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January 1977

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### Recommended Citation

Michael P. Lynn, *Anatomy of a Deceptive Trade Practices Case*, 31 Sw L.J. 867 (1977)  
<https://scholar.smu.edu/smulr/vol31/iss4/5>

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# ANATOMY OF A DECEPTIVE TRADE PRACTICES CASE

by

Michael P. Lynn\*

SINCE the enactment of the Texas Deceptive Trade Practices—Consumer Protection Act,<sup>1</sup> consumer protection has come to mean more than the simple warranty claim on the family car or registering complaints with the Better Business Bureau. Today any consumer, corporate or individual,<sup>2</sup> who since the enactment of the DTPA has been adversely affected<sup>3</sup> by a misrepresentation<sup>4</sup> in the sale of a good or service,<sup>5</sup> may bring suit pursuant to the Act. If successful, the plaintiff may recover treble his economic and other personal damages<sup>6</sup> from the defendant.<sup>7</sup> The plaintiff may recover even if the consumer is not in privity<sup>8</sup> with the defendant and even if the defendant does not have knowledge that his representation was other than completely true.

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1. TEX. BUS. & COMM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1976-77) [hereinafter cited and referred to as DTPA or Act].

2. As initially enacted in 1973, the DTPA permitted only individuals to bring suit. Since the term "individual," unlike the term "person," did not include partnerships or corporations, those types of business entities could not bring suit pursuant to the Act. Tex. Laws 1973, ch. 143, § 1, at 323. The 1975 amendments to the Act broadened the protected class and thereafter corporations and partnerships were included in the definition of consumer. Tex. Laws 1975, ch. 62, § 1, at 149. The 1977 amendments to the DTPA further expanded the scope of the Act to include governmental entities. Tex. Laws 1977, ch. 216, § 1, at 600.

3. A consumer need only be "adversely affected" to bring an action pursuant to the terms of the DTPA § 17.50.

4. Eighteen of the specifically proscribed deceptive acts are actually different forms of misrepresentation. DTPA §§ 17.46(b)(1)-(17), (19). The two remaining proscriptions deal with pyramid schemes. DTPA §§ 17.46(b)(18), (20). Also declared unlawful are violations of art. 21.21 of the Texas Insurance Code, Tex. Laws 1977, ch. 216, § 4, at 603, and all unconscionable acts as defined in the 1977 amendments to be: "(A) [taking] advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or (B) [resulting] in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration." Tex. Laws 1977, ch. 216, § 1, at 600.

5. For transactions entered into between May 21, 1973, and May 23, 1977, the term "services" is defined as "work, labor, or service purchased or leased for use, for other than commercial or business use." Tex. Laws 1975, ch. 62, § 1, at 149. The 1977 amendments which became effective May 23, 1977, have deleted the business use exception, thereby creating a cause of action for misrepresentation in accounting, business, banking, and insurance. Tex. Laws 1977, ch. 216, § 1, at 600. For an explanation of the difficulty encountered interpreting the business use exception see Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 706 (1976).

6. Any provable claim for injury or loss is actionable even if the loss results from the purchase of a house or the purchase of a security. See *Woods v. Littleton*, 554 S.W.2d 662 (Tex. 1977); *Rio Grande Oil Co. v. State*, 539 S.W.2d 917 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.).

7. The Medical Liability and Insurance Improvement Act, Tex. Laws 1977, ch. 817, § 12.01(a), at 2053, provides that the DTPA shall not apply to physicians or health care providers for injuries which have resulted from negligence on the part of the health care provider. Arguably, since the DTPA proscribes only misrepresentation and not negligent conduct, the new safe harbor provision of § 12.01 misses the mark. See 4 *Caveat Vendor*, Aug. 1977, at 2 (Texas State Bar).

