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## Deceptive Trade Practices - Consumer Protection Act

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# DECEPTIVE TRADE PRACTICES— CONSUMER PROTECTION ACT

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## I. INTRODUCTION

THE Texas Deceptive Trade Practices—Consumer Protection Act (“DTPA”)<sup>1</sup> was enacted in 1973 “to protect consumers against false, misleading and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.”<sup>2</sup> Although the Texas Legislature enacted two sets of amendments in 2001 and additional amendments in 2003, there still are no reported decisions addressing those changes.

This Survey covers significant developments under the DTPA from November 1, 2003 through October 31, 2004. Noteworthy decisions during the Survey period address consumer status, laundry list violations, damages, and reliance.

## II. CONSUMER STATUS

In order to bring a DTPA claim, a plaintiff must be a “consumer” as that term is defined by the statute.<sup>3</sup> To qualify as a consumer, a plaintiff must be an individual who seeks or acquires by purchase or lease goods or services; those goods or services must form the basis of the plaintiff’s complaint.<sup>4</sup> Consumer status under the DTPA is dependent upon showing that the plaintiff’s relationship to the transaction entitles him to relief.<sup>5</sup> Whether a plaintiff qualifies for such status is a question of law when the facts underlying the determination of consumer status are undisputed.<sup>6</sup>

The assignability of a DTPA claim based on the breach of expressed warranty is an issue that was discussed in Summer 2002 Survey in *PPG Industries, Inc. v. JMB/Houston Centers Partners Ltd. Partnership*.<sup>7</sup> The original building owner hired a window manufacturer to install windows in the building. One-fourth of the windows were defective, and the manufacturer was required to replace them pursuant to a warranty. Several years later, the original owner sold the building and assigned his warranty and DTPA claims to the purchaser. When more window problems developed, the new owner brought claims against the window manufacturer. The trial court entered a jury verdict in favor of the new owner and the

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1. TEX. BUS. & COM. CODE ANN. §§ 17.41 et seq. (Vernon 2002 & Supp. 2004-05).

2. *Id.* § 17.44(a).

3. *See id.* § 17.50.

4. *Id.* § 17.45(4); *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 351-52 (Tex. 1987) (citing *Sherman Simon Enter., Inc. v. Lorae Servs. Corp.*, 724 S.W.2d 13, 15 (Tex. 1987); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 539 (Tex. 1981)).

5. *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).

6. *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 406 (Tex. App.—Houston [14th Dist.] 1997, writ. *dism’d* by *agr.*).

7. 146 S.W.3d 79 (Tex. 2004).

Houston Court of Appeals affirmed the judgment, joining several other courts holding DTPA claims are assignable.<sup>8</sup>

The Texas Supreme Court reversed and remanded, holding that any DTPA claims that the original owner of the building had against the window manufacturer could not be assigned to the purchaser.<sup>9</sup> The court reviewed the history and goals of the DTPA, finding that the DTPA's primary goal is to protect consumers by encouraging them to bring consumer complaints.<sup>10</sup> The court reasoned that assigning DTPA claims would defeat the purpose of the statute, which is to encourage consumers to bring complaints themselves.<sup>11</sup> Allowing DTPA claims to be assigned, according to the court, would allow large companies to assert DTPA claims by stepping into the shoes of qualifying consumers.<sup>12</sup> First, the court found that the treble-damage provisions of the DTPA were intended to motivate consumers, not those considering litigation for commercial profit.<sup>13</sup> In the court's words, "the personal and punitive aspects of DTPA claims cannot be squared with a rule allowing them to be assigned as if they were mere property."<sup>14</sup> Additionally, consumers would be at a severe negotiating disadvantage to entrepreneurs willing to buy DTPA claims. Thus, allowing DTPA claims to be assigned could result in consumers being deceived twice.<sup>15</sup> Finally, the court reasoned that consumers may not be sophisticated enough to understand the claims they are assigning.<sup>16</sup> In the case of a general assignment included in contractual boilerplate language, consumers may not know they have DTPA claims when they assign them.<sup>17</sup>

The decision does not fully resolve the issue of assignability and survivability of DTPA claims. Although the court held that DTPA warranty claims may not be assigned, it specifically did not decide issues of survivability or assignment of other, "pure" DTPA claims.<sup>18</sup> The court also declined to decide whether DTPA claims survive to a consumer's heirs.<sup>19</sup> Additionally, the court held that its ruling does not prohibit equitable assignments, such as a contingent-fee interest assigned to a consumer's attorney.<sup>20</sup>

In *Roof Systems, Inc. v. Johns Manville Corporation*,<sup>21</sup> a roofing subcontractor sought consumer status in connection with a roofing project. Roof Systems received a subcontract to install roofs on two schools. The

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8. *Id.* at 83.

9. *Id.*

10. *Id.* at 84.

11. *Id.* at 85.

12. *Id.*

13. *Id.*

14. *Id.* at 82.

15. *Id.* at 86.

16. *Id.*

17. *Id.*

18. *Id.* at 91.

19. *Id.*

20. *Id.*

21. 130 S.W.3d 430 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.).

subcontract required Roof Systems to provide a ten-year warranty on the roof systems as a condition to final payment. Johns Manville Corporation (“JMC”) provided roofing materials for the schools. JMC asserted that it would not issue its “Gold Shield Roofing System Guaranty” unless the roof systems were installed by a JMC-certified installer; Roof Systems was not so certified. Roof Systems attempted to arrange for a JMC-certified installer to install the roof systems as a sub-subcontractor. The parties disagreed as to whether JMC approved this arrangement. It was undisputed that, prior to resolving the approval question, Roof Systems received written notice from the general contractor that it was contracting with another roofing company, because Roof Systems failed to provide a written warranty acknowledgment.<sup>22</sup>

JMC moved for summary judgment, arguing in part that Roof Systems was not a consumer, because its complaint was based upon JMC’s refusal to give a warranty and not based upon any goods or services sought or acquired from JMC. Roof Systems responded only that it sought to acquire roofing materials but did not address the second part of the test—whether the goods or services formed the basis of its complaint.<sup>23</sup> The trial court granted JMC’s motion, and on appeal, the Houston Court of Appeals held that “[a] refusal to sell goods or services is not a complaint based upon the goods or services for purposes of DTPA consumer status.”<sup>24</sup> Roof Systems’ DTPA claim was not based upon the terms or the breach of a warranty, but on JMC’s refusal to issue a warranty.<sup>25</sup> The court held that such a claim was not based upon any goods or services that Roof Systems sought or acquired from JMC and that as a matter of law Roof Systems was not a DTPA consumer.<sup>26</sup>

In *Jabri v. Alsayyed*,<sup>27</sup> the lessee of a convenience store sued the owner and his corporation for fraud and violations of the DTPA. The corporation operated Jabri’s convenience stores and leased one of its stores to Alsayyed. Jabri told Alsayyed that the store was an ongoing business with a good consumer base that would generate a profit of about \$10,000 per month. Alsayyed did not realize the profits promised by Jabri. The jury found that both Jabri and his corporation knowingly engaged in an unconscionable course of action that was a producing cause of damages to Alsayyed. The jury also found that Alsayyed suffered mental anguish damages as a result of Jabri and the corporation’s actions.<sup>28</sup>

On appeal, Jabri and his corporation argued that the trial court erred in upholding the jury’s award of damages because Alsayyed was not a

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22. *Id.* at 433-34.

23. *Id.* at 440.

24. *Id.*

25. *Id.*

26. *Id.* at 441. Roof Systems argued for the first time on appeal that the warranty was an integral, inseparable part of the roofing materials transaction, but the court refused to consider the argument because it was not raised before the trial court. *Id.* at 440 n.19.

27. 145 S.W.3d 660 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.).

28. *Id.* at 665.

