



---

January 1996

## Deceptive Trade Practices and Consumer Protection Act

Eve L. Pouliot

---

### Recommended Citation

Eve L. Pouliot, *Deceptive Trade Practices and Consumer Protection Act*, 49 SMU L. REV. 871 (1996)  
<https://scholar.smu.edu/smulr/vol49/iss4/11>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# DECEPTIVE TRADE PRACTICES AND CONSUMER PROTECTION ACT

*Eve L. Pouliot\**

## TABLE OF CONTENTS

I. INTRODUCTION .....	872
II. DTPA CASE LAW .....	873
A. PROPER PLAINTIFFS: WHO IS A CONSUMER? .....	873
1. <i>Step 1: Did the Plaintiff Seek or Acquire Goods or Services by Purchase or Lease?</i> .....	873
a. An Intended Beneficiary Qualifies as a DTPA Consumer .....	874
b. An Incidental Beneficiary Does Not Qualify as a DTPA Consumer .....	875
c. An Employee Does Not Usually Qualify as a Consumer .....	876
d. A Subrogor Does Not Step into its Insured's Consumer Status .....	877
e. A Purchaser of Option Contracts is Not a DTPA Consumer .....	878
f. Under an Antitrust Analysis, the "Indirect Purchaser" is Not a Consumer .....	879
2. <i>Step 2: Do the Goods or Services Purchased or Leased Form the Basis of the DTPA Complaint?</i> ..	881
a. Slip and Fall Cases Fail this Test .....	881
B. WHAT QUALIFIES AS ACTIONABLE CONDUCT UNDER THE DTPA? .....	881
1. <i>Breach of Warranty</i> .....	881
2. <i>Unconscionable Actions</i> .....	883
3. <i>False, Misleading or Deceptive Acts—The Laundry List</i> .....	885
a. When is a Failure to Disclose Information Actionable? .....	885
b. When does a Failure to Perform a Future Promise Become an Actionable Affirmative Misrepresentation? .....	887
C. WHAT CONSTITUTES A PRODUCING CAUSE? .....	887
1. <i>When Does a Casual Connection Exist?</i> .....	888

---

\* B.S., Cornell University; J.D., Southern Methodist University. Associate, Lynn, Stodghill, Melsheimer & Tillotson, L.L.P., Dallas, Texas. All rights reserved (1995). Special thanks to Michael P. Lynn for his thoughts and contributions to this article.

2.	<i>Attorney Malpractice as a Producing Cause</i> .....	888
a.	Criminal Cases .....	888
b.	Civil Cases .....	888
3.	<i>The Effect of an "As Is" Clause on Establishing a Producing Cause</i> .....	890
D.	DTPA DAMAGES .....	891
1.	<i>Offsetting DTPA Claims</i> .....	891
2.	<i>Trebling Prejudgment Interest</i> .....	892
III.	THE 1995 AMENDMENTS TO THE DTPA .....	893
A.	SECTION 17.42. WAIVERS: PUBLIC POLICY .....	893
B.	SECTION 17.44. CONSTRUCTION AND APPLICATION ....	894
C.	SECTION 17.45. DEFINITIONS .....	894
D.	SECTION 17.46. DECEPTIVE TRADE PRACTICES UNLAWFUL .....	895
E.	SECTION 17.49. EXEMPTIONS .....	895
F.	SECTION 17.50. RELIEF FOR CONSUMERS .....	896
G.	SECTION 17.505. NOTICE; INSPECTION .....	897
H.	SECTION 17.5051. MEDIATION .....	897
I.	SECTION 17.5052. OFFERS OF SETTLEMENT .....	898
J.	SECTION 17.56. VENUE .....	898
K.	EFFECTIVE DATE OF THE 1995 AMENDMENTS .....	898
IV.	CONCLUSION .....	898

## I. INTRODUCTION

THE Texas Deceptive Trade Practices and Consumer Protection Act<sup>1</sup> (DTPA) is unique both in the amount of litigation it generates<sup>2</sup> and in the frequency of its legislative amendment.<sup>3</sup> The Survey period proved to be no exception. During the Survey period, Texas courts reported over one hundred and fifty decisions involving cases

1. TEX. BUS. & COM. CODE ANN. §§ 17.41-17.63 (Vernon 1987 & Supp. 1996 [hereinafter DTPA]).

2. At one point, the Texas DTPA accounted for approximately one half of all deceptive trade practices' decisions nationwide. Anthony P. Dunbar, Comment, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427, 449 (1984). Another study, which focused on the Houston docket, indicated that about 15% of the cases filed contained DTPA claims. Nancy Friedman Atlas et al., *The DTPA In the Courts: How It Is Used In Practice*, 28 HOU. LAW. 28, 29 (Aug. 1990).

3. In every legislative session since its enactment, the legislature has amended the DTPA. See, e.g., Act of Apr. 24, 1975, ch. 62, 1975 Tex. Gen. Laws 149; Act of May 23, 1977, ch. 216, 1977 Tex. Gen. Laws 600; Act of June 13, 1979, ch. 603, 1979 Tex. Gen. Laws 1327; Act of June 8, 1981, ch. 307, 1981 Tex. Gen. Laws 863; Act of June 19, 1983, ch. 883, 1983 Tex. Gen. Laws 4943; Act of June 12, 1985, ch. 564, 1985 Tex. Gen. Laws 2165; Act of June 11, 1987, ch. 280, 1987 Tex. Gen. Laws 1641; Act of June 14, 1989, ch. 380, 1989 Tex. Gen. Laws 1490; Act of June 16, 1989, ch. 1082, 1989 Tex. Gen. Laws 4370; Act of June 6, 1991, ch. 242, 1991 Tex. Gen. Laws 939; Act of June 11, 1993, ch. 570, 1993 Tex. Gen. Laws 2099; Act of June 8, 1995, ch. 414, 1995 Tex. Gen. Laws 2988. See Richard M. Alderman & Melanie P. Rosenthal, *A Consumer Update: Recent Developments Under the Texas Deceptive Trade Practices Act*, 20 ST. MARY'S L.J. 495, 497 n.4 (1989); James W. Paulsen, *Lenders and The Texas DTPA: A Step Back From The Brink*, 48 SMU L. REV. 487 (1995).

where the parties asserted DTPA violations. In the next section, this article reviews several of those decisions. Finally, since the legislature overhauled the DTPA during its 1995 session, section III of this article discusses the 1995 amendments and their probable implications.

## II. DTPA CASE LAW

To recover under the DTPA, a plaintiff must establish that he is a "consumer," that the defendant engaged in a false, misleading, or deceptive act or an unconscionable act or breached an express or implied warranty, and that the action was a producing cause of his damage.<sup>4</sup> Significant decisions reported during this period addressed each of these elements as well as issues concerning calculation of damages. The following section discusses those decisions.

### A. PROPER PLAINTIFFS: WHO IS A CONSUMER?

To recover under the DTPA, a plaintiff must establish that he is a "consumer."<sup>5</sup> Whether a plaintiff is a consumer is a question of law for the courts to determine.<sup>6</sup> Plaintiff bears the burden of proof regarding his consumer status.<sup>7</sup> In *Melody Home Mfg. Co. v. Barnes*,<sup>8</sup> the Texas Supreme Court recognized that in order to qualify as a consumer, two requirements must be met: (1) the plaintiff "must have sought or acquired goods or services by purchase or lease;" and (2) "the goods or services leased must form the basis of the complaint."<sup>9</sup> Texas courts use this two-step analysis to determine a plaintiff's consumer status.

#### 1. Step 1: Did the plaintiff seek or acquire goods or services by purchase or lease?

When the plaintiff has not purchased or leased the goods or services at issue, he lacks contractual privity to the consumer transaction. Texas courts, however, do not analyze a plaintiff's consumer standing according

---

4. *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995). See also *Custom Controls Co. v. MDS Qantel, Inc.*, 746 S.W.2d 261, 263 (Tex. App.—Houston [1st Dist.] 1987), *rev'd on other grounds*, *Qantel Business Sys., Inc. v. Custom Controls Co.*, 761 S.W.2d 302 (Tex. 1988); *Miller v. Soliz*, 648 S.W.2d 734, 739 (Tex. App.—Corpus Christi 1983, no writ); *Bormaster v. Henderson*, 624 S.W.2d 655, 660 (Tex. App.—Houston [14th Dist.] 1981, no writ); DTPA § 17.50(a)(1)-(3).

5. DTPA § 17.50. "Consumer" means an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of \$25 million or more, or that is owned or controlled by a corporation or entity with assets of \$25 million or more. DTPA § 17.45(4).

6. *3z Corp. v. Stewart Title Guar.Co.*, 851 S.W.2d 933, 937 (Tex. App.—Beaumont 1993, writ denied).

7. *Taylor v. GWR Operating Co.*, 820 S.W.2d 908, 910 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

8. 741 S.W.2d 349 (Tex. 1987).

9. *Id.* at 351-52 (citing *Sherman Simon Enter., Inc. v. Lorac Serv. Corp.*, 724 S.W.2d 13, 15 (Tex. 1987); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 539 (Tex. 1981)).

to his contractual relationship with the defendant.<sup>10</sup> Instead, courts review the plaintiff's relationship to the transaction.<sup>11</sup> While the test has never actually been referred to as such, the cases indicate that the courts apply an intended beneficiary analysis in those situations where the plaintiff did not himself purchase or lease the goods or services.<sup>12</sup>

a. An Intended Beneficiary Qualifies as a DTPA Consumer

In *Hartford Life Ins. Co. v. Fulda*,<sup>13</sup> the Beaumont Court of Appeals applied the intended beneficiary analysis to determine whether Fulda qualified as a DTPA consumer. Fulda's father sought to buy life insurance from Hartford Life Insurance Company ("Hartford"). He applied for their maximum policy, naming Fulda as the beneficiary.

The application contained several authorization forms which allowed the insurance company to obtain information about the applicant. Fulda's father completed these forms. While waiting for Hartford to accept his application, the father applied for a second, but different, group life insurance policy. Hartford, however, also offered the second policy. According to its terms, the second policy capped recovery at \$100,000 per applicant.