8. Until May 23, 1977, the "failure by any person to comply" with an express or implied warranty was actionable. Tex. Laws 1973, ch. 143, § 1, at 326. The failure-to-comply phrase has been amended to read "breach of an express or implied warranty" to bring it into conformity with the language used in the UCC. Tex. Laws 1977, ch. 216, § 5, at 603. See TEX. BUS. & COMM. CODE ANN. § 2.714 (Tex. UCC 1968). The majority rule in Texas has been that a

On its face the DTPA requires a plaintiff to prove that a sale occurred, that the defendant participated in making a misrepresentation, and that the plaintiff was adversely affected by the misrepresentation.<sup>9</sup> No express language in the DTPA requires the courts to determine whether a falsehood is material, whether the plaintiff should have relied upon a misrepresentation, whether the plaintiff in fact relied upon a misrepresentation, or even whether the misrepresentation caused the injury to the plaintiff. Nevertheless, the Texas attorney general has recently suggested that a private plaintiff under the DTPA must prove that the representation is material to the extent that it has the "capacity to deceive" in order to recover for the alleged violation.<sup>10</sup> That position, however, is contrary to the position taken by a former chief of the consumer protection division of the attorney general's office, who argues that in most cases no materiality standard applies and that proof that a defendant committed one of the twenty proscribed acts is per se violative of the DTPA.<sup>11</sup> In addition to the disagreement between members of the staff who drafted the statute,<sup>12</sup> case and statutory developments have further unraveled whatever consensus may have been reached on the meaning of the DTPA, leaving both practitioners and judges understandably confused as to how to submit a DTPA case to the jury.<sup>13</sup>

The purpose of this Article is to supplement and extend the analysis of an earlier article which suggested that the concepts of materiality, reliance, and causation are part of the prima facie case which must be proved in actions brought pursuant to the DTPA.<sup>14</sup> The conclusion of this Article is that not all

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consumer must have privity to bring a suit for an express or implied warranty. *Compare* *Foremost Mobile Mfg. Corp. v. Steele*, 506 S.W.2d 646 (Tex. Civ. App.—Fort Worth 1974, no writ), *with* *Nobility Homes of Texas, Inc. v. Shivers*, 539 S.W.2d 190 (Tex. Civ. App.—Beaumont 1976), *aff'd* 21 Tex. Sup. Ct. J. 5 (Oct. 8, 1977). Therefore, suits which allege breach of warranty as the only deceptive act must often overcome the consumer's lack of privity to maintain the suit. In language parallel to that contained in the UCC, the DTPA also declares various overlapping misrepresentations contained in §§ 17.46(b)(1)-(20) to be unlawful. Because those proscriptions sound in fraud rather than in warranty or contract, no privity is required to bring suit pursuant to those proscriptions. *See* W. PROSSER, *LAW OF TORTS* 685 (4th ed. 1971). Thus, the plaintiff can avoid the privity issue by pleading the implicit representation rather than the implied warranties of a product as a violation of the DTPA. *Cf.* *Bourland v. State*, 528 S.W.2d 350 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (attorney found liable for mere participation in scheme rather than for attorneys' privity with plaintiffs). *See also* Lynn, *supra* note 5, at 718. *But see* *Cloer v. General Motors Corp.*, 395 F. Supp. 1070, 1072 (E.D. Tex. 1975).

9. DTPA § 17.50.

10. Hill, *Introduction to Consumer Law Symposium*, 8 ST. MARY'S L.J. 609, 613 (1977).

11. Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices—Consumer Protection Act*, 8 ST. MARY'S L.J. 617, 625 (1977). "Those 20 practices are made *per se* violations; there is no requirement for an issue or a finding that the practice has the tendency or capacity to deceive." *Id.* According to Maxwell, when the allegedly deceptive act is not one of the 20 practices made *per se* violations, the capacity to deceive tests should still apply. *Id.* at 623.

12. The initial draft of the DTPA was written by the Austin Ass'n of Young Lawyers, Consumer Section. Telephone interview with Joe Longley, Sept. 1977.

13. In *Littleton v. Woods*, 538 S.W.2d 800 (Tex. Civ. App.—Texarkana 1976), *rev'd in part*, 554 S.W.2d 662 (Tex. 1977), the court of appeals recognized the state of the confusion when it wrote:

The ambivalent approach in the trial court to both common law and statutory actions and relief indicate a mixed conception of the theory upon which liability and relief should be rested under the pleadings and proof . . . [I]t appears the case was tried upon a wrong theory and that under the facts that might be proved if pled and tried on a profit theory, Woods might justly prevail.