DTPA consumer.<sup>29</sup> In evaluating Alsayyed's consumer status, the Houston Court of Appeals examined whether his objective was the purchase or lease of a good or service.<sup>30</sup> The DTPA excludes claims based on transactions conveying intangible property rights.<sup>31</sup> Appellants argued that Alsayyed's DTPA claim was based on his purchase of the goodwill of a business, which is an intangible.<sup>32</sup> The court disagreed, finding that Alsayyed not only purchased the store's goodwill, but also purchased the inventory and services associated with operating the store.<sup>33</sup> Because goods and services were an objective of the transaction, and not merely incidental to it, the court concluded that Alsayyed qualified for DTPA consumer status.<sup>34</sup>

### III. DECEPTIVE PRACTICES

In addition to establishing consumer status, a DTPA plaintiff must show that a "false, misleading, or deceptive act," breach of warranty, unconscionable action, or course of action occurred and that such conduct was the producing cause of the plaintiff's damage.<sup>35</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>36</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>37</sup> Several significant cases involving laundry list claims were decided during the Survey period.

The plaintiff in *Cendant Mobility Services Corp. v. Falconer*<sup>38</sup> purchased his home from a relocation company selling the property for the former owner. After a severe drought, the plaintiff saw damage to interior and exterior walls and floors as well as serious and widespread structural flaws. He sued the relocation company, alleging that it had failed to disclose that the home's foundation had shown evidence of past substantial movement and provided only a portion of the relevant engineer's report. The trial court entered judgment for the plaintiff on a jury verdict and the defendant appealed.<sup>39</sup>

The Texarkana Court of Appeals reversed and rendered a take nothing

29. *Id.* at 671.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)-(3) (Vernon 2003).

36. § 17.46(b).

37. *Pennington v. Singleton*, 606 S.W.2d 682, 689 (Tex. 1980). Several subsections do explicitly involve an element of scienter. *See, e.g.*, TEX. BUS. & COM. CODE ANN. §§ 17.46(b)(9), (10), (13), (16), (17) & (24) (Vernon 2002 & Supp. 2004-05).

38. 135 S.W.3d 349 (Tex. App.—Texarkana 2004, no pet. h.).

39. *Id.* at 350-51.

judgment.<sup>40</sup> The evidence at trial established that the defendant provided the plaintiff with a report that specifically stated, "The foundation shows evidence of a substantial amount of movement in the past."<sup>41</sup> Despite the plaintiff's admission that he received and initialed the relevant portions of the report, he maintained that he was misled by the seller's agent, because she selectively informed him of certain portions of the prior owners' disclosure and the report.<sup>42</sup> The court held that the seller's agent had no duty to explain the disclosures or reports and that the information in those documents was clear and unambiguous.<sup>43</sup> Absent evidence of fraud, the parties to a contract have an obligation to read what they sign. The plaintiff failed to present evidence of an affirmative misrepresentation, so the court held that there was no evidence that the seller failed to disclose information in an attempt to fraudulently induce the plaintiff to contract.<sup>44</sup>

In *Allstate Texas Lloyds v. Mason*,<sup>45</sup> homeowners sued Allstate Texas Lloyds claiming that foundation damage to the home was covered under their homeowners' insurance policy. Allstate hired an engineer who inspected the house and determined that the damage was caused not by a plumbing leak, which would have been covered, but by subsurface drainage problems. Allstate denied coverage and the homeowners sued for breach of contract, breach of the duty of good faith and fair dealing, unconscionable conduct, and DTPA violations. The jury found in favor of the homeowners and found that the DTPA violations had been committed knowingly and Allstate appealed.<sup>46</sup>

The Fort Worth Court of Appeals reversed the DTPA claim.<sup>47</sup> The court held that the engineer hired by Allstate conducted an adequate investigation and that, based on the evidence available to Allstate, there was no evidence suggesting that the engineer's investigation was unreliable or that Allstate acted unreasonably in relying on that investigation in denying coverage.<sup>48</sup> Thus, Allstate did not make any misrepresentations about coverage or unreasonably refuse to pay a claim, and the jury's verdict on the DTPA claim could not stand.<sup>49</sup>

*Barnett v. Coppell North Texas Court, Ltd.*<sup>50</sup> arose from an attempt to build a gymnastics facility. The Lewises contracted with Barnett to build the North Texas Family & Sports Complex and secured a loan from Leg-

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40. *Id.* at 351.

41. *Id.* at 352.

42. *Id.*

43. *Id.* at 354.

44. *Id.*; see also *E.R. Dupuis Concrete Co. v. Penn. Mut. Life Ins. Co.*, 137 S.W.3d 311, 323 (Tex. App.—Beaumont 2004, no pet. h.) (denying relief on claim of failure to disclose for lack of evidence).

45. 123 S.W.3d 690 (Tex. App.—Fort Worth 2003, no pet.).

46. *Id.* at 696-97.

47. *Id.* at 706.

48. *Id.* at 705-06.

49. *Id.* at 706-07.

50. 123 S.W.3d 804 (Tex. App.—Dallas 2003, pet. denied).

acy Bank on the project. Barnett began construction in the summer of 1998 and walked off the unfinished job during the summer of 1999. Legacy Bank sued the Lewises and Barnett and foreclosed on the property. The Lewises cross-claimed against Barnett who answered and filed a cross-claim against the Lewises. The Bank's claims were resolved and the Barnett/Lewis claims were tried to a jury, which found for the Lewises.<sup>51</sup>

Barnett appealed, arguing in part that the evidence was legally and factually insufficient to support the jury's findings of DTPA violations.<sup>52</sup> The Dallas Court of Appeals held that there was sufficient evidence of a DTPA violation.<sup>53</sup> Specifically, David Lewis testified that he relied on Barnett for the management and construction of the project, that "Barnett promised 'three times the facility for one and a half times the amount of money' in a more desirable location," and that Barnett led Lewis to believe that the contractual amount was "more than adequate to build this project."<sup>54</sup> Barnett guaranteed he would finish the project for a certain sum even if costs increased and represented that the building would be completed in six months and would be of "great" quality.<sup>55</sup> Lewis also testified that Barnett was hired because of his representations and that the Lewises relied on those representations.<sup>56</sup> The Dallas Court of Appeals affirmed the verdict on the DTPA claim, holding that the evidence supporting the jury findings was not so weak as to be clearly wrong and unjust.<sup>57</sup>

In *Rosas v. Hatz*,<sup>58</sup> home purchasers sued a realtor and the sellers for breach of contract, negligent misrepresentation, fraud, and DTPA violations after the purchasers discovered undisclosed electrical and plumbing problems. The realtor filed a motion for summary judgment raising both traditional and no evidence grounds. The trial court granted the motion on the DTPA claims without specifying the basis of its ruling.<sup>59</sup> The purchasers appealed, and the Waco Court of Appeals reversed and remanded.<sup>60</sup>

In response to the realtor's no evidence summary judgment motion, the purchasers produced evidence that included the realtor's deposition testimony.<sup>61</sup> According to the realtor's deposition, the renter of the home told the realtor "her water bills were high and she thought there was a leak."<sup>62</sup> The purchasers testified that the realtor did not disclose the information regarding the leak, but instead represented that the house had

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51. *Id.* at 813.

52. *Id.*

53. *Id.* at 822.

54. *Id.*

55. *Id.*

56. *Id.* at 823.

57. *Id.*

58. 147 S.W.3d 560 (Tex. App.—Waco 2004, no pet. h.).

59. *Id.* at 562.

60. *Id.* at 566.

