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## Deceptive Trade Practices - Consumer Protection Act

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# DECEPTIVE TRADE PRACTICES— CONSUMER PROTECTION ACT

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## I. INTRODUCTION

THE Texas Deceptive Trade Practices—Consumer Protection Act (“DTPA”)<sup>1</sup> was enacted in 1973 “to protect consumers against false, misleading, and deceptive business practices, unconscionable

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1. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon 2002 & Supp. 2003) [hereinafter DTPA].

actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.”<sup>2</sup> Although the 77th Texas Legislature enacted two sets of amendments in 2001, and additional amendments in 2003, there are no reported decisions addressing those changes.

In 2003, the 78th Texas Legislature enacted several amendments to the DTPA. The legislature clarified the changes to Section 17.46 made by the 77th Legislature and renumbered portions of that section.<sup>3</sup> The legislature also added Section 17.462, which makes it an actionable false, misleading, or deceptive practice to misrepresent the geographical location of certain businesses in telephone directories or electronic databases published on or after September 1, 2003. The section applies only to businesses that derive fifty-percent or more of their gross incomes from selling or arranging the sale of flowers or floral arrangements.<sup>4</sup>

Two other changes concern the state consumer protection division of the Texas Attorney General’s Office. Effective September 1, 2003, Section 17.501 requires a consumer seeking class action status to serve the consumer protection division with a copy of the demand required by Section 17.505(a) and a copy of the petition. The new section also allows trial courts to permit the consumer protection division to intervene in the suit upon a showing of good cause.<sup>5</sup> Section 17.47, which concerns restraining orders obtained by the consumer protection division, was amended to change the amounts of civil penalties that the division can seek, and to provide guidance for the trier of fact in setting the penalty. The amendment also clarifies that there is no attorney-client relationship between the consumer protection division and any person on whose behalf the division is seeking to recover a penalty.<sup>6</sup>

This Survey covers significant developments under the DTPA from November 2, 2002, through November 1, 2003. Noteworthy decisions during the Survey period address consumer status, alleged breaches of warranties, and preemption and exemption from the DTPA.

## II. CONSUMER STATUS

In order to bring a DTPA claim, a plaintiff must be a “consumer” as that term is defined in the statute.<sup>7</sup> To qualify as a consumer, the plaintiff must be an individual who seeks or acquires, by purchase or lease, goods or services; further, those goods or services must form the basis of the plaintiff’s complaint.<sup>8</sup> Consumer status under the DTPA depends upon a showing that the plaintiff’s relationship to the transaction entitles him or

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2. *Id.* § 17.44(a).

3. Act of May 20, 2003, 78th Leg., R.S., ch. 1276, § 4.001(a), 2003 Tex. Gen. Laws 4168-70.

4. Act of May 1, 2003, 78th Leg., R.S., ch. 138, § 1, 2003 Tex. Gen. Laws 191-92.

5. Acts of May 25, 2003, 78th Leg., R.S., ch. 360, § 2, 2003 Tex. Gen. Laws 1545.

6. *Id.* § 1.

7. See DTPA, § 17.50(a).

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

her to relief.<sup>9</sup> Whether a plaintiff qualifies for DTPA consumer status is a question of law.<sup>10</sup>

The Fifth Circuit Court of Appeals examined whether holders of convertible debentures of a corporation had consumer status in *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*<sup>11</sup> The debenture holders sued Morgan Stanley, which had performed a due diligence investigation and provided a fairness opinion as a financial advisor to its client Allwaste, Inc. in connection with Allwaste's proposed merger with Philip Services Corporation. The trial court granted Morgan Stanley's motion for judgment on the pleadings as to the plaintiffs' DTPA claims, holding that the plaintiffs had not acquired goods or services from Morgan Stanley.<sup>12</sup>

The plaintiffs appealed, arguing that they were consumers because the Allwaste board of directors intended that Morgan Stanley's services would benefit the Allwaste stockholders. They also argue that there was an issue of fact as to whether the Allwaste board intended to benefit debenture holders as well because there was evidence that the board knew that the information would be disseminated to debenture holders. The Fifth Circuit held that this argument was misplaced. Because Morgan Stanley had filed a motion for judgment on the pleadings, the question was not whether there was a question of fact regarding the board's intent, but whether the plaintiffs had adequately pleaded that the board had intended to benefit them. The court of appeals held that the plaintiffs had not adequately pleaded this predicate to their claims and upheld the motion for judgment.<sup>13</sup>

In *Brittan Communications International Corp. v. Southwestern Bell Telephone Co.*,<sup>14</sup> a reseller of long-distance telephone services sued Southwestern Bell alleging that Southwestern Bell's temporary suspension of billing and collecting services for the plaintiff violated the Communications Act of 1933 and constituted common-law fraud and DTPA violations. Southwestern Bell claimed that it had suspended the services due to excessive customer complaints. The relevant parties had a conference call and services were reinstated less than a month later. The plaintiff alleged that during the conference call, Southwestern Bell made a misstatement regarding how quickly the services would be reinstated.

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9. *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)).

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

11. *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305 (5th Cir. 2002).

12. *Id.* at 310-11.

13. *Id.* at 327-28.

14. *Brittan Communications Int'l Corp. v. Southwestern Bell Tel. Co.*, 313 F.3d 899 (5th Cir. 2002).

