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DECEPTIVE TRADE PRACTICES ACT

William Christopher Carmody*
Mark A. Anderson**

ON numerous occasions during the Survey period, Texas appellate courts interpreted and applied the much litigated Texas Deceptive Trade Practices—Consumer Protection Act (“DTPA”).¹ Some of the more significant decisions reported during this period addressed the DTPA notice provision, the computation of damages available to a prevailing plaintiff in a DTPA action, and the effect that an arbitration clause contained in a contract has on a DTPA claim asserted by one of the parties to that contract. This article discusses those and other important decisions reported during the Survey period.

I. PROPER PLAINTIFF: CONSUMER STANDING

To establish eligibility for benefits from the various remedies provided by the DTPA, a plaintiff’s consumer status under the Act must first be confirmed. The Act defines a consumer as one “who seeks or acquires by purchase or lease, any goods or services”² The Texas Supreme Court clarified this definition in *Cameron v. Terrell & Garrett, Inc.*,³ where it set forth two necessary elements: (1) the party “must have sought or acquired goods or services by purchase or lease;”⁴ and (2) “the goods or services purchased or leased must form the basis of the complaint.”⁵

The Fort Worth Court of Appeals applied the consumer definition in *Luker v. Arnold*.⁶ In *Luker*, the Billingsleys sold to Arnold five duplexes in a subdivision which had been developed by Luker. The Billingsleys previously had acquired the property from Luker in a separate transaction. Arnold sued the Billingsleys and Luker for misrepresentation, negligence and DTPA

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1. TEX. BUS. & COM. CODE §§ 17.41-17.826 (Vernon 1987 & Supp. 1994) (hereinafter all cites to this statute will be “DTPA §”).

2. DTPA § 17.45(4).

3. 618 S.W.2d 535 (Tex. 1981).

4. *Id.* at 539. (citing *Riverside Nat’l Bank v. Lewis*, 603 S.W.2d 169, 174 (Tex. 1980); *Woods v. Littleton*, 554 S.W.2d 662, 666 (Tex. 1977)).

5. *Id.* (citing *Riverside*, 603 S.W.2d at 175; *Woods* 554 S.W.2d at 666; *Rutherford v. Whataburger, Inc.*, 601 S.W.2d 441, 444 (Tex. Civ. App.—Dallas 1980, writ ref’d n.r.e.); *Delaney Ralty, Inc. v. Ozuna*, 593 S.W.2d 797, 800 (Tex. Civ. App.—El Paso), writ ref’d n.r.e. *per curiam*, 600 S.W.2d 780 (Tex. 1980); *Ferguson v. Beal*, 588 S.W.2d 651, 653 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref’d n.r.e.)).

6. 843 S.W.2d 108 (Tex. App.—Fort Worth 1992, no writ).

violations. Arnold settled his claims for damages against the Billingsleys and dismissed those claims with prejudice.

Arnold prevailed at trial against Luker, and Luker appealed. On appeal, Luker urged that Arnold was not a consumer under the DTPA because Luker did not seek to enjoy a benefit from the transaction. The jury charge contained a special question which inquired whether Luker "sought to enjoy a benefit of the transaction in question."⁷ Despite the jury's negative answer, the trial judge granted Arnold's motion for judgment. The Fort Worth Court of Appeals observed that "the trial judge either disregarded the jury's answer as immaterial or determined, *sua sponte*, that Arnold proved this element as a matter of law."⁸ Luker argued that the special question was material to the definition of consumer. Furthermore, because the jury answered negatively, Arnold failed to prove consumer status with regard to Luker.

The court offered a lengthy analysis of the relevance of the special issue presented to the jury, and after discussing three previous decisions of the supreme court, *Knight v. International Harvester Credit Corp.*,⁹ *Flenniken v. Longview Bank & Trust Co.*,¹⁰ and *Qantel Business Systems v. Custom Controls*,¹¹ held that the question of consumer status was material.¹² In response, Arnold argued that if the special question was material, it is so only when the second *Cameron* element fails, when the basis of the complaint are the purchased goods. Therefore, Arnold argued, because the goods formed the basis of the complaint in the underlying transaction, the special question was immaterial and correctly disregarded. After reviewing the applicable law, the court rejected this argument and declined to limit the materiality of the special question to cases where the plaintiff fails to meet the second *Cameron* element.¹³

Ultimately, the court held that the trial court correctly disregarded the jury's answer, because, as a matter of law, Arnold sought to benefit from the transaction.¹⁴ The court cited the existence of a promissory note between Luker and the Billingsleys which called for the Billingsleys to pay the final payment immediately after an investor with a permanent lender closed on the finished property. The fact that the payments were conditioned upon the subsequent improvement and sale of the property sufficiently established that Luker sought to enjoy the benefit of the closing made by the Billingsleys and their buyers, including Arnold. Therefore, as a matter of law, Arnold was a DTPA consumer with respect to Luker.¹⁵

The DTPA expressly excludes certain businesses—those whose assets are

7. *Id.* at 111.

8. *Id.* at 111 (citing TEX. R. CIV. P. 301; *U.S. Fire Ins. Co. v. Pettyjohn*, 816 S.W.2d 839 (Tex. App.—Fort Worth 1991, no writ)).

9. 627 S.W.2d 382 (Tex. 1982).

10. 661 S.W.2d 705 (Tex. 1983).

11. 761 S.W.2d 302 (Tex. 1988).

12. *Luker*, 843 S.W.2d at 112.

13. *Id.* at 112-13.

14. *Id.* at 113-14.

15. *Id.* at 114.

equivalent to \$25 million or where such business is owned or controlled by a corporation or an entity with assets of \$25 million or more—from consumer standing.¹⁶ The Beaumont Court of Appeals, in *Transport Indemnity Co. v. Orgain, Bell & Tucker*,¹⁷ addressed whether a trial court properly held that a claim brought by a company with assets in excess of \$25 million had been brought in bad faith or for the purpose of harassment.¹⁸ The plaintiff in the lawsuit, Transport Indemnity Co., brought an action alleging malpractice and violations of the DTPA against its former law firm. In response to the law firm's request for admissions, Transport admitted that it had assets in excess of \$25 million, yet it maintained the DTPA action for over one and a half years before dismissing it. Upon motion for summary judgment, the trial court found that the DTPA claim had been brought in bad faith or for the purpose of harassment, and awarded the law firm the attorney's fees and expenses which it incurred in defending the DTPA claim.¹⁹

On appeal, Transport acknowledged that it did not qualify as a consumer under the DTPA; therefore, the only issue before the appellate court was whether Transport brought the DTPA action in bad faith. The court of appeals noted that despite Transport's response to the request for admissions, which defeated its consumer status, Transport maintained its action against the law firm for one and a half years. The court noted that bad faith has been defined as "including acting in willful disregard of and refusal to learn available facts."²⁰ According to the appellate court, Transport's actions in continuing to maintain the lawsuit, even after admitting disqualification, constituted bad faith and harassment, as well as possible malice.²¹ Accordingly, the court affirmed the trial court's award of attorneys' fees and expenses.²² The Texas Supreme Court denied Transport's application for writ of error, but neither approved nor disapproved of the court of appeals' analysis of the bad faith issue.²³

II. PROPER DEFENDANT

According to the Fort Worth Court of Appeals in *Rhodes v. Sorokolit*,²⁴ health care providers may be liable under the DTPA for breach of expressed

16. DTPA § 17.45(4).

17. 846 S.W.2d 878 (Tex. App.—Beaumont), writ denied per curiam, 856 S.W.2d 410 (Tex. 1993).

18. *Id.* at 882.

19. *Id.* at 882-83.