538 S.W.2d at 803.

14. Lynn, *supra* note 5, at 708.

misrepresentations, even those which adversely affect a specific consumer, should rise to the level of an actionable deceptive act or misrepresentation. There are falsehoods which are not material because they simply should not mislead the reasonable consumer and do not in fact mislead the particular plaintiff since he does not rely upon them. Both materiality and reliance are related to causation and provide the court with a basis for distinguishing those misrepresentations which "adversely affect or damage" the reasonable consumer from those which do not or should not damage that consumer.

### I. MATERIALITY

The Texas attorney general urges that a misrepresentation is material if it has the capacity to deceive any consumer.<sup>15</sup> He reasons that the Texas courts are "expressly instructed" to follow federal court interpretation of the Federal Trade Commission Act;<sup>16</sup> since the capacity to deceive, rather than actual deception, is all that is required to be proven under the FTC Act,<sup>17</sup> it is likewise all that is required in actions brought pursuant to the DTPA. The language to which the attorney general refers<sup>18</sup> now provides:

It is the intent of the legislature that in construing Subsection (a) of this section in suits brought under Section 17.50 of this subchapter the courts *to the extent possible* will be guided by Subsection (b) of this section and the interpretations given by the federal courts to Section 5(a) of the Federal Trade Commission Act [15 U.S.C.A. 45(g)(1)].<sup>19</sup>

A review of the problems encountered by the FTC in applying the capacity to deceive standard, consideration of the functions that such a standard serves in the Government's enforcement scheme, and the likely shortcomings of that standard in the context of private damage actions demonstrates that incorporating the FTC capacity to deceive standard into the private DTPA cause of action is simply unwarranted and unfair. Because such a standard serves neither the consumer's nor the merchant's interest, its use in the context of a private damages action is *not possible* within the meaning of section 17.46(c) of the DTPA.

15. Hill, *supra* note 10, at 613.

16. 15 U.S.C. § 45 (1970) [hereinafter cited as FTC Act] provides that unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce are unlawful.

17. See, e.g., Goodman v. FTC, 244 F.2d 584 (9th Cir. 1957); Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944).

18. Hill, *supra* note 10, at 613.

19. Tex. Laws 1977, ch. 216, § 1, at 600 (emphasis added). Prior to 1977, DTPA § 17.46(c) read:

It is the intent of the legislature that in construing Subsection (a) of this section the courts *to the extent possible* will be guided by Subsection (b) of this section and the interpretations given by the Federal Trade Commission and federal courts to Section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C.A. 45(a)(1)].

Tex. Laws 1973, ch. 143, § 1, at 324 (emphasis added). As amended, § 17.46(c) provides in essence that in suits brought by the Government pursuant to § 17.47 the courts are *to the extent possible* to be guided by interpretations of the FTC and federal courts. In private damage actions the courts are to be guided to the extent possible by the interpretations given by the federal courts. See Comment, *Caveat Vendor: The Texas Deceptive Trade Practices and Consumer Protection Act*, 25 BAYLOR L. REV. 425, 438-42 (1973), as to why the changes were made. At least one Texas court has decided that the FTC lead need not always be followed. See Vargas v. Allied Fin. Co., 545 S.W.2d 231 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.).

Section 5(a)(1) of the FTC Act outlaws all misrepresentations and deceptive trade practices. The FTC, which is given sole responsibility to enforce that section,<sup>20</sup> may not seek a cease and desist order unless it is in the public interest for it to do so, and the purported misrepresentation has the capacity to deceive. To enforce a cease and desist order, the FTC may petition a federal court for an injunction ordering the defendant to cease and desist from whatever conduct has been condemned by the FTC.