This alleged misstatement formed the basis for the plaintiff's DTPA claim.<sup>15</sup>

Southwestern Bell moved for summary judgment on the DTPA claim, arguing that the plaintiff was not a consumer because it based its claim on the suspension of service and failure to promptly reinstate the suspended service. The trial court granted the motion and the Fifth Circuit affirmed, holding that a claim based upon the suspension of service, rather than any problem with the service itself, does not give the complaining party consumer status under the DTPA.<sup>16</sup>

One case during the Survey period considered the question of when a borrower has consumer status. The plaintiff/buyer in *Bennett v. Bank United*<sup>17</sup> sued after the bank that serviced her home loan refused to discontinue charging for private mortgage insurance ("PMI") despite the buyer having reached a loan-to-value ratio of below 80 percent. The defendants argued that the buyer did not have consumer status because she never sought or obtained PMI; rather, it was her original lender that sought and obtained the insurance. Although the buyer agreed to reimburse the lender for the premiums, the defendants argued that the agreement was incidental to her loan obligations. The Austin Court of Appeals recognized that "'a lender may be subject to a DTPA claim if the borrower's 'objective' is the purchase or lease of a good or service thereby qualifying the borrower as a consumer.'"<sup>18</sup> The court first examined whether the buyer's "objective" was the purchase or lease of a good or service. The court held that the buyer's objective was the purchase of a residence and that the loan, with its requirement of PMI, was incidental to the purchase of the residence. Because the loan was incidental to the purchase of a good, the court held that the buyer was a consumer.<sup>19</sup>

### III. IDENTIFYING THE PROPER DEFENDANT

During the Survey period, the Texas Supreme Court considered whether an individual could be held liable for conduct he undertook while acting as an agent for a disclosed principal. In *Miller v. Keyser*,<sup>20</sup> home purchasers, including David and Lynette Miller, sued the builder, the builder's owner, and the builder's agent for fraud, misrepresentation, and DTPA violations. The purchasers alleged that the agent misrepresented the size of the lots and the purchasers' ability to place fencing along the back of their lots. Although the purchasers were told that the lots were subject to a drainage easement, they were not told that the easement would prevent them from fencing their entire lots. The case went to trial against the sales agent and, consistent with the jury verdict,

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15. *Id.* at 903, 906-07.

16. *Id.* at 907-08.

17. *Bennett v. Bank United*, 114 S.W.3d 75 (Tex. App.—Austin 2003, no pet.).

18. *Id.* at 81 (quoting *La Sara Grain Co. v. First Nat'l Bank*, 673 S.W. 2d 558, 567 (Tex. 1984)).

19. *Id.* at 80-82.

20. *Miller v. Keyser*, 90 S.W.3d 712 (Tex. 2002).

the court entered judgment in favor of the purchasers.<sup>21</sup>

The agent appealed and, relying on the Texas Supreme Court's decision in *Karl & Kelly Co. v. McLerran*,<sup>22</sup> the Houston Court of Appeals reversed. The court of appeals held that because the agent acted only in the scope of his employment, he could not be held personally liable under the DTPA.<sup>23</sup>

The Texas Supreme Court reversed the judgment of the court of appeals. First, the supreme court observed that the agent personally participated in the sales at issue and personally made the alleged misrepresentations. The agent nevertheless argued that liability was foreclosed by the Texas Supreme Court's opinion in *McLerran*, which held that agents of a corporation are not liable for the company's misrepresentations unless there is a finding that the agents acted as the alter ego of the corporation.<sup>24</sup> The Texas Supreme Court rejected this argument, holding that *McLerran* had been implicitly overruled by subsequent supreme court decisions. The supreme court held that Texas' longstanding rule that a corporate agent is personally liable for his own fraudulent or tortious acts was applicable to the DTPA, and that an agent could thus be held personally liable for his own DTPA violations.<sup>25</sup> The agent also argued that the DTPA indemnity provision, Section 17.555, precluded individual liability for agents. Section 17.555 provides that a person against whom a DTPA action has been brought may seek contribution or indemnity from one who may have liability under common law for the damaging events that are the subject of the complaint.<sup>26</sup> The agent argued that the DTPA thus recognizes the common-law doctrine of respondeat superior. The Texas Supreme Court held that, "the language of Section 17.555 does not excuse an agent from being a party to a suit. Rather, the indemnification provision provides a means for an agent to recoup his loss from the employer if the employer is responsible for the consumer's harm."<sup>27</sup>

The Houston Court of Appeals considered the status of a borrower in *Gonzales v. American Title Company of Houston*.<sup>28</sup> The borrowers approached defendant Woodforest Bancshares seeking a \$200,000 loan to build a house. The borrowers told Woodforest that they could not afford more than \$1,500 per month in loan payments. Woodforest had previously entered into a wholesale mortgage agreement with defendant Resource Bankshares Mortgage Group ("RBMG") pursuant to which Woodforest, as broker, could sell home loans to RBMG as buyer. Woodforest was not required to broker all of its loans to RBMG, and RBMG

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21. *Id.* at 714-15.

22. *Karl & Kelly Co. v. McLerran*, 646 S.W.2d 174 (Tex. 1983) (per curiam).

23. *Miller*, 90 S.W.3d at 715.

24. *McLerran*, 646 S.W.2d at 175.

25. *Miller*, 90 S.W.3d at 717.

26. DTPA § 17.555.

27. *Miller*, 90 S.W.3d at 718.

