In *Marshall v. Kusch,*[9] , which arose from the discovery of anthrax on real property, the Dallas Court of Appeals examined the issue of the plaintiff's relationship to the transaction. Marshall acquired real property, made numerous improvements, and then stocked it with numerous species of exotic animals. An outbreak of anthrax killed some of the animals, leading Marshall to sell the property a few years later to a real estate investment company. Marshall failed to disclose the anthrax outbreak during the subsequent sale. Marshall received cash and a nonrecourse note secured by a lien. The real estate investment company then sold the property to Kusch. When a subsequent anthrax outbreak killed many animals, Kusch sued Marshall alleging, among other things, that Marshall had violated the DTPA. The jury found in favor of Kusch on the DTPA claim.[10]

Marshall appealed arguing that, as a matter of law, the DTPA could not apply because Marshall was not a party to Kusch's transaction. The Dallas Court of Appeals reversed,[11] recognizing that while the DTPA does not require privity, it does require that a deceptive act be committed in connection with the plaintiff's transaction.[12] This connection exists when a misrepresentation reaches the consumer or when the initial seller receives a benefit from the subsequent transaction.[13] Although none of Marshall's representations reached Kusch, Kusch argued that, because Marshall had a nonrecourse note with a lien on the property, Marshall had a benefit from the sale to Kusch. The court of appeals disagreed, holding that mere possession of a purchase money note and a lien on property does not give the note holder a connection to the subsequent sale of the property.[14]

In *Bohls v. Oakes,*[15] the San Antonio Court of Appeals considered when a third-party beneficiary has consumer status. Charles Oakes contracted with a builder for construction of a new home. The builder

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

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

9. Marshall v. Kusch, 84 S.W.3d 781 (Tex. App.—Dallas 2002, no pet).

10. *Id.* at 784.

11. *Id.* at 787.

12. *Id.* at 786.

13. *Id.*

14. *Id.* at 787.

15. Bohls v. Oakes, 75 S.W.3d 473 (Tex. App.—San Antonio 2002, pet. denied).

showed Oakes and his wife Michelle a home that the builder had constructed for Louis David Bohls. During the tour of the home, Bohls recognized Michelle as a former employee and offered to provide the interim financing. The Oakeses agreed, but later, upon being dissatisfied with the home, sued the builder, Bohls, and Bohls' company for breach of contract, fraud, and DTPA violations. The jury found in favor of the Oakeses.[16]

On appeal, Bohls contended that the Oakeses were not consumers for the following reasons: (1) there was no legal relationship or written agreement between the parties; (2) there was no transfer of goods or services founded on "valuable consideration;" (3) there was no evidence of a purchase or payment for services; and (4) any services that Bohls may have provided were gratuitous. The San Antonio Court of Appeals held that the Oakeses were consumers,[17] finding that "consumer status is established merely by seeking to acquire services, even if the services are not actually acquired, and no money need change hands to establish consumer status."[18] Thus, the court held that "it was not necessary for there to have been a written agreement, an actual purchase, or any consideration paid for Charles to be a consumer. It was enough that [Charles] sought to acquire Bohls's services in good faith."[19] Bohls also argued that Michelle was a not consumer because she was a stranger to the transaction. The court rejected this argument holding that a third-party beneficiary can qualify as a consumer if (1) the transaction was specifically required by, or intended to benefit, the third party, and (2) the good or service was rendered to benefit the third party.[20] The court held that Michelle was a third-party beneficiary of the transaction between Charles and Bohls by virtue of her relationship to Charles as well as her intent to occupy the home after it was built. Thus, the court held that Charles and Michelle were consumers as a matter of law under the DTPA.[21] The determination of the remaining DTPA elements (*i.e.*, whether Bohls supplied goods or services, whether he committed any unconscionable act, and the determination of damages) were fact issues to be decided by the jury.[22]

The San Antonio Court of Appeals examined the meaning of the "seeks or acquires" requirement in *Nast v. State Farm Fire and Casualty Co.*[23] The Nasts were homeowners who sued their insurer and insurance agent. In June 1997, the Nasts became concerned about the possibility of flooding after a flood damaged their neighbor's home and spoke to their insurance agent's secretary (who also was a licensed insurance agent)

16. *Id.* at 476.
17. *Id.* at 479.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. Nast v. State Farm Fire & Cas. Co., 82 S.W.3d 114 (Tex. App.—San Antonio 2002, no pet.).

about flood insurance. The secretary told the Nasts that they did not live in a flood zone that qualified them for insurance through the National Flood Insurance Program ("FEMA flood insurance"). The Nasts then spoke with their insurance agent of eighteen years, who confirmed the secretary's statements, and said that it would be cost prohibitive to obtain non-FEMA flood insurance. The Nasts asked why their neighbors were able to get inexpensive flood insurance, and the agent responded that he had heard of a "shyster" selling flood insurance in the Nasts' neighborhood and that he hoped the neighbors never needed to collect on the insurance. Based upon the agent's representations that they were ineligible for FEMA flood insurance and that alternative insurance would be cost prohibitive, the Nasts did not purchase any flood insurance.

In October 1998, the Nasts' home suffered substantial flood damage. After the flood, the Nasts discovered that they had, in fact, been eligible for FEMA flood insurance. The Nasts sued the agent and the insurer for fraud, breach of the duty of good faith and fair dealing, negligence, gross negligence, and DTPA violations. The defendants moved for summary judgment alleging, in part, that the Nasts were not consumers because they did not purchase flood insurance. The San Antonio Court of Appeals held that the Nasts were consumers.[24] The DTPA defines a consumer as an individual who "seeks or acquires by purchase or lease, any goods or services."[25] Thus, the court explained that consumer status is established merely by seeking to acquire services, even if the services are not actually acquired.[26]

In *Rayford v. Maselli,*[27] the Houston Court of Appeals for the First District considered whether the recipient of free services falls under the definition of a consumer. In *Rayford*, a prison inmate sued the Texas Department of Criminal Justice, State Counsel for Offenders ("TDCJ-SOC") and two of its employees alleging DTPA violations related to alleged legal malpractice. The inmate had been receiving legal services provided gratuitously by the TDCJ-SOC. The trial court dismissed the case pursuant to section 14.003 of the Texas Civil Practice and Remedies Code, which permits dismissal of frivolous actions brought by inmates.[28] In determining whether a claim is frivolous or malicious, the court may consider, among other things: (1) if the claim has no arguable basis in law or fact, and (2) if it is clear that the party cannot prove facts in support of the claim.[29] The inmate appealed, arguing that he was entitled to proceed with his DTPA claims because he qualified as a consumer. Disagreeing, the Houston Court of Appeals affirmed, holding that a gratuitous act is not a purchased good or service under the DTPA.[30] Because the inmate

24. *Id.* at 122.
25. DTPA § 17.45(4).
26. *Nast*, 82 S.W.3d at 122.
27. Rayford v. Marsell,73 S.W.3d 410 (Tex. App.—Houston [1st Dist.] 2002, no pet.).
28. *Id.* at 411.
29. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 14.003 (Vernon 2002)).
30. *Id.*

could not demonstrate that he sought or acquired services by purchase or lease from the defendants, the court concluded as a matter of law that the inmate was not a consumer within the meaning of the DTPA.[31] Thus, dismissal of the inmate's claim was appropriate as it had no arguable basis in law or fact.[32]

A plaintiff that otherwise might qualify as a consumer is precluded from consumer status if it is a "business consumer that has assets of $25 million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more."[33] The United States Court of Appeals for the Fifth Circuit examined this limitation in *Hugh Symons Group, plc v. Motorola, Inc.*[34] The lawsuit was filed by Concept Technologies, Ltd., which, at the time of the events giving rise to the suit was a wholly owned subsidiary of Hugh Symons Group, plc. Subsequent to the filing, Hugh Symons transferred its shares of Concept Technologies to a third party and substituted in as plaintiff. Concept Technologies then assigned its interest in the suit to Hugh Symons. The defendant moved for summary judgment maintaining that Hugh Symons lacked consumer status because its assets exceeded $25 million. The trial court granted the motion and Hugh Symons appealed, arguing that, because Concept had less than $25 million in assets, it was a consumer under the DTPA.[35]

The Fifth Circuit affirmed, recognizing that when a DTPA plaintiff is asserting a claim acquired by assignment, the assignor's consumer status controls.[36] At the time of the alleged DTPA violation and at the time the suit was filed, the assignor—Concept—was a wholly owned subsidiary of Hugh Symons. Because Concept was at all relevant times controlled by another with assets of greater than $25 million, the court held that it was not a consumer.[37]

III. IDENTIFYING THE PROPER DEFENDANT

During this Survey period, three reported cases examined whether the proper defendant had been identified by the DTPA plaintiff.

