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## Deceptive Trade Practices - Consumer Protection Act

A. Michael Ferrill

Leslie Sara Hyman

Sara Davis

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# DECEPTIVE TRADE PRACTICES— CONSUMER PROTECTION ACT

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

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\* B.B.A., St. Mary's University; J.D., Baylor University; Shareholder, Cox Smith Matthews Incorporated, San Antonio, Texas.

\*\* B.A., Brandeis University; J.D., Hastings College of the Law; Shareholder, Cox Smith Matthews Incorporated, San Antonio, Texas.

\*\*\* B.A., College of Wooster; J.D., Tulane University School of Law; Associate, Cox Smith Matthews Incorporated, San Antonio, Texas.

## 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>

This Survey covers significant developments under the DTPA from November 1, 2004 through October 31, 2005. Noteworthy decisions during the Survey period address breach-of-warranty claims, preemption, and damages.

## II. CONSUMER STATUS

In order to bring a DTPA claim, a plaintiff must be a “consumer” as defined by the statute.<sup>3</sup> To qualify as a consumer under the statute, the 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> Further, the plaintiff must prove that his relationship to the transaction entitles him to relief.<sup>5</sup> When the facts underlying the determination of consumer status are undisputed, whether a plaintiff qualifies for such status is a question of law.<sup>6</sup>

In *Todd v. Perry Homes*,<sup>7</sup> the plaintiff homeowners sued their homebuilder for negligence, a “construction defect” under section 27.001 of the Texas Property Code, and breach of the implied warranty of habitability and unconscionable conduct under the DTPA. The homeowners claimed “that improper drainage caused rainwater to flow into their garage and crawlspace resulting in standing water under . . . [the] house.”<sup>8</sup> The builder moved for both traditional and no-evidence summary judgment on all claims, and “[t]he trial court granted the no-evidence motion on the claims for breach of implied warranty of habitability and unconscionable conduct under the DTPA.”<sup>9</sup>

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1. TEX. BUS. & COM. CODE ANN. § 17.41 (Vernon 2002 & Supp. 2005) [hereinafter DTPA].

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).

5. *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”). *See also Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 650 (Tex. 1996).

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

7. 156 S.W.3d 919 (Tex. App.—Dallas 2005, no pet. h.).

8. *Id.* at 921.

9. *Id.*

The homeowners appealed, arguing that they raised genuine issues of material fact regarding their claim that the home builder engaged in an unconscionable course of action. The Dallas Court of Appeals held that to be actionable under the DTPA, a defendant's deceptive conduct must occur in connection with a consumer transaction. Where there is no contractual privity between the defendant seller and the consumer, "the connection can be demonstrated by a representation that reaches the consumer or by a benefit from the second transaction to the initial seller."<sup>10</sup>

The homeowners, however, were the subsequent purchasers of the house, and there was no evidence of a connection between the actions of the homebuilder and the sale of the house to the homeowners. The court thus held that the home builder was not liable for any unconscionable action under the DTPA.<sup>11</sup>

### III. DECEPTIVE PRACTICES

In addition to establishing consumer status, a DTPA plaintiff must show that a "false, misleading, or deceptive act," a breach of warranty, or an unconscionable action or course of action occurred, and that such conduct was the producing cause of the plaintiff's damage.<sup>12</sup>

#### A. LAUNDRY-LIST CLAIMS

DTPA section 17.46(b) contains, in 27 subparts, a nonexclusive list of actions that constitute "false, misleading, or deceptive acts" under the statute.<sup>13</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>14</sup>

In *Ketter v. ESC Medical Systems, Inc.*,<sup>15</sup> a physician sued a manufacturer and distributor of medical equipment for, among other claims, false, misleading, and deceptive acts under the DTPA after a machine that the physician purchased failed to work satisfactorily. The manufacturer and distributor filed separate no-evidence and traditional motions for summary judgment, and without stating the specific grounds for its decision, the trial court granted the motions.<sup>16</sup>

On appeal, the physician challenged the distributor's no-evidence motion on the DTPA claim for false, misleading, or deceptive acts or practices. The distributor's motion had stated that "there is no evidence that

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10. *Id.* at 922 (quoting *Marshall v. Kuch*, 84 S.W.3d 781, 786 (Tex. App.—Dallas 2002, pet. denied)).

11. *Id.* at 921-22.

12. DTPA § 17.50(a)(1)-(3) (Vernon 2002 & Supp. 2005).

13. *Id.* § 17.46(b).

14. *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), (17), (24).

15. 169 S.W.3d 791 (Tex. App.—Dallas 2005, no pet. h.).

16. *Id.* at 795-96.

Defendant engaged in any false, misleading, or deceptive acts or practices, or that any such acts or omissions caused harm to Plaintiffs.”<sup>17</sup> The physician argued that this ground did not set forth the elements of the claim specifically challenged. The Dallas Court of Appeals disagreed, holding that the distributor’s motion was sufficiently specific under Texas Rule of Civil Procedure 166(a)(i). The court reasoned that, although the motion did not specify the act or practice lacking evidence, it did specify causation as one of the necessary elements lacking evidence.<sup>18</sup>

The physician also argued that the manufacturer’s motion did not set forth the elements of the challenged claim. The motion stated: “[the manufacturer] is entitled to summary judgment because no evidence exists of one or more elements of [the physician’s] causes of action based on the [DTPA], breach of warranties, fraud, damage to reputation, fraudulent misrepresentation, products liability, and breach of contract.”<sup>19</sup> The court found, however, that the foregoing statement was not the entirety of the manufacturer’s no-evidence challenge. Rather, the manufacturer had identified elements of the causes of action lacking evidence in other portions of the motion, thereby putting the physician on notice that he had to point out evidence that established a question of fact as to these specific elements. Thus, the court upheld the manufacturer’s no-evidence summary judgment.<sup>20</sup>

*Head v. U.S. Inspect DFW, Inc.*<sup>21</sup> involved allegations of failure to disclose information during a pre-purchase home inspection. The contract between Head and the inspection company, Affordable, “provided that a ‘licensed real estate inspector’ would perform the inspection [and was] limited to a visual inspection of the ‘Readily Accessible Items Agreed To Be Inspected.’”<sup>22</sup> John Fox, assisted by Jim Blaeser, performed the inspection. Blaeser, who was an “‘apprentice inspector’ rather than a licensed real estate inspector, conducted the inspection of the attic and roof of the [house].”<sup>23</sup> Following the inspection, Fox provided an inspection report to Head indicating the house’s inspected areas. After Head purchased the house, she discovered significant problems with the roof. Head sued Affordable and Fox, asserting breach of contract, breach of warranty, negligence, and DTPA violations. As part of her DTPA claim, “Head [alleged] that Affordable and Fox failed to disclose ‘Blaeser’s lack of qualifications to perform a roof and attic inspection,’” failed to disclose that Fox’s failure to personally inspect the roof violated the standard of care, and failed to disclose that the inspection report was not prepared according to the standards of the profession.<sup>24</sup> The trial court

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17. *Id.* at 798.