28. *Gonzales v. Am. Title Co. of Houston*, 104 S.W.3d 588 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

was not required to buy all loan contracts Woodforest submitted to RBMG.<sup>29</sup>

A few months after the loan closed, the borrowers received notice that Woodforest had transferred its interest in their loan to RBMG. The borrowers then received notice that their monthly note payment would be \$1,608. The following year, RBMG notified the borrowers that their reserve escrow account was below requirements. RBMG gave the borrowers the choice of paying the deficiency in a lump sum or increasing their monthly payments for twelve months. The borrowers refused to pay the increased amount, and when foreclosure was threatened they sued, seeking damages and an injunction to prevent foreclosure. The borrowers' claims were based upon actions of Woodforest and the title company that conducted the loan closing and issued a title policy.<sup>30</sup>

The trial court granted summary judgment in favor of the defendants and the Houston Court of Appeals affirmed. Addressing the DTPA claims against RBMG, the court held that there was not a consumer relationship between the borrowers and RBMG during the time when the borrowers' complaints arose. RBMG was only a buyer of the borrowers' note and had no contact with the borrowers until it purchased the note after the loan was consummated.<sup>31</sup>

#### 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.<sup>32</sup>

##### A. LAUNDRY LIST CLAIMS

DTPA Section 17.46(b) contains, in twenty-seven subparts, a nonexclusive list of actions that constitute "false, misleading or deceptive acts" under the statute.<sup>33</sup> Plaintiffs invoking these "laundry list" claims are generally not required to prove or plead the defendant's state of mind or intent to deceive.<sup>34</sup> Nor have plaintiffs always been required to show that they relied on the enumerated deceptions.<sup>35</sup> Several significant cases involving laundry list claims were decided during the Survey period.

The plaintiffs in *Miller v. Keyser*<sup>36</sup> sued the builder of their homes, as well as the builder's owner and the builder's agent for fraud, misrepresen-

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29. *Id.* at 591-92.

30. *Id.* at 591-92.

31. *Id.* at 595.

32. DTPA § 17.50(a)(1)-(3).

33. *Id.* § 17.466(b)(1)-(27).

34. *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).

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

36. *Miller v. Keyser*, 90 S.W.3d 712 (Tex. 2002).

tation and DTPA violations. The trial court entered judgment in favor of the homeowners against the agent, who appealed arguing that he should not be held liable because he did not actually know that the representations were false. The Houston Court of Appeals reversed the judgment and the plaintiffs petitioned for review. Holding that the DTPA does not require a consumer to prove intent to make a misrepresentation, the Texas Supreme Court reversed and remanded, stating that the DTPA was designed to provide consumers with a remedy for false, misleading and deceptive business practices “‘without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit.’”<sup>37</sup> Thus, misrepresentations that may not be actionable under common law fraud may be actionable under the DTPA because the DTPA does not require the consumer to prove that the defendant acted knowingly or intentionally.<sup>38</sup>

In *Branton v. Wood*,<sup>39</sup> home purchasers brought an action against the seller after the home washed off its foundation during a flood. The purchasers alleged that the seller’s representation that the house was completely repaired after a prior flood was false because the house would not have washed off its foundation but for the seller’s failure to repair rotten wood after the prior flood. The trial court granted the seller’s motion for partial summary judgment on the DTPA claims and the Corpus Christi Court of Appeals affirmed. In response to the seller’s motion, the purchasers had offered an expert report stating that, “[i]n inspecting further, it became evident to me that the structure had sustained previous water damage to the plates allowing them to rot and weaken so much as to allow the structure to lift and float off the slab.”<sup>40</sup> The court of appeals held that the expert report was not competent summary judgment evidence because there was no factual support underlying the opinion that the damage was caused by previous water damage. The court further held that the report did not support the purchasers’ DTPA claim that the home was not properly repaired after the prior flood. The expert did not conclude that the plates were not repaired or not properly repaired after the prior flood and did not discount other plausible causes for the rot. The court held that without such evidence, it could not conclude that the seller’s representation of proper repair was false, misleading, or deceptive.<sup>41</sup>

*Allison v. Fire Insurance Exchange*<sup>42</sup> arose from water damage and resulting mold contamination to a home. The homeowners were unhappy with their insurance company’s handling of the problem and sued, alleging breach of contract, breach of the duty of good faith and fair dealing, negligence, and DTPA violations. Regarding the DTPA claims, the

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37. *Id.* at 716 (quoting *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980)).

38. *Id.*

39. *Branton v. Wood*, 100 S.W.3d 645 (Tex. App.—Corpus Christi 2003, no pet.).

40. *Id.* at 648.

41. *Id.*

42. *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227 (Tex. App.—Austin 2002, no pet.).



homeowners alleged that an agent of the insurer misrepresented to them that "complete" plumbing tests had been performed on the home even though the agent "secretly" thought that there might be other leaks. At trial, the plumber who performed the tests testified that the tests performed were "complete" according to his company's procedures. There was also evidence that the agent's concerns were not "secret," as despite the lack of leaks located by the plumbing tests, she contacted a civil engineer to perform further analysis. Nevertheless, the jury found in favor of the homeowners on their DTPA claims.<sup>43</sup> The insurance company appealed and the Austin Court of Appeals affirmed. The court held that the jury could have reasonably concluded that the agent's characterization of the test was a misrepresentation and that the homeowners' reliance on the letter caused further damages to the house.<sup>44</sup>