The issue in *Kingston v. Helm*[38] was whether an individual could be held liable for conduct he undertook while acting as a representative for a corporation. Kingston sued Helm for fraud, negligent misrepresentation, and DTPA violations arising from Kingston's purchase of a townhome from Greenway Development, Inc. ("GDI"). Kingston alleged that Helm, who was the president of GDI, personally made false representa-

31. *Id.*
32. *Id.*
33. DTPA § 17.45(4).
34. Hugh Symons Group, plc v. Motorola, Inc., 292 F.3d 466 (5th Cir.), *cert denied*, 123 S. Ct. 386 (2002).
35. *Id.* at 469.
36. *Id.* (citing PPG Indus., Inc. v. JMB/Houston Ctr. Partners Ltd., 41 S.W.3d 270, 279 (Tex. App.—Houston [14th Dist.] 2001, pet. granted)).
37. *Id.*
38. Kingston v. Helm, 82 S.W.3d 755 (Tex. App.—Corpus Christi 2002, pet. denied).

tions to Kingston regarding the townhome. The case went to trial and the court entered a directed verdict for Helm at the close of Kingston's case, holding that the evidence was insufficient to hold Helm liable in his individual capacity.[39] Kingston appealed. The Corpus Christi Court of Appeals reversed,[40] holding that Helm could be held individually liable for his own tortious conduct and that Kingston was not required to pierce the corporate veil.[41] The court rejected Helm's argument that Article 2.21 of the Texas Business Corporations Act required a contrary result.[42] Article 2.21 states, in relevant part:

> A holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted, or any affiliate thereof or of the corporation, shall be under no obligation to the corporation or to its obligees with respect to . . . any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder . . . is or was the alter ego of the corporation . . . unless the obligee demonstrates that the holder . . . caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder.[43]

The court held that, by its terms, Article 2.21 was intended to protect a corporation's shareholders, not its officers or agents.[44] The court also held that Article 2.21 applies to suits that attempt to impose individual liability on a corporate shareholder merely on the basis of shareholder status, rather than on the basis of the shareholder's own actions.[45] Finally, the court held that Article 2.21 was limited to liability arising from the corporation's contractual obligations.[46] While the Bar Committee notes indicate that the statute should be applied "by analogy to tort obligations," the court declined to extend the coverage of the statute to the claims before it because the court did not believe that the Legislature intended Article 2.21 (with its heightened obligations on a plaintiff) to abrogate the general principle that an agent is always liable for his or her own tortious conduct.[47]

In *Jones v. CGU Insurance Co.*,[48] the issue was whether an insurer could be held liable to a third party for failing to pay that third party's claims against the insured. Jones sued a food manufacturer alleging that she became ill after eating one of the manufacturer's products. She also sued the manufacturer's insurer, CGU, alleging that CGU told her it would investigate and process her claim but then refused to pay. Jones

39. *Id.* at 758.
40. *Id.* at 757.
41. *Id.* at 761 (citing Weitzel v. Barnes, 691 S.W.2d 598, 601 (Tex. 1985)).
42. *Kingston*, 82 S.W.3d at 764-66.
43. TEX. BUS. CORP. ACT ANN. art. 2.21(A) (Vernon 1980).
44. *Kingston*, 82 S.W.3d at 765.
45. *Id.* at 765-66.
46. *Id.* at 766.
47. *Id.*
48. Jones v. CGU Ins. Co., 78 S.W.3d 626 (Tex. App.—Austin 2002, no pet.).

had filed an affidavit of inability to pay costs and, in response, CGU filed a motion to dismiss, pursuant to section 13.001 of the Texas Civil Practices and Remedies Code. The motion contended that Jones' suit had no basis in law and therefore was frivolous and malicious. After the trial court conducted a hearing on the motion and dismissed the lawsuit, Jones appealed.[49] The Austin Court of Appeals affirmed, holding that under the DTPA and the Texas Insurance Code a third party tort claimant has no direct cause of action against a defendant's liability insurer.[50]

The plaintiffs in *Oakwood Mobile Homes, Inc. v. Cabler*[51] purchased a manufactured home from a retailer. The plaintiffs contended that the salesman told them that their home would be free of defects and exactly like the model home displayed on the lot. The home arrived with numerous defects, most of which were never repaired, and the plaintiffs sued the manufacturer, retailer, and financer, alleging fraud, breach of contract, and DTPA violations. After a bench trial, the court entered judgment against the defendants. On appeal, the manufacturer and financer argued that no evidence established the retailer as their agent. Disagreeing, the El Paso Court of Appeals affirmed,[52] finding that the record established the following: (1) the three defendants were "a vertically integrated company;" (2) all three defendants were represented by the salesman and manager on the lot; (3) the retailer provided the warranty on the installation of the home while the manufacturer provided the warranty for coverage of defects and workmanship; (4) the same employee completed the repairs for both entities; and (5) the contract between the plaintiffs and the retailer was immediately assigned to the financer. Based on these findings, the court held judgment was proper because it was clear from the evidence that all three defendants participated in the transaction with the plaintiffs.[53]

IV. 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.[54]

A. LAUNDRY LIST CLAIMS

DTPA section 17.46(b) contains, in 26 subparts, a nonexclusive list of actions that constitute "false, misleading or deceptive acts" under the

49. *Id.* at 628.
50. *Id.* at 629 (citing Allstate Ins. Co. v. Watson, 876 S.W.2d 145, 149 (Tex.1994)).
51. Oakwood Mobile Homes, Inc. v. Cabler, 73 S.W.3d 363 (Tex. App.—El Paso 2002, pet. denied).
52. *Id.* at 373-74.
53. *Id.* at 374.
54. DTPA § 17.50(a)(1)-(3).

statute. Plaintiffs invoking these "laundry list"[55] claims are generally not required to prove or plead the defendant's state of mind or intent to deceive.[56] Nor have plaintiffs always been required to show that they relied on the enumerated deceptions.[57] Whether a consumer should have to show reliance, however, remains the subject of debate.[58] Several significant cases involving "laundry list" claims were decided during the Survey period.

In *James V. Mazuca and Associates v. Schumann*,[59] the plaintiff hired a law firm to represent him in claims arising from an Arizona automobile accident in which the plaintiff was injured. The law firm filed suit in Texas against the driver and the driver's insurer. Eventually, nonsuits were filed against both defendants. The nonsuit against the driver was without prejudice but contained boilerplate language that "[p]laintiff does not desire to prosecute this matter further against Defendant(s)." The claims were not refiled in Texas and by the time they were filed in Arizona, the statute of limitations had run. Schumann then sued the law firm for DTPA violations, breach of warranty, negligence, and gross negligence alleging, among other things, that the boilerplate language in the nonsuit was an actionable misrepresentation and that the law firm had nonsuited the insurer without his knowledge. The jury found for Schumann on his negligence and DTPA claims and awarded damages and attorneys' fees. Schumann elected to recover under the DTPA and the law firm appealed.[60]

The San Antonio Court of Appeals, sitting *en banc*, reversed.[61] The court held that an actionable misrepresentation must be one of material fact.[62] Because the suit could have been refiled the day of the nonsuit, the wording of the nonsuit had no independent legal effect and thus could not be material.[63] In addition, the words were not a misrepresentation to Schumann since he was not aware of the statement having been made and neither took, nor refrained from taking, any action based on the statement.[64] Finally, filing the nonsuit against the insurer without the client's knowledge or consent was not an affirmative deception as required by the DTPA.[65] The court concluded that the law firm made bad deci-

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

56. Pennington v. Singleton, 606 S.W.2d 682, 689 (Tex. 1980). Several subsections do explicitly involve an element of scienter. *See, e.g.*, DTPA §§ 17.46(b)(9), (10), (13), (16), (17) & (24).

57. *Weitzel*, 691 S.W.2d at 600.

58. *See generally* Prudential Ins. Co. of Am. v. Jefferson Ass'n, 896 S.W.2d 156 (Tex. 1995).

59. James V. Mazuca & Assocs. v. Schumann, 82 S.W.3d 90 (Tex. App.—San Antonio 2002, pet. denied).

60. *Id.* at 93.

61. *Id.* at 96.

62. *Id.* at 95.

63. *Id.*

64. *Id.*

65. *Id.* at 95-96.

sions, but not misrepresentations.[66]

The plaintiff in *Gill v. Boyd Distribution Center*[67] was an inmate who purchased five cans of Ensure, a nutritional beverage manufactured by Ross Products Division, Abbott Laboratories, from a prison commissary operated by Boyd Distribution Center. The plaintiff alleged that the cans of Ensure were labeled "Not for Retail Sale for Professional Use Only" and were nutritionally inferior to other types of Ensure. He further alleged that the commissary list gave reasonable indication that the Ensure was manufactured for retail sale, which induced him to make the purchase. The plaintiff sued Ross Products and Boyd, alleging that the misbranding and/or misrepresentation caused him mental anguish, humiliation, and embarrassment. The trial court, without a fact-finding hearing, dismissed the petition as frivolous and the plaintiff appealed.[68] The Texarkana Court of Appeals affirmed the dismissal of the plaintiff's claims against Ross Products.[69] The only wrongful conduct the plaintiff alleged against Ross Products was the introduction or delivery of products into commerce that were not manufactured for resale. The court held that this behavior was not a statement of fact and thus could not be the basis for a DTPA claim.[70] The court reversed the dismissal of the plaintiff's claims against Boyd.[71] The plaintiff alleged that Boyd made a false or misleading statement by listing the Ensure on the commissary list, which gave the plaintiff a reasonable indication that it was the type and quality of Ensure manufactured for the purpose of retail sale. The plaintiff further alleged that Boyd knew that the containers were marked "not for retail sale" and that the quality of the product was different than that produced for retail sale. Although the court recognized that inquiry into the factual basis of the plaintiff's claim against Boyd might reveal that the claim was, in fact, frivolous, the court held that the plaintiff's allegations were not indisputably meritless, irrational, or wholly incredible, and thus were improperly dismissed.[72]

1. § 17.46(b)(5)—Misrepresentation

To maintain an action for misrepresentation under DTPA section 17.46(b)(5), a consumer must show that the defendant represented "that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not."[73]

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66. *Id.* at 96.
67. Gill v. Boyd Distrib. Ctr., 64 S.W.3d 601 (Tex. App.—Texarkana 2001, pet. denied).
68. *Id.* at 603.
69. *Id.* at 605.
70. *Id.*
71. *Id.* at 606.
72. *Id.* at 605-06.
73. DTPA § 17.46(b)(5).