61. *Id.*

62. *Id.*



been re-wired and fit with new plumbing. That statement, in combination with the evidence that the renter told the realtor of a leak, created a fact issue as to whether the realtor knew of the problems with the home and withheld that information.<sup>63</sup> The court of appeals held that the trial court erred in granting the summary judgment motion, because a fact issue existed as to whether the realtor's statements were affirmative representations of false information.<sup>64</sup>

The plaintiff in *Tolpo v. Decordova*<sup>65</sup> sued his former attorney for legal malpractice, breach of contract, fee forfeiture, and violations of the DTPA. Tolpo alleged that his attorney negligently prepared and drafted a contract for unimproved property. The attorney moved for summary judgment on the DTPA claims, arguing that Tolpo's claims were merely restated claims for legal malpractice.<sup>66</sup> The trial court entered summary judgment in favor of the attorney, and the Beaumont Court of Appeals affirmed.<sup>67</sup>

The attorney used a pre-printed form and followed the client's instructions in preparing the contract. The earnest money contract, however, did not address the issue of mineral reservations and easements.<sup>68</sup> The court found that Tolpo did not produce evidence that the attorney's actions failed to meet the standard of care for a reasonably prudent attorney.<sup>69</sup> Specifically, Tolpo did not contend that the attorney was aware that he was excluding a contract term or that the attorney affirmatively misrepresented the effect of the contract.<sup>70</sup> Tolpo's DTPA claim, according to the court, was merely a restated claim for legal malpractice.<sup>71</sup> The court held that negligent conduct might be legal malpractice but is not a violation of the DTPA.<sup>72</sup> Tolpo's allegations thus did not support an independent cause of action under the DTPA separate from a malpractice cause of action, and summary judgment on the DTPA claim was proper.<sup>73</sup>

*Willowbrook Foods, Inc. v. Grinnell Corp.*<sup>74</sup> arose from a fire originating in a turkey fryer that spread and damaged a turkey processing plant and its contents. The owners and operators of the processing plant brought an action for strict liability based on defective design, manufacture and marketing, breach of warranty, negligence, and DTPA violations. Emerson, a supplier of a component part of the turkey fryer, moved for summary judgment on the DTPA claims on the grounds that there was no evidence of any false, misleading, or deceptive act on Emer-

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63. *Id.*

64. *Id.* at 565-66.

65. 146 S.W.3d 678 (Tex. App.—Beaumont 2004, no pet. h.).

66. *Id.* at 679.

67. *Id.*

68. *Id.* at 681.

69. *Id.* at 683.

70. *Id.* at 685.

71. *Id.*

72. *Id.*

73. *Id.* at 681-83, 685.

74. 147 S.W.3d 492 (Tex. App.—San Antonio 2004, pet. filed).

son's part. The trial court granted the motion and the plaintiffs appealed.<sup>75</sup> The San Antonio Court of Appeals reviewed the plaintiffs' response to the summary judgment motion, in which the plaintiffs claimed that Emerson failed to advise or warn them of the proper use of its product.<sup>76</sup> For example, the plaintiffs alleged that Emerson did not recommend certain safety measures and failed to indicate the critical effects of sensor contamination.<sup>77</sup> The court found, however, that Emerson's mere nondisclosure of material information was not enough to establish an actionable DTPA claim. To establish a violation of the DTPA, the plaintiffs needed to show that Emerson had knowledge of the undisclosed information and intentionally withheld it. In addition, the plaintiffs were required to show that the information was withheld with the intent of inducing the consumer to engage in a transaction.<sup>78</sup> The court concluded that the plaintiffs were not entitled to recover damages for nondisclosure under the DTPA, because they failed to raise a genuine issue of material fact on the elements of the claim.<sup>79</sup>

## B. UNCONSCIONABILITY

Section 17.45(5) of the DTPA defines an "unconscionable action or course of action" as "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree."<sup>80</sup> In *Allstate Texas Lloyds v. Mason*,<sup>81</sup> Allstate sent its insureds a letter stating it would attempt to give them "every advantage" of their policy. The homeowners argued that Allstate was not interested granting the benefits due to them but instead was interested in performing a sham investigation of their foundation damage claim with the purpose of denying the claim regardless of the consequences.<sup>82</sup> The court held that Allstate did not perform an unreasonable investigation and did not violate its duty of good faith and fair dealing.<sup>83</sup> Accordingly, there was no evidence of unconscionable conduct on Allstate's part.<sup>84</sup>

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75. *Id.* at 495-96.

76. *Id.* at 506.

77. *Id.* at 507.

78. *Id.*

79. *Id.* at 495, 506-07.

80. TEX. BUS. & COM. CODE ANN. § 17.45(5) (Vernon 2002).

81. 123 S.W.3d 690 (Tex. App.—Fort Worth 2003, no pet.). *Allstate Texas Lloyds* was discussed in note 44 and the accompanying text.

82. *Id.* at 706.

83. *Id.*

84. *Id.*; see also *E.R. Dupuis Concrete Co. v. Penn Mut. Life Ins. Co.*, 137 S.W.3d 311 (Tex. App.—Beaumont 2004, no pet. h.) (holding that investor's allegations that insurance agents attended the same church as insured, obtained insured's trust by showing him how much money he could save through estate planning, and selected investments did not constitute unconscionable conduct).

C. INCORPORATION OF THE DTPA INTO THE TEXAS  
INSURANCE CODE

Several statutes incorporate sections of the DTPA or permit recovery for their violation via the DTPA.<sup>85</sup> One of the most frequently invoked of these “borrowing” statutes is article 21.21 of the Texas Insurance Code.<sup>86</sup> Although the DTPA laundry list is not exclusive for DTPA purposes, it is exclusive for deceptive practices claims under the Insurance Code.<sup>87</sup>

In *Perez v. Blue Cross Blue Shield of Texas, Inc.*,<sup>88</sup> the Austin Court of Appeals considered whether Blue Cross’s denial of coverage constituted sufficient evidence of a DTPA violation to survive summary judgment. Debra Perez applied to Blue Cross for an individual health insurance policy for herself and her son, Brandon. She stated on the application that her son had Down Syndrome but was very healthy. Blue Cross provided coverage for Debra but excluded Brandon because of his Down Syndrome. Brandon, through his mother, sued Blue Cross individually and on behalf of similarly situated individuals alleging that Blue Cross’s policy of denying coverage to healthy persons with Down Syndrome violated the Insurance Code and DTPA section 17.46(b)(12). The trial court granted summary judgment in favor of Blue Cross and Brandon appealed.<sup>89</sup> The Austin Court of Appeals affirmed, holding that section 17.46(b)(12) requires evidence that the defendant represented “that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law.”<sup>90</sup> Blue Cross made no promise of coverage in the application and instead specifically stated that coverage was subject to approval by Blue Cross.<sup>91</sup> Because there was no evidence that Blue Cross made any misrepresentations, the court affirmed summary judgment in favor of Blue Cross.<sup>92</sup>

*Dallas Fire Insurance Co. v. Texas Contractors Surety & Casualty Agency*<sup>93</sup> involved a dispute over commissions to be paid under an agency agreement. Texas Contractors Surety and Casualty Agency (“TCSCA”)

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85. 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 2004); TEX. PROP. CODE ANN. § 41.007 (Vernon 2000); TEX. PROP. CODE ANN. §§ 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 art. 21.21 (Vernon 1981); TEX. REV. CIV. STAT. art. 9020 (Vernon 1981); and TEX. TRANSP. CODE ANN. § 684.086 (Vernon 1999).

86. TEX. INS. CODE ANN. art. 21.21.

87. *Allstate Ins. Co. v. Watson*, 876 S.W.2d 145, 149 (Tex. 1994).

88. 127 S.W.3d 826 (Tex. App.—Austin 2003, pet. denied).

89. *Id.* at 829-30.

90. *Id.* at 835 (quoting TEX. BUS. & COM. CODE ANN. § 17.46(b)(12) (Vernon 2002)).