The plaintiff in *Aiken v. Hancock*<sup>45</sup> sued his former attorney raising claims of breach of fiduciary duty, breach of contract, negligence, gross negligence, and DTPA violations and seeking equitable fee forfeiture. Aiken alleged that the attorney (1) falsely represented that he was prepared to go forward with Aiken's case; (2) failed to reveal that he was not prepared to go forward and try the case; (3) falsely represented that an expert witness was prepared to testify; and (4) failed to reveal that the expert was not prepared to testify.<sup>46</sup> Aiken argued that these statements were express misrepresentations and constituted unconscionable actions. The attorney moved for summary judgment on the DTPA claims, arguing that Aiken's claims were properly characterized as a single legal malpractice claim.<sup>47</sup>

The trial court entered summary judgment in favor of the attorney and the San Antonio Court of Appeals affirmed. The court held that at most, the statements constituted negligent conduct, not deceptive conduct. Citing *Latham v. Castillo*,<sup>48</sup> the court held that the allegations did not support an independent cause of action under the DTPA separate from a legal malpractice cause of action. Since Texas law does not permit a plaintiff to fracture a legal malpractice claim, summary judgment on the DTPA claim was proper.<sup>49</sup>

#### B. 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.<sup>50</sup> To be actionable under the DTPA, an implied warranty "must be recog-

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43. *Id.* at 234-37.

44. *Id.* at 245, 251.

45. *Aiken v. Hancock*, 115 S.W.3d 26 (Tex. App.—San Antonio 2003, pet. denied).

46. *Id.* at 24.

47. *Id.* at 28.

48. *Latham v. Castillo*, 972 S.W.2d 66 (Tex. 1998).

49. *Aiken*, 115 S.W.3d at 29.

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

nized by the common law or created by statute.”<sup>51</sup> The Dallas Court of Appeals examined this issue in *Anthony Equipment Corp. v. Irwin Steel Erectors, Inc.*<sup>52</sup> In that case, which arose from an accident during a two-crane lift of a steel truss, a steel erection subcontractor sued the lessor of a crane used in the lift for negligence, breach of contract, breach of implied warranty, and knowing violations of the DTPA. After a jury found in favor of the subcontractor, the lessor moved for judgment notwithstanding the verdict on the issue of implied warranty, arguing that there was no implied warranty under the facts of the case. The trial court granted the motion.<sup>53</sup>

The Dallas Court of Appeals affirmed. Citing the Texas Supreme Court’s opinion in *Rocky Mountain Helicopters, Inc. v. Lubbock County Hospital District*,<sup>54</sup> the court first acknowledged that an implied warranty for services exists only when the services relate to the repair or modification of existing tangible goods or when public policy mandates. Here, the crane owner provided the crane services to assist in the tandem lift, not to repair or modify tangible goods or property. The court held that public policy did not mandate imposing an implied warranty because other adequate remedies were available to the subcontractor. Because there was no implied warranty under the circumstances of the case, a directed verdict was appropriate against the subcontractor.<sup>55</sup>

*United States Tire-Tech, Inc. v. Boeran, B.V.*<sup>56</sup> involved the question of whether privity of contract is required for a breach of express warranty claim. Boeran is a wholesale distributor of tire-liner products. Boeran purchased the product from Marketing Ventures, Inc. (“MVI”), whom it assumed was the manufacturer, and had no contact with the true manufacturer, Tire-Tech, until Boeran received numerous complaints about the product and filed suit. The jury found that both Tire-Tech and MVI had breached both an express warranty and an implied warranty of merchantability, and the court rendered judgment against MVI on all theories. However, the judgment stated that Tire-Tech was liable for breach of an express warranty but not breach of an implied warranty. Only Tire-Tech appealed arguing in relevant part that Boeran could not prevail on a DTPA claim based upon a breach of express warranty in the absence of privity of contract between Boeran and Tire-Tech.<sup>57</sup>

After examining numerous cases from other courts of appeals, the Houston Court of Appeals held that privity of contract is not required to

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

52. *Anthony Equip. Corp. v. Irwin Steel Erectors, Inc.*, 115 S.W.3d 191 (Tex. App.—Dallas 2003, pet. dismiss’d).

53. *Id.* at 197-98.

54. *Rocky Mountain Helicopters, Inc. v. Lubbock County Hosp. Dist.*, 987 S.W.2d 50 (Tex. 1998).

55. *Anthony Equip. Corp.*, 115 S.W.3d at 208-09.

56. *U.S. Tire-Tech, Inc. v. Boeran, B.V.*, 110 S.W.3d 194 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

57. *Id.* at 196-97.

sustain a breach of express warranty claim for purely economic losses. The court reasoned that “[t]o hold otherwise could allow unscrupulous manufacturers who make public representations about their product’s performance to remain insulated from express-warranty liability if consumers did not purchase the product directly from them.”<sup>58</sup>

The plaintiff in *Elliott v. Kraft Foods North America, Inc.*<sup>59</sup> sued Kraft Foods alleging that she had bitten into a hard object while eating Grape Nuts cereal manufactured by Kraft. She testified that she found rocks in the cereal. The trial court entered judgment in favor of the plaintiff but failed to award her attorneys’ fees. The plaintiff appealed, arguing that she was entitled to attorneys’ fees under the DTPA because she had “presented conclusive evidence that Kraft had breached [the] implied warranty of merchantability.”<sup>60</sup>