20. *Id.* at 883 (quoting *Citizens Bridge Co. v. Guerra*, 258 S.W.2d 64, 69-70 (1953)).

21. *Id.*

22. *Id.* The court noted that Section 17.50(c) of the DTPA states that:

'On a finding by the court that an action under this section was groundless and brought in bad faith, or brought for the purpose of harassment, the court shall award the Defendant reasonable and necessary attorneys' fees and court costs.'

This is a determination to be made by the court.

Id. at 882 (citing *Donwerth v. Preston II Chrysler-Dodge*, 775 S.W.2d 634 (Tex. 1989)).

23. *Transport Indemnity Co. v. Orgain, Bell & Tucker*, 856 S.W.2d 410 (Tex. 1993) (per curiam).

24. 846 S.W.2d 618 (Tex. App.—Fort Worth 1993, writ granted).

warranties and knowing misrepresentations.²⁵ Rhodes sued Sorokolit under the DTPA for breach of implied and express warranties and misrepresentations with respect to plastic surgery performed by Sorokolit.²⁶ The trial court sustained Sorokolit's special exceptions to the DTPA allegations based on the Texas Medical Liability and Insurance Improvement Act and dismissed the case. Thus, Rhodes appealed.

With respect to the breach of implied warranty action, the court of appeals found that the trial court did not err in sustaining Sorokolit's special exception, as "Texas has expressly rejected the existence of an implied warranty for good and workmanlike performance of purely professional services."²⁷ Further, the court recognized that other courts "have held that the Medical Liability Act precludes a cause of action founded on negligence even if it is phrased in terms of a breach of implied warranty."²⁸

The court found, however, that the trial court erred in dismissing Rhodes' DTPA claims of misrepresentation and breach of express warranty.²⁹ The court followed the reasoning set forth by the Austin Court of Appeals in *Chapman v. Paul R. Wilson, Jr., D.D.S., Inc.*,³⁰ which recognized that the Texas Medical Liability & Insurance Improvement Act expressly precludes actions based upon negligence from being asserted against physicians, but that the language does not address other types of actions.³¹ The *Rhodes* court reasoned that if the intent of the legislature had been to exempt health care providers from all causes of action under the DTPA, regardless of their nature, then that intention could have been clearly expressed in the language of the statute.³² Since knowing misrepresentations are not within the plain meaning of negligence, the court held that a DTPA cause of action against health care providers exists based upon a knowing misrepresentation.³³ The *Rhodes* court extended the same reasoning to hold that a DTPA cause of action against health care providers also exists when it is based upon the breach of an expressed warranty.³⁴

III. PRESUIT NOTICE

The DTPA provides that, as a prerequisite to filing a suit seeking damages under the Act, a consumer must give written notice of his complaint to the defendant.³⁵ The Texas Supreme Court thoroughly discussed this notice re-

25. *Id.* at 620-21.

26. Initially, Rhodes sued Sorokolit for professional negligence, however she later amended her pleadings to include just DTPA violations.

27. *Id.* at 620 (citing *Dennis v. Allison*, 698 S.W.2d 94, 95-96 (Tex. 1985); *Chapman v. Paul R. Wilson, Jr., D.D.S.*, 826 S.W.2d 214, 217 (Tex. App.—Austin 1992, writ denied)).

28. *Id.* (citing *Chapman*, 826 S.W.2d at 218; *Eoff v. Hal and Charlie Peterson Found.*, 811 S.W.2d 187, 195 (Tex. App.—San Antonio 1991, no writ); *Wisnberger v. Gonzalez Warm Springs Hosp.*, 789 S.W.2d 688, 690-91 (Tex. App.—Corpus Christi 1990, writ denied)).

29. *Id.* at 621.

30. 826 S.W.2d 214 (Tex. App.—Austin 1992, writ denied).

31. *Id.* at 219.

32. *Rhodes*, 846 S.W.2d at 620-21 (citing *Chapman*, 826 S.W.2d at 219).

33. *Id.* at 621 (citing *Chapman*, 826 S.W.2d at 219).

34. *Id.*

35. DTPA § 17.505(a).

quirement in *Hines v. Hash*.³⁶ The court ultimately held that the proper remedy for failure to give timely notice is abatement, and that the request for abatement must be made "with the filing of an answer or very soon thereafter."³⁷

Hines brought the DTPA lawsuit against Hash for damages suffered as a result of a leak in a roof installed by Hash on Hines' home. Hines alleged in his original petition that the notice of his claim had been sent to Hash by certified mail, return receipt requested, but had been returned unclaimed. Hash, in his original answer, asserted as an affirmative defense that he never received proper notice prior to receiving the lawsuit papers and, therefore, had not been able to tender Hines a settlement offer. Hash never requested the trial court to abate the suit.

The evidence at trial supported Hines' claim that he had attempted to give Hash proper notice. The notice letter Hines sent to Hash and the envelope in which it was sent were admitted into evidence, and these demonstrated three unsuccessful attempts of delivery before the letter was returned to Hines. Hash did not dispute that the letter was properly addressed to him and, in fact, admitted that he received notice that the certified letter was waiting for him at the post office. Hash testified that it was not convenient for him to pick up the letter due to his work schedule.

The jury returned a favorable verdict for Hines, finding that Hash knowingly violated the DTPA. On appeal, the Amarillo Court of Appeals held that the DTPA mandates *actual* delivery of notice and that Hines' failure to deliver notice to Hash was reversible error.³⁸ That court remanded the case for a new trial with instructions to the trial court to abate the proceedings for not more than sixty days to allow Hines to comply with the notice requirement.³⁹

Hines argued to the supreme court that notice, even if not actually received, is given when mailed to the defendant at the correct address. Hines further argued that if actual delivery is required, the result of failure to give notice should not be reversal of the trial court's judgment. The supreme court set forth an exhaustive review of the evolution of the notice provision.⁴⁰ The court noted that the 1979 provision was in effect when the events of this case occurred and the suit was filed; therefore, the 1979 statute governed this case.⁴¹

36. 843 S.W.2d 464 (Tex. 1992).

37. *Id.* at 469.

38. 796 S.W.2d 312, 314 (Tex. App.—Amarillo 1990), *rev'd*, 843 S.W.2d 464 (Tex. 1992).

39. *Id.* at 315.

40. *Hines*, 843 S.W.2d at 466-67.

41. *Id.* at 467. In 1979, the statutory provision read as follows:

Section 17.50A Notice: Offer of Settlement

- (a) As a prerequisite to filing a suit seeking damages under subdivision (1) of Subsection (b) of § 17.50 of this subchapter against any person, a consumer shall give written notice to the person at least 30 days before filing the suit advising the person of the consumer's specific complaint and the amount of actual damages and expenses, including attorneys' fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant.

The supreme court recognized that the 1979 version placed the burden on the plaintiff to plead that he gave notice;⁴² however, a defendant must raise a timely objection to plaintiff's failure to plead.⁴³ The court also provided that if a defendant specifically denies receiving notice, the plaintiff must prove either that he provided it or that he was excused from providing it.⁴⁴ If a defendant does not specifically deny receiving notice, then the plaintiff is excused from proof by Rule 54 of the Texas Rules of Civil Procedure.⁴⁵

The supreme court recognized that the purpose of the DTPA notice provision is "to discourage litigation and encourage settlements of consumer complaints."⁴⁶ The court concluded that "if a plaintiff files an action for damages under the DTPA without first giving the required notice and a defendant timely requests an abatement, the trial court must abate the proceedings for sixty days."⁴⁷ The court stated that in order for an abatement request "[t]o be timely, it must be made when the purposes of notice — settlement and avoidance of litigation expense — remain viable."⁴⁸ In the words of the supreme court, the defendant must request an abatement "with the filing of an answer or very soon thereafter."⁴⁹ "A defendant who fails to make a timely request for abatement must be considered to have waived his objection to the lack of notice."⁵⁰

The court reiterated that notice other than written (such as actual or oral

Act approved June 13, 1979, 66th Leg., R.S., ch. 603, § 5 1979 Tex. Gen. Laws 1327, 1330.