Chandler v. Gene Messer Ford, Inc.[74] arose from an automobile accident in which a seven-year-old boy was severely injured while riding in the front passenger seat of a Ford Aspire. His parents sued Ford Motor Company and the dealership where they purchased the car claiming: (1) the passenger air bag enhanced their son's injuries; (2) the defendants misrepresented the Aspire's safety characteristics; and (3) the defendants failed to warn them of the possible risks to a child riding in the front passenger seat. The trial court granted summary judgment for the defendants on the Chandlers' DTPA claims and the Chandlers appealed.[75]

The Eastland Court of Appeals affirmed,[76] holding that the Chandlers' misrepresentation claim under section 17.46(b)(5) required that they introduce evidence demonstrating that the alleged misrepresentations were false or misleading.[77] The summary judgment evidence demonstrated that the car salesman had told Mr. Chandler that the Ford Aspire had dual air bags and that, in the salesman's opinion, if the Chandlers were going to buy a small car, the Ford Aspire would be safer for children than the Geo Metro, which the Chandlers were also considering, because of the passenger side air bag. The Chandlers did not introduce any evidence that the salesman's statements were false or misleading. Instead, Ford introduced unrebutted evidence that a vehicle with two air bags is safer than a vehicle with one air bag. The court also observed that the salesman's statements were qualified—that the Aspire was a safer car if the Chandlers were buying a small car—and that the statements were "sales talk" or "puffing," which are not actionable under the DTPA.[78] The Chandlers also alleged that Ford and the car dealership engaged in deceptive advertising. The Chandlers supported this claim with an advertisement for a Ford Taurus showing a child riding in the front seat. The Eastland Court of Appeals held that the advertisement was too vague to support a DTPA misrepresentation claim.[79]

2. *§ 17.46(b)(24)—Failure to Disclose*

Section 17.46(b)(24) is perhaps the broadest "laundry list" provision, as it permits a consumer to premise a DTPA claim on the allegation that the defendant failed to disclose information to the consumer prior to consummation of the transaction. To maintain an action for failure to disclose under this section, a consumer must show that the defendant failed to disclose information concerning goods or services that was known at the time of the transaction and that the nondisclosure was motivated by an intent to induce a transaction into which the consumer otherwise

74. Chandler v. Gene Messer Ford, Inc., 81 S.W.3d 493 (Tex. App.—Eastland 2002, no pet.).
75. *Id.* at 498.
76. *Id.* at 501-04.
77. *Id.* at 501.
78. *Id.* (citing Autohaus, Inc. v. Aguilar, 794 S.W.2d 459, 460 (Tex. App.—Dallas 1990), *writ denied*, 800 S.W.2d 853 (Tex. 1991) (per curiam)).
79. *Id.* (citing Douglas v. Delp, 987 S.W.2d 879, 886 (Tex. 1999)).

would not have entered.[80]

As discussed above, *Chandler v. Gene Messer Ford, Inc.*[81] arose from an accident in which a child was injured while riding in the front passenger seat of a Ford Aspire. His parents sued Ford Motor Company and the dealership where they purchased the car, claiming that the defendants violated section 14.46(b)(24) by failing to warn of the possible risks from a deploying air bag to a child riding in the front passenger seat.[82] The trial court granted summary judgment to the defendants and the Chandlers appealed.[83]

The Eastland Court of Appeals affirmed,[84] holding that a plaintiff claiming nondisclosure under the DTPA was required to prove four elements: "(1) a failure to disclose information concerning goods or services; (2) which was *known* at the time of the transaction; (3) if such failure was *intended to induce* the consumer into a transaction; (4) into which the consumer would not have entered had the information been disclosed."[85] Thus, nondisclosure is actionable only if the defendant had knowledge of the undisclosed information and intentionally withheld that information.[86] The only evidence of the defendants' knowledge was a 1972 memorandum stating that there was a risk of serious injury from deploying airbags to children under twelve years old or under five feet tall. The court of appeals held that the memorandum was not evidence that Ford knew of the alleged danger from the 1994 Aspire's air bag to a seven-year-old boy, because there was no evidence that the 1972 air bag was the same as or similar to the air bag in the 1994 Aspire.[87] Because the Chandlers had not introduced evidence that Ford intentionally withheld information regarding the danger to a child from the Aspire's air bag, the court of appeals held that summary judgment was appropriate on the Chandlers' section 17.46(b)(24) claim.[88]

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.[89] To be actionable under the DTPA, an implied warranty must be recognized by common law or created by statute.[90] The Austin Court of Ap-

80. DTPA § 17.46(b)(24); *see also* Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 479 (Tex. 1995).

81. *Chander*, 81 S.W.3d at 493.

82. At the time the Chandlers filed suit, section 17.46(b)(24) was numbered 17.46(b)(23). *Chandler*, 81 S.W.3d at 502 n.1.

83. *Id.* at 498.

84. *Id.* at 501-04.

85. *Id.* at 502 (emphasis omitted).

86. *Id.*

87. *Id.*

88. *Id.*

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

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

peals examined this issue in *Raymond v. Rahme*.[91] In that case, the concrete subcontractor on a construction project attempted to file and sue on a mechanic's and materialman's lien against the property. The property owner counterclaimed alleging that the subcontractor had breached his contract with the contractor as well as express and implied warranties, so as to give rise to both common law claims and DTPA violations. After a bench trial, the court rendered a take nothing judgment for the subcontractor and awarded the property owner damages on his counterclaims.[92]

The subcontractor appealed, and the Austin Court of Appeals reversed and rendered.[93] The court found that the subcontractor had given a two-year express warranty against major cracking. But there was no evidence in the record that the concrete had suffered "major cracking" and no evidence that any such cracking occurred during the two-year warranty period.[94] The court also held that a property owner cannot recover under an implied warranty theory from a subcontractor with whom the owner has no direct contractual relationship.[95] Because the DTPA does not create a warranty, there was no evidence of a breach of an express warranty, and there was no evidence of an actionable implied warranty, the trial court erred in entering judgment for the property owner.[96]

In *Chandler v. Gene Messer Ford, Inc.*,[97] discussed above, parents of a child injured by an air bag sued Ford Motor Company and the dealership where they purchased the car alleging breaches of implied warranties. The trial court granted summary judgment for the defendants, and the Eastland Court of Appeals affirmed.[98] The court held that there was no breach of the implied warranty of merchantability because a plaintiff raising such a claim has the burden of proving that the goods were defective at the time they left the manufacturer's or seller's possession.[99] To prove that the goods are defective, the plaintiff must show that the goods are not fit for the ordinary purposes for which they are used.[100] Because the Chandlers' car provided transportation, the court held that it was fit for its ordinary purpose.[101] And because the car's air bag restrained passengers by deploying upon a frontal or near frontal impact, it too was fit for its ordinary purpose.[102] The court of appeals held that "[a] product which performs its ordinary function adequately does not breach the implied warranty of merchantability merely because it does not function as the

91. Raymond v. Rahme, 78 S.W.3d 552 (Tex. App.—Austin 2002, no pet.).
92. *Id.* at 555.
93. *Id.* at 563-64.
94. *Id.* at 562-63.
95. *Id.* at 563 (citing Codner v. Arellano, 40 S.W.3d 666, 672-74 (Tex. App.—Austin 2001, no pet.)).
96. *Id.* at 563.
97. *Chandler*, 81 S.W.3d at 493.
98. *Id.* at 498, 501-04.
99. *Id.* at 502.
100. *Id.*
101. *Id.* at 503.
102. *Id.*

buyer would prefer."[103]

The court of appeals also held that the Chandlers had presented no evidence of a breach of the implied warranty of fitness for a particular, non-ordinary purpose, applicable when the seller has some reason to know that the buyer requires the goods for a particular purpose and is relying on the seller's skill or judgment to select or furnish suitable goods.[104] Summary judgment was appropriate on that claim because there was no evidence that the Chandlers purchased their car for a purpose other than transportation and no evidence that the Chandlers purchased the air bag as part of the car for some purpose other than as part of the restraint system.[105]

In *Nast v. State Farm Fire and Casualty Co.*,[106] discussed previously, homeowners sued their insurer and insurance agent alleging fraud, breach of the duty of good faith and fair dealing, negligence, gross negligence and DTPA violations because the agent erroneously told the homeowners that they were not eligible to purchase FEMA flood insurance. The plaintiffs alleged that the defendants breached an implied warranty by failing to furnish insurance services in a good and workmanlike manner. Summary judgment was granted for the defendant because there is no breach of an implied warranty for failing to furnish insurance services.