18. *Id.* at 797-98.

19. *Id.* at 798.

20. *Id.* at 798-99.

21. 159 S.W.3d 731 (Tex. App.—Fort Worth 2005, pet. denied).

22. *Id.* at 735.

23. *Id.*

24. *Id.* at 743-44.

granted summary judgment against Head, and she appealed, arguing in part that she had raised an issue of fact on her failure-to-disclose claim.<sup>25</sup>

The Fort Worth Court of Appeals held that mere nondisclosure of material information does not establish an actionable DTPA claim. Rather, the elements of a DTPA claim for failure to disclose are “(1) a failure to disclose information concerning goods or services, (2) which was known at the time of the transaction, (3) if such failure was intended to induce the consumer into a transaction, (4) which the consumer would not have entered had the information been disclosed.”<sup>26</sup> Affordable and Fox argued that the “transaction” was the agreement providing for the inspection services, not the actual rendering of services, and that there was no failure to disclose during the agreement. The court agreed, holding that a “transaction” contemplates an act whereby an alteration of legal rights occurs. Under this rationale, the transaction “occurred when Head and Affordable and Fox entered into the written agreement for the inspection services.”<sup>27</sup> In order to prevail on her failure-to-disclose claim, “Head [had] to show that Affordable and Fox intentionally withheld material information with the intent to induce her into the [inspection agreement].”<sup>28</sup> As Head did not produce any evidence that Affordable and Fox withheld information with such intent, the court held that she failed to meet her burden of proof.<sup>29</sup>

*Monumental Life Insurance Co. v. Hayes-Jenkins*<sup>30</sup> arose from a dispute over a mortgage life-insurance policy. When the Jenkinses purchased their home, NovaStar, a residential mortgage lender, provided the mortgage. At the closing, the Jenkinses signed an “escrow agreement authorize[ing] NovaStar to collect and escrow funds from the Jenkinses ‘to pay for taxes, insurance premiums, and assessments. . . .’”<sup>31</sup> In January 2001, NovaStar mailed the Jenkinses an unsolicited application for Mortgage Life and Disability Insurance underwritten by Monumental Life Insurance Co. (“MLIC”). In the accompanying letter, NovaStar informed the Jenkinses that the policy would pay off their mortgage balance in the event that either of them died and promised a thirty-day “risk free” period, commencing on the date that they received their policy, during which time they could examine the policy without cost or obligation.<sup>32</sup> The accompanying MLIC brochure also promoted the thirty-day “risk free” period and assured that any insurance premium would be added to the Jenkinses monthly mortgage payments.<sup>33</sup> The application reiterated these assurances and guaranteed that the applicant “would be ‘fully covered’ by the insurance policy during the thirty-day period while they ex-

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25. *Id.* at 735-37, 743-44.

26. *Id.* at 744.

27. *Id.*

28. *Id.*

29. *Id.* at 743-44.

30. 403 F.3d 304 (5th Cir. 2005).

31. *Id.* at 307.

32. *Id.* at 308.

33. *Id.*

amined the policy.”<sup>34</sup>

The Jenkinses completed the application and mailed it to MLIC. Relying on the brochure’s assurances that their premiums would be included in the invoices from NovaStar and that “they would ‘owe nothing’ if they returned the [policy] during the thirty-day examination period,” the Jenkinses did not enclose a check for their first insurance premium.<sup>35</sup> In March 2001, after NovaStar had mailed its March invoice to the Jenkinses, MLIC sent the family a letter stating that it had approved their application and that their certificate of insurance would arrive shortly. The notice did not mention any first-premium requirement.<sup>36</sup>

Mr. Jenkins died unexpectedly on April 4, 2001. Mrs. Jenkins received the MLIC Certificate of Insurance and policy in the mail the following day. The policy specified that the insurance was effective April 1, 2001. Mrs. Jenkins paid the April invoice from NovaStar including the premium for the MLIC policy. Mrs. Jenkins filed a claim with MLIC for benefits under the policy, but MLIC denied her claim, asserting that no insurance was in effect at the time of Mr. Jenkins’ death. MLIC then filed a declaratory-judgment action in federal district court, “seeking a holding that no MLIC insurance covered the Jenkinses at the time of [Mr. Jenkins’s] death . . . .”<sup>37</sup> Mrs. Jenkins filed a counterclaim against MLIC and a third-party claim against NovaStar for DTPA violations. MLIC and NovaStar moved for summary judgment, which the trial court granted.<sup>38</sup>

On appeal, Mrs. Jenkins argued “that MLIC and NovaStar [had] engaged in unfair and deceptive practices under . . . the DTPA by representing to potential applicants [that] the applicants would enjoy a thirty-day ‘risk free’ period during which they could (1) examine the policy and accept or reject it, (2) remain covered by the insurance while they considered these options, and (3) owe nothing if they timely rejected coverage.”<sup>39</sup> She argued that if coverage began only after the first premium was paid as MLIC and NovaStar claimed, the thirty-day period would be meaningless. In most cases, it would expire “by the time (1) MLIC notif[i]e[d] NovaStar of MLIC’s approval of the applicant . . . and (2) NovaStar bill[ed] its borrower and receive[d] the premium from its borrower.”<sup>40</sup> In response, MLIC and NovaStar relied on the “fine print above the applicants’ signature line on the application, [which] purportedly inform[ed] the applicants that the first premium [was] absolutely necessary to effectuate coverage . . . .”<sup>41</sup> MLIC and NovaStar maintained that this fine print prevented their representations from being either deceptive or misleading. The Fifth Circuit rejected this view. The court

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34. *Id.* at 307-08.

35. *Id.* at 309.

36. *Id.*

37. *Id.* at 309-10.

38. *Id.* at 310.

39. *Id.* at 319.