To show a breach of the implied warranty of merchantability, a plaintiff must demonstrate that goods are not fit and that they are unfit because they lack something necessary for adequacy.<sup>61</sup> Because the trial court had failed to file the requested findings of fact and conclusions of law, the Houston Court of Appeals had to imply findings from the trial court’s judgment. The court held that the judgment against Kraft necessarily implied that the trial court found there was a rock in the cereal due to no fault of the plaintiff and that the rock caused the plaintiff injury. Based upon these implied findings, the court held that there was no evidence in the record to support the trial court’s implied finding that Kraft did not breach the implied warranty of merchantability and, to the contrary, there was conclusive evidence that Kraft had breached the warranty.<sup>62</sup> The court also held, based upon expert testimony from a dentist, that the record conclusively established that the breach of the warranty was a producing cause of the plaintiff’s injuries. As the plaintiff had conclusively established the elements of a DTPA claim based upon breach of the implied warranty of merchantability, she was entitled to an award of attorneys’ fees.<sup>63</sup>

### C. UNCONSCIONABILITY

DTPA Section 17.45(5) defines an “unconscionable action or course of action” as “an act or practice which, to a consumer’s detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the

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58. *Id.* at 198.

59. *Elliott v. Kraft Foods N. Am., Inc.*, 118 S.W.3d 50 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

60. *Id.* at 53.

61. *Id.* at 56-57.

62. *Id.* at 58.

63. *Id.* at 57-59; see also *Cont’l Dredging, Inc. v. De-Kaizered, Inc.*, 120 S.W.3d 380, 391-92 (Tex. App.—Texarkana 2003, pet. filed) (holding that a dredging company’s failure to dredge a channel to a uniform thirty-six feet as promised constituted a breach of the implied warranty to perform in a good and workmanlike manner).

consumer to a grossly unfair degree.”<sup>64</sup> In *Bennett v. Bank United*,<sup>65</sup> a home buyer argued that Bank United’s policies provided her the opportunity to cease paying PMI once she had twenty-percent equity in her home and that the defendants’ refusal to discontinue the PMI requirement was unconscionable. The Austin Court of Appeals first noted that the buyer had executed a deed of trust providing for PMI premium reimbursement until the loan was paid in full. Second, although Bank United told the buyer that it had a policy that would permit canceling a mortgagor’s requirement of paying PMI premiums, by the time the buyer had sufficient equity the mortgage was held by First Boston Mortgage, which did not have such a policy. Finally, the court recognized that requiring buyers to pay PMI premiums for the lender was standard practice in the industry. Based upon these facts, the court held that no unconscionable action occurred.<sup>66</sup>

In *United States Tire-Tech, Inc. v. Boeran, B.V.*,<sup>67</sup> a tire sealant distributor sued the manufacturer, with whom the distributor had never dealt directly, for DTPA violations arising from the manufacturer’s allegedly unconscionable actions. The Houston Court of Appeals held that an unconscionable act is only actionable under the DTPA if it is “committed in connection with the plaintiff’s transaction in goods or services.”<sup>68</sup> The court affirmed the trial court’s decision not to grant the wholesaler a jury question on unconscionability because the wholesaler was not involved in a consumer transaction with the manufacturer.<sup>69</sup>

## V. DETERMINING THE MEASURE OF DAMAGES

A prevailing plaintiff in a DTPA action may recover economic damages.<sup>70</sup> If the trier of fact finds that the defendant acted “knowingly,” the plaintiff may also recover damages for mental anguish and additional statutory damages up to three times the amount of economic damages.<sup>71</sup>

### A. REQUIREMENT OF “KNOWING CONDUCT”

To act “knowingly” is to act with the actual awareness of the falsity, unfairness, or deception of the conduct in question.<sup>72</sup> “Actual awareness” means more than merely knowing what one is doing; rather it means knowing that what one is doing is false, misleading, or deceptive

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64. DTPA § 17.45(s).

65. *Bennett v. Bank United*, 114 S.W.3d 75 (Tex. App.—Austin 2003, no pet. h.).

66. *Id.* at 82.

67. *U.S. Tire-Tech, Inc. v. Boeran, B.V.*, 110 S.W.3d 194 (Tex. App.—Houston [1st Dist.] 2003, no pet. h.).

68. *Id.* at 202.

69. *Id.* at 202-03; *see also* *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 251 (Tex. App.—Austin 2002, no pet.) (finding no evidence to support a jury finding of unconscionable conduct because the only allegation was of a simple misrepresentation and not every misrepresentation constitutes unconscionable conduct).

70. DTPA § 17.50(b)(1).

71. *Id.*

72. DTPA § 17.45(9).

and deciding to do it anyway. Even conscious indifference towards the consumer's rights or welfare is insufficient.<sup>73</sup>

In *Allison v. Fire Insurance Exchange*,<sup>74</sup> the Austin Court of Appeals examined the sufficiency of the evidence that the defendant's conduct was done knowingly. The plaintiffs were homeowners who sued their home insurer after being unhappy with the insurer's handling of claims for water damage and mold remediation. The jury found that the insurer had acted knowingly. On appeal, Fire Insurance Exchange argued that the evidence was legally insufficient to support the jury's finding of knowing behavior. The Austin Court of Appeals agreed. The court examined the record and held that there was no evidence that the insurer was more than consciously indifferent to the homeowners' rights and welfare. The court thus reversed the jury's award of punitive damages.<sup>75</sup>