When Fulda's father died, Fulda, as named beneficiary, attempted to claim the benefits under the first policy. Claiming that the second policy's capped recovery clause eliminated the benefits offered under the initial policy, Hartford denied the enforceability of the first policy. Fulda sued Hartford on a host of theories, including the DTPA.<sup>14</sup> The jury found in favor of Fulda, so Hartford appealed.

On the issue of consumer status, the Beaumont Court of Appeals held that Fulda qualified as a DTPA consumer.<sup>15</sup> After reviewing the evidence, the court made two findings concerning the first insurance policy: (1) Fulda's father had fully performed his obligations under the insurance contract, including filling out all necessary application forms and paying all the premiums; and (2) Fulda was the *named* beneficiary to that insurance contract.<sup>16</sup> As the named beneficiary of the insurance policy, Fulda was obviously an intended beneficiary. Accordingly, the court held that

---

10. *Birchfield v. Texarkana Memorial Hosp.*, 747 S.W.2d 361, 368 (Tex. 1987).

11. *Id.*

12. *See Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 707-08 (Tex. 1983).

13. No. 09-94-168 CV, 1995 WL 261996 (Tex. App.—Beaumont, May 4, 1995, n.w.h.) (not designated for publication).

14. *Id.* at \*1.

15. *Id.* at \*21.

16. *Id.* at \*22 (emphasis added). *Cf. Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 274 (Tex. 1995) (holding a third party who attempts to negotiate a settlement with insurer, is not a consumer because he does not seek to purchase or lease goods or services, he merely wishes to obtain the proceeds of the policy). In *Fulda*, the claimant was a named beneficiary of the policy; in *Faircloth*, however, the claimant was not a named beneficiary of the policy.

he must qualify as a consumer.<sup>17</sup>

In *Arthur Andersen & Co. v. Perry Equip. Corp.*,<sup>18</sup> the Houston Court of Appeals analyzed the consumer standing of Perry Equipment Corporation ("PECO"). PECO purchased another company—Maloney Pipeline Systems, Inc. ("Maloney"). As part of the deal, Maloney agreed to pay for an audit of itself performed by Arthur Andersen for PECO's benefit. During the audit, Arthur Andersen found Maloney to be operating at a loss. Arthur Andersen, however, prepared financial statements for PECO showing Maloney to be a profitable company. Shortly after the purchase occurred, Maloney started to require cash infusions from PECO. One year later, Maloney filed a Chapter 11 bankruptcy proceeding.<sup>19</sup>

Consequently, PECO sued Arthur Andersen contending that the financial statements prepared by Arthur Andersen overstated the profits and net worth of Maloney by millions of dollars.<sup>20</sup> PECO alleged fraud, negligence, breach of implied warranty, and violations of the DTPA.<sup>21</sup> At trial, the jury awarded PECO almost ten million dollars in damages, and Arthur Andersen appealed.<sup>22</sup>

On appeal, Arthur Andersen alleged that PECO was not a "consumer" of Arthur Andersen's audit services under the DTPA.<sup>23</sup> Because the audit was a condition of the sale and because Arthur Andersen prepared a separate audit of Maloney for the purpose of supplying PECO with its financial statements, the court held that PECO "*sought and acquired* the auditing services of Arthur Andersen."<sup>24</sup> So what's the issue? "[A]lthough PECO 'sought and acquired' Arthur Andersen's auditing services, it did not, itself 'pay' Arthur Anderson directly for those services."<sup>25</sup> Regardless, the court ruled that Maloney paid for Arthur Anderson's services *for the benefit* of PECO and upheld its DTPA consumer standing.<sup>26</sup> Once again, a court upheld consumer standing for an intended beneficiary.

b. An Incidental Beneficiary Does Not Qualify as a DTPA Consumer

In *Thompson v. Deloitte & Touche, L.L.P.*,<sup>27</sup> the Houston Court of Appeals determined the consumer standing of two beneficiaries of a will

---

17. *Id.* The court stated that to hold otherwise would effectively prohibit the named beneficiaries of insurance policies from bringing suit to collect or recover the policy's benefits under the DTPA. *Id.*

18. 898 S.W.2d 914 (Tex. App.—Houston [1st Dist.] 1995, n.w.h.).

19. 11 U.S.C.S. §§ 701-766 (Law Co-op. 1987 and Supp. 1994).

20. *Arthur Andersen*, 898 S.W.2d at 917.

21. *Id.* at 914.

22. *Id.* at 917-18.

23. *Id.* at 918.

24. *Id.*

25. *Arthur Andersen*, 898 S.W.2d at 918.

26. *Id.* at 918-19.

27. 902 S.W.2d 13 (Tex. App.—Houston [1st Dist.] 1995, n.w.h.).

who sought to sue upon the services rendered to the defendant in making the will. The Thompsons were the widow and daughter of James R. Thompson. After his death, they learned that he had secretly changed his will two months before his death. As a result, they sued the accountants and their firm for helping him do so and for not informing them of his intention to do so.

The Thompsons asserted a host of theories: breach of fiduciary duty by reason of self-dealing and actual or constructive fraud; civil conspiracy; negligent misrepresentation; breach of fiduciary duty by reason of conflict of interest and tortious interference with inheritance rights and actual or constructive fraud; negligence; gross negligence; and DTPA. The trial court granted a directed verdict against four of their claims and submitted the remainder to the jury.<sup>28</sup> The jury found against the Thompsons, and the trial court entered a take-nothing verdict.<sup>29</sup>

On appeal, the Thompsons contended that the trial court erred in directing a verdict on their DTPA claims.<sup>30</sup> The trial court granted the directed verdict because the Thompsons did not qualify as consumers under the DTPA.<sup>31</sup> The Thompsons complained about the defendants' services in helping to construct a new will for James R. Thompson. Reasoning that James R. Thompson purchased those services for his own benefit and not theirs, the court held that the Thompsons were not intended beneficiaries.<sup>32</sup> Because the Thompsons were not intended beneficiaries, the court denied their DTPA consumer status and affirmed the trial court's ruling.<sup>33</sup>

### c. An Employee Does Not Usually Qualify as a Consumer

During the last Survey period, the Austin Court of Appeals also refused to expand the intended beneficiary consumer analysis to include incidental beneficiaries.<sup>34</sup> Applying the intended beneficiary analysis in the employment context, the Austin Court of Appeals stated that an employee-plaintiff is only entitled to DTPA consumer status for claims involving goods or services that the employer purchased or leased *primarily* for the employee's benefit.<sup>35</sup> During this Survey period, two other appellate courts reviewed the issue of whether an employee was a consumer under the DTPA.

---

28. *Id.* at 16.

29. *Id.*

30. *Id.* at 19.

31. *Id.*

32. *Thompson*, 902 S.W.2d at 19.

33. *Id.* Clearly, the Thompsons were incidental beneficiaries of the defendants' services because the will named them. However, even if the Thompsons were intended beneficiaries, the defendants' services were not actionable under the DTPA because the producing cause of their damage was James Thompson's decision to change his will, not the defendants' assistance in effectuating that decision.

34. See Eve L. Pouliot and William Christopher Carmody, *Deceptive Trade Practices Act*, 48 SMU L. REV. 1113, 1115-16 (1995) (discussing *Brandon v. American Sterilizer Co.*, 880 S.W.2d 488 (Tex. App.—Austin 1994, n.w.h.)) [hereinafter *Survey 1994*].

35. *Id.* at 1115.

In *Figueroa v. West*,<sup>36</sup> the El Paso Court of Appeals determined whether an employee was a consumer as required by the DTPA. Anabelle Figueroa (Figueroa) sued her former employer Kirby West for wrongful termination based on breach of oral and written contracts, fraud, negligence, and the DTPA.<sup>37</sup> The trial court directed a verdict in favor of the employer, and Figueroa appealed.

After reviewing the case, the court found no evidence that Figueroa was a consumer.<sup>38</sup> As an employee, Figueroa received work from Kirby West, not goods or services. Accordingly, the court held that she failed to establish her consumer status.<sup>39</sup>

In *Nabors Loffland Drilling Co. v. Martinez*,<sup>40</sup> the San Antonio Court of Appeals faced the same question. Rosendo Martinez (Martinez) worked for a company that had contracted to do work for Nabors Loffland Drilling Co. (Nabors). While moving a building for Nabors, an accident occurred injuring Martinez. Martinez sued Nabors, and the jury awarded him \$270,000 in damages.<sup>41</sup> Nabors appealed, alleging that Martinez was not a consumer under the DTPA.<sup>42</sup>

Citing *Kennedy v. Sale*,<sup>43</sup> the court acknowledged that an individual who has not bought anything can still be a consumer.<sup>44</sup> After reviewing the evidence, however, the court determined that “[n]o contract was entered into for Martinez’s benefit or with Martinez.”<sup>45</sup> As a result, Martinez did not qualify as a consumer under the DTPA.<sup>46</sup>

#### d. A Subrogor Does Not Step into its Insured’s Consumer Status

In *Trimble v. Itz*,<sup>47</sup> the San Antonio Court of Appeals reviewed the question of whether an insurance company may assume the consumer status of its subrogee for purposes of bringing a claim under the DTPA.<sup>48</sup> The Trimble’s home was destroyed by fire. State Farm Lloyds, Inc. (State Farm) reimbursed the Trimbles \$537,760.83 towards their losses. Pursuing their rights of subrogation, State Farm sued the defendants who had constructed and wired the Trimble’s home.<sup>49</sup> The trial court entered sum-

---

36. 902 S.W.2d 701 (Tex. App.—El Paso 1995, n.w.h.).

37. *Id.* at 703.

38. *Id.* at 707.

39. *Id.* (citing *Currey v. Lone Star Steel Co.*, 676 S.W.2d 205, 213 (Tex. App.—Fort Worth 1984, no writ). The court, however, noted that “[a]lthough the DTPA is clearly consumer protection legislation, and not a labor law, we need not hold that an employee may never be a consumer.” *Id.*

40. 894 S.W.2d 70 (Tex. App.—San Antonio 1995, writ denied).

41. *Id.* at 74.

42. *Id.*

43. 689 S.W.2d 890 (Tex. 1985) (holding a third-party beneficiary of an insurance policy is a consumer under the DTPA).