91. *Id.*

92. *Id.*

93. *Dallas Fire Ins. Co. v. Tex. Contractors Sur. & Cas. Agency*, 159 S.W.3d 895 (Tex. 2004). Although the Texas Supreme Court’s opinion was issued just after the close of the Survey period, the opinion is treated in this Survey because it reversed an opinion by the Fort Worth Court of Appeals released during the Survey period.

was formed to sell contract surety bonds. TCSCA agreed with Dallas Fire Insurance Company to the terms of a subagency agreement including a commission structure. Dallas Fire subsequently changed the manner of calculating TCSCA's commissions retroactively to the beginning of the parties' relationship in a manner that significantly limited further commissions and resulted in a claim by Dallas Fire for reimbursement for certain previously paid commissions. TCSCA sued and the case was tried to a jury on TCSCA's claims of breach of contract and Insurance Code violations based on misrepresentations by Dallas Fire in violation of DTPA section 17.46(b)(12) and on counterclaims by Dallas Fire. The jury found that Dallas Fire knowingly misrepresented the rights, remedies, or obligations of the parties and awarded damages to TCSCA.<sup>94</sup>

On appeal, Dallas Fire argued that the parties' dispute did not arise out of the "business of insurance" because TCSCA only sold contract surety bonds.<sup>95</sup> The Fort Worth Court of Appeals disagreed holding that, although the Texas Supreme Court had held that the relationship between a surety and its obligee was not covered by article 21.21 of the Insurance Code,<sup>96</sup> the case before the court did not involve such a relationship. Instead, the court noted that surety bonds are insurance products for purposes of Insurance Code provisions relating to agent licensure and that TCSCA's principals were required to be licensed as insurance agents to sell surety bonds.<sup>97</sup> The court concluded that it was obliged to construe article 21.21 liberally and that, as a matter of law, the dispute between TCSCA and Dallas Fire arose out of the "business of insurance."<sup>98</sup>

The Texas Supreme Court reversed and rendered judgment for Dallas Fire, holding that although surety bonds are insurance products for purposes of Insurance Code provisions relating to agent licensure, the Insurance Code defines the "business of insurance" differently in multiple sections of the code, and TCSCA's claims did not arise in context of the licensure requirements.<sup>99</sup> The court held that the Fort Worth Court of Appeals had interpreted *Great American Insurance Co.* too narrowly and that the holding applied to suretyship generally, not only to suits between sureties and their bondholders.<sup>100</sup> The Texas Supreme Court concluded that "suretyship, as historically understood in the insurance and suretyship fields, does not constitute the business of insurance under article 21.21."<sup>101</sup> Thus, because TCSCA's claims involved the business of suretyship, not the business of insurance, the court rendered judgment that TC-

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94. *Id.* at 896.

95. *Id.*

96. *See* *Great Am. Ins. Co. v. N. Austin Util. Dist. No. 1*, 908 S.W.2d 415, 424 (Tex. 1994).

97. *Dallas Fire Ins. Co.*, 128 S.W.3d 279, 291 (Tex. App.—Fort Worth 2004), *rev'd*, 159 S.W.3d 895 (Tex. 2004).

98. *Id.* at 289-90.

99. *Dallas Fire Ins. Co.*, 157 S.W.3d at 896-97.

100. *Id.*

101. *Id.* at 897.

SCA take nothing on its claims under article 21.21.<sup>102</sup>

#### IV. DETERMINING THE MEASURE OF DAMAGES

A prevailing plaintiff in a DTPA action may recover economic damages.<sup>103</sup> In cases involving misrepresentation, the plaintiff may recover under either the "out of pocket" or "benefit of the bargain" measure of damages, whichever gives the plaintiff a greater recovery.<sup>104</sup> 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.<sup>105</sup>

##### A. EVIDENCE OF DAMAGES

*Ford Motor Co. v. Cooper*<sup>106</sup> arose from the sale of a new 1998 Lincoln Town Car from Crane Lincoln Mercury. After experiencing a steering problem with the vehicle, Cooper sued Crane and Ford alleging breach of warranty and DTPA violations. Cooper testified that, in the car's damaged condition, it was worthless for taking long trips, which was the purpose for which he purchased it. The jury found in favor of Cooper and awarded \$5,000 for diminished value of the vehicle, \$1,000 for expenses, and additional damages based upon a finding of knowing conduct. The trial court reduced the award and rendered judgment for \$18,000.<sup>107</sup>

On appeal, Crane and Ford argued that the evidence was legally insufficient to support the award of actual damages.<sup>108</sup> The Texarkana Court of Appeals agreed.<sup>109</sup> Cooper pled for the difference between the fair market value of the car as sold and the value as warranted and represented.<sup>110</sup> The court held that evidence of the negotiated price for the new car established its value as warranted and represented.<sup>111</sup> The only evidence of the value as sold, however, was Cooper's own testimony.<sup>112</sup> Citing the Texas Supreme Court's decision in *Porras v. Craig*,<sup>113</sup> the Texarkana Court of Appeals explained that an owner of property can testify as to its market value as long as the testimony shows that it refers to market value, rather than some other value of the property.<sup>114</sup> Because Cooper's testimony referred to the value of the car to him, and did not reference the car's market value, the testimony constituted no evi-

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102. *Id.*

103. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 2002).

104. *Leyendecker & Assocs. v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984).

105. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 2002).

106. 125 S.W.3d 794 (Tex. App.—Texarkana 2004, no pet. h.).

107. *Id.* at 796.

108. *Id.* at 799.

109. *Id.* at 803.

110. *Id.* at 799.

111. *Id.*

112. *Id.* at 803.

113. 675 S.W.2d 503 (Tex. 1984).

114. *Ford Motor Co.*, 129 S.W.3d at 799.

dence.<sup>115</sup> Given the jury's findings of breach of warranty and knowing violations of the DTPA, the court held that the interests of justice required a remand for a new trial.<sup>116</sup>

The San Antonio Court of Appeals also considered an owner's testimony regarding damages. In *Lefton v. Griffith*,<sup>117</sup> a lessor of property sued the owners for breach of contract, tortious interference, fraud, intentional infliction of emotional distress, and DTPA violations. Dixie Griffith leased a tract of property owned by David and Arthur Lefton for use as a furniture store. When Griffith was unable to pay her rent, the Leftons allegedly agreed to give her time to vacate; but instead of keeping their promise, they changed the locks and refused to give her access to the property except for two weekend days. Griffith sued, alleging that she was forced to sell her inventory at a loss, was forced to sell her home to pay her creditors, and suffered damage to her credit reputation and mental anguish. When the Leftons failed to answer the suit, the trial court granted Griffith's motion for default judgment and entered judgment in favor of Griffith on her DTPA claim, awarding treble economic damages, treble mental anguish damages, and attorneys' fees. The Leftons filed a restricted appeal under Texas Rule of Appellate Procedure 30, arguing that the evidence of damages was legally and factually insufficient.<sup>118</sup>

Griffith provided evidence of damages in an affidavit. The Leftons first argued that Griffith's affidavit was incompetent, because it failed to refer to market value, rather than personal value.<sup>119</sup> The court of appeals rejected this argument, holding that Griffith's testimony did not affirmatively show that she was referring to personal rather than market value.<sup>120</sup> The Leftons also argued that Griffith's testimony was incompetent because it was conclusory.<sup>121</sup> The court agreed, holding that conclusory allegations will not support an award of unliquidated damages.<sup>122</sup> Because Griffith failed to establish the value of the inventory she sold and failed to explain how she arrived at the conclusion that she lost \$60,000 on the sale of her home, the evidence was insufficient to support those elements of damage.<sup>123</sup> Similarly, because Griffith failed to allege that she was denied a loan or charged a higher interest rate, the court held that she could not recover damages for loss of credit reputation.<sup>124</sup> Finally, because Griffith's affidavit merely stated an amount of profits she expected to have made based solely on past profits, the court held that she failed to provide sufficient data to determine her lost profits with

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115. *Id.*

116. *Id.* at 805.

117. 136 S.W.3d 271 (Tex. App.—San Antonio 2004, no pet. h.).

118. *Id.* at 273-74.