The San Antonio Court of Appeals affirmed,[107] noting that the Texas Supreme Court has recognized an implied warranty for services only when the services relate to the repair or modification of existing tangible goods or services or when, due to a compelling need, public policy mandates such a warranty.[108] The court held that under the Texas Insurance Code, an insured normally has recourse against a carrier for unfair practices; therefore, there is no compelling need for an implied warranty for failing to furnish insurance services in a good and workmanlike manner.[109]

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.[110] One of the most frequently

103. *Id.* (citing Gen. Motors Corp. v. Brewer, 966 S.W.2d 56, 57 (Tex. 1998)).
104. *Id.*
105. *Id.*
106. *Nast*, 82 S.W.3d at 114.
107. *Id.* at 123.
108. *Id.*
109. *Id.*
110. 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 (Vernon 2003); TEX. PROP. CODE ANN. §§ 41.007 (Vernon 2000), 59.005, 221.024, 221.071, 222.011 (Vernon 1995); TEX. BUS. & COM. CODE ANN. § 35.74(c) (Vernon 2002); TEX. HEALTH & SAFETY CODE ANN. § 164.013 (Vernon 2001); TEX. INS. CODE ANN. art. 21.21 (Vernon 1981 & Supp. 2003); TEX. REV. CIV. STAT. ANN. art. 4413(36) (Vernon 1976 & Supp. 2003), 5221a-7 (Vernon 1987, Supp. 2003), 5221a-8 (Vernon 2003), 5221f (Vernon 1987 & Supp. 2003), 9020 (Vernon 2003); and TEX. TRANSP. CODE ANN. § 684.086 (Vernon 1999).

invoked "borrowing" statutes is Article 21.21 of the Texas Insurance Code.[111]

In *Mid-Century Insurance Company of Texas v. Boyte,*[112] the Texas Supreme Court considered whether an insurer's common law and statutory duties of good faith and fair dealing extend beyond entry of judgment in favor of the insured. Boyte sustained injuries to his back in a car accident. He settled with the other driver's insurer for the limit of the driver's policy and then filed an underinsured motorist ("UIM") claim with his insurance carrier, Mid-Century Insurance Company of Texas. A jury found that Boyte was entitled to his entire remaining policy benefits. While Mid-Century's subsequent appeal was pending, Boyte informed Mid-Century that he was in urgent need of back surgery but could not afford to pay for it. Mid-Century offered to pay for the surgery and post-surgery therapy but refused to pay the full judgment while its appeal was pending. Boyte never scheduled the surgery. The court of appeals affirmed the UIM judgment. The Texas Supreme Court denied review and Mid-Century paid the judgment. Boyte then filed a new suit against Mid-Century for, among other things, common law bad faith and violations of Article 21.21 of the Insurance Code, alleging that Mid-Century knowingly failed to attempt a fair settlement when its liability became reasonably clear after the UIM judgment. Boyte also alleged that the two-plus year delay in payment had injured him. The trial court granted Mid-Century a directed verdict on Boyte's claims arising before or during the UIM trial, and the parties stipulated that Boyte was seeking damages only for Mid-Century's post-judgment conduct.[113] The jury found in Boyte's favor, and the trial court rendered judgment against Mid-Century. The Fort Worth Court of Appeals affirmed, holding that Mid-Century's duty of good faith and fair dealing extended beyond the UIM judgment.[114]

The Texas Supreme Court reversed and rendered judgment that Boyte take nothing.[115] The court held that once the trial court's judgment was entered the parties became judgment debtor and judgment creditor, respectively.[116] Because the concerns of disparity in bargaining power that give rise to an insurer's duty of good faith do not exist in the judgment creditor-judgment debtor context, Mid-Century's duty of good faith and fair dealing was extinguished upon entry of judgment.[117] As the statutory standard for good faith is identical to the common law standard, Boyte's statutory claims received identical treatment.[118]

111. TEX. INS. CODE ANN. art. 21.21 (Vernon 1981 & Supp. 2003).

112. Mid-Century Ins. Co. of Tex. v. Boyte, 80 S.W.3d 546 (Tex. 2002).

113. *Id.* at 547.

114. *Id.* at 547-48.

115. *Id.* at 547.

116. *Id.* at 548.

117. *Id.* The court rejected Boyte's argument that Mid-Century's ability to supercede the judgment was relevant to the analysis. *Id.*

118. *Id.*

In *Wright's v. Red River Federal Credit Union*,[119] the Texarkana Court of Appeals held that not every claim of misrepresentation under the Insurance Code is also a DTPA claim. In that case, an automobile repair shop sued an insurance company, a credit union, and a vehicle's owner to recover the cost of repairing the vehicle. Although the plaintiff did not allege a DTPA violation against the credit union, the credit union moved for summary judgment on claims of negligent misrepresentation and DTPA violations but made no mention of the plaintiff's claims of breach of contract, fraud, or violation of the Insurance Code. The trial court nevertheless granted summary judgment on all of the plaintiff's claims against the credit union. On appeal, the court of appeals recognized that Article 21.21, section 16(a) of the Insurance Code incorporated part of the DTPA.[120] However, the plaintiff had specifically sued the credit union for violation of section (4)(1) of Article 21.21 and thus had not alleged a DTPA violation at all.[121]

The Texas Insurance Code expressly requires that a plaintiff alleging a DTPA claim under the Insurance Code demonstrate that he or she relied on an insurance agent's deceptive act or practice.[122] The defendants in *Nast v. State Farm Fire and Casualty Co.*,[123] discussed above, moved for summary judgment alleging that, as a matter of law, the plaintiffs did not rely on the agent's misrepresentations. The defendants alleged that because the plaintiffs knew that their neighbors had obtained FEMA flood insurance, they should have known that the insurance agent was wrong when he said that the plaintiffs were ineligible for such insurance.

The plaintiffs offered evidence that, while they were aware that some of their neighbors had FEMA flood insurance, they did not believe that they were entitled to obtain it because their agent (whom they had known for 18 years) told them that they were not eligible. The agent further told the plaintiffs that they should beware of anyone quoting low rates to persons in their neighborhood. The San Antonio Court of Appeals held that this evidence created a fact issue concerning whether the plaintiffs relied on the agent's misrepresentations.[124]

V. DETERMINING THE MEASURE OF DAMAGES

A prevailing plaintiff in a DTPA action may recover economic damages.[125] 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.[126]

119. Wright's v. Red River Fed. Credit Union, 71 S.W.3d 916 (Tex. App.—Texarkana 2002, no pet.).
120. *Id.* at 918.
121. *Id.* at 918-19.
122. TEX. INS. CODE ANN. art. 21.21, § 16(a) (Vernon 1981 & Supp. 2003).
123. *Nast*, 82 S.W.3d at 114.
124. *Id.* at 121.
125. DTPA § 17.50(b)(1).
126. *Id.*

The plaintiff in *Guzman v. Ugly Duckling Car Sales of Texas, L.L.P.*[127] purchased a used car from the defendant under a contract providing that the defendant did not waive any remedies it might have in the event of a future default merely by deciding not to use its remedies for every default. The plaintiff made several late car payments and made other payments for less than the full amount due. Eventually, the defendant repossessed the car and sold it at auction. The plaintiff sued, claiming that the defendant violated the DTPA by making false and misleading statements regarding the acceptance of her late payments and the possibility of the car being repossessed. The defendant counterclaimed against the plaintiff for breach of contract. In response to the counterclaim, the plaintiff asserted waiver as an affirmative defense. The jury found that the defendant had committed a DTPA violation and that the plaintiff had breached her contract with the defendant but awarded no damages to either party.[128] The plaintiff appealed, claiming that it was against the great weight of the evidence for the jury to find that she suffered no damages. The San Antonio Court of Appeals affirmed.[129] In determining the proper amount of damages, the jury was asked to consider: (1) the reasonable and necessary expense incurred in renting a car after the repossession; (2) the amount of equity the plaintiff had in the vehicle; and (3) past and future mental anguish. The evidence at trial indicated the following: (1) the plaintiff rented a car "a couple of times . . . to do stuff on the weekend;" (2) at the time of the repossession the plaintiff owed more than the car was worth; and (3) while the plaintiff was "depressed and sidetracked" and suffered from declining performance at work as a result of losing her car, she did not lose her job and never sought any counseling or treatment. In viewing the evidence as a whole, the court held that the jury's finding that the plaintiff was not entitled to damages was not against the great weight and preponderance of the evidence.[130]

The plaintiff in *Cooper v. Lyon Financial Services, Inc.*[131] was a cosmetic surgeon who purchased a laser based in part upon the representations of a sales representative that with the laser there would be no discoloration, no pain, and no need for reoperation and that the surgeon could return the laser if he was dissatisfied. After the surgeon received the laser, the salesman provided a one-day, in-service training session during which the surgeon used the laser on two of his patients. The surgeon had not previously used a laser, did not take advantage of any other free training, and did not read the manual before the surgery. The surgeon testified that there was no problem with the laser from a functioning standpoint, but his patients were not satisfied with the surgery and he

127. Guzman v. Ugly Duckling Car Sales of Tex., L.L.P., 63 S.W.3d 522 (Tex. App.—San Antonio 2002, pet. denied).

128. *Id.* at 525.

129. *Id.* at 526-27.

130. *Id.* at 527.