### B. MENTAL ANGUISH DAMAGES

The Fort Worth Court of Appeals considered the evidence of mental anguish necessary to survive a "no evidence" summary judgment motion in *Anderson v. Long*.<sup>76</sup> Anderson experienced problems with a customized horse trailer she had purchased from the Longs. She sued the Longs and the manufacturer, alleging breach of contract, negligence, breach of warranty, and DTPA violations. The trial court granted the Longs' motion for summary judgment on the breach of warranty and DTPA claims; Anderson appealed, arguing that she had produced evidence of false, misleading, or deceptive practices that were the producing cause of mental anguish damages.<sup>77</sup> "To support her mental anguish claim, Anderson averred that the trailer had been the source of extreme fright, constant worry, extreme apprehension, and nervousness on a daily basis for nearly the entire time she had owned it."<sup>78</sup> She further alleged that she was frightened that the trailer would burn and that the experience had caused her to lose sleep and had been extremely nerve racking and extremely embarrassing on a daily basis. The Fort Worth Court of Appeals held that a plaintiff must demonstrate emotional distress that caused a substantial disruption in her daily routine and that amounts to more than mere worry, anxiety, vexation, embarrassment, or anger. The court held that Anderson's evidence did not reach this standard and that summary judgment in favor of the Longs therefore was appropriate.<sup>79</sup>

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73. See *St. Paul Surplus Lines Ins. Co. v. Dal-Worth Tank Co.*, 974 S.W.2d 51, 53-54 (Tex. 1998).

74. *Allison*, 98 S.W.3d at 227.

75. *Id.* at 257-58.

76. *Anderson v. Long*, 118 S.W.3d 806 (Tex. App.—Fort Worth 2003, no pet.).

77. *Id.* at 808-09.

78. *Id.* at 811.

79. *Id.*

## 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.<sup>80</sup> This is only partially correct, since several DTPA provisions expressly require proof of intentional conduct.<sup>81</sup> The courts, the Texas Legislature, and the United States Congress have also carved out exemptions from the DTPA’s reach.<sup>82</sup>

### A. PREEMPTION AND EXEMPTION FROM THE DTPA

Certain 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. *The Federal Communications Act of 1934*

Section 332 of the Federal Communications Act of 1934 (the “FCC Act”) provides in relevant part that “no State or local government shall have any authority to regulate the . . . rates charged by any commercial mobile service.”<sup>83</sup> This provision has been interpreted to prohibit state courts from adjudicating state law claims if the court would be required to determine the reasonableness of a set rate or to set a prospective charge for services.<sup>84</sup> The plaintiffs in *Bryceland v. AT&T Corp.*<sup>85</sup> were subscribers of AT&T’s digital service who sued AT&T for fraud in the inducement, negligent misrepresentation, breach of contract, and DTPA violations. AT&T moved for summary judgment, arguing that the FCC Act preempted all of the claims because any award of damages would amount to prohibited indirect rate regulation. AT&T argued that the claims “would require the factfinder to determine the quality of services provided and, in doing so, it would necessarily determine if AT&T has adequate infrastructure to operate a wireless service and to set the value of the provided services.”<sup>86</sup> The trial court granted the motion and the plaintiffs appealed.<sup>87</sup>

The Dallas Court of Appeals reversed. Following the analysis used by the FCC, the court held that a carrier that charged a reasonable rate for its services might nevertheless be liable for damages if it misrepresented its rates or how those rates would apply or misrepresented or failed to

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80. 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 dismissed).

81. See, e.g., DTPA § 17.46(b)(9), (10), (13), (16), (17), (24).

82. See, e.g., *Id.* § 17.49.

83. Federal Communications Act of 1934, 47 U.S.C. § 332(c)(3)(A) (2001).

84. *Bryceland v. AT&T Corp.*, 114 S.W.3d 552, 554 (Tex. App.—Dallas 2002, pet. filed) (citing *In re Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17021 ¶ 39, 2000 WL 1140570 ¶ 39 (2000)).

85. *Id.*

86. *Id.* at 553.

87. *Id.*

disclose material terms and conditions on its services.<sup>88</sup> The court then reviewed the factual allegations in the plaintiffs' petition and concluded that adjudicating the allegations would not require the trial court to prescribe, set, or fix a reasonable previous or prospective rate. Rather, the trial court would merely determine the difference between the value of what AT&T promised and what the plaintiffs received. Section 332 thus did not preempt the plaintiffs' claims.<sup>89</sup>

## 2. *The Carmack Amendment*

The Carmack Amendment governs a motor carrier's liability to a shipper, consignor, holder of a bill of lading, or buyer for the loss of, or damage to, an interstate shipment of goods.<sup>90</sup> The Amendment subjects the motor carrier to absolute liability for actual loss or injury to property.<sup>91</sup> If a transaction is governed by the Amendment, state statutory and common-law claims involving the transaction are preempted.<sup>92</sup> The plaintiff in *Hoskins v. Bekins Van Lines*<sup>93</sup> sued a moving company under various theories including the DTPA for damage to her personal belongings during a move from Texas to Virginia. The moving company moved for summary judgment, arguing that such claims were completely preempted by the Carmack Amendment. The Fifth Circuit recognized that in *Beers v. North American Van Lines, Inc.*,<sup>94</sup> it had held that the Carmack Amendment did not completely preempt that plaintiff's claims against a moving company. The court then held that it was no longer bound by the holding in *Beers* because the Supreme Court's decision in *Beneficial National Bank v. Anderson*<sup>95</sup> had expressly overruled the preemption analysis used in *Beers*.<sup>96</sup> The court then turned to an analysis of whether Congress intended a shipper's remedy under the Carmack Amendment to be exclusive. After examining prior Supreme Court and Fifth Circuit decisions discussing the reach of the Carmack Amendment, the court held that Congress did intend for the Carmack Amendment to provide a shipper's exclusive cause of action for loss or damages to goods during interstate transportation and thus, state law claims arising from such transportation were completely preempted.<sup>97</sup>

## 3. *Federal Insecticide, Fungicide and Rodenticide Act*

The Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA")<sup>98</sup>

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88. *Id.* at 555 (citing *In re Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17021 ¶ 27, WL 1140570 ¶ 27 (2000)).