119. *Id.* at 277.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 277-78.

reasonable certainty.<sup>125</sup> The court of appeals therefore remanded the case for a new trial on damages.<sup>126</sup>

In *Barnett v. Coppell North Texas Court, Ltd.*,<sup>127</sup> discussed above, David and Wanda Lewis contracted with Barnett to build a gymnastics complex. The Lewises and Barnett brought claims against each other, which the jury resolved in favor of the Lewises. Barnett appealed arguing in part that the evidence was legally and factually insufficient to support the jury's award of damages.<sup>128</sup>

The Dallas Court of Appeals reviewed the evidence and held that the jury's award was supported by sufficient evidence.<sup>129</sup> There was ample evidence in the record that the Lewises incurred substantial costs in connection with the project, including up front costs for the construction.<sup>130</sup> Additionally, the evidence demonstrated that: the Lewises relied on Barnett's representations regarding the amount of time for construction, did not renew the lease on their existing gymnastics center, and had to rent and improve a temporary site.<sup>131</sup> The Lewises also presented evidence of lost profits.<sup>132</sup> David Lewis testified that he is a gymnastics instructor and teacher and owned and operated a successful gymnastics center for three years before contracting with Barnett, and, in light of the growth of that business, his conservative estimate of profits going forward was between \$150,000 and \$180,000 per annum.<sup>133</sup> The court held that this testimony demonstrated that Lewis was familiar with the business and had based his estimate on the trend in the industry and the specific area where the business was located.<sup>134</sup>

## B. ATTORNEYS' FEES

A consumer who prevails on a DTPA claim is entitled to an award of reasonable and necessary attorneys' fees.<sup>135</sup> The plaintiff in *Blue Star Operating Co. v. Tetra Technologies, Inc.*,<sup>136</sup> obtained a jury finding that the defendant knowingly failed to perform services in a good and workmanlike manner, but the jury found that the plaintiff's damages were zero. On appeal, the plaintiff argued that it was entitled to recover its attorneys' fees as a prevailing DTPA plaintiff.<sup>137</sup> The Dallas Court of Appeals disagreed, holding that a party is not entitled to recover attor-

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125. *Id.*

126. *Id.* at 278.

127. 123 S.W.3d 804 (Tex. App.—Dallas 2003, pet. denied). *Barnett* is also discussed at note 50 and accompanying text.

128. *Id.* at 813.

129. *Id.* at 826.

130. *Id.*

131. *Id.* at 826-27.

132. *Id.* at 827-28.

133. *Id.*

134. *Id.* at 828.

135. TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon 2002).

136. 119 S.W.3d 916 (Tex. App.—Dallas 2003, pet. denied).

137. *Id.* at 922.

neys' fees if the jury did not award any damages.<sup>138</sup>

### C. MENTAL ANGUISH DAMAGES

The San Antonio Court of Appeals considered the amount of evidence necessary to support an award of mental anguish damages in *Lefton v. Griffith*.<sup>139</sup> The plaintiff presented affidavit testimony that, as a result of the defendants' conduct, she "suffered severe emotional distress and mental anguish as a result of numerous encounters with angry, frustrated customers." She claimed she "was unable to sleep, was depressed, and suffered from anxiety."<sup>140</sup> She concluded that her damages for emotional and mental anguish equaled the damages for the loss of her business.<sup>141</sup> The court of appeals held that "[m]ental anguish damages are appropriate when there is *either* 'direct evidence of the nature, duration, and severity of [plaintiffs'] mental anguish, thus establishing a substantial disruption in the plaintiffs' daily routine,' *or* other evidence of 'a high degree of mental pain and distress' that is 'more than mere worry, anxiety, vexation, or anger.'<sup>142</sup> The court further held that there must be evidence to justify the amount awarded.<sup>143</sup> Examining the evidence, the court concluded that Griffith failed to establish the duration of her anguish and failed to establish that she suffered a high degree of mental pain and distress.<sup>144</sup> The court also concluded that Griffith failed to show that the damages she sought were a fair and reasonable amount for the mental anguish she suffered.<sup>145</sup>

In *Jabri v. Alsayed*,<sup>146</sup> discussed above, the lessee of a convenience store sued Jabri and his corporation for fraud and DTPA violations, alleging that Jabri told Alsayed that the convenience store was an ongoing business with a good consumer base that would generate profits of about \$10,000 per month. The jury found in favor of Alsayed and awarded mental anguish damages.<sup>147</sup>

On appeal, Jabri and the corporation argued that the evidence was insufficient to support a finding of mental anguish damages. To support his mental anguish claim, Alsayed testified that the sale of the business and Jabri's intent that Alsayed take over the operations of the store regularly placed him in harm's way and he feared for his life. Among other facts, Alsayed testified that the front door of the store would not lock;

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138. *Id.*

139. 136 S.W.3d 271 (Tex. App.—San Antonio 2004, no pet. h.). *Lefton* is also discussed at note 119 and accompanying text.

140. *Id.* at 278-79.

141. *Id.* at 279.

142. *Id.* (citing *Saenz v. Fid. & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996)).

143. *Id.*

144. *Id.*

145. *Id.*

146. 145 S.W.3d 660 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.). *Jabri* is also discussed at note 27 and accompanying text.

147. *Id.* at 665.



the store was frequented by prostitutes, drug dealers, and vagrants; a murder occurred in the store while he was operating it; he was robbed at gunpoint; and there were several late night burglaries of the store.<sup>148</sup> The Houston Court of Appeals held that a plaintiff must show direct evidence of the nature, duration, or severity of the anguish or other evidence of emotional distress that amounts to more than mere worry, anxiety, vexation, embarrassment, or anger.<sup>149</sup> The court found that Alsayed's fear stemmed from the high crime in the area, not from misrepresentations regarding the profitability of the business.<sup>150</sup> The court concluded that the evidence was insufficient to support an award of mental anguish damages.<sup>151</sup>

## V. EXEMPTIONS, DEFENSES, AND LIMITATIONS ON RECOVERY

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>152</sup> This is only partially correct, as several DTPA provisions expressly require proof of intentional conduct.<sup>153</sup> Some courts have gone so far as holding that common law defenses, such as estoppel and ratification, are not available to combat DTPA claims.<sup>154</sup> Other courts have recognized a variety of defenses to DTPA claims.<sup>155</sup> Additionally, both the courts and the legislature have carved out exemptions from the DTPA's reach.

### A. EXEMPTIONS WITHIN THE DTPA

Section 17.49 of the DTPA contains several exemptions from the Act's reach. During the Survey period, the Fort Worth Court of Appeals examined the exemption for transactions involving total consideration of

148. *Id.* at 669.

149. *Id.*

150. *Id.*

151. *Id.* at 670.

152. *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*) (rejecting appellant's strict liability contention).

153. *See, e.g.,* TEX. BUS. & COM. CODE ANN. § 17.46(b)(9), (10), (13), (16), (17), (24) (Vernon 2002 & Supp. 2004-05).

154. *See, e.g.,* *Ins. Co. of N. Am. v. Morris*, 928 S.W.2d 133, 154 (Tex. App.—Houston [14th Dist.] 1996, writ granted), *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).

155. *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*, 1995 WL 500308, at \*10 (Tex. App.—Dallas 1995, writ denied) (not designated for publication) (applying illegality/public policy affirmative defense to DTPA claims); *Keriotis v. Lombardo Rental Trust*, 607 S.W.2d 44, 46 (Tex. App.—Beaumont 1980, writ *ref'd n.r.e.*) (applying statute of frauds to DTPA claims).

more than \$500,000.<sup>156</sup> *Citizens National Bank v. Allen Rae Investments, Inc.*,<sup>157</sup> involved a construction loan from Citizens National Bank (“CNB”) made to Allen Rae Investments, Inc. (“ARI”) and upon which ARI defaulted. ARI brought an action against CNB, among other defendants, for fraud, negligence, negligent misrepresentation, and DTPA violations. The trial court entered judgment in favor of ARI.<sup>158</sup> The Fort Worth Court of Appeals reversed, finding that the trial court abused its discretion in submitting the DTPA question to the jury.<sup>159</sup> CNB argued that the trial court abused its discretion by allowing ARI to recover under the DTPA because ARI’s hotel project involved a total consideration of more than \$500,000; under DTPA section 17.49(g), the DTPA did not apply. ARI contended that, because CNB advanced only \$463,193 under its \$600,000 note, the DTPA did apply.<sup>160</sup> In this case of first impression, the Fort Worth Court of Appeals concluded that ARI’s overall consideration exceeded \$500,000 on the hotel project, and because the project did not involve a consumer’s residence, the DTPA did not apply.<sup>161</sup> Accordingly, the trial court abused its discretion in submitting the DTPA jury question and in allowing the corporation to recover from the bank under the DTPA.<sup>162</sup>

## B. 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, the United States District Court for the Western District of Texas examined one such limitation on the DTPA’s reach. In *Franyutti v. Hidden Valley Moving and Storage*,<sup>163</sup> the plaintiff hired May Flower Transit, an authorized agent of Hidden Valley Moving and Storage, to move his household goods to San Antonio from California. Upon arrival, Hidden Valley allegedly charged the plaintiff a higher amount than that orally agreed upon and delivered the goods several days late. The plaintiff sued in state court alleging common law fraud and DTPA violations. The defendant removed the action to federal court, contending that the plaintiff’s claims were preempted because the action involved tariff charges for the interstate shipment of goods and that the Interstate Commerce Act, including the Carmack Amendment, precluded the plaintiff’s claims.<sup>164</sup> The district court held that the plaintiff’s claims arose under federal law.<sup>165</sup> The court relied on a recent Fifth Circuit opinion holding that the Carmack Amendment pro-

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156. See TEX. BUS. & COM. CODE ANN. § 17.49(g) (Vernon 2002).