44. *Nabors*, 894 S.W.2d at 74 (citing *Kennedy*, 689 S.W.2d at 892).

45. *Id.*

46. *Id.*

47. 898 S.W.2d 370 (Tex. App.—San Antonio 1995), writ denied per curiam, 906 S.W.2d 481 (Tex. 1995).

48. *Id.* at 371.

49. *Id.*



mary judgment holding that State Farm was not a consumer for DTPA purposes.<sup>50</sup>

On appeal, State Farm argued that it could claim its insureds' consumer status and sue under the DTPA. After reviewing the statutory definition of consumer, the court held that State Farm was not a consumer because it had assets in excess of \$25 million.<sup>51</sup> The court simply refused to expand the DTPA beyond the specific language of the statute and allow State Farm to assume the consumer status of its subrogees.<sup>52</sup>

e. A Purchaser of Option Contracts is Not a DTPA Consumer

In *Hand v. Dean Witter Reynolds Inc.*,<sup>53</sup> an investor brought suit against her broker for failing to purchase oil contracts as she had requested, alleging negligence and violations of the DTPA. The Houston Court of Appeals analyzed whether the investor qualified as a consumer under the DTPA. The court started by assessing whether the sale of commodities option contracts qualified as a sale of goods under the DTPA. A commodity option contract is a right, for a limited period of time, to buy or sell the commodity in question at a predetermined price. Accordingly, the court ruled that a commodity option contract is an intangible.<sup>54</sup> As an intangible, an option contract does not fit within the definition of a "good" supplied by the DTPA.<sup>55</sup>

The court's next consumer analysis focused on whether the investor had purchased "services."<sup>56</sup> Services can be sought or purchased outright and also can be obtained in connection with the acquisition of goods.<sup>57</sup> Because the investor used the broker services merely to effectuate trades and did not use his services for advice or any other service, the court held

50. *Id.*

51. *Id.* at 372.

52. *Trimble*, 898 S.W.2d at 372. This decision comports with the current political environment for the DTPA. As the 1995 legislative amendments indicate, a significant contingent exists which is determined to limit the expansive scope of the DTPA. See *infra* Section III (discussing the 1995 amendments and their probable implications). See generally Michael P. Lynn and Eve L. Pouliot, *Texas Deceptive Trade Practices-Consumer Protection Act: Then and Now*, State Bar of Texas Advanced Civil Trial Course, 1995 [hereinafter *Then and Now*].

53. 889 S.W.2d 483 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

54. *Id.* at 497-98. "[N]umerous courts have held that intangibles are not "goods" and thus, are excluded from coverage under the DTPA." *Id.* at 497 (citing to *Swenson v. Engelstad*, 626 F.2d 421, 428 (5th Cir. 1980) (stock certificates, choses in action, and other incorporeal rights); *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 174 (Tex. 1980) (money); *Cowen v. First Nat'l Bank*, 63 S.W. 532, 533 (1901) (bills and notes); *Portland Sav. & Loan Ass'n v. Beville, Bresler & Schulman Gov't Sec., Inc.*, 619 S.W.2d 241, 245 (Tex. Civ. App.—Amarillo 1981), *rev'd on other grounds*, 620 S.W.2d 101 (Tex. 1981) (certificates of deposit); *Snyders Smart Shop v. Santi, Inc.*, 590 S.W.2d 167, 170 (Tex. Civ. App.—Corpus Christi 1979, no writ) (accounts receivable)).

55. *Id.* at 497-98.

56. "Services" are defined as "work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods." DTPA § 17.45(2).

57. *Hand*, 889 S.W.2d at 498 (citing *Woods v. Littleton*, 554 S.W.2d 662, 666 (Tex. 1977)).

that she had not purchased "services" as contemplated by the DTPA.<sup>58</sup> Thus, she did not qualify as a consumer for DTPA purposes.

f. Under an Antitrust Analysis, the "Indirect Purchaser" is Not a Consumer

Applying the "indirect purchaser" doctrine from antitrust law,<sup>59</sup> one set of crafty Defendants successfully nullified the Plaintiffs' consumer standing under the DTPA. In *Segura v. Abbott Laboratories, Inc.*,<sup>60</sup> the plaintiffs intervened in an antitrust suit originally brought by the State of Texas. In the original action on behalf of the consumers, the State of Texas sought injunctive relief and damages for alleged overcharging for infant formula. Concluding that the indirect purchaser doctrine deprived the State of standing to sue, the trial court dismissed the State's claims.<sup>61</sup>

Alleging DTPA violations based on the same conduct on which the State had premised its claims, plaintiffs intervened.<sup>62</sup> In response, Defendants argued that plaintiffs lacked standing to sue because to hold otherwise would allow the DTPA to conflict with the Texas Antitrust Act because one law would give standing to indirect purchasers and the other would not. Because the Texas Antitrust Act was the later-enacted statute, Defendants argued that it should pre-empt the DTPA, allowing the indirect purchaser doctrine to come into play thereby depriving the plaintiffs of standing to sue.<sup>63</sup>

Focusing on two points which indicated to it that the legislature did not intend to have the Texas Antitrust Act supersede or pre-empt the DTPA, the court of appeals found Defendants' argument unpersuasive. First, the court noted that both statutes included cumulative remedies provisions, which allow a plaintiff to recover under the statute as well as other laws, as long as to do so, does not give the plaintiff a double recovery.<sup>64</sup> Second, the court focused on the simple fact that whenever the legislature wanted to exempt a certain type of defendant or claim from the purview of the DTPA, it did so in unequivocal terms.<sup>65</sup> "If the legislature had intended to exclude indirect purchasers from coverage of the DTPA, it

---

58. *Id.* Where a non-licensed individual cannot purchase commodities option contracts and where a person requesting such a service is usually charged a percentage-based service fee, it seems to be a debatable point as to whether or not the investor actually purchased a service when she asked the broker to purchase those contracts for her.

59. In the antitrust context, a "direct purchaser" is one who purchases goods or services directly from a manufacturer, a wholesaler, or other entity who has violated section 4 of the Clayton Act, 15 U.S.C. § 15(a) (1988). An "indirect purchaser" is one who purchases such goods or services from a seller who is down line in the marketing chain from the antitrust violator. The "Indirect Purchaser" doctrine deprives an indirect purchaser of standing to sue an antitrust violator because to allow otherwise would create difficult issues as to how much of the monopoly price was "passed on" to the end consumer by the middlemen. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 741-47 (1977).

60. 873 S.W.2d 399 (Tex. App.—Austin 1994), *rev'd*, 907 S.W.2d 503 (Tex. 1995).

61. *Id.* at 401.

62. *Id.*

63. *Id.*

64. *Id.* at 404.

65. *Segura*, 873 S.W.2d at 404-05.

could easily have done so by simply drafting the restriction into the definition of consumer or some other provision of the Act."<sup>66</sup> In the absence of such an express exemption in either the DTPA or the Texas Antitrust Act, the court declined to hold that the indirect purchaser doctrine applied to the DTPA.<sup>67</sup> As indirect purchasers of the infant formula, the plaintiffs qualified as consumers and could maintain a DTPA cause of action.

A divided Texas Supreme Court, however, disagreed and reversed the court of appeals' decision.<sup>68</sup> Justices Phillips wrote the majority opinion in which Justices Hightower, Hecht, Enoch and Owen joined. Their opinion stated that indirect purchasers could not use the DTPA as an end run around the antitrust laws.<sup>69</sup> In a concurring opinion, Justice Gonzales agreed in essence with the majority that the DTPA should not be used to create a loophole in the state's Antitrust laws. Justice Cornyn also wrote a concurring opinion. In his opinion, he stated that it was unnecessary to reach the question of whether the Anti-trust Act pre-empted a DTPA cause of action because the DTPA claims were without merit.<sup>70</sup> Justices Gammage and Spector, however, joined in a dissent. Focusing on the presence of cumulative remedies provisions in both statutes, the dissent was unable to reconcile their presence with the majority's decision supporting pre-emption of the DTPA by the Texas Antitrust Act.<sup>71</sup>

While it is unclear how this Antitrust/DTPA interaction issue will ultimately be resolved, the 1995 Amendments to the DTPA raise some interesting questions regarding the court's analysis.<sup>72</sup> Clearly, the court's decision goes against the grain of the DTPA. The DTPA was originally

---

66. *Id.* at 405 (citing *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d at 540) (Tex. 1981)).

67. *Id.* Also playing a part in the court's decision was the presumption against finding statutes to be in conflict by implication. *Id.*

68. *Abbott Lab., Inc. v. Segura*, 907 S.W.2d 503 (Tex. 1995).

69. *Id.* at 505-07.

70. *Id.* at 507. After analyzing the Texas DTPA case law regarding "unconscionable acts," he found that defendants had not committed unconscionable acts. *Id.* at 509. Because the marketplace abounds with information about infant nutrition, Justice Cornyn found that plaintiffs operated in a self-imposed ignorance, and therefore, could not claim that Defendants had taken unfair advantage of their lack of knowledge. *Id.* Furthermore, he was not convinced that a sales mark-up of two to five and one half times manufacturing costs rose to the level of a "gross disparity" of value. *Id.* at 510.

71. *Id.* at 511-16.

72. As the court of appeals' decision reasoned, if the legislature had intended to exclude indirect purchasers from the purview of the DTPA, it could easily have done so. When the legislature amended section 17.49 by the Act of June 8, 1995, the court of appeals' decision had already been reached. If they had disagreed with its reasoning or holding, then it surely would have included anti-trust cases among the additions to the list of specific exemptions from the DTPA. See *infra* Section IV (e) (discussing the numerous additions to the list of specific areas of law to be exempt from the DTPA § 17.49, and Antitrust law was not included). The legislature, however, removed the "gross disparity" prong, relied on by the antitrust consumers in their DTPA cases, from the definition of "unconscionable acts." See *infra* Section III (c) (discussing the removal of the "gross disparity" language from the DTPA). Would this deletion effectively prevent an antitrust case from being brought under the DTPA? See *Abbott Lab.*, 907 S.W.2d 503, 513 (J. Cornyn concurring) (holding that DTPA claims were without merit).

enacted to protect private individual consumers from the overreaching of big business.<sup>73</sup> While the DTPA gives consumers a vehicle for redressing wrongs, the *Abbott Laboratories* decision eliminates this remedy for the individual consumer who has suffered damages caused by big business' monopolistic practices.