131. Cooper v. Lyon Fin. Servs., Inc., 65 S.W.3d 197 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

never used the laser again. The surgeon called the salesman twice about returning the laser but failed to comply with the contractual requirement of rejecting the laser in writing. He could not recall whether he rejected the laser within the contractual 30-day limit.

The surgeon stopped making payments on the laser and the finance company repossessed it and sold it to another medical practice. The company then sued the surgeon for breach of contract seeking the amount still due on the lease and attorneys' fees. The surgeon counterclaimed and sued the laser's manufacturer. The jury found in favor of the finance company on its breach of contract claim and awarded damages. The jury found in favor of the surgeon on his DTPA claims against the finance company and manufacturer, but awarded no damages.

The surgeon appealed, challenging the legal and factual sufficiency of the evidence supporting the jury's decision not to award him damages.[132] His appeal rested entirely on his testimony that the laser had no value to him. The Houston Court of Appeals held that the surgeon's testimony was not evidence of the value of the laser because a property owner can only testify about the market value of his property and not the intrinsic, personal, or other measure of value.[133] The surgeon admitted that the laser was not defective in any way, that it did what the literature said it would do, and that he had no complaints about its working according to specifications. The court found that the testimony constituted more than a scintilla of evidence to support the jury's implicit finding that the value of the laser the surgeon received equaled or exceeded the purchase price.[134] The only evidence weighing against the jury's finding of no damages was the surgeon's subjective testimony that the laser did not fulfill representations that it would produce no pain, no discoloration, and no need for reoperation. Evidence also existed, however, that the surgeon was unable to properly use the laser because he did not obtain the recommended training and thus his expectations were unreasonable. The court held that "the jury's finding [was] not so contrary to the overwhelming weight of the evidence so as to be clearly wrong and unjust."[135]

VI. 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.[136] This is only partially correct, since several DTPA provisions expressly require proof of intentional conduct.[137] Some courts have gone so far as to hold that common law defenses, such as estoppel and

132. *Id.* at 202.
133. *Id.* at 204.
134. *Id.*
135. *Id.*
136. *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).
137. *See, e.g.*, DTPA § 17.46(b)(9), (10), (13), (16), (17) & (24).

ratification, are not available to combat DTPA claims.[138] Other courts have recognized a variety of defenses to DTPA claims.[139] 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.[140] 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."[141]

As discussed above, the plaintiff in *James V. Mazuca and Associates v. Schumann*[142] hired a Texas law firm to represent him in claims arising from an Arizona automobile accident in which the plaintiff was injured. The law firm filed suit but the claims were nonsuited; meanwhile the Texas statute of limitations lapsed. Local counsel in Arizona attempted to pursue litigation in that state, but the claims were ultimately dismissed as barred by the Arizona statute of limitations. Schumann then sued the Texas law firm alleging breach of the DTPA. The jury found for Schumann and the law firm appealed.[143]

The San Antonio Court of Appeals reversed.[144] The court recognized that under Texas law an allegation that an attorney was negligent will not give rise to a DTPA claim. But a DTPA claim can arise from an allegation that an attorney engaged in an unconscionable course of action.[145] The court held that, while the law firm was clearly negligent, its actions in nonsuiting the case without prejudice prior to the running of the statute of limitations did not constitute unconscionable conduct.[146] Similarly, the law firm's mistaken belief, based upon consultation with Arizona counsel,

138. *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.2d 667 (Tex. 1998); *see also* Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980) (recognizing that a primary purpose of the DTPA was to relieve consumers of common law defenses while providing a cause of action for misrepresentation).

139. *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 (Tex. App.—Dallas 1995, writ denied) (not designated for publication), 1995 WL 500308, at *10 (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).

140. Act of May 19, 1995, 74th Leg., R.S., ch. 414, § 4, 1995 Tex. Gen. Laws 2991.

141. DTPA § 17.49(c)(1).

142. *Schumann*, 82 S.W.3d at 90.

143. *Id.* at 93.

144. *Id.* at 96.

145. *Id.* at 94.

146. *Id.*

that an Arizona savings provision would extend the Arizona statute of limitations constituted negligence, but was not evidence of deceptive conduct.[147]

The defendants in *Nast v. State Farm Fire and Casualty Co.*,[148] discussed above, also moved for summary judgment on the ground that the insurance agent's erroneous statements—that the plaintiffs were not eligible to purchase FEMA flood insurance and that a "shyster" was selling flood insurance in their neighborhood—constituted professional advice/opinion. The San Antonio Court of Appeals disagreed,[149] holding that the plaintiffs eligibility for FEMA flood insurance and a shyster going around the plaintiffs' neighborhood selling flood insurance were facts and not advice or opinions.[150]

B. Preemption and Exemption From the DTPA

Certain statutory schemes and common law doctrines expressly or impliedly bar DTPA claims and may affect a plaintiff's procedures for bringing DTPA claims. During the Survey period, several cases examined such 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 for labeling herbicides and requires that all herbicides be registered with the Environmental Protection Agency.[151] FIFRA preempts common law tort suits based solely upon claims relating to labeling.[152] The plaintiffs in *American Cyanamid Co. v. Geye*[153] treated part of their peanut crop with a mixture of the herbicides manufactured by American Cyanamid. The plaintiffs claimed that they relied on various labels and advertisements specifically stating that the two herbicides could be "tank mixed." Additionally, they claimed to have relied on advertisements stating that one of the herbicides was a good choice for crop safety and did not cause injury to peanut plants. The plaintiffs asserted that the herbicide mix harmed their peanut plants and resulted in a reduction in yield. The plaintiffs sued American Cyanamid alleging breach of express and implied warranties, strict liability, and DTPA violations. American Cyanamid filed a motion for summary judgment, asserting that FIFRA preempted the claims. The trial court agreed and dismissed the claims.[154] The Eastland Court of Appeals reversed, hold-

147. *Id.* at 95.
148. *Nast*, 82 S.W.3d at 114.
149. *Id.* at 122.
150. *Id.*
151. Quest Chem. Corp. v. Elam, 898 S.W.2d 819, 820 (Tex. 1995).
152. *Id.*
153. American Cyanamid Co. v. Geye, 79 S.W.3d 21 (Tex. 2002).
154. *Id.* at 23.

ing that FIFRA did not preempt the plaintiffs' claim.[155] The Texas Supreme Court affirmed the court of appeals, holding that the plaintiffs' claims related directly or indirectly to the statement on the product label claiming that the herbicides could be combined by tank mixing.[156] The Texas Supreme Court noted that the Environmental Protection Agency did not require herbicide manufacturers seeking labeling approval to submit data regarding either the efficacy or the toxic effect of the herbicide on desirable plants.[157] Because the EPA had not evaluated whether the tank-mixed herbicide combination used by plaintiffs had a toxic effect on peanut plants, and thus neither evaluated nor regulated the American Cyanamid labels (claiming that the combination was safe to use on peanut plants), the Texas Supreme Court held that FIFRA did not preempt the plaintiffs' claims.[158]

The plaintiff in *Dow AgroSciences, LLC v. Bates*[159] was an herbicide manufacturer who received numerous demand letters from peanut farmers contending that one of the plaintiff's herbicides was "highly toxic" and failed to control weeds. Further it was alleged that the plaintiff misrepresented the product. The plaintiff sought a declaratory judgment that FIFRA preempted the farmers' claims. Regarding the farmers' threatened DTPA claims, the plaintiff argued that the claims were, in essence, claims of misrepresentation through advertising and that such claims are challenges to the herbicide's label. The farmers responded that their claims also arose from the representations made by the plaintiff's retail distributors who instructed the farmers about the herbicide's uses and extolled the herbicide's excellent results. The United States District Court for the Northern District of Texas, Lubbock Division held that the farmers offered no evidence that the distributors' remarks were different from the information on the herbicide's label.[160] Because claims premised on off-label remarks are preempted when they merely repeat the information on the label, the court held that FIFRA preempted those claims.[161]

The farmers also complained that, after the herbicide allegedly damaged the peanut crops, the plaintiff's employees misrepresented that the peanut crops would recover and that the plaintiff would pay for any production loss and increased expenses. The court held that these representations did not repeat any information on the herbicide's label and thus were not preempted.[162]

155. Geye v. American Cyanamid Co., 32 S.W.3d 916 (Tex. App.—Eastland 2000), *aff'd*, 79 S.W.3d 21 (Tex. 2002).

156. *American Cyanamid*, 79 S.W.3d at 23.

157. *Id.* at 25.

158. *Id.* at 26-27, 29.

159. Dow AgroSciences, LLC v. Bates, 205 F. Supp. 2d 623 (N.D. Tex. 2002).

160. *Id.* at 627.

161. *Id.* (citing Andrus v. AgrEvo USA Co., 178 F.3d 395, 400 (5th Cir. 1999)).

162. *Id.* at 627-28.

2. Texas Motor Vehicle Commission Code

The Texas Legislature enacted the Texas Motor Vehicle Commission Code[163] to govern the distribution and sale of motor vehicles through licensing and regulating vehicle manufacturers, distributors, and dealers.[164] 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; but it may not award damages to parties.[165]

The 2000 and 2001 DTPA Surveys reported on the case of *David McDavid Nissan, Inc. v. Subaru of America, Inc.*,[166] in which the Dallas Court of Appeals and the Texas Supreme Court examined the relationship between the Code and the DTPA. 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 theories based upon the Code and the DTPA.