89. *Id.*

90. 49 U.S.C. § 14706 (2000).

91. *Missouri Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 137 (1964).

92. *Accura Sys., Inc. v. Watkins Motor Lines, Inc.*, 98 F.3d 874, 876 (5th Cir. 1996).

93. *Hoskins v. Bekins Van Lines*, 343 F.3d 769 (5th Cir. 2003).

94. *Beers v. N. Am. Van Lines, Inc.*, 836 F.2d 910, 912 (5th Cir. 1988).

95. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 123 S. Ct. 2058 (2003).

96. *Hoskins*, 343 F.3d at 775.

97. *Id.* at 776-78.

98. Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y (2000).

regulates the content and format of labeling for herbicides and requires that all herbicides be registered with the Environmental Protection Agency.<sup>99</sup> FIFRA preempts common-law tort suits that are based solely upon claims relating to labeling.<sup>100</sup> In *Dow Agrosciences L.L.C. v. Bates*,<sup>101</sup> an herbicide manufacturer sought a declaratory judgment against Texas peanut farmers who were threatening to sue it for crop damages caused by its herbicide. In a published opinion that was discussed in last year's Survey,<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup> The peanut farmers appealed and the Fifth Circuit affirmed. The court held that because the farmers' breach of warranty and DTPA claims were based on allegedly misleading comments made by Dow retailers and the farmers failed to establish a genuine issue of material fact that the comments differed from the herbicide's label, the claims were preempted and summary judgment was appropriate.<sup>105</sup>

#### 4. *National Traffic and Motor Vehicle Safety Act*

In *Shields v. Bridgestone/Firestone, Inc.*,<sup>106</sup> the United States District Court for the Eastern District of Texas, Beaumont Division, was called upon to determine whether the National Traffic and Motor Vehicle Safety Act<sup>107</sup> preempted DTPA claims arising from alleged problems with Bridgestone/Firestone tires. The Act expressly states that remedies under the Act are in addition to other rights and remedies under state or federal law.<sup>108</sup> Thus, by its express terms, the Act does not preempt state law claims.<sup>109</sup>

### B. CAUSATION

Liability under the DTPA is limited to conduct that is a producing cause of the plaintiff's damages.<sup>110</sup> Unlike the doctrine of proximate

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99. *Quest Chem. Corp. v. Elam*, 898 S.W.2d 819, 820 (Tex. 1995).

100. *Id.*

101. *Dow Agrosciences L.L.C. v. Bates*, 332 F.3d 323 (5th Cir. 2003).

102. Michael Ferrill & Leslie Sara Hyman, *Deceptive Trade Practices—Consumer Protection Act*, 56 SMU L. REV. 1481, 1501 (2003) (discussing *Dow Agrosciences L.L.C. v. Bates*, 205 F. Supp. 2d 623 (N.D. Tex. 2002)).

103. *Dow*, 205 F. Supp. 2d at 627.

104. *Id.* (citing *Andrus v. AgrEvo USA Co.*, 178 F.3d 395, 399 (5th Cir. 1999)).

105. *Bates*, 332 F.3d at 331-32.

106. *Shields v. Bridgestone/Firestone, Inc.*, 232 F. Supp. 2d 715 (E.D. Tex. 2002).

107. National Traffic and Motor Vehicle Safety Act, 49 U.S.C. §§ 30101-30170 (2000).

108. 49 U.S.C. § 30103(d).

109. 232 F. Supp. 2d at 720.

110. *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995).



cause, producing cause does not require that the injury be foreseeable.<sup>111</sup> "Producing cause" has been defined as "an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of."<sup>112</sup> When determining whether the actions complained of are a producing cause of a plaintiff's damages, courts look to whether the alleged cause is a substantial factor that brings about the plaintiff's injury, without which the injury would not have occurred.<sup>113</sup>

The San Antonio Court of Appeals applied the concept of producing cause in *Smith v. Hennessey & Associates, Inc.*,<sup>114</sup> which arose from the sale of a home. The home had been purchased by the plaintiff's mother. At the time of the original purchase, Hennessey & Associates appraised the property and represented to the purchaser's lender that the house consisted of 3,000 square feet. When the plaintiff later listed the house for sale, another appraisal was done, which revealed that the house consisted of only 2,552 square feet. The plaintiff sued Hennessey, alleging negligence, breach of contract, and violations of the DTPA. The trial court rendered summary judgment in favor of Hennessey on all claims and the plaintiff appealed.<sup>115</sup>