157. 142 S.W.3d 459 (Tex. App.—Fort Worth 2004, no pet. h.).

158. *Id.* at 467-69.

159. *Id.* at 474.

160. *Id.* at 473; see TEX. BUS. & COM. CODE ANN. § 17.49(g) (Vernon 2002).

161. *Citizens Nat’l Bank*, 142 S.W.3d at 474.

162. *Id.*

163. 325 F. Supp. 2d 775 (W.D. Tex. 2004).

164. *Id.* at 776.

165. *Id.* at 778.

vides the exclusive cause of action for loss or damage to goods arising from interstate transportation by common carrier.<sup>166</sup> Although that opinion applied complete preemption to claims involving loss or damage to goods, the district court noted that the Fifth Circuit had itself relied upon an earlier Fifth Circuit opinion holding that the Carmack Amendment provides the exclusive remedy for breach of contract of carriage provided by a bill of lading.<sup>167</sup> The district court concluded that “the Carmack Amendment provides the exclusive cause of action for any claim arising out of the interstate transportation of household goods.”<sup>168</sup>

### C. NECESSITY OF PROVING RELIANCE

To recover under section 17.50 of the DTPA for a laundry list violation, a consumer must prove that the false, misleading, or deceptive act or practice was the producing cause of damages and that the consumer relied upon the act or practice.<sup>169</sup>

The Waco Court of Appeals considered the element of reliance in *O'Connor v. Miller*.<sup>170</sup> O'Connor purchased used airplane engines and complained that the condition of the engines had been misrepresented. The case was tried to a jury, which was asked whether the defendants engaged in “any false, misleading, or deceptive act or practice that Robert O'Connor relied on to his detriment and that was a producing cause of damages to Robert O'Connor.”<sup>171</sup> The jury found against O'Connor and the trial court entered a take-nothing judgment.<sup>172</sup>

On appeal, the Waco Court of Appeals framed its analysis as whether the plaintiff had relied on allegedly false information in spec sheets given by the sellers.<sup>173</sup> The court assumed—without discussion or citation to case law—that reliance was a necessary element of O'Connor's case.<sup>174</sup> The court held that the spec sheets contained obvious discrepancies, and if O'Connor relied upon them, he would have noticed the discrepancies and asked for clarification.<sup>175</sup> In addition, there was evidence that relying solely on spec sheets is risky and that the condition and authenticity of some engine parts cannot be verified without totally disassembling the

166. *Id.* at 777 (citing *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 778 (5th Cir. 2003)).

167. *Id.* (citing *Air Prods. & Chems., Inc. v. Ill. Central Gulf R.R. Co.*, 721 F.2d 483, 484-85 (5th Cir. 1983)).

168. *Id.* at 778.

169. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)(A)-(B) (Vernon 2002). Despite the plain language of section 17.50, which was amended in 1995 to require reliance, some courts continue to cite pre-amendment caselaw for the proposition that reliance is not an element of a DTPA claim. *See, e.g.*, *Monsanto Co. v. Altman*, No. 07-02-0370-CV, 2004 WL 350991, at \*3 (Tex. App.—Amarillo Feb. 25, 2004, pet. denied); *James V. Mazuca & Assocs. v. Schumann*, 82 S.W.3d 90, 95 (Tex. App.—San Antonio 2002, pet. denied) (en banc).

170. 127 S.W.3d 249 (Tex. App.—Waco 2003, pet. denied).

171. *Id.* at 256.

172. *Id.* at 253.

173. *Id.* at 257.

174. *Id.*

175. *Id.*

engines, which did not occur.<sup>176</sup> Because there was evidence from which the jury could have reasonably determined that O'Connor did not rely on the information in the spec sheets, the court held that the jury's failure to find a DTPA violation was not so against the great weight and preponderance of the evidence that it was clearly unjust.<sup>177</sup>

In *McLaughlin, Inc. v. Northstar Drilling Technologies, Inc.*,<sup>178</sup> a directional boring and utility contractor entered into a contract with Northstar Drilling Technologies for directional drilling guidance services and equipment at three job sites. Northstar charged McLaughlin for each job but McLaughlin only paid for one job. Northstar sued McLaughlin for payment for the two other jobs and McLaughlin counterclaimed, alleging that Northstar failed to properly perform the guidance services and that Northstar's promotional literature contained misrepresentations. McLaughlin asserted claims for breach of contract, breach of warranties, and DTPA violations. After a bench trial, the trial court awarded damages to Northstar and denied all of McLaughlin's counterclaims and McLaughlin appealed.<sup>179</sup> The San Antonio Court of Appeals affirmed the trial court's judgment.<sup>180</sup> The court held that the record established that McLaughlin hired Northstar based upon a friend's recommendation and did not rely on Northstar's promotional literature. Absent reliance, McLaughlin could not maintain a DTPA cause of action.<sup>181</sup>

The Corpus Christi Court of Appeals considered the reliance element of a DTPA claim in two consolidated cases in *Ford Motor Co. v. Ocanas*.<sup>182</sup> Both cases arose from allegations that the Ford F-150 with optional towing package was marketed as having a larger radiator than F-150s without the towing package, but that the trucks as delivered did not have the larger radiator. The trial court certified both a Texas class and a nationwide class on claims of breach of express warranties, breach of implied warranties of merchantability, and DTPA violations.<sup>183</sup> On interlocutory appeal of the class certifications, Ford argued that individual issues predominated over common questions of fact and the Corpus Christi Court of Appeals agreed.<sup>184</sup> Citing the Texas Supreme Court's opinion in *Henry Schein, Inc. v. Stromboe*,<sup>185</sup> the court of appeals held that both DTPA laundry list violation claims and claims of breach of express warranties require proof of reliance.<sup>186</sup> Thus, each class member had to prove reliance upon Ford's alleged misrepresentations.<sup>187</sup>

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176. *Id.*

177. *Id.* at 258.

178. 138 S.W.3d 24 (Tex. App.—San Antonio 2004, no pet. h.).

179. *Id.* at 26-27.

180. *Id.* at 31.

181. *Id.* at 30.

182. 138 S.W.3d 447 (Tex. App.—Corpus Christi 2004, no pet. h.).

183. *Id.* at 449-50.

184. *Id.* at 454.

185. 102 S.W.3d 675 (Tex. 2002).

186. *Ocanas*, 138 S.W.3d at 453.