40. *Id.*

41. *Id.* at 320.

noted that the cover letter and the brochure both used the future tense regarding payment of the initial premium. The Fifth Circuit thus held that, particularly given the timing issues and these other documents, reasonable jurors could differ as to whether the statement in the application effectively communicated to the applicant that he would not, in fact, be “fully covered” during the entire thirty-day examination period unless he had paid his first premium.<sup>42</sup> The court concluded that Mrs. Jenkins “raised a genuine issue of material fact as to whether . . . MLIC and NovaStar represented to her and her husband that the insurance agreement conferred a full thirty-day ‘risk-free’ trial period during which they would be fully covered,” when, in fact, the agreement did not confer such a right.<sup>43</sup>

The Fifth Circuit also concluded that Mrs. Jenkins “raised a genuine issue of material fact as to whether . . . MLIC and NovaStar failed to adequately disclose information concerning the policy that they knew or should have known was crucial to [a] potential insured’s decision [whether] to apply . . . for coverage, with the intent of inducing the Jenkinses to purchase the insurance.”<sup>44</sup> The court thus reversed the district court’s grant of summary judgment in favor of MLIC and NovaStar.<sup>45</sup>

#### B. SECTION 17.50—BREACH OF EXPRESS OR IMPLIED WARRANTIES

Although a DTPA claim may be based on the breach of an express or implied warranty, the DTPA does not itself create any warranties.<sup>46</sup> The Dallas Court of Appeals examined the proof necessary to establish the existence of an express warranty in *Lacroix v. Simpson*.<sup>47</sup> In that case, the purchaser of an irrigation pump sued the seller/installer when the pump failed. After a bench trial, the court awarded the buyer damages, interest, and court costs. The seller appealed, arguing that the buyer had failed to establish the existence of a warranty. The Dallas Court of Appeals examined the evidence before the trial court to determine whether there was sufficient evidence to find an express warranty. At trial, the buyer testified that the seller had orally given a warranty for one and a half years on the pump and installation; the seller testified that he gave no warranty as to the labor and only provided a booklet with the manufacturer’s one-year warranty on the pump. The person hired to repair the pump also testified, blaming the failure of the pump on the seller’s failure to wrap the pump joints. The court of appeals concluded that this was sufficient evidence to support the trial court’s finding of an express

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42. *Id.*

43. *Id.* at 319-20.

44. *Id.* at 320.

45. *Id.* at 321.

46. *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 438 (Tex. 1995); see DTPA § 17.50(a)(2) (Vernon 2002 & Supp. 2005).

47. 148 S.W.3d 731 (Tex. App.—Dallas 2004, no pet. h.).



warranty.<sup>48</sup>

The plaintiff homeowners in *Todd v. Perry Homes*,<sup>49</sup> discussed above, sued their homebuilder for breach of the implied warranty of habitability and unconscionable conduct under the DTPA. The homeowners claimed that improper drainage resulted in standing water under the house. The builder moved for both traditional and no-evidence summary judgment on all claims, and the trial court granted the no-evidence motion on the claims for breach of implied warranty of habitability. The homeowners appealed, arguing that they had raised genuine issues of material fact.<sup>50</sup>

The Dallas Court of Appeals noted that the homeowners presented evidence showing that certain drainage problems created a future risk of mold, rot, or termites in the house. However, the court held that "[e]vidence of a risk of future problems [did] not . . . create a fact issue with respect to the home's current condition or suitability for habitation."<sup>51</sup> In addition, the court explained that the implied warranty of habitability only applied to latent defects, and the cause of the drainage problems was a condition visible to the homeowners. Accordingly, the court held that the homeowners did not raise a genuine issue of material fact as to the warranty of habitability.<sup>52</sup>

In *Ketter v. ESC Medical Systems*,<sup>53</sup> as discussed above, a physician sued a manufacturer and distributor of medical equipment for breach of warranty under the DTPA after a machine that the physician purchased did not work satisfactorily. The manufacturer moved for traditional summary judgment on the breach-of-warranty claims, arguing that the physician failed to give notice of the breach within a reasonable time as required by section 2.607 of the Texas Business and Commerce Code. The manufacturer asserted that, since it did not receive notice until two years and seven months after receipt of the equipment in question, the physician's causes of action for breach of express warranty and breach of implied warranty of fitness for a particular purpose were barred. The trial court granted the motion. However, on appeal, the Dallas Court of Appeals held that the manufacturer did not establish when the physician discovered the breach or why the period between discovery of the breach and notice was unreasonable. Thus, the court held that the manufacturer failed to establish as a matter of law that untimely notice barred the physician's causes of action for breach of express and implied warranty.<sup>54</sup>

The plaintiff in *Head v. U.S. Inspect DFW, Inc.*,<sup>55</sup> as discussed above, experienced problems with the roof of her house and sued the company and individual that inspected the house before she purchased it. The

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48. *Id.* at 733-35.

49. 156 S.W.3d 919 (Tex. App.—Dallas 2005, no pet. h.).

50. *Id.* at 921.

51. *Id.*

52. *Id.*

53. 169 S.W.3d 791 (Tex. App.—Dallas 2005, no pet. h.).

54. *Id.* at 795-96, 799-800.

55. 159 S.W.3d 731 (Tex. App.—Fort Worth 2005, pet. denied).

plaintiff alleged that the person who inspected the attic and “roof was an ‘apprentice inspector’ rather than a licensed real estate inspector.”<sup>56</sup> The plaintiff claimed that the defendants therefore “breached express warranties set forth in the inspection agreement that (1) ‘a licensed professional real estate inspector would perform the inspection’ and (2) ‘that the inspection would be conducted in accordance with the standards of the Texas Real Estate Commission.’”<sup>57</sup> The trial court granted summary judgment against the plaintiff. She appealed, arguing that she had raised an issue of fact on her DTPA breach-of-warranty claim. Specifically, she pointed to the inspector’s testimony, who acknowledged that he would have fallen below his own standard of care by allowing the apprentice inspector to inspect the roof unsupervised. The court held that the inspector’s admission was some evidence that the defendants breached the warranties. The Fort Worth Court of Appeals also distinguished between breach of contract and breach of warranty, holding that “when a party fails to deliver the goods as promised, a breach of contract occurs, but when a seller delivers nonconforming goods, it is a breach of warranty.”<sup>58</sup> As the plaintiff offered evidence that the problems with the roof should have been visible on the date of the inspection, the inspections arguably did not conform to the quality of the services bargained for. The court thus concluded that there was “a fact issue as to whether [the defendants] breached an express warranty that a licensed inspector would perform the inspection in conformity with industry standards.”<sup>59</sup>

### C. 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>60</sup> In *Ketter v. ESC Medical Systems*,<sup>61</sup> discussed above, a physician sued a manufacturer and distributor of medical equipment for, among other claims, DTPA violations based upon unconscionable conduct after a machine that the physician purchased did not work satisfactorily. The manufacturer and distributor filed separate no-evidence and traditional motions for summary judgment, and without stating the specific grounds for its decision, the trial court granted the motions. On appeal, the physician argued that the defendants falsely represented that the medical equipment was of the best quality, taking advantage of the physician’s lack of knowledge, ability, experience, or capacity to a grossly unfair degree. The defendants contended that, since the physician was a doctor with years of advanced education and experience, the physician’s suggestion that the defendants

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56. *Id.* at 735.

57. *Id.* at 746.

58. *Id.* at 747.

59. *Id.* at 735, 737, 746-47.