Id. at 466-67.

The court noted that the notice provision has been amended since the 1979 version, but the changes were not significant to the court's analysis. The only changes are that the statute has been renumbered, the notice period extended from thirty to sixty days and the words "in reasonable detail" have been added after the words "advising the person." *Id.* at 467 n.1.

42. *Id.* at 467 (citing *Angelo Broadcasting, Inc. v. Satellite Music Network, Inc.*, 836 S.W.2d 726, 736 (Tex. App.—Dallas 1992, writ denied); *Automobile Ins. Co. v. Davila*, 805 S.W.2d 897, 902 (Tex. App.—Corpus Christi 1991, writ denied); *HOW Ins. Co. v. Patriot Fin. Serv.*, 786 S.W.2d 533, 537 (Tex. App.—Austin 1990, writ denied); *U.S. Steel Corp. v. Fibrex, Inc.*, 751 S.W.2d 628, 638 (Tex. App.—Dallas 1988), *modified and aff'd in part, rev'd in part on other grounds, and remanded sub nom.*, *Plas-tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442 (Tex. 1989); *Blumenthal v. Ameritex Computer Corp.*, 646 S.W.2d 283, 286-87 (Tex. App.—Dallas 1983, no writ)).

43. *Id.* (citing *Star-tel v. Nacogdoches Telecommunications Inc.*, 755 S.W.2d 146, 149 (Tex. App.—Houston [1st Dist.] 1988, no writ)).

44. *Id.* at 467 (citing *Winkle Chevy-Olds-Pontiac, Inc. v. Condon*, 830 S.W.2d 740, 745 (Tex. App.—Corpus Christi 1992, writ dismissed); *Automobile Ins. Co. v. Davila*, 805 S.W.2d 897, 902 (Tex. App.—Corpus Christi 1991, writ denied)). An example of when the plaintiff is excused from providing notice is found in § 17.505(b), wherein notice is excused if it "is rendered impracticable for reason of the necessity of filing suit in order to prevent the expiration of the statute of limitations or if the consumer's claim is asserted by way of counter-claim." *Id.* at 467.

45. *Id.* at 467 (citing *Investors, Inc. v. Hadley*, 738 S.W.2d 737, 741-42 (Tex. App.—Austin 1987, writ denied)).

46. *Id.* at 468 (quoting *Jim Walters Homes, Inc. v. Valencia*, 690 S.W.2d 239, 242 (Tex. 1985)).

47. *Id.* at 469.

48. *Id.*

49. *Id.*

50. *Id.* (citing *Miller v. Presswood*, 743 S.W.2d 275, 281 (Tex. App.—Beaumont 1987, writ denied); *Pool Co. v. Salt Grass Exploration, Inc.*, 681 S.W.2d 216, 219 (Tex. App.—Houston [1st Dist.] 1984, no writ)).

notice) is insufficient, because it does not comply with the statutory requirements.⁵¹ Furthermore, if notice is not given by plaintiff while the action is abated for that purpose, the action should be dismissed.⁵² The court also recognized that if the trial court refuses to abate the action, the defendant is entitled, but not obliged, to seek review of a denial of abatement by mandamus.⁵³

The supreme court also addressed the issue of expenses incurred by the defendant as a result of the plaintiff's non-compliance with the notice provision. The court recognized that the defendant could possibly suffer expenses associated with the filing of an answer, requesting abatement, and generally responding to the litigation. The court stated that if such effects occur, the trial court is authorized to remedy the effects through appropriate sanctions under Texas Rule of Civil Procedure 13.⁵⁴

IV. BREACH OF WARRANTY

It is well-settled that the builder or vendor of a residential home impliedly warrants that the home is constructed in a good and workmanlike manner and suitable for human habitation.⁵⁵ Until *Luker v. Arnold*,⁵⁶ no Texas court had extended an implied warranty to develop the property in a good and workmanlike manner to the developers of the property. In *Luker, Arnold*, the purchaser, urged the court to extend *Humber* to recognize an implied warranty from developers. After an extensive review of the policies behind the recognized implied warranties, the *Luker* court agreed that a developer impliedly warrants to develop the property in a good and workmanlike manner.⁵⁷

The *Luker* court recognized that the main reason the supreme court imposed implied warranties on builders is the consumer's reliance on the skill of the builder and on the builder's implied representation that the house will be erected in a reasonably workmanlike manner and will be fit for habitation.⁵⁸ The *Luker* court also noted that the Texas Supreme Court, in *Melody Home Manufacturing Co. v. Barnes*,⁵⁹ stated that implied warranties arise "by operation of law when public policy so mandates."⁶⁰ Moreover,

51. *Id.* (citing *HOW Ins. Co. v. Patriot Fin. Serv.*, 786 S.W.2d 533, 537 (Tex. App.—Austin 1990, writ denied); *The Moving Co. v. Whitton*, 717 S.W.2d 117, 123 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.)).

52. *Id.* (citing *Miller v. Kossey*, 802 S.W.2d 873, 876-77 (Tex. App.—Amarillo 1991, writ denied)).

53. *Id.* The court also recognized that the defendant may wait until appeal from the final judgment to seek review of a denial of abatement, but the trial court's error must be shown to be harmful to obtain a reversal and ordinarily this would require a showing the defendant was unable to limit his damages under the statute by tendering a settlement offer. *Id.*

54. *Id.* It should be noted that costs and attorneys' fees may also be awarded under § 17.50(c), which provides a standard similar to Rule 13.

55. See *Humber v. Morton*, 426 S.W.2d 554, 555 (Tex. 1968).

56. 843 S.W.2d 108 (Tex. App.—Fort Worth 1992, no writ).

57. *Id.* at 117.

58. *Id.* at 115 (citing *Humber*, 426 S.W.2d at 560).

59. 741 S.W.2d 349 (Tex. 1987).

60. *Luker*, 843 S.W.2d at 116 (quoting *Melody Home*, 741 S.W.2d at 353.)

"the public interest in protecting consumers from inferior services is paramount to any monetary damages imposed on sellers who breach an implied warranty."⁶¹

In *Luker*, Arnold's complaint was of loss resulting from damage caused by septic problems. The court reasoned that for fifteen years the Texas Department of Health has been concerned about septic system failures resulting from small lot size financially ruining consumers.⁶² The court also reasoned that the developer was in a better position to prevent the loss by septic system failures because of the control over lot size and deed restrictions.⁶³ In extending the implied warranty of good and workmanlike manner to developers, the court noted that the "caveat emptor rule as applied to developers is out of harmony with modern home buying practices."⁶⁴

V. VIOLATIONS OF THE INSURANCE CODE

The DTPA allows for consumers to maintain an action for an act or practice in violation of Article 21.21 of the Texas Insurance Code.⁶⁵ In *Spencer v. Eagle Star Insurance Co. of America*⁶⁶ the Texas Supreme Court addressed the propriety of a jury question regarding a violation of Article 21.21. As proprietors of a furniture store, the Spencers were insured by Eagle Star Insurance Company against loss of the contents of their store and interruption of its business. After a fire destroyed the store, Eagle Star hired an investigator who reported that the fire had been intentionally set inside the store and that the fire department's chief suspect was the insured, Charles Spencer. Therefore, Eagle Star made no payments on the policy. As a result of Eagle Star's refusal to pay on the policy, the Spencers were unable to reopen their business.