The San Antonio Court of Appeals affirmed. The court held that the plaintiff failed to present evidence that her mother saw, much less relied upon, the Hennessey appraisal. Nor did the plaintiff present evidence that her mother obtained the home loan based upon representations made by Hennessey or that she suffered damages as a result of any representation made by Hennessey. In fact, the plaintiff even failed to attach a copy of the Hennessey appraisal to her summary judgment response. In the absence of any evidence that the allegedly incorrect appraisal caused any damages, summary judgment was proper.<sup>116</sup>

The plaintiff in *Bennett v. Bank United*<sup>117</sup> alleged that lenders violated the DTPA by failing to provide her with written notice of her possible right to terminate PMI and stop reimbursing the premiums. The defendants maintained that they were entitled to summary judgment on this claim even assuming that the alleged failure to notify was true. The trial court granted summary judgment and the Austin Court of Appeals affirmed, holding that since the buyer had expressly agreed in the deed of trust to pay the PMI premiums until the note was paid in full, "she could suffer no injury from having to live up to her part of the bargain."<sup>118</sup>

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

112. *Union Pump Co. v. Albritton*, 898 S.W.2d 773, 775 (Tex. 1995).

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

114. *Smith v. Hennessey & Assocs.*, 103 S.W.3d 567 (Tex. App.—San Antonio 2003, no pet.).

115. *Id.* at 568-69.

116. *Id.* at 569-70.

117. *Bennett*, 114 S.W.3d at 75.

118. *Id.* at 82-83.

C. 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.<sup>119</sup> During the Survey period, two cases applied this law to the facts before them.

The plaintiff in *Continental Dredging, Inc. v. De-Kaizered, Inc.*<sup>120</sup> was a dredging company that contracted with a dock owner to dredge to a uniform depth of thirty-six feet in front of a dock. The plaintiff sued the dock owner seeking to compel payment on the contract and the dock owner counter-claimed for breach of contract, breach of warranty, and DTPA violations arising from the dock owner's allegation that the dredging company had not, in fact, excavated to a uniform thirty-six feet. The jury awarded the dredging company damages offset by damages awarded to the dock owner on its DTPA claim and both parties appealed. Regarding the dock owner's DTPA claim, the Texarkana Court of Appeals held that all of the alleged misrepresentations were in substance alleged breaches of the terms of the contract. The alleged misrepresentations therefore gave rise only to a breach of contract claim, not a DTPA claim.<sup>121</sup>

The plaintiff in *Wayne Duddleston, Inc. v. Highland Insurance Co.*<sup>122</sup> sued insurance companies from which it had purchased worker's compensation insurance alleging that they had inappropriately settled and paid several claims asserted against the plaintiff by its employees. The plaintiff included a DTPA claim based upon the defendants' alleged misrepresentations about the standard and quality of the insurance services, the rights and remedies that the policies provided, and upon the defendants' alleged failure to disclose information concerning the services and benefits. The insurance companies filed a motion for summary judgment contending that there was no evidence of misrepresentations and that deposition testimony conclusively established that the plaintiff could not prevail. The trial court granted the motion.<sup>123</sup>

The Houston Court of Appeals affirmed. The court found that the alleged misrepresentations stemmed from defendants' alleged failure to comply with the terms of the insurance contracts. Such allegations may give rise to a breach of contract claim, but cannot form the basis of a DTPA claim.<sup>124</sup>

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119. *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).

120. *Cont'l Dredging, Inc.*, 120 S.W.3d at 380.

121. *Id.* at 389-90.

122. *Wayne Duddleston, Inc. v. Highland Ins. Co.*, 110 S.W.3d 85 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

123. *Id.* at 89-91.

124. *Id.* at 92 (citing *Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 14 (Tex. 1996)).

## VII. CONCLUSION

This year's DTPA cases continue trends observed in earlier surveys. Decisions involving consumer status,<sup>125</sup> and the defendant's relationship to the transaction forming the basis of the plaintiff's claim,<sup>126</sup> continue to explore the outer contours of the statute's reach. Statutory exemptions and preemption doctrines similarly place limits on the DTPA's availability,<sup>127</sup> as do cases elaborating on the principle that a "mere breach of contract" cannot be converted into a DTPA claim through artful pleading.<sup>128</sup>

With the exception of the 2003 amendment creating Section 17.426<sup>129</sup> (which surely ranks as one of the more peculiar pieces of special interest legislation tacked onto the DTPA), and a minority of appellate decisions where the plaintiff's claims survived, the past year was not a kind one to DTPA plaintiffs. Of the surveyed cases, two-thirds were decided in the defendant's favor. Equally telling, this year's total of nineteen reported cases is well below the average of thirty-four cases annually reported in the six preceding surveys. On the legislative front, the 2003 amendments appear designed to erect additional obstacles for DTPA class actions and attorney general suits seeking civil penalties. Thirty years after the statute's original enactment, and after several earlier periods of expansion and contraction of the DTPA's reach, the current trend seems to be one of continuing retrenchment.

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125. E.g., *Great Plains*, cited *supra* notes 11-13 and accompanying text; *Brittan*, cited *supra* notes 14-16 and accompanying text; *Bennett*, cited *supra* notes 17-19 and accompanying text.

126. E.g., *Miller*, cited *supra* notes 20-27 and accompanying text; *Gonzales*, cited *supra* notes 28-34 and accompanying text.

127. See *supra* text accompanying notes 83-109.

128. E.g., *Continental Dredging*, cited *supra* notes 120-21; *Wayne Duddelston, Inc.*, cited *supra* notes 122-24.

129. See *supra* text accompanying notes 3-4.