60. DTPA § 17.45(5) (Vernon 2002 & Supp. 2005).

61. 169 S.W.3d 791 (Tex. App.—Dallas 2005, no pet. h.).

took advantage of this lack of knowledge, ability, and experience to a grossly unfair degree was untenable. Rejecting this argument, the Dallas Court of Appeals stated, "We decline to hold that an unconscionable action or course of action cannot be practiced upon an experienced physician."<sup>62</sup> The court also concluded that the defendant's summary-judgment motion failed to establish as a matter of law that there was not a gross disparity between the value received and the consideration paid. Accordingly, the court held that trial court erred in granting summary judgment to the manufacturer and distributor on the physician's claim for unconscionable conduct under the DTPA.<sup>63</sup>

#### IV. DETERMINING THE MEASURE OF DAMAGES

A prevailing plaintiff in a DTPA action may recover economic damages.<sup>64</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>65</sup> Out-of-pocket damages measure the difference between the value that the buyer paid and the value of what he received.<sup>66</sup> Benefit-of-the-bargain damages measure the difference between the value as represented and the value as received.<sup>67</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>68</sup>

##### A. EVIDENCE OF DAMAGES

In *Matheus v. Sasser*,<sup>69</sup> the Fort Worth Court of Appeals addressed the proper measure of damages for a realtor's misrepresentation of a house's square footage. The realtors represented that the house had 4,218 square feet. The misled buyer relied upon the realtors' representations, agreeing to pay \$343,255 for the house (which he calculated as \$81.37 per square foot). Subsequent to the closing, the buyer received a copy of an appraisal, which stated that the house's fair market value was \$347,000 and that it was only 3,595 square feet. The buyer sued the realtors and others for misrepresentation under the DTPA. At trial, the buyer sought damages of \$50,856.25 for the 625 square feet mistake, or \$81.37 per square foot. At the conclusion of the buyer's case, the realtors moved for judgment on the DTPA claim. They contended that proof of the fair market

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62. *Id.* at 801.

63. *Id.* at 795-96, 800-02. See also *Head*, 159 S.W.3d at 731 (holding that plaintiff failed to show how her lack of knowledge was taken advantage of to an unfair degree particularly when she was represented by an attorney in connection with the transaction).

64. DTPA § 17.50(b)(1).

65. *Leyendecker & Assocs. v. Wechter*, 683 S.W.2d 369, 372 (Tex. 1984).

66. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 817 (Tex. 1997).

67. *Id.*

68. *Leyendecker & Assocs.*, 683 S.W.2d at 372-73.

69. 164 S.W.3d 453 (Tex. App.—Fort Worth 2005, no pet. h.).

value of the property was a necessary element of either a benefit-of-the-bargain or out-of-pocket measure of damages, and that the buyer presented no such evidence. The trial court granted the motion and the buyer appealed.<sup>70</sup>

The Fort Worth Court of Appeals first considered the measure of damages available for a DTPA claim. The court held that a victorious DTPA plaintiff could recover any actual damages recoverable at common law, which includes both direct damages—the necessary and usual results of the defendant’s wrongful act—and consequential damages—those that result naturally, but not necessarily, from the acts complained of. While the out-of-pocket and benefit-of-the-bargain measures are the two generally recognized measures of direct damages for misrepresentation, “[o]ther damages may be available to ensure that the plaintiff is made whole.”<sup>71</sup> In this case, however, the buyer did not plead or argue that he was entitled to consequential damages. Instead, he argued that he was entitled to benefit-of-the-bargain damages, as measured by a particular price per square foot. The court disagreed, explaining that the buyer’s calculation of damages was generally available only if a sale of real estate was on a per-unit basis. Here, although the buyer testified that he was calculating his offering price on a per-unit basis, the home and property were being sold in gross. In so holding, the court also relied upon the fact that, despite the alleged misrepresentations, the buyer received property of a *greater* value than he had bargained for. Finally, the court held that the buyer failed to provide any evidence that the property had a fair market value in excess of the amount paid. The only evidence of value was the appraisal and the buyer’s testimony, which was impermissibly based on the intrinsic value of the property to him rather than the fair market value. Because there was no competent evidence to support the buyer’s claimed damages, the court held that the realtors’ motion for judgment was properly granted.<sup>72</sup>

The Houston Court of Appeals considered the proper measure of damages for failure to deliver a vehicle as promised in *Manon v. Tejas Toyota, Inc.*<sup>73</sup> The Manons went to Tejas Toyota in September of 2000 to buy a new minivan, specifying that they wanted a certain color exterior, wood-grained interior, and a trailer hitch. Tejas offered a 2001 model with those features, and the Manons accepted. When the minivan arrived, however, it did not have the promised wood-grained interior or trailer hitch. The Manons accepted the vehicle on the condition that Tejas would install the desired features. Tejas agreed and assured the Manons that it had ordered the necessary parts. Tejas later placed a trailer hitch on the vehicle; however, it had to be removed soon thereafter because it was causing excessive noise. Tejas never installed the wood-grained inte-

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70. *Id.* at 457.

71. *Id.* at 459.

72. *Id.* at 458-63.

73. 162 S.W.3d 743 (Tex. App.—Houston [14th Dist.] 2005, no pet. h.).

rior because Toyota did not manufacture that interior for the 2001 minivan. Tejas offered to refund the approximate value of the interior trim and trailer hitch and to discount a new vehicle. The Manons refused Tejas' offer and instead traded the van in for an SUV at another dealership.<sup>74</sup>

The Manons then sued Tejas for breach of contract, fraud, negligent misrepresentation, and DTPA violations, seeking in damages either the original purchase price of the minivan or the difference between the cost of the SUV and the amount received for the van's trade-in. At trial, the jury awarded actual and exemplary damages. Tejas appealed, arguing that there was insufficient evidence to support DTPA damages.<sup>75</sup>

Like the Fort Worth Court of Appeals in *Matheus v. Sasser*,<sup>76</sup> the Houston Court of Appeals first held that recovery under the DTPA was not limited to benefit-of-the-bargain or out-of-pocket damages. Rather, a prevailing plaintiff was entitled to recover "related and reasonably necessary expenses" or such other damages that are needed "to ensure that the plaintiff is made whole."<sup>77</sup> The jury's award equaled the difference between what the Manons paid for the minivan and what they received when they traded it in, plus a credit that Tejas allegedly neglected to provide the Manons. The Manons had provided documentary evidence to support these amounts. Because this award appeared to be an attempt to make the Manons whole, the court upheld the verdict.<sup>78</sup>

#### B. ADDITIONAL DAMAGES FOR "KNOWING"

The court in *Manon* also examined the sufficiency of the evidence to support an award of additional damages. As discussed above, the Manons specified to Tejas Toyota that they wanted a minivan with wood-grained interior. While the wood-grained interior trim was no longer available, Tejas nevertheless told the Manons "that it had ordered the wood-grained trim and that the trim would be delivered and installed within three weeks."<sup>79</sup> The Manons returned to Tejas several times for service, and each time, Tejas promised that the wood trim was on order and that it would be installed as soon as possible. Several months passed before "Tejas finally informed the Manons that the wood-grained trim was no longer available."<sup>80</sup> Dealership records and trial testimony also suggested that Tejas never even placed an order for the wood-grained trim, despite repeatedly assuring the Manons that the trim was on order. Given these facts, the court held that the evidence supported the jury's additional award of \$5,000.<sup>81</sup>

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74. *Id.* at 746.