After the Spencers complained to the State Board of Insurance, Eagle Star agreed to pay the full policy limits for coverage of the store's contents. However, Eagle Star did not offer to the Spencers the full amount of the business interruption coverage. The Spencers sued Eagle Star for breach of contract, breach of common law duty of good faith and fair dealing, and violations of the DTPA, Texas Insurance Code section 21.21, as well as two Board of Insurance orders.⁶⁷

At trial the jury responded to two questions relating to Eagle Star's liability. The first question "asked whether Eagle Star's handling of the Spencers' claim for loss of earnings was an 'unfair practice in the business of insurance' defined by an accompanying instruction as 'any act or series of acts which is

61. *Id.* (quoting *Melody Home*, 741 S.W.2d at 353).

62. *Id.* The court quoted a statute, 25 TEX. ADMIN. CODE § 301.11(f)(4)(A), which has been in existence for fifteen years and which states that the single most important factor concerning public health problems resulting from septic system failures is a function of lot size. *Id.* (quoting 25 TEX. ADMIN. CODE § 301.11(f)(4)(A) (West Supp. 1992) (Wastewater Surveillance and Technology)).

63. *Id.* at 117.

64. *Id.*

65. DTPA § 17.50(a)(4).

66. No. C-9469, 1994 WL 37481 (Tex., Feb. 9, 1994).

67. *Id.* at *1.

arbitrary, without justification, or takes advantage of a person to the extent that an unjust or inequitable result is obtained.’”⁶⁸ The second question inquired into whether Eagle Star’s conduct was unconscionable as defined by DTPA section 17.45(5)(A). Eagle Star objected to both questions. The jury answered “yes” to the unfair insurance practice issue and “no” to the unconscionable conduct issue. The trial court granted Eagle Star’s motion for judgment notwithstanding the verdict on the ground that the first question was insufficient to support recovery by the Spencers. The court of appeals affirmed the trial court’s judgment.⁶⁹

The Texas Supreme Court observed that “[w]hen liability is asserted based upon a provision of a statute or regulation, a jury charge should track the language of the provision as closely as possible.”⁷⁰ The supreme court held that the trial court’s charge failed this test as the language of the first question—“unfair practice in the business of insurance”—appears to have been taken from Article 21.21, section 16(a), but that statute only refers to those practices specified by certain other statutes and regulations and does not refer to every such practice imaginable.⁷¹ Absent an instruction indicating Eagle Star’s actions which could result in liability, the supreme court held such question improper, as it “allowed the jury to find an unfair insurance practice based upon any action of Eagle Star that took advantage of the Spencers and resulted in an inequitable result.”⁷² Since the charge was defective and properly objected to, the court ruled that Eagle Star was entitled to a new trial.⁷³

VI. DAMAGES

The Texas Supreme Court addressed the settlement credit issue in a DTPA context in *First Title Co. v. Garrett*.⁷⁴ The Garretts purchased a parcel of land from Jenkins & Dameron for use as an automobile salvage yard. One year earlier, Jenkins & Dameron had obtained the land by a deed which contained a restrictive covenant designed to prevent certain activities, such as the use of the property as an auto salvage yard. The Garretts were not advised of the covenant which unquestionably forbade their intended use of the property. In completing the purchase, the Garretts depended on the representations of First Title Co. of Waco and Alamo Title Insurance of Texas.

After the purchase became final, the person who previously had sold the land to Jenkins & Dameron enjoined the Garretts from using the property as an auto salvage yard. The Garretts sued Jenkins & Dameron for misrepresentations and received a \$69,000 settlement. The Garretts then filed a separate lawsuit against First Title and Alamo Title, alleging negligence and

68. *Id.*

69. *Id.*

70. *Id.* at *2. (citing *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex.), *cert. denied*, 449 U.S. 1015 (1980)).

71. *Id.*

72. *Id.*

73. *Id.*

74. 860 S.W.2d 74 (Tex. 1993).

breach of the DTPA. After a favorable jury verdict for the Garretts, the trial court entered judgment against the title companies for over \$115,000. The trial court refused to credit the \$69,000 settlement which the Garretts had received from Jenkins & Dameron. The Waco Court of Appeals affirmed the trial court's decision in all respects.⁷⁵

The Texas Supreme Court analyzed whether the trial court's refusal to offset the prior settlement was appropriate under the "one satisfaction" rule as previously recognized by the supreme court in *Stewart Title Guaranty Co. v. Sterling*⁷⁶ and *Bradshaw v. Baylor University*.⁷⁷ The "one satisfaction" rule dictates that when a plaintiff files suit alleging that multiple tortfeasors are responsible for his injuries and only the non-settling defendant remains in court, any settlements are to be credited against the amount for which the non-settling defendants are found responsible. This rule prevents a windfall for the plaintiff.⁷⁸

The court noted that the settlement agreement between the Garretts and Jenkins & Dameron stated "that the Garretts made claims based on the alleged misrepresentations made by Jenkins & Dameron . . . , [and that] the Garretts sought to recover money, rescission of the sale of land, and . . . attorneys' fees . . ." ⁷⁹ The court opined that the settlement agreement covered the same injury for which the title companies were found liable in the subsequent lawsuit; therefore, even though the title companies and the sellers were not adjudicated to be joint tortfeasors, they could not reasonably be said to have caused separate injuries. Accordingly, the court reversed the court of appeals, because the lawsuit against the title companies and the settlement with Jenkins & Dameron both compensated an indivisible injury, and the title companies were entitled to offset the final judgment by the amount of the prior settlement.⁸⁰

Prior to the *First Title* decision, the Fort Worth Court of Appeals also addressed the "one satisfaction" rule in *Luker v. Arnold*.⁸¹ In that case, the owner, Arnold, brought suit against the builder, Billingsley, and the developer, Luker. Arnold had settled with Billingsley prior to trial, and Luker sought to have the amount of that settlement reduce the amount of the jury award. The trial court refused to offset the settlement amount and Luker appealed. The court of appeals held that there was more than one injury and that the settlement agreement with the builder did not specify the reason for the settlement.⁸² Therefore, the court had no way of knowing which portion of the settlement was for which injuries. Accordingly, the court of appeals

75. *First Title*, 802 S.W.2d 254 (Tex. App.—Waco 1990), *rev'd*, 860 S.W.2d 74 (Tex. 1993).

76. 822 S.W.2d 1, 5 (Tex. 1991).

77. 126 Tex. 99, 84 S.W.2d 703, 705 (1935) (overruled in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984); superseded by statute as stated in *Chemical Exp. Carriers, Inc. v. French*, 759 S.W.2d 683 (Tex. App.—Corpus Christi 1988, writ denied)).

78. *First Title*, 860 S.W.2d at 78.

79. *Id.* at 79.

80. *Id.*

81. 843 S.W.2d 108 (Tex. App.—Fort Worth 1992, no writ).

82. *Id.* at 119.

affirmed the trial court's decision to not reduce the judgment because of the settlement.⁸³

The Corpus Christi Court of Appeals addressed the "one satisfaction" rule in a different context in the case of *Berry Property Management, Inc. v. Bliskey*.⁸⁴ Juli Bliskey was sexually assaulted in her townhome by an intruder who had obtained the key to her door by breaking into the office of the property management company. Bliskey sued the owners of the townhome and the management company, Berry Property Management, Inc., for negligence and deceptive trade practices. Bliskey settled with the owners of the townhome during trial and proceeded to obtain a sizeable judgment against Berry. The jury found \$3,013,760 in actual damages to be the result of Berry's negligence and \$3,000,000 as actual damages from Berry's deceptive conduct. The jury also found Berry liable for \$5,000,000 as common law exemplary damages and \$3,000,000 as "additional" DTPA damages. The court ordered Bliskey to elect which set of compensatory damages she wished to recover and, under protest, Bliskey elected to recover actual damages under the DTPA. Therefore, the court entered the final judgment awarding Bliskey the DTPA damages as well as both types of punitive damages.