## 2. *Step 2: Do the Goods or Services Purchased or Leased Form the Basis of the DTPA Complaint?*

### a. Slip and Fall Cases Fail this Test

After a plaintiff meets the first requirement of the *Melody Home* test by showing that he is a direct purchaser/lessee or an intended beneficiary of the transaction, he must go on to show that those goods and services sought and acquired by the transaction form the basis of his DTPA complaint.<sup>74</sup> During the Survey period, two reported cases dealt with slip and fall plaintiffs who alleged violations of the DTPA.<sup>75</sup> In both cases, the courts of appeal held the plaintiffs failed to qualify as consumers because the services about which they complained—maintaining the floors in a safe condition—was neither the good nor service which they sought to acquire when they entered the store.<sup>76</sup> Because the slip and fall plaintiff cannot meet the second requirement of the *Melody Home* test, they do not qualify as a DTPA consumer.<sup>77</sup>

## B. WHAT QUALIFIES AS ACTIONABLE CONDUCT UNDER THE DTPA?

### 1. *Breach of Warranty*<sup>78</sup>

During the Survey period, the Texas Supreme Court addressed the issue of when an implied warranty will be recognized. In *Parkway Co. v. Woodruff*,<sup>79</sup> the Woodruffs purchased a home in a master-planned community known as Sugar Creek. They were the third family to occupy the home. Two years later, Parkway, the successor developer for the community, began to develop the section of land that lies adjacent to their prop-

---

73. See *Then and Now*, n.13, *supra* note 52.

74. *Melody Home*, 741 S.W.2d at 351-52.

75. *Henry v. Cullum Companies, Inc.*, 891 S.W.2d 789 (Tex. App.—Amarillo 1995, writ denied); *Ramirez v. H.E. Butt Grocery Co.*, 909 S.W.2d 62 (Tex. App.—Waco 1995, writ denied).

76. *Henry*, 891 S.W.2d at 795; *Ramirez*, 909 S.W.2d at 68 (citing *Henry*). The *Hand* court expressed similar reasoning when it stated "all transactions, whether they concern tangibles or intangibles, involve human service to some extent, the cost of which is included in the price of the transaction. Thus, it could be argued that every transaction involves the purchase of 'services' under the DTPA." *Hand*, 889 S.W.2d at 499. To recognize such tangential services under the DTPA would extend the reach of the DTPA even further than it already goes. Given the recent trend toward curtailing its reach, these three court decisions are in sync with the political environment surrounding the DTPA and its applications. See generally, *Then and Now*, *supra* note 52.

77. *Henry*, 891 S.W.2d at 795; *Ramirez*, 909 S.W.2d at 68.

78. The DTPA prohibits the breach of an express or implied warranty. DTPA § 17.50(a)(2).

79. 901 S.W.2d 434 (Tex. 1995).

erty. During the course of construction, Parkway constructed a concrete wall along the line dividing the two properties.

Mr. Woodruff, an engineer, immediately notified Parkway by letter that the wall might alter the drainage patterns on his lot. After an investigation, Parkway proposed a new drainage system. Because the new system required an earthen berm to be built across the back of his property, Mr. Woodruff objected. Accordingly, he installed a drainage system of his choice. While Parkway offered to pay for this system, Mr. Woodruff declined the offer because it would have required him and his wife to release the company from any further liability.

The Woodruffs' home flooded later that year and again in 1986, 1987, and 1989. The flooding caused the house's foundation to crack and other structural damage. After the first incidence, the Woodruffs filed suit alleging negligence, gross negligence, nuisance, trespass, water code and DTPA violations. At trial, the jury found Parkway's actions negligent, in violation of the water code, in breach of an implied warranty, and unconscionable.<sup>80</sup> Parkway appealed, and the court of appeals affirmed the majority of the judgment, reversing only those damages awarded for mental anguish because of a lack of evidence.<sup>81</sup>

Parkway filed a writ of error. The Texas Supreme Court granted its writ, and reviewed the case. After passing on the question of whether the Woodruffs qualified as consumers, the court determined that Parkway had not violated the DTPA and reformed the damage award to reflect its decision.<sup>82</sup>

Analyzing the Woodruffs' DTPA claims, the court held that the Woodruffs did not have an implied warranty from Parkway promising to perform future development services in a good and workmanlike manner.<sup>83</sup> A warranty must be recognized by either statutory or common law.<sup>84</sup> The implied service warranty is a creature born of common law.<sup>85</sup> Thus, the Texas Supreme Court reviewed the case to determine whether an implied warranty to perform future development services existed.

Reviewing the case law, the court noted that implied warranties in service transactions were of relatively recent creation.<sup>86</sup> According to the court, an implied warranty will not be judicially recognized unless there is

---

80. *Id.* at 437-38.

81. *Id.*; 857 S.W.2d 903 (Tex. App.—Houston [1st Dist.] 1993).

82. *Parkway*, 901 S.W.2d at 441.

83. *Id.* at 440.

84. *Id.* at 438.

85. *Id.* See also *Melody Homes Mfg. Co. v. Barnes*, 741 S.W.2d 349, 353 (Tex. 1987) (“An implied warranty arises by operation of law when public policy so mandates.”)

86. According to the court, statutes like the DTPA provide an incentive to plaintiffs to characterize simple negligence actions differently in an attempt to obtain enhanced remedies. *Parkway*, 901 S.W.2d at 438 n.4. Furthermore, “[t]raditionally, commentators rejected the idea that warranties applied to services at all.” *Id.* For these two reasons, the court was skeptical to recognize an implied warranty to perform future development services in a good and workmanlike manner.

a demonstrated need for it.<sup>87</sup> Indeed, the only existing implied warranty regarding services is limited to services provided to remedy defects existing at the time of the relevant consumer transaction.<sup>88</sup> When a consumer urges the recognition of a specific implied warranty, the consumer must have sought or acquired that service in his transaction.<sup>89</sup> Thus, the first order of business for the court was to determine which underlying transaction could serve as the basis for the Woodruffs' claim.

The only transaction that the court could reasonably impose an implied service warranty upon was the initial sale of the lot by Parkway to the homebuilder. The court of appeals reasoned that because Sugar Creek was a "master planned community," Parkway impliedly promised to perform all future development in a good and workmanlike manner.<sup>90</sup> The Texas Supreme Court, however, refused to expand the meaning of "master planned community" to mean "an implied promise to never 'adversely affect' any homeowner in the community."<sup>91</sup> Accordingly, the supreme court held that no implied warranty to perform future development services should be imposed because no services existed in the underlying transaction for which its service-related warranty could have been breached.<sup>92</sup> Additionally, the Woodruffs failed to show why a negligence cause of action did not provide adequate redress, and therefore, public policy did not mandate the imposition of an implied warranty in this instance.<sup>93</sup>

## 2. Unconscionable Actions<sup>94</sup>

The Woodruffs also claimed that Parkway violated the DTPA by acting unconscionably.<sup>95</sup> Because the Woodruffs' pleadings did not specify from

87. *Id.* at 438-39 (citing *Dennis v. Allison*, 698 S.W.2d 94 (Tex. 1985)(declining recovery under an implied warranty theory because the plaintiff had adequate alternative remedies).

88. *Id.* at 439. (citing *Melody Homes*, 741 S.W.2d at 354).

89. *Id.* (citing ARTHUR BIDDLE, A TREATISE ON THE LAW OF WARRANTIES IN THE SALE OF CHATTLES 1 (1884).

90. *Parkway*, 857 S.W.2d at 911.

91. *Parkway*, 901 S.W.2d at 439-40. The court reviewed the term "planned community" as it is used in the real estate community. It held that Sugar Creek had those features common to a "planned community," i.e., a homeowner's association, common area, deed restrictions, and a formal development plan. *Id.* at 440. "Parkway's use of the term to describe its development can be fairly construed as a representation about the form of common interest ownership, not an implied promise to provide future development services of the type at issue here." *Id.*

92. *Id.*

93. *Id.*

94. DTPA § 17.50(a)(3).

95. Unconscionable action or course of conduct means 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; or

B) results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration.

DTPA § 17.45(5). See *infra* Section III (C) (discussing the 1995 amendment to the definition of unconscionable which removed the gross disparity prong).

which prong of the unconscionability definition they sought recovery, the court analyzed their claim with regard to both prongs. Under the taking advantage prong, the Woodruffs claimed that Parkway's exclusive control over the drainage on the adjacent lots deprived them of the "ability or capacity" to protect their property interests.<sup>96</sup> Because the action which takes advantage must occur at the time of the sale, the court declined to recognize Parkway's subsequent actions as unconscionable.<sup>97</sup>

The Woodruffs then argued that the flooding caused by Parkway's actions created a gross disparity between the purchase price of their home and its current value.<sup>98</sup> The gross disparity must also exist at the time of the sale.<sup>99</sup> Because the disparity in value did not exist when the Woodruffs purchased the house, the court could not find Parkway's actions unconscionable.<sup>100</sup>

The Tyler Court of Appeals also determined whether a defendant's conduct was unconscionable. In *Innovative Office Systems v. Johnson*,<sup>101</sup> Johnson had leased a color copy system from Innovative Office Systems ("Innovative"). Based on Johnson's known expectations and the representations of an Innovative representative, Johnson decided to upgrade his system. When the system failed to perform as expected and represented, Johnson brought suit alleging breach of contract, breach of warranties, fraud and DTPA violations.<sup>102</sup>

On appeal, the court reviewed the sufficiency of the evidence to determine whether the defendant's conduct was unconscionable.<sup>103</sup> The court defined "grossly unfair" conduct to mean unfair conduct that was "glaringly noticeable, flagrant, complete and unmitigated."<sup>104</sup> Based on the depth of knowledge that the Innovative representative had regarding Johnson's expectations, the representations made to Johnson by the Innovative representative and Johnson's reliance on these facts when entering into the transaction, the court held that evidence supported a finding that Innovative had acted unconscionably.<sup>105</sup>

In *Century 21 v. Hometown Real Estate Co.*,<sup>106</sup> Hometown purchased a Century 21 franchise. As a highly successful franchise, Hometown received an achievement award from Century 21 in 1986. Century 21 had an unwritten policy of not placing a second franchise in an area served by a franchise having a thirty to forty percent marketshare (the "30% rule"). In early 1992, Hometown executed a new franchise agreement. Both the agreement and the required Federal Trade Commission disclo-

---

96. *Parkway*, 901 S.W.2d at 441.