75. *Id.* at 746-48.

76. 164 S.W.3d at 453.

77. *Manon*, 162 S.W.3d at 754.

78. *Id.* at 753-55.

79. *Id.* at 757.

80. *Id.*

81. *Id.* at 757-58.

## 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>82</sup> This is only partially correct, since several DTPA provisions expressly require proof of intentional conduct.<sup>83</sup> Some courts have gone so far as to hold that common-law defenses, such as estoppel and ratification, are unavailable to combat DTPA claims.<sup>84</sup> Other courts have recognized a variety of defenses to DTPA claims.<sup>85</sup> However, 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 professional-services exemption in what is one of very few published opinions on the provision. As discussed above, *Head v. U.S. Inspect DFW, Inc.*<sup>86</sup> involved a contract for home inspection. The contract provided that a licensed real-estate inspector would perform the inspection, but an unlicensed apprentice allegedly inspected the roof and attic. When the plaintiff sued, the defendants raised the professional-services exemption. The plaintiff conceded that the inspection services in question were professional services; however, she argued that one of the exceptions in DTPA section 17.49(c), misrepresentation, applied to save her claims from the exemption.<sup>87</sup>

The plaintiff argued that the defendants "made express misrepresentations of fact 'that cannot be characterized as advice, judgment, or opinion,' and thus" the first exception to the professional services exemption applied.<sup>88</sup> Specifically, she claimed that the defendants promised to provide a licensed real-estate inspector and did not, furnished her the inspection report incorrectly, stating that certain items had been inspected by a licensed inspector, and falsely stated that the inspected items were performing their intended function. The plaintiff maintained that these mis-

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82. 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).

83. See, e.g., DTPA § 17.46(b)(9), (10), (13), (17), (24) (Vernon 2002 & Supp. 2005).

84. 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 the DTPA's primary purposes are to relieve consumers of the burden of overcoming common-law defenses and to provide a cause of action for misrepresentation).

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

86. 159 S.W.3d 731 (Tex. App.—Fort Worth 2005, pet. denied).

87. *Id.* at 735, 737, 740.

88. *Id.* at 741.

representations dealt with “factual conditions” rather than opinion, and therefore were outside the professional-services exemption.<sup>89</sup> The Fort Worth Court of Appeals disagreed, holding that the statement that the roof and attic were performing their intended function was one of professional opinion. Similarly, the court held that whether a licensed real-estate inspector conducted the inspection related to the level of expertise necessary for the opinions that the defendants agreed to furnish. Thus, the professional-services exemption applied.<sup>90</sup>

## B. PREEMPTION AND EXEMPTION FROM THE DTPA

Certain statutory schemes and common-law doctrines bar DTPA claims either expressly or by implication, while other schemes affect a plaintiff’s procedures for bringing DTPA claims.

### 1. *The Federal Insecticide, Fungicide, and Rodenticide Act*

In *Bates v. Dow Agrosciences LLC*,<sup>91</sup> the United States Supreme Court considered one such preemption argument. The Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”)<sup>92</sup> creates a comprehensive regulatory scheme for pesticide and herbicide labeling.<sup>93</sup> Under its FIFRA authority, the Environmental Protection Agency conditionally registered the weed-killer Strongarm. With this permission to sell the product in the United States, Dow marketed Strongarm to Texas peanut farmers. Strongarm’s label stated, “Use of Strongarm is recommended in all areas where peanuts are grown,” and Dow’s agents made similar representations in their sales to farmers.<sup>94</sup> When farmers applied Strongarm to their peanut crops, the pesticide severely damaged the crops and failed to control the growth of weeds. After the farmers gave Dow notice of their intent to sue, as required by the DTPA, Dow filed a declaratory-judgment action, asserting that FIFRA expressly or impliedly preempted the claims. The farmers counterclaimed, alleging fraud, breach of warranty, and DTPA violations. The trial court granted Dow’s motion for summary judgment, finding that all but one claim were expressly preempted. The Fifth Circuit affirmed. The Supreme Court granted certiorari to resolve a conflict among the states and federal circuit courts regarding the scope of preemption.

The relevant provision of FIFRA states, “Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act.”<sup>95</sup> The Supreme Court first held that the prohibition applies only to “requirements” and that an “occurrence that merely motivates an optional decision does not

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89. *Id.*

90. *Id.* at 741-42.

91. 544 U.S. 432 (2005).

92. 7 U.S.C. § 136 (2000 & Supp. III 2003) [hereinafter FIFRA].

93. *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 601 (1991).

94. *Bates*, 544 U.S. at 436.

95. FIFRA § 136v(b).

qualify as a requirement.”<sup>96</sup> The Court thus rejected the Fifth Circuit’s holding that “any event . . . that might ‘induce’ a pesticide manufacturer to change its label should be viewed as a requirement.”<sup>97</sup> The Court nevertheless held that the term “requirements” in FIFRA “reaches beyond positive enactments, such as statutes and regulations, to embrace common law duties.”<sup>98</sup> Thus, in order for a state rule to be preempted, the Court held that it must (1) be a requirement “for labeling or packaging” and (2) must impose a requirement that is “in addition to or different from” those required under FIFRA.<sup>99</sup>

The Court then examined the farmers’ allegations. The Court determined that many of the common-law rules upon which the farmers relied did not satisfy the first condition because they related to design of safe products, appropriate testing of products, marketing products free of manufacturing defects, and honoring express warranties or other contractual commitments, rather than “labeling or packaging.”<sup>100</sup> Therefore, the Court concluded that the farmers’ claims for defective design, defective manufacture, negligent testing, and breach of express warranty were not preempted. The fact that Dow’s express warranty was located on Strongarm’s label did not affect this analysis because, as the court explained, a cause of action on an express warranty “does not require a manufacturer to make an express warranty, or in the event that a manufacturer [does] so, to [warrant] anything in particular [and thus a warranty claim] does not impose a requirement ‘for labeling or packaging.’”<sup>101</sup>

## 2. *Texas Medical Liability and Insurance Improvement Act*

Under the Medical Liability and Insurance Improvement Act (“MLIIA”), a plaintiff bringing a healthcare-liability claim must file an expert report within 120 days after filing suit.<sup>102</sup> The Texas Supreme Court examined this requirement in *Murphy v. Russell*.<sup>103</sup> Russell went to a hospital for a biopsy, allegedly telling the anesthesiologist that she only wanted a local anesthetic and did not want to be sedated or lose consciousness. He assured Russell that he would not sedate her. However, after Russell lost consciousness in the operating room, the anesthesiologist admitted that he had sedated her contrary to her instructions. Russell sued the anesthesiologist, asserting battery, breach of contract, and DTPA violations. She did not file an expert report, and the anesthesiologist moved to dismiss, arguing that the claims were healthcare-liability claims subject to the requirements of the MLIIA. The trial court granted the motion. The Dallas Court of Appeals reversed, holding that,

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96. *Bates*, 544 U.S. at 436-37.