Both parties appealed the trial court's judgment. Berry contended that the trial court erred in awarding both types of punitive damages, as such recovery violated the "one satisfaction" rule. Bliskey, on the other hand, contended that she should not have been required to elect under which theory she would recover her compensatory damages. The court of appeals recognized that the DTPA remedies are cumulative with those provided by other laws, but that "no recovery of both actual damages and penalties for the same act or practice shall be permitted under the provisions of the DTPA and another law."⁸⁵ Therefore, the court observed that the issue was whether there was a single act or whether there were multiple acts. The court noted that the charge submitted to the jury contained separate and distinct damage questions on both the negligent acts and the deceptive acts or practices. The court concluded that the jury intended to hold Berry liable for both acts alleged and to assess damages for each.⁸⁶

The court held that the trial court properly determined that Bliskey suffered only one compensable injury and, therefore, properly awarded her one recovery for actual damages.⁸⁷ The appellate court also held, however, that because the jury found that Berry engaged in two different acts, the trial court did not err in awarding Bliskey both common law exemplary damages and statutory additional damages.⁸⁸

Berry also raised several other points relating to the total damages

83. *Id.* at 119-20.

84. 850 S.W.2d 644 (Tex. App.—Corpus Christi 1993, writ pending).

85. *Id.* at 665 (citing *Mayo v. John Hancock Mut. Life Ins. Co.*, 711 S.W.2d 5, 6-7 (1986); DTPA § 17.43).

86. *Id.*

87. *Id.*

88. *Id.*

awarded Bliskey. Berry contended that the court awarded Bliskey a double recovery of attorney's fees because it instructed the jury, by its exemplary damages instruction, that it could consider attorney's fees as part of the exemplary damages amount and, in a separate question, the jury found that Bliskey should recover 33 1/3 percent as attorney's fees. The appellate court noted that the DTPA provides that a consumer who prevails shall be awarded court costs and reasonable and necessary attorney's fees.⁸⁹ Furthermore, in a suit for negligence, it is proper for a jury to consider attorney's fees when determining what amount to award for the plaintiff as exemplary damages.⁹⁰ The court concluded that including attorney's fees in the instruction and allowing a separate award of attorney's fees does not constitute a double recovery, as the 33 1/3 percent related to the DTPA violation and the court's instruction regarding exemplary damages include a statement that the jury "could" consider attorney's fees, which does not necessarily lead to the conclusion that Bliskey received a double recovery of her attorney's fees.⁹¹

The court also held that it was improper for the trial court to award Bliskey pre-judgment interest on attorney's fees,⁹² and that the settlement amount received from the townhome owners should have been credited to the judgment *before* calculating pre-judgment interest.⁹³

The DTPA allows for the automatic trebling of damages up to \$1,000.⁹⁴ In *Celotex Corp. v. Gracy Meadow Owners Association, Inc.*⁹⁵ the Austin Court of Appeals addressed whether the trial court could segregate the damages award to a condominium owners association into subparts for each condominium owner so as to allow an automatic trebling, because each subpart would be less than \$1,000. The court held that the damage award was a collective award and could not be segregated for that purpose.⁹⁶

Gracy Meadow Owners Association, Inc. sued Celotex Corp. on behalf of the 102 members of its association. Gracy Meadow alleged that Celotex breached express and implied warranties and that it made representations in violation of the DTPA relating to roofing shingles manufactured by Celotex. The jury returned a verdict in favor of Gracy Meadow, finding that Celotex had made certain misrepresentations regarding the shingles. The jury found actual damages in the amount of \$29,240 as a result of the misrepresentations, but refused to find that Celotex had committed the misrepresentations knowingly.

89. *Id.* at 669 (citing DTPA § 17.50(d)).

90. *Id.* (citing *Fitz v. Toungate*, 419 S.W.2d 708, 710 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.); *Allison v. Simmons*, 306 S.W.2d 206, 211 (Tex. Civ. App.—Waco 1957, writ ref'd n.r.e.)).

91. *Id.*

92. *Id.* at 670 (citing *Hervey v. Passaro*, 658 S.W.2d 148, 148-49 (Tex. 1983); *Southwestern Bell Tel. Co. v. Vollmer*, 805 S.W.2d 825, 834 (Tex. App.—Corpus Christi 1991, writ denied); *McCann v. Brown*, 725 S.W.2d 822, 826 (Tex. App.—Fort Worth 1987, no writ)).

93. *Id.* at 671.

94. DTPA § 17.50(b)(1).

95. 847 S.W.2d 384 (Tex. App.—Austin 1993, writ denied).

96. *Id.* at 390.

The trial court determined that each of the 102 owners suffered \$286.66 in damages, the proportionate share of the \$29,240 total actual damages found by the jury. As one of the owners could not recover because she was barred by the statute of limitations,⁹⁷ the trial court allowed recovery on behalf of each of the 101 other owners, resulting in an actual damages award of \$28,953.33. The trial court determined that since the proportionate share of damages for each owner was less than \$1,000, each recovering owner's share should be trebled pursuant to section 17.50(b)(1), and rendered judgment awarding additional damages on that basis.⁹⁸

Celotex appealed the trial court's award of the additional damages. In reviewing the propriety of this award, the Austin Court of Appeals recognized that "[a]n owner of an apartment in a condominium regime shares ownership of the regime's common elements with the other apartment owners."⁹⁹ The roof, the subject of the present lawsuit, was a "common element" in the condominium.¹⁰⁰ According to the court of appeals, since a common harm to the condominium owners caused by damage to a common element was the basis of the complaint, Gracy Meadow was entitled to bring the lawsuit. The court recognized that there was no claim or indication that individual condominium owners sustained any harm, except as a result of an undivided interest in the common elements. The court stated that "this lawsuit was a collective claim based on collective harm, not individual harm, [and that] [a] single, collective harm is properly remedied by a single, collective award of damages."¹⁰¹ The court reversed the trial court, holding that such an award should not be treated as 101 separate damage awards and then trebled individually pursuant to section 17.50(b). The court noted that the result advocated by Gracy Meadow would extend beyond the DTPA's underlying purpose of protecting consumers and would result in a windfall to the owners of Gracy Meadow.¹⁰²

In *Nationwide Mutual Insurance Co. v. Holmes*¹⁰³ the San Antonio Court of Appeals allowed the plaintiff to recover attorneys' fees that were incurred in a prior lawsuit as an element of actual damages in a subsequent DTPA

97. The court of appeals also addressed whether this one condominium owner's knowledge of the defect should be imputed to Gracy Meadow, thus barring Gracy Meadow's claim in its entirety. The court of appeals refused to impute this knowledge to Gracy Meadow. *Id.* at 391. This issue is discussed more fully in Section VII, *infra*.

98. Section 17.50(b) provides in part as follows: "In a suit filed under this section, each consumer who prevails may obtain: (1) the amount of actual damages found by the trier of fact. In addition the court shall award two times that portion of the actual damages that does not exceed \$1,000 . . ." DTPA § 17.50(b).

99. *Id.* at 389 (quoting TEX. PROP. CODE ANN. § 81.107 (Vernon 1984)).