97. *Id.* (citing *Chastain v. Koonce*, 700 S.W.2d 579, 584 (Tex. 1985)).

98. *Id.*

99. *Id.*

100. *Id.*

101. 906 S.W.2d 940 (Tex. App.—Tyler 1995, writ denied).

102. *Id.* at 940.

103. *Id.*

104. *Id.* at 948 (citing *Kennemore v. Bennett*, 755 S.W.2d 89, 92 (Tex. 1988)).

105. *Id.*

106. 890 S.W.2d 118 (Tex. App.—Texarkana 1994, writ denied).

sure statement specifically stated that the franchise agreement does not include any territorial rights or protected areas, which is in direct contradiction of the unwritten 30% rule.

Shortly after Hometown executed its new franchise agreement, Century 21 granted another franchise in that area. Hometown sued Century 21, alleging violations of the DTPA.<sup>107</sup> At trial, the jury rendered a verdict for Hometown.<sup>108</sup> Century 21 appealed the verdict, alleging insufficient evidence to support the jury's findings.<sup>109</sup>

The court of appeals reviewed the evidence to determine whether sufficient evidence existed to support a finding that Century 21 had acted unconscionably. While the court did not find that a gross disparity between consideration paid and value received existed,<sup>110</sup> the court found that the evidence supported a finding that Century 21's action took advantage of Hometown to a grossly unfair degree.<sup>111</sup> Hometown relied on the unwritten "30%" rule when renewing its franchise. "By signing the renewal agreement, Hometown surrendered any leverage it had as a successful franchise to block or otherwise resist a decision to place a second franchise in its market."<sup>112</sup> Additionally, a Century 21 representative admitted that Hometown had forty percent of the market share in its county and that Century 21 "may have pulled the trigger way too fast on this one."<sup>113</sup> Based on these facts, the court found sufficient evidence to support the jury's finding of unconscionable actions.<sup>114</sup>

### 3. *False, Misleading or Deceptive Acts—The Laundry List*<sup>115</sup>

#### a. When is a Failure to Disclose Information Actionable?

Many DTPA claims are based on the defendant's failure to disclose material information to the consumer prior to the transaction. To maintain a cause of action under the DTPA, "failure to disclose material information necessarily requires that the defendant have *known* the information and have failed to bring it to the plaintiff's attention."<sup>116</sup> A

---

107. *Id.* at 124.

108. *Id.*

109. *Id.*

110. The court could not find any evidence to support a finding of a "gross" disparity: "Hometown must share the real estate market with another agency now, which in turn harms its profit potential, but Hometown provided no proof that there is a gross disparity." *Id.* at 127.

111. *Century 21*, 890 S.W.2d at 127-28.

112. *Id.* at 127.

113. *Id.* at 128.

114. *Id.*

115. DTPA § 17.46(a)-(b).

116. *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 479 (Tex. 1995)(emphasis added)(citing DTPA § 17.46(b)(23)(stating that it is unlawful to fail to "disclose information concerning . . . services which was known at the time of the transaction") and *Robinson v. Preston Chrysler-Plymouth, Inc.*, 633 S.W.2d 500, 502 (Tex. 1982)(holding no duty to disclose material facts exist if defendant does not know of them)). *See also Century 21*, 890 S.W.2d at 126 (holding that mere nondisclosure of a material fact is insufficient to establish a DTPA claim, there must be a showing of intentional misconduct).



defendant, however, who willfully maintains his ignorance to avoid the duty of disclosure will not be protected.<sup>117</sup>

In *Doe v. Boys Clubs of Greater Dallas, Inc.*,<sup>118</sup> grandparents brought suit against the Boys Club for damages caused from sexual molestation of their grandchildren by a volunteer worker. The grandmother claimed that Boys Club failed to disclose material information regarding the qualifications of one of its workers.<sup>119</sup> She had inquired about a specific worker's qualifications because he had offered to take her grandchildren on a camping trip. In response to her inquiry, the Boys Club representative told her that it thoroughly checked out its volunteers and that the volunteer seemed to be okay. The representative, however, failed to tell her that the volunteer worker was a court-referred probationer serving a criminal court's order of community service.<sup>120</sup> The court held that this was not actionable under the DTPA because the information was not withheld for the purposes of inducing the grandmother into a consumer transaction.<sup>121</sup>

In *Smith v. Herco, Inc.*,<sup>122</sup> a vendor made oral and written affirmations that it would deed, sell, and give title to the purchaser of the entirety of a townhouse. The representation was false. The purchaser sued the vendor, alleging breach of contract, DTPA violations, and breaches of express and implied warranties. The jury found that the vendor had breached its duty to know whether the representations were true.<sup>123</sup>

On appeal, Herco (the vendor) argued that it could not be held liable for the nondisclosure because it did not know that the townhouse extended into the common area.<sup>124</sup> The court held that Herco had a duty to know.<sup>125</sup> Accordingly, the court imputed that knowledge to Herco, transforming its nondisclosure of a fact into an affirmative misrepresentation,<sup>126</sup> thereby making Herco liable under the DTPA.<sup>127</sup>

---

117. *Doe*, 907 S.W.2d at 479.

118. *Id.* at 472.

119. *Id.* at 479-80.

120. *Id.* at 479. His conviction was for driving while intoxicated (DWI). Furthermore, as the court noted, an investigation of his criminal record would only have revealed his two DWI convictions, and would not have revealed his propensity to sexually abuse young boys. *Id.*

121. *Doe*, 907 S.W.2d at 479. The Boys Club did not promote or offer the camping trip. As a result, its representative's misrepresentation was not made to induce the consumer into a transaction; and therefore, was not actionable under the DTPA. *Id.* See DTPA § 17.46(b)(23).

122. 900 S.W.2d 852 (Tex. App.—Corpus Christi 1995, writ denied).

123. *Id.* at 859.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Smith*, 900 S.W.2d at 859.

b. When does a Failure to Perform a Future Promise Become an Actionable Affirmative Misrepresentation?

A mere breach of contract is not actionable under the DTPA.<sup>128</sup> A number of cases discuss the additional element that is required to change a simple breach of contract case into a DTPA claim.<sup>129</sup> The additional requirement is the showing that at the time the promise was made, the promisor had no intentions of fulfilling the promise.<sup>130</sup> This determination can be made based on the nature of the promise and the surrounding circumstances.<sup>131</sup>

In *Kuehnhoefer v. Welch*,<sup>132</sup> a dispute arose over the renewal of a lease for which the Welchs filed a cause of action under DTPA.<sup>133</sup> It was the Welch's contention that Kuehnhoefer misrepresented to them that he would renew their existing lease for five years.<sup>134</sup> Kuehnhoefer contended that while this may be a breach of contract cause of action, it certainly was not a DTPA violation.<sup>135</sup> Even though the jury instruction did not limit the jury to consider whether this was a false, deceptive, or misleading act only at the time of the transaction, the court of appeals stated that the evidence in the record was sufficient to support such a finding.<sup>136</sup> Thus, this is a very circumstance specific analysis.

C. WHAT CONSTITUTES A PRODUCING CAUSE?

In order to recover damages under the DTPA, the consumer must prove that the defendant's conduct was a producing cause.<sup>137</sup> A producing cause is an efficient, exciting or contributing cause, which in the natural sequence, produced injuries or damages.<sup>138</sup> While the law does not require reliance or foreseeability,<sup>139</sup> some causal connection must exist between the deceptive act and actual damages suffered.<sup>140</sup>

---

128. *La Sara Grain Co. v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 565 (Tex. 1984).

129. See *Quitta v. Fossati*, 808 S.W.2d 636, 644 (Tex. App.—Corpus Christi 1991, no writ); *Coleman v. Hughes Blanton, Inc.*, 599 S.W.2d 643, 645 (Tex. Civ. App.—Texarkana 1980, writ denied); *Holloway v. Dannenmaier*, 581 S.W.2d 765, 767 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.).

130. *Kuehnhoefer v. Welch*, 893 S.W.2d 689, 693 (Tex. App.—Texarkana 1995, writ denied).

131. *Id.*

132. *Id.*

133. *Id.* at 691.

134. *Id.* at 693.

135. *Keuhnhoefer*, 893 S.W.2d at 693.

136. *Id.*

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

138. *Rourke v. Garza*, 530 S.W.2d 794, 801 (Tex. 1975). There can be more than one producing cause of damages. *Id.*

139. *Allied Towing Serv. v. Mitchell*, 833 S.W.2d 577, 585 (Tex. App.—Dallas 1992, no writ).

140. *Weitzel*, 691 S.W.2d at 602-03.

### 1. *When Does a Causal Connection Exist?*

A negligent act and an injury are not necessarily causally connected.<sup>141</sup> The plaintiff must show an unbroken causal connection between the act and the injury.<sup>142</sup> In *Doe*, the grandparents alleged that representations made by the Boys Club's representative that it provided a wholesome environment and that it thoroughly checked out its volunteers violated the DTPA. Because an unbroken connection between the Boys Club's misrepresentations and the sexual molestation of the children could not be shown the Texas Supreme Court denied liability under the DTPA.<sup>143</sup>

### 2. *Attorney Malpractice as a Producing Cause*

#### a. Criminal Cases

During the last Survey Period, the Dallas Court of Appeals faced a question of first impression regarding the standard of producing cause to be applied in criminal cases.<sup>144</sup> In *Peeler v. Hughes & Luce*,<sup>145</sup> the Dallas Court of Appeals noted the strong public policy reasons for recognizing a criminal defendant's culpability as the superseding cause of a conviction.<sup>146</sup> Upon review, the Texas Supreme Court agreed holding that the criminal's own conduct is the *sole* cause of an indictment and subsequent conviction.<sup>147</sup> Thus, unless she can first establish her own innocence, a criminal defendant cannot sue her attorney under the DTPA for malpractice.<sup>148</sup>

#### b. Civil Cases

In *Haynes & Boone v. Bowser Bouldin, Ltd.*,<sup>149</sup> Bouldin hired Haynes & Boone to represent him in a suit seeking rescission of a lease brought by the anchor tenant of his strip mall. The attorney in charge of Bouldin's case failed to respond to certain discovery requests in a timely manner. As a sanction, the trial court struck Bouldin's pleadings. The attorney filed a motion to reconsider, which was granted, and the court ordered defendant's attorney to pay \$1,500 and reinstated defendant's pleadings. When the attorney failed to pay the sanction, the court permanently

---

141. *Doe*, 907 S.W.2d at 481 (citing *General Motors Corp. v. Saenz*, 873 S.W.2d 353, 361 n.6 (Tex. 1993)).