In an opinion issued in May 2001, the Texas Supreme Court held that the Code conferred primary, but not exclusive, jurisdiction over McDavid's DTPA claims to the TMVC.[167] About the time that opinion was issued, the Texas Legislature amended the Code to provide that the TMVC "has the exclusive, original jurisdiction to regulate those aspects of the distribution, sale, and leasing of motor vehicles as governed by" the Code.[168] The Texas Supreme Court then granted Subaru's motion for rehearing to determine which version of the Code applied and whether the applicable provision granted primary or exclusive jurisdiction to the TMVC.[169]

The Texas Supreme Court first held that the 2001 amendments to the Code applied retroactively and that the Code, as amended, vests the TMVC with exclusive jurisdiction.[170] The court then held that McDavid was required to exhaust its administrative remedies and obtain final TMVC findings to support its DTPA claim.[171] If the Board's findings

163. TEX. REV. CIV. STAT. ANN. art. 4413(36) (Vernon 1976 & Supp. 2003).

164. Subaru of American, Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 224 (Tex. 2002).

165. *See* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.01-.03 (Vernon 1976 & Supp. 2003); *see also* Kawasaki Motors Corp. v. Tex. Motor Vehicle Comm'n, 855 S.W.2d 792, 798 (Tex. App.—Austin 1993, no writ).

166. David McDavid Nissan, Inc. v. Subaru of Am., Inc., 10 S.W.3d 56 (Tex. App.—Dallas 1999), *aff'd in part, rev'd in part*, 84 S.W.3d 212 (Tex. 2002).

167. Subaru of Am., Inc. v. David McDavid Nissan, Inc., 44 Tex. Sup. Ct. J. 779, 2001 WL 578337 (May 31, 2001), *superseded on rehearing by* 84 S.W.3d 212 (Tex. 2002).

168. TEX. REV. CIV. STAT. ANN. art. 4413(36), § 3.01(a) (Vernon 1976 & Supp. 2003).

169. *Subaru*, 84 S.W.3d at 219.

170. *Id.* at 223.

171. *Id.* at 225. The Texas Supreme Court rejected McDavid's argument that this would violate its open courts rights as to its DTPA claims because those claims arise from a statute and not the common law. *Id.* at 227.

were favorable, McDavid could maintain its DTPA action in the trial court.[172] The Code requires the trial court to "pay due deference" to the TMVC's findings.[173] The Texas Supreme Court interpreted this provision to mean that the trial court cannot retry the TMVC's findings and "must treat them as entirely binding."[174] The impediment to the trial court's jurisdiction would be removed once McDavid exhausted its administrative remedies by obtaining findings from the TMVC on the issues covered by the Code. The Texas Supreme Court thus held that the trial court should not dismiss McDavid's claims requiring such findings, but should abate the claims to allow McDavid a reasonable opportunity to cure the jurisdictional problem.[175]

3. *The Texas Workers' Compensation Act*

In *American Motorists Insurance Co. v. Fodge*,[176] the Texas Supreme Court considered whether a person seeking workers' compensation could, without a prior determination from the Texas Workers' Compensation Commission that the benefits are due, prosecute a lawsuit against a carrier to recover benefits and damages resulting from the denial of benefits. The plaintiff claimed compensation for a back injury she suffered at work. The carrier denied coverage. The Commission determined that the plaintiff had suffered a compensable back injury and ordered payment of temporary income benefits, which the carrier made. The plaintiff had neither claimed medical benefits nor complained that the carrier had denied medical benefits. The plaintiff then sued the carrier for mishandling her claim thereby seeking damages for workers' compensation due, mental anguish resulting from her inability to obtain medical care, past and future lost wages, impairment of credit reputation, statutory damages, and attorneys' fees. The carrier interposed a plea to the jurisdiction and motion to dismiss, arguing that the plaintiff's claims were based on a denial of compensation benefits that only the Commission has jurisdiction to award and that the plaintiff had never complained to the Commission for additional benefits and thus had failed to exhaust her administrative remedies. The trial court dismissed the case and the plaintiff appealed.[177] The court of appeals reversed and remanded, holding that all of the plaintiff's extracontractual claims were unrelated to any claim for compensation benefits and thus were properly before the trial court.[178]

The Texas Supreme Court reversed the judgment of the court of appeals.[179] The court read the plaintiff's petition as making three claims:

172. *Id.*
173. TEX. REV. CIV. STAT. art. 4413(36), § 6.06(a) (Vernon 1976 & Supp. 2003).
174. *Subaru*, 84 S.W.3d at 225.
175. *Id.* at 228.
176. American Motorists Ins. Co. v. Fodge, 63 S.W.3d 801 (Tex. 2001).
177. *Id.* at 803.
178. *Id.*
179. *Id.* at 805.

one for compensation benefits, another for damages caused by the bad faith denial of those benefits, and a third for damages caused by the delay in handling the claim and paying the benefits that were determined to be due. The court held that, because only the Commission can determine a claimant's entitlement to compensation benefits, it follows that allowing a court to award damages for wrongful deprivation of benefits would circumvent the Commission's jurisdiction.[180] Thus, courts cannot award damages for a denial of compensation benefits without a determination by the Commission that the benefits were due.[181] With respect to the plaintiff's first two claims, therefore, the claims were properly dismissed.[182] Because her third claim related to benefits that the Commission had awarded, however, the claim was ripe for adjudication and should not have been dismissed.[183]

C. THE STATUTE OF FRAUDS

Smith v. Elliott[184] involves the application of the statute of frauds in an action against a physician for misrepresentation. The plaintiff consulted the defendant physician about breast reduction surgery. The physician assured her that the results would be favorable, that her breasts would "look good," and that she would be pleased with the results. He also said that any scarring would be a "fine line." The plaintiff had the surgery but was not pleased with the results as her breasts were different sizes and she had very noticeable scarring. The patient plaintiff sued the physician under various theories including misrepresentation under the DTPA. The trial court entered judgment for the physician on his affirmative defense of statute of frauds and the plaintiff appealed.[185] The El Paso Court of Appeals affirmed, relying on the Texas Supreme Court's opinion in *Sorokolit v. Rhodes*,[186] which "note[d] the possible application of the statute of frauds" to claims of physician misrepresentation. The court held that a DTPA claim fails where a defendant physician in a DTPA case raises the affirmative defense of statute of frauds and the plaintiff fails to prove a writing signed by the physician that contains the representation or promise relied upon.[187] The court held that such a requirement was particularly apt since the plaintiff had signed a consent form that expressly warned of the risk of scars.

D. "AS IS" CLAUSES

An "as is" agreement generally negates the causation element of a

180. *Id.* at 804.
181. *Id.*
182. *Id.*
183. *Id.* at 805.
184. Smith v. Elliott, 68 S.W.3d 844 (Tex. App—El Paso 2002, pet. denied).
185. *Id.* at 846.
186. Sorokolit v. Rhodes, 889 S.W.2d 239, 243 n.5 (Tex. 1994).
187. *Smith*, 68 S.W.3d at 847.

DTPA claim.[188] The plaintiffs in *Oakwood Mobile Homes, Inc. v. Cabler*[189] entered into a contract to purchase a manufactured home that disclaimed enforceability of oral statements. The plaintiffs contended that the salesman told them that their manufactured home would be exactly like the model home on the lot and that all defects would be fixed. The home arrived with numerous defects, most of which were never repaired, and the plaintiffs sued alleging claims of fraud, breach of contract and DTPA violations. The trial court entered judgment against the defendants. On appeal, the defendants argued that the disclaimer of enforceability of oral statements acted like an "as is" clause barring the plaintiffs' claims.

The El Paso Court of Appeals first acknowledged that to determine the effect of an "as is" clause, a court must consider the nature of the transaction and the totality of the circumstances surrounding the agreement.[190] The court held that the plaintiffs were not bound by the disclaimers because the plaintiffs were unsophisticated, the disclaimers were boilerplate provisions and the plaintiffs testified that they had relied upon the salesman's representations in deciding to enter into the agreement.[191]

E. Causation

Liability under the DTPA is limited to conduct that is a producing cause of the plaintiff's damages.[192] Unlike the doctrine of proximate cause, producing cause does not require that the injury be foreseeable.[193] "Producing cause" has been defined as "an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of."[194] When determining whether the actions complained of are the producing cause of a plaintiff's damages, courts look to whether the alleged cause is a substantial factor that brings about the plaintiff's injury, without which the injury would not have occurred.[195]

The Corpus Christi Court of Appeals applied the concept of producing cause in *Palmer v. Espey Huston & Associates, Inc.*,[196] which arose from the development of a marina in the Laguna Madre at Port Isabel, Texas. The development included construction of an artificial breakwater that in subsequent storms failed to protect docks and boats inside the marina. The developer then sued the architectural firm that worked on the planning and design phase of the project, the engineering firm that studied the

188. Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd., 896 S.W.2d 156, 161 (Tex. 1995).
189. *Cabler*, 73 S.W.3d at 363.
190. *Id.* at 371.
191. *Id.* at 372 (distinguishing *Prudential Ins. Co.*, 896 S.W.2d at 156).
192. *Doe*, 907 S.W.2d at 478.
193. *See* Hycel, Inc. v. Wittstruck, 690 S.W.2d 914, 922 (Tex. App.—Waco 1985, writ dism'd).
194. Union Pump Co. v. Albritton, 898 S.W.2d 773, 775 (Tex. 1995).
195. *Prudential Ins. Co.*, 896 S.W.2d at 161.
196. Palmer v. Epsey Huston & Assocs., Inc., 84 S.W.3d 345 (Tex. App.—Corpus Christi 2002, no pet.).