100. *Id.* (citing TEX. PROP. CODE ANN. § 81.002(6)(B) (Vernon 1984)).

101. *Id.* at 390. The court recognized that Texas law will sometimes allow the individual condominium owner, to proceed with an individual action to recover damage to the common property and allow recovery only for "the amount to which he shows himself entitled according to his proportionate interest in the common property." *Id.* (quoting *Scott v. Williams*, 607 S.W.2d 267, 271 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.)). In distinguishing, the court noted that the owner "may recover his *proportionate share* of damages," but this "does not constitute a separate individual award of damages." *Id.*

102. *Id.* at 390.

103. 842 S.W.2d 335 (Tex. App.—San Antonio 1992, writ denied).

suit.¹⁰⁴ The plaintiff in the DTPA suit, Holmes, had been a defendant in a prior personal injury lawsuit in which his insurance carrier, Nationwide Mutual Insurance Co., provided a defense. One week before the prior lawsuit, Nationwide's attorney advised Holmes that he should hire a lawyer, as there existed a possibility of a judgment in excess of the policy limits. The arrangement between Holmes and his hired personal attorney called for the attorney to be paid \$7,500 if the case went to trial. Even though Nationwide knew of this arrangement, it did not inform Holmes that it had decided to fully indemnify Holmes until after the trial began. Therefore, Holmes incurred \$7,500 in unnecessary legal fees.

In the subsequent lawsuit against Nationwide, Holmes prevailed on his claim that Nationwide's conduct was unconscionable¹⁰⁵ and the jury awarded him actual damages which included the \$7,500 in attorneys' fees incurred in the personal injury lawsuit. On appeal, Nationwide argued that Holmes was not entitled to attorneys' fees as actual damages, since the attorneys' fees were not authorized by contract or statute. The San Antonio Court of Appeals recognized that, generally, attorneys' fees are not recoverable unless authorized by statute or contract between the parties, but that a recovery of attorneys' fees based upon equitable principles can exist.¹⁰⁶ The court observed that "[t]he general rule disallowing attorney's fees applies to attorney's fees that are incurred while prosecuting or defending a cause of action."¹⁰⁷ The attorneys' fees awarded Holmes, however, were not awarded for prosecuting or defending the underlying cause of action, so that general prohibition did not apply. The court affirmed the jury's award of attorneys' fees, observing that "[t]here is nothing sacrosanct about attorneys' fees per se that forbids their award as damages."¹⁰⁸

In *Sunderland v. St. Luke's Episcopal Hospital*¹⁰⁹ the Corpus Christi Court of Appeals affirmed a summary judgment for a defendant because of a lack of evidence of a "producing cause" of actual damages.¹¹⁰ In her lawsuit, Sunderland alleged that two doctors of the defendant hospital made misrepresentations to her regarding particular tests performed on her still-born child and that such misrepresentation caused her emotional distress. The court granted St. Luke's motion for summary judgment on the basis that there existed uncontroverted evidence that even if such testing had taken place, they would have been inconclusive; therefore, the misrepresentation itself did not cause Sunderland's distress. The Corpus Christi Court of Appeals affirmed, holding that there existed no evidence of a causal link

104. *Id.* at 342.

105. Unconscionable action or course of action is defined as "an act or practice, which to a person's detriment: (A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree." DTPA § 17.45(5).

106. *Nationwide*, 842 S.W.2d at 341 (citing *Baja Energy, Inc. v. Ball*, 669 S.W.2d 836, 838 (Tex. App.—Eastland 1984, no writ); *Barndtjen & Kluge, Inc. v. Manney*, 238 S.W.2d 609, 612 (Tex. Civ. App.—Fort Worth 1951, writ ref'd n.r.e.)).

107. *Id.* at 342.

108. *Id.*

109. 841 S.W.2d 923 (Tex. App.—Corpus Christi 1992, writ denied).

110. *Id.* at 924.

between the alleged misrepresentation and the alleged injury.¹¹¹

VII. LIMITATIONS

In *Holmes v. P.K. Pipe & Tubing, Inc.*¹¹² the First District Court of Appeals addressed whether the DTPA's two-year statute of limitations barred a plaintiff's DTPA claim filed almost three years after it learned of the misrepresentation, but less than a year after it became aware that it would suffer monetary damages from the defendant's misrepresentations. The trial court found that the statute of limitations did not bar the plaintiff's claim and the defendant appealed.

The court of appeals observed that the DTPA statute of limitations begins to run when the plaintiff should have discovered the *occurrence of the misrepresentation*, not when damages resulting from the misrepresentation are incurred or learned of by the consumer.¹¹³ Therefore, the trial court erred in concluding that the statute of limitations did not bar the plaintiff's DTPA claim.¹¹⁴

In *Celotex Corp. v. Gracy Meadow Owners Association, Inc.*¹¹⁵ the Austin Court of Appeals addressed whether the statute of limitations barred a condominium owners association's claim due to the fact that one of the individual owners knew of the alleged misrepresentations more than two years before the owner's association filed suit. The owners association of Gracy Meadow brought suit against a roofing shingles manufacturer, Celotex, based on an alleged breach of express and implied warranties and express representations in violation of the DTPA. The association brought the lawsuit on behalf of the 102 condominium owners which were members of the association. The jury found that one of the condominium owners, Susan Chelf, discovered, or should have discovered, that the shingles on her roof were not as represented approximately five and a half years prior to the time that the association filed suit. As a result of this finding, the statute of limitations barred Chelf from recovering her proportionate share of the damage award.

Celotex argued on appeal that Chelf's knowledge of the misrepresentations should be imputed to Gracy Meadow, thereby precluding Gracy Meadow's entire claim. The Austin Court of Appeals refused to accept the imputed knowledge theory, recognizing instead that even though Gracy Meadow was the agent of the individual owners, the individual owners were not agents for each other or for Gracy Meadow.¹¹⁶

111. *Id.*

112. 856 S.W.2d 530 (Tex. App.—Houston [1st Dist.] 1993, n.w.h.).

113. *Id.* at 537 (citing *Cal Fed Mortgage Co. v. Street*, 824 S.W.2d 622, 625 (Tex. App.—Austin, 1991, writ denied)).

114. *Id.* at 538. The trial court granted the plaintiff's trial amendment which added a claim for implied warranty of suitability under the DTPA. The appellate court held the statute of limitations also barred this claim, as DTPA § 17.565 applies to "[a]ll actions brought under the subchapter." *Id.* at 538-39.

115. 847 S.W.2d 384 (Tex. App.—Austin 1993, writ denied).

116. *Id.* at 391 (citing *Horlock v. Horlock*, 614 S.W.2d 478, 485 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.)). *Celotex* cited *First Financial Dev. Corp. v. Hughston*, 797

During the Survey period, the Tyler Court of Appeals issued an opinion regarding the applicable statute of limitations period for a breach of implied warranty action under the DTPA. In *Ben Fitzgerald Realty Co. v. Muller*¹¹⁷ the plaintiffs, Jean and Derel Muller, brought an action to recover damages for personal injuries allegedly sustained by Jean Muller when a beam supporting two ceiling fans fell upon her. The Mullers alleged breach of warranties in violation to the DTPA. The trial court rendered judgment against Fitzgerald Realty, which appealed based upon, among other things, the premise that the Mullers' claims were barred by the statute of limitations.