142. *Id.*

143. The court noted that the volunteer worker developed a relationship with the boys' grandparents outside of the Boys Club. *Id.* Additionally, when the grandmother came to inquire about the volunteer because she was considering allowing him to take the boys camping, the representative stated that "[t]he Boys Club couldn't make that choice for her." *Id.* Accordingly, the court held that the causal connection was not unbroken by external factors. *Id.*

144. See *Survey 1994*, *supra* note 34, at 1127-28.

145. 868 S.W.2d 823 (Tex. App.—Dallas 1993), *aff'd*, 38 Tex. Sup. Ct. J. 1094 (Aug. 1, 1995).

146. *Id.* at 827-33.

147. 38 Tex. Sup. Ct. J. at 1094.

148. *Peeler*, 868 S.W.2d 823, 834.

149. 896 S.W.2d 179 (Tex. 1995).

struck the defendant's pleadings. As a result, Bouldin entered into a settlement agreement with the tenant which included a provision allowing the tenant to give ninety days notice and vacate the premises.<sup>150</sup>

At trial, Bouldin contended that the loss of his anchor tenant, precipitated by the attorney's malpractice, caused the resultant foreclosure on his strip mall.<sup>151</sup> A review of the evidence, however, revealed the following facts:

- (1) Tenant planned on leaving;
- (2) By the time defendant's pleadings were struck, the terms of the lease allowed the tenant to leave with only one year's rent; and
- (3) By the time defendant's pleadings were struck, the tenant had also signed a lease at another location.<sup>152</sup>

Bouldin argued that he lost valuable rights against the tenant due to the unfavorable settlement he was forced into because of his attorney's malpractice.<sup>153</sup> After reviewing the evidence, the Texas Supreme Court held that because there was no evidence that Haynes & Boone was the "producing cause" of the foreclosure, Bouldin could not recover his loss of investment and foreclosure deficiency damages.<sup>154</sup> The Supreme Court did, however, award Bouldin attorney's fees and expenses for both cases.<sup>155</sup>

*Mackie v. McKenzie*<sup>156</sup> involves DTPA claims brought against an attorney by his former clients. The Mackies hired McKenzie and his firm to represent them in a will contest. After McKenzie refused to write an opinion letter outlining their potential recovery in the will contest, the Mackies fired him.<sup>157</sup> Thereafter, McKenzie was granted a motion to withdraw.<sup>158</sup> The next day, McKenzie's associate sent a letter to the Mackies notifying them of the date any written responses were due and of a pending hearing on a motion for partial summary judgment. The Mackies failed to obtain substitute counsel in time, and the trial court granted partial summary judgment against them in their will contest case.<sup>159</sup> Subsequently, the Mackies entered into a settlement with the estate. In turn, they sued McKenzie, his associate, and their firm, alleging negligence and DTPA violations.<sup>160</sup>

The defendants were granted a motion for summary judgment by the trial court.<sup>161</sup> On appeal, the court noted that "[w]hen a client sues his attorney on the ground that the latter caused him to lose his cause of

---

150. *Id.* at 181.

151. *Id.* at 181-82.

152. *Id.* at 182.

153. *Id.*

154. 896 S.W.2d at 183.

155. *Id.*

156. 900 S.W.2d 445 (Tex. App.—Texarkana 1995, writ denied)

157. *Id.* at 448.

158. *Id.*

159. *Id.*

160. *Mackie*, 900 S.W.2d at 448.

161. *Id.*

action, the burden of proof is on the client to prove that his suit would have been successful but for the negligence of his attorney. . . ."<sup>162</sup> Because the Mackies failed to establish that they would have won the underlying will contest, the appellate court affirmed summary judgment in favor of McKenzie.<sup>163</sup>

### 3. *The Effect of an "As Is" Clause on Establishing a Producing Cause*

In *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*,<sup>164</sup> the Texas supreme court determined the effect of an "as is" clause in a commercial sales transaction. The purchaser of a commercial building sued the vendor for misrepresentations and concealment regarding the existence of asbestos in the building.<sup>165</sup> The purchaser alleged violations of the DTPA and fraudulent concealment. The jury awarded the purchaser over six million dollars in actual damages, and over fourteen million in punitive damages.<sup>166</sup> The court of appeals affirmed this award.<sup>167</sup>

The Texas supreme court, however, held that unless Jefferson could show that it was induced to make the "as is" agreement because of a fraudulent representation or concealment of information by Prudential, it could not establish the causation requirement.<sup>168</sup> After reviewing the evidence, the court held that: 1) no evidence existed to indicate that Prudential knew the building contained asbestos at the time of the sale;<sup>169</sup> 2) Jefferson could have discovered asbestos from a site inspection; and 3) Prudential's representative's statements that the building was in great shape was merely puffing or opinion.<sup>170</sup> Because Jefferson could not show that he was somehow fraudulently induced into making the "as is" agreement, the court held that he could not establish the causation element of his claims and reversed the judgment.<sup>171</sup>

During the Survey period, the San Antonio Court of Appeals also had the opportunity to review the effect of an "as is" clause on a plaintiff's DTPA claims.<sup>172</sup> In *Smith v. Levine*,<sup>173</sup> the appellees, the Levines, purchased a house from the Smiths. The Smiths knew that an engineer

162. *Id.*

163. *Id.* at 449-51.

164. 896 S.W.2d 156 (Tex. 1995).

165. *Id.* at 159.

166. *Prudential Ins. Co. of Am.*, 896 S.W.2d at 160.

167. See 839 S.W.2d 866, 879 (Tex. App.—Austin 1992).

168. *Prudential Ins. Co. of Am.*, 896 S.W.2d at 161.

169. See *supra* Section IIB(3)(a) (failure to disclose information is not actionable unless defendant knew or had a duty to know information at the time of the transaction).

170. *Prudential Ins. Co. of Am.*, 896 S.W.2d at 162-63. See also *Autohaus, Inc. v. Aguilar*, 794 S.W.2d 459, 462-64 (Tex. App.—Dallas 1990), writ denied *per curiam*, 800 S.W.2d 853 (Tex. 1991) (statements by salesman were too general to be an actionable misrepresentation but were merely puffing or opinion); *but cf.* *Pennington v. Singleton*, 606 S.W.2d 682, 687 (Tex. 1980) (statements that boat was "new" or "perfect" was not merely puffing or opinion).

171. *Prudential Ins. Co. of Am.*, 896 S.W.2d at 164.

172. *Smith v. Levine*, No. 04-94-00241-CV, 1995 WL 539851 (Tex. App.—San Antonio Sept. 13, 1995, writ requested).

173. *Id.*

had inspected the house and determined that the foundation was defective, however, they marketed the house in local newspapers, describing it as being in "excellent" condition.<sup>174</sup> In response to one of the ads, the Levines became interested in the house. The Levines purchased the house after being assured that the cracks were superficial and routine for a house in that area.<sup>175</sup> A year later, they decided to sell the house. When an interested buyer accidentally hired the same engineer that had originally determined the foundation was defective, the Levines lost the sale and realized that the Smiths had concealed this from them. The Levines sued the Smiths for DTPA violations, for which a jury awarded them \$81,792.62 in damages.<sup>176</sup>

On appeal, the Smiths relied on the existence of an "as is" clause in the earnest money contract to negate the Levines element of causation.<sup>177</sup> Reviewing the Texas Supreme Court's *Prudential* holding,<sup>178</sup> the court of appeals interpreted *Prudential's* mandate as requiring courts "to determine the validity of the 'as is' agreement at issue in light of the sophistication of the parties, the terms of the 'as is' agreement, and whether there was a knowing misrepresentation or concealment of a known fact."<sup>179</sup> While the *Prudential* "as is" clause was specifically worded for that contract, the "as is" clause in *Smith* came from a preprinted form used by the sellers.<sup>180</sup> While no evidence existed that Prudential or its representative knew that the building contained asbestos when it was sold, the Smiths clearly knew that the foundation of their house was defective.<sup>181</sup> The Smiths made affirmative oral misrepresentations upon which the Levines relied.<sup>182</sup> Accordingly, the court of appeals held that the Smiths' "as is" clause could not negate the Levines' element of causation.<sup>183</sup>

#### A. DTPA DAMAGES.

##### 1. Offsetting DTPA claims

Under the DTPA, a plaintiff must establish that he is a consumer, that defendant committed a deceptive trade practice, and that such conduct was the producing cause of damage. Once the plaintiff establishes each of these elements, he is entitled to compensation for his damages.<sup>184</sup> How damages should be calculated is a common issue in DTPA cases.

In *Hamra v. Gulden*,<sup>185</sup> a former patient sued her plastic surgeon and a magazine for publishing her photograph in conjunction with an article

---

174. *Id.* at \*1.

175. *Id.*

176. *Id.* at \*2.

177. *Smith*, 1995 WL 539851 at \*3.

178. *Prudential Ins. Co. of Am.*, 896 S.W.2d 156 (Tex. 1995).

179. *Smith*, 1995 WL 539851 at \*4.

180. *Id.* at \*3.

181. *Id.* at \*5.