97. *Id.* at 441.

98. *Id.*

99. *Id.*

100. *Id.* at 442.

101. *Id.* (quoting FIFRA § 136(b)).

102. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon 2005 & Supp. 2005).

103. 167 S.W.3d 835 (Tex. 2005).



since Russell was not alleging that the anesthesiologist deviated from the standard of medical care, no expert report was required.<sup>104</sup>

The Texas Supreme Court reversed and dismissed the suit. The court first held that the expert-report requirements apply to all healthcare-liability claims. The applicable version of the MLIIA defined a healthcare-liability claim as

a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or healthcare or safety which proximately results in injury or death of the patient, whether the patient's claim or cause of action sounds in tort or contract.<sup>105</sup>

Applying this definition, the court held that the issue in Russell's DTPA claim was whether the administration of a general anesthetic under all the circumstances met the standard of care for anesthesiologists and thus was "'nothing more than an attempt to recast [a] malpractice claim as a DTPA action.'" <sup>106</sup>

The court held that in enacting the requirement of an expert report in healthcare-liability claims, "the Legislature intended health care liability claims to be scrutinized by an expert . . . before the suit can proceed."<sup>107</sup> Even if Russell might have been able to prove her claims at trial without expert testimony, the court held that

the Legislature envisioned that discovery and the ultimate determination of what issues are submitted to the factfinder should not go forward unless at least one expert has examined the case and opined as to the applicable standard of care, that it was breached, and that there is a causal relationship between the failure to meet the standard of care and the injury, harm, or damages claimed. The fact that in the final analysis, expert testimony may not be necessary to support a verdict does not mean the claim is not a health care liability claim.<sup>108</sup>

### 3. *National Flood Insurance Act*

In *Wright v. Allstate Insurance Co.*,<sup>109</sup> Allstate denied Dr. Thomas Wright's claim against his flood-insurance policy, which was issued under the National Flood Insurance Act ("NFIA"). Wright purchased a Standard Flood Insurance Policy ("SFIP") from Allstate to cover his home. Wright filed a claim on this SFIP, which, after a series of negotiations, Allstate rejected. Wright filed suit, alleging breach of contract and various other state-law claims, including DTPA violations. The trial court

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104. *Id.* at 837.

105. *Id.* (quoting former TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.03(a)(4) (repealed 2003) (now codified at TEX. CIV. PRAC. & REM. CODE ANN. § 74.001 (Vernon 2005 & Supp. 2005))).

106. *Id.* at 839 (quoting *Gormley v. Stover*, 907 S.W.2d 448, 450 (Tex. 1995)).

107. *Id.* at 838.

108. *Id.*

109. 415 F.3d 384 (5th Cir. 2005).

held that federal law preempted all but one claim. The Fifth Circuit affirmed, holding that the NFIA was “conceived to achieve policies which are national in scope” and that “the federal government participates extensively in the program both in a supervisory capacity and financially.”<sup>110</sup> For these reasons, the court held that federal law preempts state-law tort claims arising from claims handled by insurers under the NFIA.<sup>111</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 he relied upon the false, misleading, or deceptive act or practice.<sup>112</sup>

The Waco Court of Appeals considered the effect of a merger clause on the DTPA’s reliance element in *Simpson v. Woodbridge Properties, LLC*.<sup>113</sup> A real-estate deal did not close by the contractually set deadline, and the seller refused to sell the buyer the land after the deadline. The agreement contained a merger clause providing that it was the entire agreement and stated that the parties would not be bound by any stipulations, representations, agreements, or promises not contained within the agreement. The buyer sued for fraud, negligent misrepresentation, and DTPA violations, alleging that the seller made material misrepresentations and omissions about the property and never indicated that any “time deadlines had or were soon to pass.”<sup>114</sup> The trial court granted summary judgment in favor of the seller. The Dallas Court of Appeals affirmed, holding that alleged misrepresentations forming the basis of the buyer’s claim were outside the contract, and the merger clause barred them. In other words, the existence of a form deadline in the contract vitiated any reliance that the buyer may have placed on the seller’s alleged willingness to complete the sale after those deadlines.<sup>115</sup>

In *Fidelity & Guaranty Life Insurance Co. v. Pina*,<sup>116</sup> teachers sued an issuer of annuities, alleging that the issuer had misrepresented the applicable interest rate. The trial court certified a class action, and the issuer brought an interlocutory appeal.<sup>117</sup>

The Corpus Christi Court of Appeals recognized that a misrepresentation claim under the DTPA requires reliance upon the misrepresentation and that “the Texas Supreme Court [has] limited the ability of potential plaintiffs to form a class when the issue of reliance is [important] to the resolution of the class[’s] claim[s].”<sup>118</sup> Specifically, in the context of mis-

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110. *Id.* at 390 (quoting *West v. Harris*, 573 F.2d 873, 881 (5th Cir. 1978)).

111. *Id.*

112. DTPA § 17.50(a)(1) (Vernon 2002 & Supp. 2005).

113. 153 S.W.3d 682 (Tex. App.—Dallas 2005, no pet. h.).

114. *Id.* at 683.

115. *Id.* at 683-84.

116. 165 S.W.3d 416 (Tex. App.—Corpus Christi 2005, no pet. h.).

117. *Id.* at 418-20.