The court recognized that claims brought under the DTPA must be brought within two years after the consumer discovered, or in the exercise of reasonable diligence, should have discovered the defect.¹¹⁸ The court also recognized that "[a] homeowner's action against a builder for breach of implied warranties is barred four years from the time the homeowner knew of the alleged defect."¹¹⁹ The appellate court held that the two year statute of limitations applied because the DTPA limitations section governs "all actions brought under this subchapter;" therefore, the two year limitations period must necessarily include actions such as breach of warranty.¹²⁰ The appellate court held that the trial court correctly refused to bar the Mullers' claim, apparently because the lawsuit was brought within one year after the beam fell and injured Jean Muller and the Mullers did not know nor should they have known that the home was not built as warranted prior to that incident.¹²¹

VIII. EFFECT OF ARBITRATION CLAUSE

During the Survey period, the Texas Supreme Court twice addressed the effect of an arbitration clause on a DTPA claim. In *Jack B. Anglin Co., Inc. v. Tipps*¹²² the underlying dispute concerned the construction of a dam built by the defendant, Jack B. Anglin Co., Inc., for the plaintiff, the City of

S.W.2d 286, 292 (Tex. App.—Corpus Christi 1990, writ denied), for the proposition that individual owners may act as agents for a homeowners association. The Celotex court found *Hughston* unpersuasive, because in that case the owner possessing knowledge that was imputed to the homeowners association was also a director of the association, and there was no evidence in the instant case that indicated that Chelf was either an officer or a director of Gracy Meadow. *Id.* at 391.

117. 846 S.W.2d 110 (Tex. App.—Tyler 1993, writ denied).

118. *Id.* at 118 (citing DTPA § 17.565).

119. *Id.* (citing *Conann Constructors v. Muller*, 618 S.W.2d 564 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.); *Forest Park Enters., Inc. v. Culpepper*, 754 S.W.2d 775 (Tex. App.—Fort Worth 1988, no writ)).

120. *Id.* at 119.

121. *Id.* at 119. Despite the fact that the court ruled that the claims were not barred by the statute of limitations, the court ruled that there was no evidence that Fitzgerald Realty breached the DTPA. The court noted a lack of evidence that the breach of implied warranty "proximately caused" the damages suffered by the Mullers. *Id.* at 123. The use of the "proximate cause" standard by the court has been criticized, as DTPA §§ 17.50(a) & (b) provide that the consumer may recover all actual damages of which the breach was a "producing cause." See Richard M. Alderman, *Recent Developments - Important New DTPA Cases*, DTPA, Consumer and Insurance Law Institute, July 8-9, 1993.

122. 842 S.W.2d 266 (Tex. 1992).

Jacksboro. The City filed suit against Anglin and other parties¹²³ alleging breach of contract and negligence. The City later added a DTPA cause of action against Anglin.

Anglin filed an application with the trial court to compel arbitration, asserting that all of the City's claims were subject to arbitration under the Federal Arbitration Act¹²⁴ pursuant to the arbitration clause contained in the parties' contract.¹²⁵ The City, in response, "denied that its DTPA claims were subject to arbitration, claimed that no material issues were subject to the arbitration provision, and argued that arbitration would result in multiple suits because other defendants were not parties to the contract."¹²⁶ The trial court granted the application for arbitration only for the City's breach of contract cause of action.

After the court of appeals denied Anglin's motion for leave to file a writ of mandamus, Anglin argued to the supreme court that the trial court erred in excluding the City's DTPA claims from the order compelling arbitration. The City argued that the DTPA claims were not subject to arbitration under two theories: (1) "because its DTPA claims do not arise out of the contract and therefore were beyond the scope of the arbitration clause;"¹²⁷ and (2) because the DTPA's non-waiver provision prevented "the City from waiving a judicial determination of its DTPA claims."¹²⁸

The supreme court recognized that, generally, a misrepresentation claim is considered distinguishable from a breach of contract occurrence.¹²⁹ However, the court found that the City's misrepresentation claims and contract claim were factually intertwined, and therefore, were subject to the contract's arbitration provision.¹³⁰

The supreme court also recognized that under the supremacy clause of the United States Constitution,¹³¹ the Federal Arbitration Act preempts all

123. The City also named Anglin's bonding company and two engineering firms as defendants in the lawsuit.

124. 9 U.S.C. §§ 1-16 (1988).

125. *Anglin*, 842 S.W.2d at 267. The contract contained the following arbitration clause: "All questions subject to arbitration under the Contract may be submitted to arbitration at the choice of either party to the dispute." *Id.*

126. *Id.* at 268.

127. *Id.* at 270.

128. *Id.* The non-waiver provision at issue was found in DTPA § 17.42, which states in pertinent part: "*Waivers: Public Policy* Any waiver by a consumer of the provision of this subchapter is contrary to public policy and is unenforceable and void . . ." *Id.* (quoting DTPA § 17.42 (Vernon 1987)).

As noted by the supreme court, "[t]he version of § 17.42 in effect at the time permitted written contractual waiver by certain business consumers. The legislature broadened the categories of consumers eligible to waive DTPA remedies [in] 1989." *Id.* at 270 n.7 (citing John T. Montford, Will G. Barber & Robert L. Duncan, *1989 Texas DTPA Reform: Closing the DTPA Loophole in the 1987 Tort Reform Laws and the Ongoing Quest for Fairer DTPA Laws*, 21 ST. MARY'S L.J. 525, 556-62 (1990)).

129. *Anglin*, 842 S.W.2d at 270-71 (citing *Weitzel v. Barnes*, 691 S.W.2d 598, 600 (Tex. 1985); *Decision Control Systems, Inc. v. Personnel Cost Control, Inc.*, 787 S.W.2d 98, 100 (Tex. App.—Dallas 1990, no writ)).

130. *Id.* at 271. The court noted that "Texas law favors the joint resolution of multiple claims to prevent multiple determination to the same matter." *Id.*

131. U.S. CONST. Art. VI, Cl. 2.

otherwise applicable state laws to the extent they are inconsistent with that Act.¹³²

The court recognized that the primary purpose of the Federal Arbitration Act is to require the courts to compel arbitration when the parties have so provided in their contract. Therefore, according to the supreme court, federal law preempts the application of the non-waiver provision of the DTPA to prevent or restrict enforcement of the arbitration agreement.¹³³ For those reasons, the court held that the City's DTPA claims were arbitrable pursuant to the parties agreement and should be arbitrated under the Federal Arbitration Act.¹³⁴

The Texas Supreme Court addressed this issue again in *Capital Income Properties—LXXX v. Blackmon*.¹³⁵ Plaintiffs, residents of fourteen different states, purchased shares in Capital Income Properties—LXXX ("CIP"), a limited partnership formed to develop and operate a Corpus Christi hotel. Plaintiffs brought suit to seek a return of their initial investment and damages based upon fraud, breach of fiduciary duty, negligent misrepresentation, and violations of the DTPA. CIP filed a motion for leave to file a petition for writ of mandamus requesting that the court of appeals direct the trial court to compel arbitration of claims brought against it.¹³⁶

The limited partnership agreement provided that "any dispute, controversy or claim arising out of or in connection with or relating to this Agreement . . . shall, upon the request of any party involved, be submitted to and settled by arbitration . . ." ¹³⁷ "[T]he trial court determined that the agreement to arbitrate was binding and enforceable, but that the claims raised were not within the scope of the arbitration clause."¹³⁸

The Texas Supreme Court held that the Federal Arbitration Act, which applies to transactions involving commerce, clearly applied because "citizens from a number of different states purchased interests from a business entity in one state for the purpose of carrying out a commercial venture in another state."¹³⁹ Furthermore, the asserted claims, including the claims under the DTPA, arose out of and related to the limited partnership agreement.¹⁴⁰ Accordingly, the court held that the plaintiffs' claims were within the scope

132. *Anglin*, 842 S.W.2d at 271 (citing *Perry v. Thomas*, 482 U.S. 483, 489 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 14-16 (1984); *Batton v. Green*, 801 S.W.2d 923, 927 (Tex. App.—Dallas 1990, no writ)).