187. *Id.*

## D. NECESSITY OF PROVING CAUSATION

Liability under the DTPA is limited to conduct that is a producing cause of the plaintiff's damages.<sup>188</sup> Unlike the doctrine of proximate cause, producing cause does not require that the injury be foreseeable.<sup>189</sup> "Producing cause" is defined as "'an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of . . . .'"<sup>190</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>191</sup>

The Houston Court of Appeals applied the concept of producing cause in *Carousel's Creamery, L.L.C. v. Marble Slab Creamery, Inc.*,<sup>192</sup> which arose from Marble Slab Creamery's desire to increase the size of its franchise system. In the mid-1990s, Marble Slab distributed a Uniform Franchise Operating Circular ("UFOC") to potential franchisees. The UFOC contained representations regarding two company-owned stores. Carousel began investing in Marble Slab franchises. It eventually owned several Marble Slab stores but financial losses forced them to close. Carousel sued Marble Slab alleging fraud, negligent misrepresentation, and DTPA violations, contending that the UFOCs it obtained from Marble Slab misrepresented the value of the franchise. Marble Slab counterclaimed for breach of contract. The case was tried to a jury, which found against Carousel on its fraud and DTPA claims and awarded Marble Slab damages on its breach of contract claim; Carousel appealed.<sup>193</sup>

The Houston Court of Appeals affirmed.<sup>194</sup> The court found that there was sufficient evidence that Marble Slab's representations were neither a cause in fact nor a "substantial factor" in causing Carousel's injuries.<sup>195</sup> Marble Slab presented evidence that the Carousel investors made numerous mistakes and errors of business judgment. For example, the Carousel investors did very little investigation or preparation before purchasing their stores, and they ignored red flags in the financial data they did review. Marble Slab's expert witnesses opined that Carousel's reliance on the UFOC was unreasonable and that the UFOC contained caveats that a reasonable investor would heed. Marble Slab also presented evidence that Carousel's business was poorly managed.<sup>196</sup> Although Carousel presented testimony inconsistent with Marble Slab's evidence, the court

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

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

190. *Union Pump Co. v. Albritton*, 898 S.W.2d 773, 775 (Tex. 1995) (quoting *Rourke v. Garza*, 530 S.W.2d 794, 801 (Tex. 1975)).

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

192. 134 S.W.3d 385 (Tex. App.—Houston [1st Dist.] 2004, pet. granted).

193. *Id.* at 389-90. The trial court granted Marble Slab's motion for directed verdict with respect to the negligent misrepresentation claim. *Id.* at 390.

194. *Id.* at 405.

195. *Id.* at 402-03.

196. *Id.* at 400.

held that the jury is the sole judge of the witnesses' credibility and the weight to be given to their testimony.<sup>197</sup> Therefore, the court concluded that Carousel was unable to recover on its DTPA claim.<sup>198</sup>

#### E. "AS IS" CLAUSES

An "as is" agreement generally negates the causation element of a DTPA claim.<sup>199</sup> In *Bynum v. Prudential Residential Services, Ltd. Partnership*,<sup>200</sup> the plaintiffs were home purchasers who brought claims against their direct seller, which had provided home relocation services to the prior homeowner, and against the prior homeowners and their remodeling contractor. The contract between the plaintiffs and the direct seller stated, "Buyer accepts the Property in its present condition."<sup>201</sup> The trial court granted summary judgment in favor of the defendants.<sup>202</sup>

On appeal, the defendants argued that the quoted language from the contract negated the causation element of a DTPA claim. The plaintiffs first argued that the "as is" clause and other similar disclaimers were not binding because the disclaimers were inconspicuous boiler-plate provisions and the plaintiffs lacked sophistication in purchasing property or reviewing contracts.<sup>203</sup> The Houston Court of Appeals rejected this argument because the plaintiffs were represented in the transaction by a licensed real estate broker, they had prior experience with "as is" purchases, and they admitted being aware of the "as is" clause.<sup>204</sup> The plaintiffs next argued that the disclaimers were the result of fraudulent concealment, but the court of appeals held that there was no evidence that the defendants had actual knowledge of any misrepresentations about the home.<sup>205</sup>

The plaintiffs also argued that even if the "as is" clause was enforceable, it did not waive their claims under the DTPA because the "as is" clause did not comply with the DTPA's waiver requirements.<sup>206</sup> Relying upon the Texas Supreme Court's decision in *Prudential Insurance Co. of America v. Jefferson Associates*,<sup>207</sup> the court of appeals held that the waiver provisions in the DTPA were inapplicable because an "as is" clause is a statement that no basis exists for the assertion of a DTPA claim, it is not a waiver of DTPA rights.<sup>208</sup> The court concluded that the "as is" clause was the proper basis for summary judgment against the

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197. *Id.* at 403.

198. *Id.*

199. *Prudential Ins. Co. of Am. v. Jefferson Assocs.*, 898 S.W.2d 156, 161 (Tex. 1995).

200. 129 S.W.3d 781 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

201. *Id.* at 787.

202. *Id.* at 785.

203. *Id.* at 788-89.

204. *Id.* at 789.

205. *Id.* at 792.

206. *Id.*

207. 898 S.W.2d 156, 163-64 (Tex. 1995).

208. *Bynum*, 129 S.W.3d at 792.

plaintiffs on their DTPA claims.<sup>209</sup> Finally, the plaintiffs argued that the "as is" clause did not bind their minor children because the children did not have capacity to contract and were not parties to the agreement.<sup>210</sup> The court of appeals rejected this argument, holding that a third-party beneficiary generally will not have greater rights under a contract than the party who bargained for their benefit.<sup>211</sup> Thus, although a third-party beneficiary can have standing to assert a cause of action under the DTPA if the transaction was intended to benefit the third party, there was no authority for the proposition that an intended beneficiary of a contract would not be bound by the terms of that contract.<sup>212</sup>

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

A breach of contract without misrepresentation or fraud is not a false, misleading, or deceptive act; therefore, it does not violate the DTPA.<sup>213</sup> The Beaumont Court of Appeals applied this principle in *Conquest Drilling Fluids, Inc. v. Tri-Flo International, Inc.*<sup>214</sup> The plaintiff purchased oilfield equipment that allegedly never functioned. Conquest sued Tri-Flo, asserting claims of negligence, negligent misrepresentation, breach of contract, breach of warranty, and DTPA violations. The trial court granted summary judgment to Tri-Flo on the DTPA, negligence, and negligent misrepresentation claims, and a jury returned a verdict for Conquest on the breach of contract and breach of warranty claims. Both parties appealed.<sup>215</sup>

In its summary judgment motion on Conquest's DTPA claims, Tri-Flo argued that the claims were nothing more than breach of contract claims. One group of DTPA claims was premised on Tri-Flo's alleged failure to fulfill its promise that the equipment would have certain characteristics, benefits, and uses; would be a particular standard, quality, or grade; would be of good quality; and would be free of defects in material and workmanship.<sup>216</sup> The Beaumont Court of Appeals held that this group of claims was, in substance, merely a claim that Tri-Flo did not comply with the contract and summary judgment was proper.<sup>217</sup> Conquest also alleged that Tri-Flo advertised goods or services with the intent not to sell them as advertised and failed to disclose information concerning the equipment with the intent to induce Conquest into a transaction that it

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209. *Id.*

210. *Id.*

211. *Id.* at 793.

212. *Id.*

213. *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).

214. 137 S.W.3d 299 (Tex. App.—Beaumont 2004, no pet. h.).

215. *Id.* at 301-02.

216. *Id.* at 309.

217. *Id.*

would not have entered into had the information been disclosed.<sup>218</sup> The court held that a duty not to illegally procure a contract is independent from the duties established by the contract.<sup>219</sup> Because these two claims did not merely allege a breach of contract, the court reversed the grant of summary judgment on the claims.<sup>220</sup>

### G. LIMITATIONS PERIOD

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.<sup>221</sup> Generally, when a DTPA cause of action accrues is a question of law.<sup>222</sup>

Last year's Survey reported on *Knott v. Provident Life and Accident Insurance Co.*,<sup>223</sup> in which a physician 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, there were some procedures that he was unable to perform. He initially applied for total disability benefits under the policies in 1985, but the claim was denied in 1986. The plaintiff did not contest that denial. In 1996, he filed a second claim for total disability benefits. The insurer paid the benefits for twenty-four months and then terminated payment. The plaintiff sued, alleging that the termination of benefits constituted bad faith and breach of the insurance contract and alleging that the insurance agent had misrepresented the terms of the policies. The agent moved for summary judgment on the ground that the claims were barred by limitations. The trial court granted the motion.<sup>224</sup> In the decision reported last year, the Eastland Court of Appeals affirmed.<sup>225</sup> The court rejected the plaintiff's argument that his cause of action did not accrue until his benefits were terminated in 1998.<sup>226</sup> The plaintiff claimed that he had been continuously disabled since the accident in 1985.<sup>227</sup> The court stated that if the plaintiff's claims of misrepresentation were correct, the initial denial of benefits was improper.<sup>228</sup> The court found that due to the initial denial of benefits, the plaintiff was authorized at that time to seek a judi-

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218. *Id.*

219. *Id.* at 309-10.