182. *Id.*

183. *Id.*

184. DTPA § 17.50(a)(1).

185. 898 S.W.2d 16 (Tex. App.—Dallas 1995, writ requested).

featuring the doctor and his techniques.<sup>186</sup> While the magazine company, Conde Naste Publications, settled with the patient for \$8,000, the doctor proceeded to trial and elected a dollar-for-dollar settlement credit.<sup>187</sup> The jury awarded the patient \$2,500 in actual damages, and the trial court awarded her \$5,000 in additional damages under the DTPA and then granted a settlement credit which resulted in the patient not recovering anything for actual damages, however, she did receive compensation for attorneys' fees and court cost.<sup>188</sup>

On appeal, the doctor argued that under the DTPA only a "prevailing party" could recover attorneys' fees,<sup>189</sup> and that the patient was not a prevailing party.<sup>190</sup> The court, however, drew a distinction in the case before it because the patient's claim was entirely offset by a *settling* party who, by definition is not an opposing party at trial.<sup>191</sup> As a result, the court of appeals held that patient was not a "prevailing party," and therefore, was not entitled to recover attorneys' fees.<sup>192</sup>

## 2. Trebling Prejudgment Interest

The question is really whether prejudgment interest should be considered part of a consumer's actual damages because if it is, then it would be included in any amount that is trebled. The courts of appeal are split on this issue.<sup>193</sup> While the supreme court has yet to squarely address this

---

186. *Id.* at 18.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 18-19. A consumer can recover attorneys' fees for the successful prosecution of a DTPA claim even though opposing party's claim entirely offsets consumer's claim. *Id.* at 19 (citing *McKinely v. Drozd*, 685 S.W.2d 7, 9-10 (Tex. 1985)).

191. *Id.* at 19. "It is one thing to allow a party an attorney's fees award on a successful claim notwithstanding an opposing party's success on an offsetting claim. However, it is another to allow attorney's fees on a claim that, although successful, was paid in full before trial." *Id.* (citing *Blizzard v. Nationwide Mut. Fire Ins. Co.*, 756 S.W.2d 801, 806 (Tex. App.—Dallas 1988, no writ).

192. *Hamra*, 898 S.W.2d at 19.

193. The Houston, Fort Worth, El Paso, and San Antonio courts have held that prejudgment interest is not to be trebled in DTPA and insurance cases. *Roberts v. Grande*, 868 S.W.2d 956, 960 (Tex. App.—Houston [14th Dist] 1994, writ denied); *Benefit Trust Life Ins. Co. v. Littles*, 869 S.W.2d 453 (Tex. App.—San Antonio 1993), *remanded for entry of judgment*, 873 S.W.2d 704 (Tex. 1994); *Group Medical & Surgical Serv. Inc. v. Leong*, 750 S.W.2d 791, 798 (Tex. App.—El Paso 1988, writ denied); *Hope v. Allstate Ins. Co.*, 719 S.W.2d 634, 638 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.); *Precision Homes, Inc. v. Cooper*, 671 S.W.2d 924, 930-31 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.); *Rotello v. Ring Around Prods., Inc.*, 614 S.W.2d 455, 463 (Tex. App.—Houston [14th Dist] 1981, writ ref'd n.r.e.).

The Dallas, Austin, Beaumont, and Texarkana courts have included prejudgment interest in actual damages and trebled it. *Hartford Life Ins. Co. v. Fulda*, No. 09-94-168 CV, 1995 WL 261996 at \*41 (Tex. App.—Beaumont, May 4, 1995 writ requested); *Crum & Forster, Inc. v. Monsanto Co.*, 887 S.W.2d 103, 154 (Tex. App.—Texarkana 1994) *remanded*; *Celtic Life Ins. Co. v. Coats*, 831 S.W.2d 592, 599 (Tex. App.—Austin 1992), *aff'd as modified*, 885 S.W.2d 96 (Tex. 1994); *Paramore v. Nehring*, 792 S.W.2d 210, 212 (Tex. App.—Austin 1990, no writ); *Indust-Ri-Chem Lab. v. Par-Pak Co., Inc.*, 602 S.W.2d 282, 295 (Tex. Civ. App.—Dallas 1980, no writ).

issue,<sup>194</sup> the legislature addressed the issue as part of its 1995 Amendments to the DTPA, discussed in the next section. The 1995 Amendments prohibited prejudgment interest from being considered when computing additional damages under the statute.<sup>195</sup>

### III. THE 1995 AMENDMENTS TO THE DTPA<sup>196</sup>

During its 1995 session, the legislature overhauled the DTPA. Almost every section was subject to an amendment of some sort ranging from the simple tune-up to a major repair. Apparently, the legislature was determined to limit its expansive scope. This section explores the significant 1995 amendments which will have a profound impact on the DTPA.

#### A. SECTION 17.42. WAIVERS: PUBLIC POLICY

Up until this point, consumers could only waive their DTPA rights in big money transactions where the consideration paid was \$500,000 or more or where the consumer had a personal net worth of \$5 million or more. After the 1995 amendments, however, any consumer can execute a valid waiver of his DTPA rights, as long as the waiver meets the following requirements:

- (1) it is in writing;<sup>197</sup>
- (2) it is signed by the consumer;
- (3) the consumer was not in a significantly disparate bargaining position; and
- (4) the consumer was represented by legal counsel in the transaction in question.<sup>198</sup>

Even though the amendments seem to make it easier for consumers to waive their DTPA rights in a greater number of transactions, the requirement that the consumer be represented by counsel will significantly limit the number of transactions covered by this exemption. However, over time waivers will effectively negate the DTPA as a commercial litigation tool, because presumably most vendors will require a waiver as part of most major transactions.<sup>199</sup>

---

194. See *Fulda*, 1995 WL 261996 at \*42 (J. Burgess, dissenting).

195. DTPA § 17.50(f).

196. This section is reprinted from the *DTPA - Then and Now*, *supra* note 52.

197. DTPA § 17.42(a)(1). The amendments also require that the waiver be identified in the text by the heading "Waiver of Consumer Rights" or by words of similar meaning, and that the text be placed conspicuously and done in bold-face, 10 point type. DTPA § 17.42(c)(1)(2). The amendment goes further to suggest a suitable waiver provision that reads: "I waive my rights under the Deceptive Trade Practices-Consumer Protection Act, Section 17.41 et seq., Business & Commerce Code, a law that gives consumers special rights and protections. After consultation with an attorney of my own selection, I voluntarily consent to this waiver." DTPA § 17.42(c)(3).

198. DTPA § 17.42 (a)(1-3). The section, however, also states that an otherwise valid waiver will not be so considered if the consumer's legal counsel was in anyway suggested, identified, or selected by the defendant or its agent. DTPA § 17.42(b) (1995).

199. The exclusion of a waiver for the purchase or lease of a residence is still in effect. See DTPA § 17.49(f)(3), (g).



## B. SECTION 17.44. CONSTRUCTION AND APPLICATION

Having never been amended, this provision mandates that courts "liberally construe" and apply the DTPA "to promote its underlying purposes."<sup>200</sup> In this round of amendments, however, the legislature added a new subsection which states that Chapter 27, the Property Code, prevails over the DTPA to the extent the two conflict.<sup>201</sup>

## C. SECTION 17.45. DEFINITIONS

The legislature amended two of the existing definitions—"unconscionable action" and "knowingly."<sup>202</sup> It also added three new definitions—"economic damages," "residence" and "intentionally."<sup>203</sup> In amending the "unconscionable action" definition, the legislature removed the "gross disparity" prong that allowed consumers to sue when a gross disparity of value existed between the consideration paid for and the value received in a transaction.<sup>204</sup>

The revision of "knowingly" and the addition of definitions for "economic damages" and "intentionally," reflect the changes enacted in the DTPA's damage scheme outlined in section 17.50.<sup>205</sup> The 1995 amendments revised the definition of "knowingly" to specify that the defendant must possess actual awareness of the "act, practice, condition, defect, or failure" giving rise to the consumer's complaint "at the time" of the transaction in issue.<sup>206</sup> As defined, "economic damages" means compensatory damages for pecuniary loss, but does not include damages for mental anguish, loss of consortium, companionship, or society, or physical injury.<sup>207</sup> Finally, "intentionally" means that defendant acted not only with knowledge, but that he acted with the specific intent that the consumer act in detrimental reliance.<sup>208</sup> Thus, the DTPA has been brought more in

---

200. DTPA § 17.44 (1973-1993).

201. DTPA § 17.44(b). It is unclear why the legislature placed this provision here rather than in section 17.49 to which it added several areas of law that will now be excluded from the purview of the DTPA. See *infra* section III (E), (discussing the additions to § 17.49).

202. DTPA § 17.45(5), (9).

203. DTPA § 17.45(11)-(13).

204. DTPA § 17.45(5). The gross disparity test has typically been applied when the product received is something other than what the buyer sought or when the product is virtually worthless, at least in comparison to the goods sought. See, e.g. *Dwight's Discount Vacuum Cleaner City, Inc. v. Scott Fetzer Co.*, 860 F.2d 646 (5th Cir. 1988), *cert. denied*, 490 U.S. 1108 (1989) ("[T]he 'gross disparity' test obviously mirrors a fraud-type measure of recovery, in which a consumer receives a product inferior in quality to that which he intended to buy or, alternatively, when the consumer is defrauded out of his money entirely." 860 F.2d at 650-51.); *Teague v. Bandy*, 793 S.W.2d 50, 56 (Tex. App.—Austin 1990, writ denied) (finding a gross disparity in value when a cow purchased as an embryo donor proved to be infertile).

205. See *infra* Section III (f) and accompanying text (discussing DTPA's new damage scheme).

206. DTPA § 17.45(9).

207. DTPA § 17.45(11).

208. DTPA § 17.45(13). Basically, a defendant acted intentionally if he acted to defraud the consumer. His intent, however, will be inferred if the facts indicate that he acted with flagrant disregard of prudent and fair business practices. *Id.*

line with fraud.

#### D. SECTION 17.46. DECEPTIVE TRADE PRACTICES UNLAWFUL

This section contains the "laundry list" of unlawful practices. The only change in this section was the addition of a new unlawful practice to the laundry list. The 1995 amendments added section 17.46(25), making it actionable to take advantage of a declared disaster by selling or leasing necessities, (i.e. fuel, food and medicine), for an exorbitant or excessive price.<sup>209</sup>

#### E. SECTION 17.49. EXEMPTIONS

Originally, this section contained only two exemptions. The first exempts from liability the innocent owners and employees of regularly published or broadcast mediums for advertisements contained in their publication or broadcast that violate the DTPA. The second exemption exempts acts or practices authorized by the Federal Trade Commission in Section 5(a)(1) of the Federal Trade Commission Act.<sup>210</sup> The 1995 amendments add four new exemptions to this section.