133. *Id.* (citing *Commerce Park v. Mardian Construction Co.*, 729 F.2d 334, 338 (5th Cir. 1984)).

134. *Id.*

135. 843 S.W.2d 22 (Tex. 1992) (per curiam).

136. CIP urged the application of the Texas General Arbitration Act, TEX. REV. CIV. STAT. ANN. art. 224-249-43 (Vernon 1973 & Supp. 1994), and the Federal Arbitration Act, 9 U.S.C. § 1-16 (1988). *Id.* at 23.

137. *Id.*

138. *Id.*

139. *Id.* (citing *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 n.7 (1967); *Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 243 (5th Cir. 1986); *Lost Creek Util. v. Travis Indep. Painter*, 827 S.W.2d 103, 105 (Tex. App.—Austin 1992, writ denied)).

140. *Id.*

of the arbitration clause and directed the trial court to order that all claims proceed to arbitration under the Federal Arbitration Act.¹⁴¹

The Corpus Christi Court of Appeals addressed the waiver of arbitration issue in *D. Wilson Construction Co. v. McAllen Independent School District*.¹⁴² In *Wilson*, a dispute arose between the McAllen Independent School District and D. Wilson Construction Co. regarding certain deficiencies in the construction performed by Wilson pursuant to a construction contract between the parties. The School District filed suit against Wilson and others after the parties were unable to resolve the dispute. Wilson attempted to compel the parties to arbitration pursuant to an arbitration clause within the construction contract.¹⁴³ After a hearing, the trial court denied Wilson's motion and Wilson appealed.

In addressing the waiver issue, the court was unable to avail itself of the federal preemption argument as recognized by the Texas Supreme Court in *Jack B. Anglin Co. v. Tipps*¹⁴⁴ and *Capital Properties—LXXX v. Blackmon*,¹⁴⁵ because the court did not possess jurisdiction to review by appeal an order denying arbitration under the Federal Arbitration Act.¹⁴⁶ The *Wilson* court recognized that a party must seek a writ of mandamus to complain of a stay of arbitration when rights under the Federal Arbitration Act are asserted; therefore, the appellate court based its review of the trial court's order on the application of the Texas Arbitration Act.¹⁴⁷

The court noted, with respect to whether the School District could waive its right to assert a DTPA cause of action, that section 17.42 prohibits the waiver of a party's DTPA cause of action, but it also recognized that nowhere in the DTPA is arbitration precluded.¹⁴⁸ The court then recognized existing case law wherein other courts had "reasoned that an agreement to submit to arbitration all controversies arising out of the contract may encompass tort claims inextricably intertwined with the contract."¹⁴⁹ The court held that the School District based its DTPA claim on Wilson's failure to perform the contract and that the claim was encompassed within the broad language of the arbitration agreement.¹⁵⁰ Accordingly, the court reversed the trial court and held that submitting the claim to arbitration was not a violation of the DTPA no-waiver provision.¹⁵¹

141. *Id.* at 24.

142. 848 S.W.2d 226 (Tex. App.—Corpus Christi 1992, writ dismissed w.o.j.).

143. The contract's arbitration provision states that: "Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration . . ." *Id.* at 230.

144. 842 S.W.2d 266 (Tex. 1992).

145. 843 S.W.2d 22 (Tex. 1992) (per curiam).

146. *Wilson*, 848 S.W.2d at 228.

147. *Id.* (citing TEX. REV. CIV. STAT. ANN. art. 224-249-43 (Vernon 1973 & Supp. 1993)).

148. *Id.* at 231.

149. *Id.* (quoting *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 270-71 (Tex. 1992); *Merrill Lynch v. Wilson*, 805 S.W.2d 38, 39-40 (Tex. App.—El Paso 1991, no writ)).

150. *Id.* (citing *Capital Income Properties—LXXX v. Blackmon*, 843 S.W.2d 22, 23 (Tex. 1992) (per curiam)).

151. *Id.*

IX. MISCELLANEOUS

In *Palmer v. Coble Wall Trust Co., Inc.*¹⁵² the Texas Supreme Court held that a statutory probate court has jurisdiction over DTPA claims.¹⁵³ William Palmer, the independent administrator of an estate, brought a suit alleging negligence, gross negligence and violations of the DTPA in a statutory probate court against the estate's former temporary administrator, Coble Wall Trust Co., and Elwood Cluck, the president of Coble Wall. The probate court rendered judgment for Palmer based on favorable jury findings, but the San Antonio Court of Appeals reversed because the probate court lacked subject matter jurisdiction.¹⁵⁴

The Texas Supreme Court analyzed Texas Probate Code section 5A(b) as it existed in 1985. At that time, the last sentence of section 5A(b) stated that "[i]n actions by or against a personal representative, the statutory probate courts have concurrent jurisdiction with the district courts."¹⁵⁵ The court held that since the suit was filed by a personal representative against a personal representative, the probate court had concurrent jurisdiction with the district court and could hear all asserted claims, including the DTPA cause of action.¹⁵⁶

The San Antonio Court of Appeals, in *Pozero v. Alfa Travel, Inc.*,¹⁵⁷ addressed the application of a forum selection clause in a DTPA context. According to their original petition, the Pozeros purchased travel services from defendant Alfa Travel, Inc., including round trip airfare to Hawaii and a cruise operated by the other defendant, American Hawaii Cruises, Inc. The Pozeros purchased from Alfa a cancellation insurance policy which they were led to believe would entitle them to a full refund if they had to cancel their trip unexpectedly. They later received a cruise ticket contract from American which contained a forum selection clause which mandated that all suits relating to the ticket be brought in California. The Pozero's were unable to make the planned trip and contacted Alfa and American to notify them of their cancellation and request a refund under the cancellation insurance. The Pozeros were informed that they were not entitled to a refund as they had failed to notify Alfa and American at least four days prior to the beginning of the cruise.

The Pozeros brought a DTPA suit alleging various laundry list violations as well as a claim of unconscionable conduct. Based on the forum selection clause, American filed a motion to dismiss alleging improper venue and want of jurisdiction. The trial court granted the motion, dismissing all of the Pozero's claims.

The appellate court noted that the Pozeros' causes of action are pled in the

152. 851 S.W.2d 178 (Tex. 1992).

153. *Id.* at 182-83.

154. 848 S.W.2d 696, 703 (Tex. App.—San Antonio 1991), *rev'd*, 851 S.W.2d 178 (Tex. 1992).

155. *Palmer*, 851 S.W.2d at 181 (quoting TEX. PROP. CODE ANN. § 5A(b) (Vernon 1985)).

156. *Id.* at 182-83.

157. 856 S.W.2d 243 (Tex. App.—San Antonio 1993, n.w.h.).

language of the DTPA and that they are complaining of the misrepresentations concerning the cancellation insurance. In fact, the plaintiffs did not mention the cruise ticket contract in their pleading. The appellate court reversed the trial court because the suit arose from the misrepresentations, not the cruise ticket contract.¹⁵⁸ Therefore, since the Pozero's cause of action is solely derived from a Texas statute, they should be entitled to have the claim litigated in a Texas court.¹⁵⁹

* * *

Despite the existence of the DTPA for over twenty years, there are still many issues regarding the Act's application which have yet to be resolved. During the Survey period, Texas appellate courts clarified several of these issues, most notably in the areas concerning the notice requirement, the damages recoverable and the effect of arbitration provisions on DTPA claims.

158. *Id.* at 245.

159. *Id.*