118. *Id.* at 423.

representations by a seller, it is not enough to show that the seller wanted purchasers to rely upon its misrepresentations. Instead, class certification of such claims requires "evidence that the [plaintiffs] actually did rely upon the misrepresentations 'so uniformly that common issues of reliance predominate over individual issues.'"<sup>119</sup> In application to this case, the court found that, while the named plaintiffs provided some evidence that they relied upon the alleged misrepresentation when making their purchases, each individual's reliance was personalized; there was no evidence demonstrating uniform, classwide reliance. Under these circumstances, the court held that certification of a class was in error.<sup>120</sup>

#### D. NECESSITY OF PROVING CAUSATION

Liability under the DTPA is limited to conduct that is a producing cause of the plaintiff's damages.<sup>121</sup> Unlike proximate cause, producing cause does not require that the injury be foreseeable.<sup>122</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>123</sup> When determining whether a defendant's actions are a producing cause of a plaintiff's damages, courts consider whether the alleged cause is a substantial factor that brings about the plaintiff's injury, without which the injury would not have occurred.<sup>124</sup>

The Dallas Court of Appeals applied the concept of producing cause in *Nelson v. Regions Mortgage, Inc.*, which arose from a father's decision to save his son's home from foreclosure.<sup>125</sup> Nelson's son and his wife, who were having financial and marital difficulties, defaulted on their mortgage. When the mortgage holder accelerated the maturity of the note and posted the property for foreclosure, Nelson purchased the property from the bank to avoid the foreclosure. Nelson received an assignment of the mortgage and copies, but not originals, of the note and deed of trust. The son and his wife reconciled but never made payments to Nelson on the note. Nelson then filed suit against the bank and its lawyer, seeking to rescind the note and collect damages. He claimed that he did not receive the benefit of his bargain because he never received the original note and deed of trust and thus, was unable to receive payments on the note from his son. The trial court granted summary judgment in favor of the defendants, and the Dallas Court of Appeals affirmed. The court noted that Nelson had no evidence that he made a demand on his son to pay or that the son refused. The court therefore held that Nelson had failed to raise a genuine issue of material fact that his failure to receive

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119. *Id.* (quoting *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 694 (Tex. 2002)).

120. *Id.* at 423-24.

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

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

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

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

125. 170 S.W.3d 858 (Tex. App.—Dallas 2005, no pet. h.).

the original note and deed of trust was the cause of his alleged damages.<sup>126</sup>

### E. "As Is" CLAUSES

An "as is" agreement generally negates the causation element of a DTPA claim.<sup>127</sup> One such clause was considered in *Savage v. Doyle*.<sup>128</sup> In this case, the seller's house sustained water damage from a water-heater malfunction while under a contract for deed. The buyer asked the seller to make a claim on his insurance. He subsequently executed a quitclaim deed, citing as consideration the cancellation of the contract for deed. The seller failed to make the insurance claim, and the buyer sued for breach of contract. After discovering extensive preexisting water damage while repairing the damage from the leaky water heater, the buyer added claims for fraud and DTPA violations. The seller moved for summary judgment on the buyer's claims, arguing that the quitclaim deed cancelled the contract and released all claims. The trial court granted summary judgment for the seller, and the buyer appealed.<sup>129</sup>

On appeal, the Beaumont Court of Appeals upheld summary judgment on the breach-of-contract claim, reasoning that "[w]hen the contract was cancelled in consideration for the quitclaim deed, the . . . obligations under the contract ended."<sup>130</sup> However, the court reversed summary judgment on the DTPA and fraud claims. The disputes over water damage and insurance claims were not mentioned in the quitclaim deed, and the quitclaim deed only expressly released the claim to an interest in the real property.<sup>131</sup> In addition, the court rejected the seller's argument that the "as is" provision in the contract for deed precluded "a claim for some minor property damage."<sup>132</sup> The court held that, in order to overcome the "as is" provision, the buyer had to "present some summary judgment evidence that 'but for' the representations of the seller regarding the condition of the subject of the contract, the buyer would not have assented to the 'as is' clause in the sales contract."<sup>133</sup> The buyer presented sufficient evidence in an affidavit to raise a fact issue as to whether the seller failed to disclose his knowledge that the property sustained water damage. Thus, the DTPA claim survived summary judgment, notwithstanding the "as is" clause in the contract for deed.<sup>134</sup>

*Gym-N-I Playgrounds, Inc. v. Snider*<sup>135</sup> centered on the applicability and effect of an "as is" clause in a commercial lease. Gym-N-I leased a

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126. *Id.* at 860, 862-63.

127. *See Prudential*, 896 S.W.2d at 161.

128. *Savage v. Doyle*, 153 S.W.3d 231 (Tex. App.—Beaumont 2004, no pet. h.).

129. *Id.* at 233-34.

130. *Id.* at 235.

131. *Id.* at 234-35, 237.

132. *Id.* at 235.

133. *Id.* at 236 (quoting *Procter v. RMC Capital Corp.*, 47 S.W.3d 828, 834 (Tex. App.—Beaumont 2001, no pet. h.)).

134. *Id.* at 236-37.

135. 158 S.W.3d 78 (Tex. App.—Austin 2005, pet. filed).

building from Snider and agreed in the lease to accept the building "as is," disclaiming reliance on warranties and representations. The building was destroyed by fire, and Gym-N-I sued Snider for various claims relating to the building's condition. The court granted Snider's motion for summary judgment, and Gym-N-I appealed, arguing, inter alia, that the summary judgment was improper because the lease containing the "as is" provision was unenforceable against its claims.<sup>136</sup>

The Austin Court of Appeals explained that, under the Texas Supreme Court's decision in *Prudential Insurance Co. of America v. Jefferson Associates*, as long as a buyer is not induced by fraud into accepting the "as is" provision, the provision negates the causation element essential to recover on claims associated with the physical condition of the property.<sup>137</sup> Gym-N-I did not allege that it was fraudulently induced; "Instead, Gym-N-I [argued] that *Prudential* applies only to the sale of property, not a lease, and should . . . be distinguished on that basis."<sup>138</sup> The court disagreed, and held that "as is" clauses also can apply to leases of commercial property.<sup>139</sup>

Since *Prudential* applied, Gym-N-I argued that the "as is" clause could not be enforced under the standards set forth in *Prudential* and its progeny. Thus, the court analyzed whether the "as is" clause met the "letter and spirit of *Prudential*."<sup>140</sup> In doing so, the court considered five factors: "(1) the sophistication of the parties; (2) the terms of the 'as is' agreement; (3) whether the 'as is' agreement was freely negotiated; (4) whether the agreement was an arm's-length transaction; and (5) whether there was a knowing misrepresentation or concealment of a known fact."<sup>141</sup> In assessing the parties' relative sophistication and whether the agreement was freely negotiated, the court considered whether a party was represented by counsel. In application to this case, the court emphasized the sophistication of the parties, the terms of the "as is" clause, and Gym-N-I's admissions of lack of fraudulent inducement. The court noted in particular that, before signing the lease, the owners of Gym-N-I had actual knowledge of the building conditions that were later made the basis of the suit, yet signed the "as is" clause with awareness of that provision and its meaning.<sup>142</sup> Thus, the court held that the "as is" agreement should be enforced.