220. *Id.* at 310.

221. TEX. BUS. & COM. CODE ANN. § 17.565 (Vernon 2002).

222. *Provident Life and Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003).

223. 70 S.W.3d 924 (Tex. App.—Eastland 2002, pet. granted), *aff'd in part, rev'd in part*, 128 S.W.3d 211 (Tex. 2003).

224. *Id.* at 926-27, 933.

225. *Id.* at 926-27, 932-33.

226. *Id.* at 933.

227. *Id.* at 932-33.

228. *Id.*



cial remedy and the statute of limitation had long since expired.<sup>229</sup>

The Texas Supreme Court affirmed the court of appeals' judgment regarding limitations.<sup>230</sup> The court held that all of the plaintiff's extra-contractual claims accrued upon the denial of his claim for total disability under the policies.<sup>231</sup> Citing its decision in *Murray v. San Jacinto Agency, Inc.*,<sup>232</sup> the court stated that when there is no outright denial of an insurance claim, the date of accrual should be a question of fact to be determined on a case-by-case basis.<sup>233</sup> The court rejected the plaintiff's claim that the 1986 letter did not constitute an outright denial of benefits, explaining that an insurer is not required to include "magic words" in its denial of a claim; the insurer need only provide its determination of the claim and the reasons for the determination in clear language.<sup>234</sup> Because the 1986 letter clearly conveyed the insurer's position that the plaintiff was not entitled to total disability coverage, the letter triggered the statute of limitations.<sup>235</sup>

In *Gibson v. Ellis*,<sup>236</sup> the Dallas Court of Appeals applied DTPA limitations to a claim arising from an attorney client relationship. Gibson and his wife hired attorney Ellis to represent them in a personal injury suit after their original attorney died. Ellis agreed to work under the former attorney's contingency fee agreement. The Gibsons' personal injury claims were settled, and Ellis deducted his attorneys' fees and some doctors' bills from the proceeds. Gibson then sued Ellis complaining about the deductions and Ellis's explanations for them and asserting claims for breach of fiduciary duty, fraud, negligence, breach of contract, and DTPA violations. The trial court held that Gibson's DTPA and negligence claims were barred by limitations, and Gibson appealed.<sup>237</sup>

The Dallas Court of Appeals reviewed the summary judgment evidence. The evidence included an affidavit from Gibson in which he admitted that as early as January 1995, he began to question whether Ellis's explanation for the deductions from the settlement were true.<sup>238</sup> By March 1995, Gibson had been informed that the deductions for doctor's bills were not covered by letters of protection on his settlement and had consulted with an attorney who advised Gibson that Ellis might be liable for malpractice.<sup>239</sup> The court rejected Gibson's argument that it was only after he did legal research in September 1995 that he became aware of his cause of action against Ellis, because Gibson clearly was aware of the

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229. *Id.*

230. *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 223 (Tex. 2003).

231. *Id.*

232. 800 S.W.2d 826, 828 n.2 (Tex. 1990).

233. *Provident Life & Acc. Ins. Co.*, 128 S.W.3d at 222.

234. *Id.* at 222-23.

235. *Id.* at 233.

236. 126 S.W.3d 324 (Tex. App.—Dallas 2004, no pet. h.).

237. *Id.* at 328.

238. *Id.* at 331.

239. *Id.*

factual basis of his claims in March 1995.<sup>240</sup> The court also rejected Gibson's argument that Ellis's explanations for the deductions and denial of wrongdoing prevented Gibson from discovering the facts supporting his causes of action because, despite Ellis's explanations, Gibson continued to question Ellis and consulted with an attorney regarding the deductions.<sup>241</sup>

## VI. AWARD OF ATTORNEYS' FEES TO DEFENDANT

Section 17.50(c) of the DTPA provides that a defendant is entitled to recover its attorneys' fees incurred in defending against a DTPA claim if the claim is "groundless and brought in bad faith, or for purposes of harassment."<sup>242</sup> 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.<sup>243</sup> 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."<sup>244</sup> A suit is brought in bad faith if it is motivated by a malicious or discriminatory purpose.<sup>245</sup> Whether a suit is groundless or brought in bad faith is a question of law.<sup>246</sup>

The Dallas Court of Appeals examined this provision in *Gibson v. Ellis*.<sup>247</sup> As discussed above, Gibson and his wife hired Ellis to represent them in a personal injury suit. Ellis deducted his attorneys' fees and some doctors' bills from the settlement proceeds. Gibson sued, complaining about the deductions and Ellis's explanations for them. After Gibson's claims were resolved against him by summary judgment and a jury trial, Ellis's counterclaim for attorneys' fees was tried before the court; which awarded Ellis \$41,000 in attorneys' fees. Gibson appealed, arguing that "[t]here is room for good faith argument on both sides of the issue as to when Gibson learned sufficient facts to end the tolling of limitations." He also cited the appellate court's opinion reversing the trial court's initial summary judgment.<sup>248</sup>

The Dallas Court of Appeals was "unpersuaded by Gibson's arguments."<sup>249</sup> The record included evidence that Gibson had actually requested Ellis to make the deductions, and that Gibson picketed Ellis's before he filed the lawsuit, circulated a flyer critical of Ellis, changed the

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240. *Id.*

241. *Id.* at 331-32.

242. TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon 2002).

243. *Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634, 637 (Tex. 1989); see TEX. R. CIV. P. 13.

244. *Spletstosser v. Myer*, 779 S.W.2d 806, 808 (Tex. 1989).

245. *Cent. Tex. Hardware, Inc. v. First City, Texas-Bryan, N.A.*, 810 S.W.2d 234, 237 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (citing *Knebel v. Port Enters., Inc.*, 760 S.W.2d 829, 831 (Tex. App.—Corpus Christi 1988, writ denied)).

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

247. 126 S.W.3d 324 (Tex. App.—Dallas 2004, no pet. h.).

248. *Id.* at 328, 335-36.

249. *Id.* at 336.

greeting on his home telephone answering machine to one critical of Ellis, and filed four grievances against Ellis with the State Bar of Texas.<sup>250</sup> Based on the record, the court of appeals held that the trial court had not abused its discretion in finding Gibson's DTPA action was groundless and brought in bad faith.<sup>251</sup>

## VII. CONCLUSION

This was not a successful year for DTPA plaintiffs. Of the twenty-four cases selected for discussion, plaintiffs lost eighteen on appeal. Of those, six affirmed summary judgment for the defendant. In contrast, a plaintiff secured a reversal of summary judgment in only two cases. The fact that one-third of the twenty-four cases selected for review involved summary disposition reflects an increased judicial willingness to dismiss questionable DTPA claims as a matter of law.

Another interesting trend evident in this year's crop of cases is the belated judicial recognition that reliance is an element of a DTPA claim. Although this has been the law since the legislature's 1995 amendment to the statute, several courts have continued to incorrectly cite pre-1995 case law for the proposition that reliance is not an element of a DTPA claim.<sup>252</sup> The fact that three courts during the Survey period managed to avoid this error does not bode well for future DTPA plaintiffs. The Corpus Christi Court of Appeal's decision in *Ocanas*<sup>253</sup> is particularly noteworthy because it suggests that, due to the individualized nature of the reliance inquiry, DTPA class actions will be increasingly difficult to maintain.

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250. *Id.*

251. *Id.*

252. This is discussed in detail at note 171 and accompanying text.

253. *Ocanas* is discussed further at notes 184-89 and accompanying text.