types of waves that could be expected (as well as how four different types of breakwaters would react to those waves), and the civil engineer that designed the final breakwater. The developer alleged that the defendants had misrepresented their ability to design the breakwater as well as misrepresented that the breakwater was constructed in a good and workmanlike manner. Affirming the trial court's grant of summary judgment for the defendants, the Corpus Christi Court of Appeals held that, where none of the defendants had constructed or supervised the construction of the breakwater, any misrepresentations regarding the construction could not be the producing cause of the developer's damages.[197] The court also held that the evidence did not establish that the alleged misrepresentations regarding the defendants' ability to design the breakwater were the producing cause of the developer's damages.[198]

Wellisch v. United Services Automobile Assoc.[199] arose from an automobile accident in which the Wellisches' daughter was killed. The Wellisches sued the driver's estate and settled. The Wellisches then sought to recover under their own uninsured/underinsured motorist coverage with USAA. USAA denied the claim, and the Wellisches sued raising both contractual and extracontractual claims. The contractual claims were tried to a jury, which found in favor of the Wellisches. USAA immediately paid the policy limits. The trial court then considered the Wellisches' claims under the Insurance Code and DTPA, which were premised on the Wellisches' assertion that, because no reasonable investigation into the claim took place, their claim was unreasonably denied. The trial court granted summary judgment in favor of USAA.[200]

On appeal, the Wellisches did not challenge the summary judgment in favor of USAA on economic damages; instead, they challenged the summary judgment on only their mental anguish damages.[201] The San Antonio Court of Appeals affirmed, holding that while the Wellisches presented evidence of their mental anguish, they had failed to present evidence that the mental anguish stemmed from USAA's failure to properly investigate their claim (as opposed to the actual denial of their claim). The court thus held that the Wellisches did not raise a fact issue sufficient to defeat USAA's entitlement to summary judgment on their mental anguish claim.[202]

197. *Id.* at 355.

198. *Id.*; *see also Schumann*, 82 S.W.3d at 95 (holding that a law firm's use in a nonsuit without prejudice of boilerplate language that the plaintiff did not intend to pursue his claims was not a producing cause of damages since the client did not rely on the language and the language was not a pivotal factor in the client's subsequent inability to pursue the nonsuited claims); *see* discussion *supra* notes 59-66, 142-47 and accompanying text.

199. Wellisch v. United Servs. Auto. Ass'n, 75 S.W.3d 53 (Tex. App.—San Antonio 2002, pet. denied).

200. *Id.* at 56.

201. *Id.* at 59.

202. *Id.* at 60.

The plaintiff in *Gourrier v. Joe Myers Motors, Inc.*[203] purchased a used automobile and extended warranty from Myers and drove the car for several years. When the car began leaking engine oil, another dealer refused to repair it under the warranty because the car was beyond the mileage limit. Rather than paying to have the car repaired, Gourrier drove it until it became inoperable. He then stopped making monthly payments and the car was repossessed. Gourrier sued Myers complaining of errors in the documentation of his car purchase, alleging that Myers violated the DTPA by misrepresenting its ability to legally sell the vehicle and by breaching an implied warranty of title. Myers moved for summary judgment on the ground that there was no evidence that any of these acts were the producing cause of any damages. The trial court granted Myers' motion and the Houston Court of Appeals affirmed.[204] Gourrier had not discovered the alleged problems with the purchase paperwork until after he stopped using the vehicle. The court held that summary judgment was appropriate given Gourrier's failure to produce evidence that any alleged violations or misrepresentations caused him damage.[205]

In *Golden v. McNeal*,[206] a convicted felon attempted to bring malpractice and DTPA claims against his court appointed attorney and investigator. Golden had been convicted of possession of a controlled substance and sentenced to forty years' imprisonment. His conviction was upheld on direct appeal. The Texas Court of Criminal Appeals refused his petition for discretionary review, and the United States Supreme Court denied his petition for writ of certiorari. Golden then sued his attorney and investigator, complaining in a 344-page petition of numerous deficiencies that he perceived in the conduct of the investigation, trial, and appeal of his case. The investigator moved for summary judgment alleging, among other things, that Golden's criminal behavior was the sole proximate cause of his conviction. The trial court granted the motion and the Houston Court of Appeals for the Fourteenth District affirmed.[207]

The court recognized that in *Peeler v. Hughes & Luce*,[208] the Texas Supreme Court held that, as a matter of law, a criminal defendant's own conduct was the sole proximate cause of her indictment and conviction, thus barring the criminal defendant's malpractice and DTPA claims against her attorney.[209] The court held that the rationale of *Peeler* should be extended to malpractice and DTPA claims brought against an investigator aiding a criminal defense attorney or a *pro se* criminal defendant.[210]

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203. Gourrier v. Joe Myers Motors, Inc., 78 S.W.3d 651 (Tex. App.—Houston [14th Dist.] 2002, no pet.), *withdrawn and superseded by*, No. 14-00-01665-CV, 2002 WL 31971745 (Tex. App.—Houston [14th Dist.] Aug. 8, 2002, no pet.).

204. *Id.* at 658.

205. *Id.*

206. Golden v. McNeal, 78 S.W.3d 488 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

207. *Id.* at 491-92.

208. Peeler v. Hughes & Luce, 909 S.W.2d 494 (Tex. 1995).

209. *Golden*, 78 S.W.3d at 491-92.

210. *Id.* at 492.

The court concluded that Golden's own criminal conduct was the sole proximate cause of any malpractice, negligence, or DTPA damages flowing from his conviction and, thus, summary judgment on those claims was appropriate.[211]

In *Nast v. State Farm Fire and Casualty Co.*,[212] discussed above, the plaintiffs alleged that they had been damaged because their homeowner's insurance agent erroneously told them that they were not eligible to purchase FEMA flood insurance. The defendants moved for summary judgment maintaining that the plaintiffs had been damaged by their own failure to purchase flood insurance, rather than by the agent's misrepresentations. The San Antonio Court of Appeals held that there was a genuine issue of material fact regarding the cause of the plaintiffs' damages.[213] Both plaintiffs testified in their depositions that they trusted their insurance agent and did not make further attempts to purchase flood insurance because they believed him. The court held that summary judgment was inappropriate because there was evidence that the plaintiffs did not purchase FEMA flood insurance because they relied upon the agent's misrepresentation.[214]

F. 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.[215]

In *LaGloria Oil and Gas Co. v. Carboline Co.*,[216] a refinery owner/operator sued the manufacturer of fireproofing material that had been applied to certain structural steel, vessels, vessel skirts and pipe racks at the refinery alleging that the fireproofing material had caused corrosion. The defendants pled the statute of limitations as an affirmative defense and LaGloria responded by pleading the discovery rule. At trial, the jury was asked over LaGloria's objection whether LaGloria "discovered, or in the exercise of reasonable diligence should have discovered . . . the existence of corrosion that was occurring under . . . [the] fireproofing."[217] The jury answered in the affirmative.[218]

The Tyler Court of Appeals reversed and remanded,[219] holding that a jury issue on the discovery rule must inquire when the plaintiff "discov-

211. *Id.*
212. *Nast*, 82 S.W.3d at 114.
213. *Id.* at 122-23.
214. *Id.*
215. DTPA § 17.565.
216. LaGloria Oil & Gas Co. v. Carboline Co., 84 S.W.3d 228 (Tex. App.—Tyler 2001, pet. denied).
217. *Id.* at 232.
218. *Id.*
219. *Id.* at 243.

ered, or in the exercise of reasonable care and diligence should have discovered, the 'nature of the injury' as that term has been defined by the Texas Supreme Court."[220] The court recognized that the Texas Supreme Court's definition has changed slightly over time but held that the current definition of "nature of the injury" covers both the injury itself and the fact that the injury was "'likely caused by the wrongful acts of another.'"[221]

The case of *Ehrig v. Germania Farm Mutual Insurance Association*[222] arose from an insurance company's denial of coverage under a homeowner's insurance policy. The homeowners sued their insurer alleging violations of the DTPA. The insurer moved for summary judgment on limitations grounds, arguing that limitations had been triggered on the date its adjuster informed the homeowners orally that their claim was denied. The Ehrigs argued that limitations was not triggered until they received the subsequent, written notice of the denial. The trial court granted summary judgment in favor of the insurer but the Corpus Christi Court of Appeals reversed.[223] The court held that limitations on causes of action stemming from the denial of insurance coverage begin to run when the claim is denied outright.[224] The court held that the question of whether the oral denial constituted an "outright denial" sufficient to trigger limitations was a question of fact for the jury to determine.[225]