The 1995 provisions exempts from liability professionals whose service is to provide advice, judgment, opinion, or similar professional skills.<sup>211</sup> This exemption does not apply if the professional makes an express misrepresentation of a material fact, acts unconscionably, or breaches an express warranty in ways that cannot be characterized as advice, opinion, or judgment, or if the professional fails to disclose information in violation of section 17.46(b)(23).<sup>212</sup> While clearly intended to protect lawyers and accountants from claims of malpractice, the exceptions to the exemption are difficult to understand and easily circumvented by creative pleading.

The 1995 provisions also prohibit claimants from asserting DTPA causes of action in conjunction with actions for bodily injury, death, or the infliction of mental anguish.<sup>213</sup> This addition effectively eliminates the DTPA from being alleged in tort actions.

The new exemptions also eliminate from the purview of the DTPA, certain contractual transactions evidenced by a written contract. One exempts those transactions in which the consideration paid is between \$100,000 and \$500,000 and the consumer is represented by counsel, who was not suggested by the defendant.<sup>214</sup> The other exempts those transactions in which the consideration paid is over \$500,000.<sup>215</sup> Neither of these exemptions, however, applies if the transaction at issue involves the con-

---

209. DTPA § 17.46(25).

210. 15 U.S.C. § 45(a)(1) (1989).

211. DTPA § 17.49(c). This exemption also covers the entities which may be found vicariously liable for a professional's conduct. DTPA § 17.49(d).

212. DTPA § 17.49(c)(1-4).

213. DTPA § 17.49(e). Mental anguish damages, however, are recoverable when a consumer can prove that a defendant acted "knowingly" or "intentionally."

214. DTPA § 17.49(f).

215. DTPA § 17.49(g).

sumer's residence.<sup>216</sup>

#### F. SECTION 17.50. RELIEF FOR CONSUMERS

This section received significant attention during the 1995 legislative session. In section 17.50(a), the legislature amended the text allowing a consumer to maintain an action for economic damages or damages for mental anguish.<sup>217</sup> This amendment, however, conflicts with the new provision in section 17.49 that exempts causes of action solely for mental anguish from the ambit of the DTPA.<sup>218</sup> How this conflict will be resolved is unclear.

More importantly, the legislature amended section 17.50(a) to include an element of transactional reliance. A consumer has a cause of action where the producing cause of their damage is "the use or employment by any person of a false, misleading, or deceptive act or practice that is: (A) specifically enumerated in [the laundry list]; and (B) relied on by a consumer to the consumer's detriment."<sup>219</sup> This addition not only acts to increase the individual consumer's burden of proof, but it also adds an element to a consumer claim that may differ between consumers thus creating consumer class actions in the future.

By amending section 17.50(b), the legislature revised the DTPA's damage scheme. Because the DTPA is no longer applicable to tort-type cases, these changes were no longer necessary, and therefore, eliminated by the 1995 amendments.

Under the new damage scheme, a prevailing consumer is always entitled to economic damages.<sup>220</sup> If the consumer proves that defendant acted "knowingly," he can also recover mental anguish damages and potentially receive treble his economic damages.<sup>221</sup> If the consumer proves that defendant acted "intentionally," he can recover both economic and mental anguish damages, as well as a possible trebling of both amounts.<sup>222</sup> In calculating treble damages, however, the legislature specifically limited those amounts that could be included in the computation by adding a new provision which states that attorneys' fees, costs and prejudgment interest are not to be included.<sup>223</sup>

---

216. DTPA § 17.49(f)(3), (g). See DTPA § 17.45 (12) (defining the term "residence" to mean, "a building that is a single-family house, duplex, triplex, or quadruplex or a unit in a multi-unit residential structure in which title to the individual units is transferred to the owners under a condominium or cooperative system and that is occupied or to be occupied as the consumer's residence.").

217. DTPA § 17.50(a).

218. Compare DTPA § 17.49(e), with DTPA § 17.50 (a). Perhaps, to avoid the conflict, the legislature should have worded section 17.50(a) to read conjunctively by using "and" instead of "or."

219. DTPA § 17.50(a) (emphasis added).

220. DTPA § 17.50(b).

221. *Id.*

222. *Id.*

223. DTPA § 17.50(e). This amendment resolves the current split of authority on this issue.

## G. SECTION 17.505. NOTICE; INSPECTION

The legislature severed the provisions regarding settlement offers from this section and created a new section — section 17.505: Offers of Settlement. The amended notice provision is now limited in scope to notification of DTPA claims and the right to inspect. The amended section requires the notice to advise in reasonable detail, the consumer's specific complaint, the amount of economic damages claimed, the estimated cash value for mental anguish damages experienced, and any expenses incurred up to the point of giving notice.<sup>224</sup> In addition, when notice is rendered impractical by necessity of filing suit to prevent the expiration of the statute of limitations, the time period in which the defendant may tender an offer has been changed from within 60 days after the filing of the DTPA claim to within 60 days after *service* of the DTPA suit or counterclaim.<sup>225</sup> These changes will make it easier to draft DTPA notice letters and presumably much easier to draft class action notice letters.

The legislature also added a new provision for instances where the consumer fails to give notice, as required by section 17.505(a), and does not have a justifiable excuse, such as limitations. Under the new provision, if a consumer fails to give notice of his DTPA claim prior to filing suit and is not justified in his failure by a limitations restraint, the defendant may file a plea in abatement, as long as he does so within 30 days of filing his original answer in the DTPA suit.<sup>226</sup> After a hearing on the matter, the court must abate the suit if the consumer's failure to provide notice was not excusable under the exceptions outlined in section 17.505(b).<sup>227</sup> Such an abatement continues for 60 days after the consumer serves written notice on defendant in compliance with section 17.505(a).<sup>228</sup>

## H. SECTION 17.5051. MEDIATION

The legislature now requires mediation to promote out-of-court settlement of consumer claims. Under the mediation provisions, a party may compel mediation in a DTPA case by filing a motion to compel within 90 days of receiving service of the suit.<sup>229</sup> Within 30 days of filing this motion, the court must sign an order setting the time and place of the mediation.<sup>230</sup> The mediation must be held within 30 days after the order for mediation is signed, unless the parties agree otherwise or the court deter-

---

224. DTPA § 17.505(a) (adding the requirement that any claim for mental anguish damages be separately identified and included in the notice).

225. DTPA § 17.505(b).

226. DTPA § 17.505(c).

227. DTPA § 17.505(d). A suit will automatically be abated without order of the court starting on the eleventh day after the plea in abatement is filed, if the plea is verified and alleges that defendant did not receive notice, and the consumer does not file a controverting affidavit in response before the eleventh day after the plea in abatement is filed.

*Id.*

228. DTPA § 17.505(e).

229. DTPA § 17.5051(a).

230. DTPA § 17.5051(b). If the parties cannot agree on a mediator, the court will appoint one. DTPA § 17.5051(c).

mines that additional time is warranted.<sup>231</sup> Normally, the cost of mediation will be borne equally between the parties participating in the mediation.<sup>232</sup>

#### I. SECTION 17.5052. OFFERS OF SETTLEMENT

Even though the settlement provisions were moved to a new section, and they remain largely unchanged. The legislature did, however, add a few new subsections describing how the mediation rules will interact with the existing settlement rules. When mediation is not compelled in a DTPA case, the defendant can tender a settlement offer at anytime from the date of filing an original answer, to 90 days thereafter.<sup>233</sup> However, if a mediation is conducted then the settlement period runs from the day after mediation and extends 20 days.<sup>234</sup>

#### J. SECTION 17.56. VENUE

The legislature amended the venue provision. The amendment eliminated the venue provision added by the 1979 amendments that allowed suit to be brought in any county where the seller was doing business. In its place, the legislature included a new provision allowing suit to be brought in any place that would be proper under Chapter 15 of the Civil Practice and Remedies Code.<sup>235</sup> While this addition has expanded the venue possibilities, it primarily caused the DTPA to conform more to the general laws of Texas.

#### K. EFFECTIVE DATE OF THE 1995 AMENDMENTS

The Act takes effect on September 1, 1995. All causes of action that accrue on or after that date are governed by the Act. Regardless of when a cause of action accrued, this Act will also apply to *all* DTPA cases filed on or after September 1, 1996.<sup>236</sup> If the cause of action accrued before September 1, 1995 and is filed before September 1, 1996, then the amendments do not apply. In such instances, the case will be governed by the current version of the DTPA.

### IV. CONCLUSION

Originally, the legislature enacted the DTPA to give a private right of

---

231. DTPA § 17.5051(d). A court ordered extension, however, cannot exceed an additional 30 days. *Id.*

232. DTPA § 17.5051(e) (1995). An exception exists where the amount of economic damages claimed by the consumer is less than \$15,000. In those instances, mediation cannot be compelled unless the party seeking mediation agrees to bear the entire cost. DTPA § 17.5051(f) (1995). This caveat protects smaller consumers with minor claims from being forced out of their suit because of an inability to pay mediation costs.

233. DTPA § 17.5052(b).

234. DTPA § 17.5052(c).

235. DTPA § 17.56(1).

236. The amended venue provision, however, applies to all causes of action that accrued before September 1, 1995 and are filed on that date or thereafter.

action to consumers.<sup>237</sup> Since its inception, however, Texas courts have expanded the reach of the DTPA because of its broad terminology and its mandate for a liberal approach.<sup>238</sup> Indeed, the DTPA is no stranger to large commercial litigation cases. Accordingly, both the 1995 legislative amendments and the Survey period cases indicate the new trend to limit the DTPA and to restore it to its original purpose, as a remedy for the wronged small consumer.

---

237. See 167 Tex. Gen. Laws, ch. 274, § 1, at 608-09; *Id.* at § 2, arts. 10.01-.05, at 658-59 (codified as TEX. REV. CIV. STAT. ANN. arts. 5069-10.01-.05 (Vernon 1970)).

238. See generally, *DTPA - Then and Now*, *supra* note 52.