Lastly, Gym-N-I argued that the trial court erred in finding that the "as is" clause in the commercial lease waived the implied warranty of suitability. The Austin Court of Appeals again disagreed. The lease explicitly mentioned that the landlord made no warranties, including the implied warranty of suitability. In addition, the "as is" provision was underlined

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136. *Id.* at 81, 84.

137. 898 S.W.2d 156, 161 (Tex. 1995).

138. *Gym-N-I Playgrounds, Inc.*, 158 S.W.3d at 85.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 85-86.

and set in capital letters for emphasis. Moreover, the tenant realized that the “as is” provision was in the lease, knew that it highly favored the landlord, and understood the provision’s intent and scope. Finally, it was undisputed that the tenant knew of the building’s condition.<sup>143</sup> Thus, the implied warranty of suitability was waived.

#### F. 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>144</sup> Generally, “when a [DTPA] cause of action accrues is a question of law.”<sup>145</sup>

In *Dean v. Frank W. Neal & Associates*,<sup>146</sup> the Fort Worth Court of Appeals applied the DTPA limitations period to a construction-defect case. The Deans entered into contracts with a builder, an architect, and a design firm for the construction of a home. The architect hired a structural-engineering firm to design the home’s foundation. In designing the foundation, the engineering firm used information from a soil report prepared by HBC Engineering several years earlier for a different architect. The report indicated that the soil beneath the house could potentially move two inches. The structural-engineering firm recommended a suspended-slab, or pier-and-beam, foundation, but the homeowners rejected the idea as too costly.<sup>147</sup>

Cracks appeared during the home’s construction during 1996 and continued during the months after the Deans moved there. In October 1997, with the homeowners’ knowledge, the architect met with the structural engineer, the builder, and a representative of HBC to discuss how to mitigate the problem. Between 1998 and 2002, the architect continued to meet with various people. In January 2002, the homeowners filed suit against the design firm, the structural engineer, the builder, and HBC, alleging negligence, breach of warranty, fraud, breach of contract, and DTPA violations. The design firm was nonsuited and the remaining defendants were granted summary judgment based upon the applicable statutes of limitations.<sup>148</sup>

The homeowners appealed, arguing that the discovery rule saved their claims and that the defendants were equitably estopped from relying upon limitations. The Fort Worth Court of Appeals reviewed the summary-judgment evidence, including an affidavit from one of the homeowners in which she admitted that she first observed cracking in the

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143. *Id.* at 86, 88.

144. DTPA § 17.565 (Vernon 2002 & Supp. 2005).

145. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003).

146. *Dean v. Frank W. Neal & Assocs.*, 166 S.W.3d 352 (Tex. App.—Fort Worth 2005, no pet. h.).

147. *Id.* at 354-55.

148. *Id.* at 355.

garage in 1996 and noticed additional cracking shortly after moving in. Also, the evidence showed that by October 1997, the homeowners were aware of the movement in the soil because the architect began to call meetings regarding the problem.<sup>149</sup> Thus, the court of appeals held that the homeowners knew or should have known of the injury to their home by October 1997. Citing the Texas Supreme Court's opinion in *PPG Industries, Inc. v. JMB/Houston Centers Partners L.P.*,<sup>150</sup> the court of appeals held that the homeowners' alleged lack of knowledge of the problem's exact cause was not relevant because the limitations clock begins to run when the party learns of a wrongful injury, even if the party does not yet know the specific cause or full extent of the injury or the party responsible.<sup>151</sup> Therefore, the plaintiffs' discovery-rule argument was rejected.

As for the equitable-estoppel argument, the court of appeals recognized that estoppel in avoidance of limitations may be invoked if "a potential defendant conceal[ed] facts that are necessary for the plaintiff to know [of the] cause of action or the defendant engages in conduct that induces the plaintiff to forgo a timely suit."<sup>152</sup> The court held that neither the defendants' initial attempts to repair the foundation nor the attempts by HBC and the architect to have insurance companies pay for more extensive repairs were sufficient to raise a fact issue regarding equitable estoppel. The court thus affirmed the grant of summary judgment.<sup>153</sup>

## VI. CONCLUSION

This year's crop of cases brings more bad news for DTPA plaintiffs. Of the sixteen cases reported for discussion, plaintiffs won just two. This thirteen-percent success rate is even more dismal than last year, during which plaintiffs won six of twenty-four cases, or 25%.

Another interesting trend is the use of summary judgment and other dispositive motions to terminate DTPA claims before trial. Whereas last year, one-third of the cases were appeals from summary judgment, this year, 75% were appeals from summary judgments or dismissals on the pleadings. In light of the fact that reported DTPA cases have declined by one-third in the past two years, these statistics suggest that putative DTPA plaintiffs are quite reasonably giving up hope on the statute.

The courts' aggressive use of summary judgment to kill DTPA claims is nowhere more evident than in the Texas Supreme Court's *Murphy* decision.<sup>154</sup> As noted above, the issue in the case was whether the plaintiff's claims were subject to the provision in the Medical Liability and Insurance Improvement Act requiring submission of an expert report. The

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149. *Id.* at 356.

150. 146 S.W.3d 79, 93-94 (Tex. 2004) (footnotes omitted).

151. *Dean*, 166 S.W.3d at 355-57.

152. *Id.* at 358.

153. *Id.* at 360-61.

154. *Murphy v. Russell*, 167 S.W.3d 835 (Tex. 2005).

plaintiff's claims of battery, breach of contract, and DTPA violations were based on an anesthesiologist's false assurance that he would not sedate her. The Dallas Court of Appeals held that the plaintiff's complaint was not based on a claim that the anesthesiologist deviated from the standard of care, and therefore, no expert report was required. The supreme court reversed, concluding that the plaintiff's DTPA claim was "nothing more than an attempt to recast [a] malpractice claim as a DTPA action."<sup>155</sup> This holding was little more than *ipse dixit*, as it elided the plain fact that the plaintiff's claim turned not on the standard of care but on a misrepresentation of fact. The court's decision to throw out the claim because it was unaccompanied by an expert report would seem to imply either that (1) there indeed are instances in which it is permissible for a physician to lie to a patient and that an expert witness is needed to say when that is so; or (2) there are cases in which the standard of care is irrelevant to a DTPA claim, but the plaintiff should be put to the expense of paying for expert testimony on that nonissue anyway. Although this holding is no doubt good news for expert witnesses in need of more work, it is not supported in either the statute's plain language, the respective roles of the court and experts in the gatekeeping function, or in the Texas Legislature's express policy "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>156</sup> It is, however, sure to reinforce the trend of courts disposing of DTPA claims on summary judgment and aggrieved consumers declining to invoke the DTPA.

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155. *Id.* at 839 (quoting *Gormley v. Stover*, 907 S.W.2d 448, 450 (Tex. 1995)).

156. DTPA § 17.44(a) (Vernon 2002 & Supp. 2005) (emphasis added).