The plaintiff in *Knott v. Provident Life and Accident Insurance Co.*,[226] was a physician who sued an insurer and its agent alleging that they had misled him regarding the terms of two disability insurance policies. The plaintiff sustained a fracture to his spine in 1985. He was unable to work for two months and, although he returned to his practice, he was never able to do some procedures again. He initially applied for total disability benefits under the policies in 1985, but the claim was denied. The plaintiff did not contest that denial. In 1996, he filed a second claim for total disability benefits. The insurer paid the benefits for 24 months and then terminated payment. The plaintiff filed suit alleging that the termination of benefits constituted bad faith and breach of the insurance contract and that the insurance agent had misrepresented the terms of the policies. The agent moved for summary judgment alleging, in part, that the claims were barred by limitations. The trial court granted the motion and the Eastland Court of Appeals affirmed.[227] The court rejected the plaintiff's argument that his cause of action did not accrue until his benefits were terminated in 1998. The plaintiff claimed that he had been continuously

220. *Id.* at 236.
221. *Id.* at 234-36 (quoting Childs v. Haussecker, 974 S.W.2d 31 (Tex. 1998)).
222. Ehrig v. Germania Farm Mut. Ins. Ass'n, 84 S.W.3d 320 (Tex. App.—Corpus Christi 2002, pet. denied).
223. *Id.* at 322.
224. *Id.* at 324.
225. *Id.* at 325.
226. Knott v. Provident Life & Accident Ins. Co., 70 S.W.3d 924 (Tex. App.—Eastland 2002, pet. granted).
227. *Id.* at 932-33.

disabled since the accident in 1985. The court stated that if the plaintiff's claims of misrepresentation were correct, the initial denial of benefits was improper.[228] The court found that, because of that initial denial of benefits, the plaintiff was authorized at that time to seek a judicial remedy and the statute of limitation had long since expired.[229]

An insurance policy holder sued its insurer and insurance broker for negligence and DTPA violations in *All-Tex Roofing, Inc. v. Greenwood Insurance Group, Inc.*,[230] claiming they placed its insurance with an insolvent insurer. The insured had contacted the insurer in late 1995 to purchase $2 million of general liability insurance. The insurer wrote a policy for $1 million and asked the agent to procure another $1 million of coverage. The agent procured the $1 million policy from Resure, Inc. In March 1997, the agent learned that Resure was insolvent and notified the insurer. The insurer then notified the insured that the policy would be cancelled effective March 27, 1997. In March 1999, judgment was entered against the insured on a personal injury suit.

The insured then sued the agent and insurer who moved for summary judgment on the ground that the claims were barred by limitations. The trial court granted the motion and the insured appealed.[231] On appeal, the insurer asserted that the insured suffered damage authorizing a judicial remedy in March 1997, either when it learned of Resure's insolvency or when the Resure policy was cancelled. The defendants claimed that these events caused three distinct injuries: (1) the loss of liability coverage, (2) the loss of pre-paid premiums, and (3) the loss of coverage under the policy for defense costs for the personal injury lawsuit. The Houston Court of Appeals for the First District held that the loss of coverage did not authorize the insured to seek a remedy before the day it suffered a judgment in the personal injury suit because, until that day, the insured had not made a claim for indemnity and nobody had denied such a claim.[232] The court held that while the loss of the pre-paid premiums might have started limitations running under other circumstances, it did not do so here because the evidence showed that the premiums were refunded.[233] Finally, the court held that the record did not show that the insured ever claimed or was denied coverage for its defense costs in the personal injury suit.[234] Because the defendants did not show as a matter of law that the claims were barred by limitations, summary judgment was inappropriate.[235]

228. *Id.* at 932.

229. *Id.* at 932-33.

230. All-Tex Roofing, Inc. v. Greenwood Ins. Group, Inc., 73 S.W.3d 412 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

231. *Id.* at 414.

232. *Id.* at 415.

233. *Id.* at 416.

234. *Id.* at 416-17.

235. *Id.* at 417.

VII. 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 and brought in bad faith, or for purposes of harassment." 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.[236] 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."[237] A suit is brought in bad faith if it is motivated by a malicious or discriminatory purpose.[238] Whether a suit is groundless or brought in bad faith is a question of law.[239]

The San Antonio Court of Appeals examined this provision in two cases decided during the Survey period. In *Bohls v. Oakes*,[240] Charles Oakes contracted with a builder for the construction of a new home and accepted Bohls' offer to provide the interim financing. Charles and his wife were dissatisfied with the home and sued the builder, Bohls and Bohls' company, Bohls Equipment Company. The claims against Bohls Equipment Company were nonsuited prior to trial. After trial on the Oakeses claims against Bohls (individually) and the builder, the trial court awarded Bohls Equipment $9,000 in attorneys' fees, finding the suit against the company groundless.[241] The Oakeses appealed, contending that the trial court erred in awarding the attorneys' fees to Bohls Equipment because there was no hearing on the motion for sanctions and no "good cause" stated in the order.

The San Antonio Court of Appeals disagreed, holding that the trial itself constituted the hearing and the trial court's judgment stated the suit was "groundless."[242] The court held that limitations had run by the time the Oakeses added Bohls Equipment to the suit and that, except for a few invoices issued on Bohls Equipment letterhead, there was virtually no evidence that the company was involved in the transaction. The court thus held that the trial court did not abuse its discretion by awarding attorneys' fees to Bohls Equipment.[243]

In *Davila v. World Car Five Star*,[244] a woman sued World Car for breach of contract, conversion and DTPA violations claiming that World Car repossessed a car she had lawfully purchased. World Car counterclaimed alleging fraud and breach of contract and seeking its attorneys'

236. Donwerth v. Preston II Chrysler-Dodge, Inc., 775 S.W.2d 634, 637 (Tex. 1989).
237. Splettstosser v. Myer, 779 S.W.2d 806, 808 (Tex. 1989).
238. Cent. Tex. Hardware, Inc. v. First City, Tex.-Bryan, N.A., 810 S.W.2d 234, 237 (Tex. App.—Houston [14th Dist.] 1991, writ denied).
239. *Donwerth*, 775 S.W.2d at 637.
240. *Bohls*, 75 S.W.3d at 473.
241. *Id.* at 476.
242. *Id.* at 480.
243. *Id.*
244. Davila v. World Car Five Star, 75 S.W.3d 537 (Tex. App.—San Antonio 2002, no pet.).

fees under section 17.50 of the DTPA. By the time the case was called to trial, a combination of summary judgment rulings and pre-trial directed verdicts had left the plaintiff with no claims, and the only remaining issue was World Car's counterclaims. The trial court entered a directed verdict in favor of World Car. World Car then presented its claim for attorneys' fees and asked that they be assessed jointly and severally against the plaintiff and her attorney, which the trial court subsequently did. The attorney filed a motion for new trial on the issue of his liability for attorneys' fees. The trial court ordered World Car's attorney to file a motion for sanctions and stated that it was abating the ruling on attorneys' fees and would hold a "full-blown" hearing on the motion. World Car filed its motion; the trial court held a hearing and took the matter under advisement. Weeks later, the parties appeared before the court upon the attorney's request that an order be entered. Despite the court's earlier statement abating the attorneys' fees ruling, the trial court stated that the only issue it took under advisement was the amount of attorneys' fees. Rather than ruling on World Car's motion, the trial judge then upheld its original judgment.[245]

The attorney appealed arguing that he had been denied a meaningful hearing.[246] The attorney maintained that the trial court had erred in limiting its evaluation to only the evidence presented during the course of the litigation and refusing to consider evidence relating to the attorneys' motives and credibility or to the information available to the attorney.[247] The San Antonio Court of Appeals reversed. The court held that to determine whether a suit is groundless under the DTPA, a trial court must consider "the totality of the tendered evidence to determine whether there is an arguable basis in fact or law for the consumer's claim."[248] The trial court must examine the facts available to the litigant, the circumstances existing when the litigant's pleadings were filed, and the credibility and motives of the person signing the pleadings.[249] Because the attorney attempted to introduce evidence relevant to this inquiry and the trial court refused to consider it, the court of appeals held that the trial had denied the attorney an opportunity to be heard in a meaningful manner.[250]

VIII. CONCLUSION

Continuing a trend perceived over the last several Surveys, this year's crop of cases was dominated by disputes involving financial and professional services and real estate. Over half of the 30 reported decisions selected for discussion either involved insurance (eight cases), profes-

245. *Id.* at 541.
246. *Id.* at 543.
247. *Id.*
248. *Id.* at 543-44 (citing *Splettstosser*, 779 S.W.2d at 808).
249. *Id.* at 544.
250. *Id.*

sional services (five cases), or real estate (five cases). Of the remaining cases, four involved motor vehicles, two involved herbicides, and the remaining cases involved sundry other services and goods. Aside from automobiles, few cases involved traditional consumer products.

This year's cases broke little new substantive legal ground. Continuing another trend seen in previous years, several cases focused on the parties' respective relationships to the transaction in issue (*Marshall*, *Bohls*, *Oakwood*, *Homes*, *Kingston*, *Gill*, *Raymond*). Another area that received significant attention was causation (*Palmer*, *Wellisch*, *Gourrier*, *Golden*, *Nast*). These decisions suggest that, in the absence of explicit privity or forseeability requirements, the courts continue to struggle with the task of placing appropriate limits on the DTPA's reach. Similar tensions are reflected in the cases testing the relationship between the Insurance Code and the DTPA (*Jones*, *Nast*, *Mid-Century*, *Wrights*, *Wellisch*, *Ehrig*, *Knott*, *All-Tex Roofing*) and cases involving efforts to base DTPA claims on alleged implied warranties (*Raymond*, *Chandler*, *Nast*).