Some courts and commentators, interpreting the FTC mandate, have linked the public interest test with a materiality standard, reasoning that an insignificant or trivial misrepresentation cannot be attacked by the FTC because such an action would not be in the public interest.<sup>21</sup> Despite such reasoning, the capacity to deceive standard has been applied so as to leave the FTC free to prosecute the slightest and most trivial misrepresentation.<sup>22</sup> In so doing, the FTC may have attained some purity in advertising language, but has failed to advance significantly the protection of the consumer.<sup>23</sup> An example often cited as the high-water mark of such trivial prosecutions is *Gelb v. FTC*,<sup>24</sup> in which the Commission's cease and desist order was upheld against a merchant who represented that a hair coloring product could "color hair permanently." The Commission claimed that the respondent's use of the term "permanently" was misleading since hair not yet grown when the product was applied would retain its natural color. Only one consumer testified, after much prodding, that although she was not deceived she was sure that someone might have misunderstood the ad. As the FTC hearing demonstrated, it is unlikely that anyone but the most naive and credulous consumer would have understood permanent to mean "forever," especially when the temporary styling of a woman's hair is also incorrectly but popularly termed "a permanent."

Nevertheless, while the FTC has on occasion prosecuted trivial claims and misrepresentations, there are sound policy justifications supporting the capacity to deceive standard when used to obtain a cease and desist order for the Government. In such actions the Government is seeking to prevent a

20. See *Moore v. New York Cotton Exch.*, 270 U.S. 593, 603 (1926). The consumer, however, may soon have a private remedy under the proposed amendments to the FTC Act. See *Proposed Amendments to the Federal Trade Commission Act: Hearings on H.R. 3816 Before the House Comm. on Interstate Foreign Commerce*, 95th Cong., 1st Sess. (1977).

21. See, e.g., *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933); *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1056 (1967).

22. But see *Heinz Kircher*, 63 F.T.C. 1282, 1290 (1963), *aff'd*, 337 F.2d 751 (9th Cir. 1964) ("An advertiser cannot be charged with . . . every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded."); *Feil v. FTC*, 285 F.2d 879 (9th Cir. 1960) (Commission has the right to issue cease and desist orders if representations are likely to mislead appreciable segment of public).

23. See *General Elec. v. FTC*, 144 F.2d 580 (2d Cir. 1944); *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676 (2d Cir. 1944) (establishing lower standard of materiality which has been raised by subsequent cases). Posner has observed that the FTC has concentrated upon the trivial and inconsequential deception in the marketplace, thereby insuring truth at the consumer's expense. R. POSNER, *REGULATION OF ADVERTISING BY THE FTC* 5, 17 (1973). See also Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 671 (1977).

24. 144 F.2d 580 (2d Cir. 1944). In contrast to a private action for damages, government suits to enforce securities law require less proof of the deceptive nature of the misrepresentation. See *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963); *SEC v. North Am. Research & Dev. Corp.*, 424 F.2d 63, 84 (2d Cir. 1970).

"deceptive act" from being committed in the future, and is not bringing suit to compensate the consumer for past harm. Thus, a reduced burden of proof is appropriate since it is usually impossible for the Government to demonstrate with any degree of certainty that actual deception will occur in the future.

Furthermore, the Government has a policy role to play in focusing consumer attention on new information which *should* affect the public's decision to purchase, but which at the time the policy decision is initiated, does not. For example, the Government could bring suits which call the consumer's attention to false statements with regard to a product's consumption of energy,<sup>25</sup> a product's effect on the environment or health,<sup>26</sup> or even the fact that a company is using unethical practices in producing a product.<sup>27</sup> None of those areas of information may represent current concerns of the consumer; yet each could affect a consumer's decision to purchase if the consumer were properly informed. The omission of such information can therefore logically be considered deceptive. Finally, because the Government's equitable action operates prospectively, a court's judgment can be molded to the various conditions which are expected to develop in the prosecuted firm or industry and to changes in the needs of the consuming public.<sup>28</sup>

On balance, the capacity to deceive standard in a Government equitable action can benefit the consumer by increasing the ability of the Government to deal effectively with new forms of deception. With that increased flexibility, however, there has been an increase in the FTC's ability and, in fact, the FTC's propensity, to prosecute the insignificant and the trivial.<sup>29</sup> Nevertheless, as with any government action, an ill-conceived or poorly-executed policy can ultimately be checked by political intervention.<sup>30</sup> No such check, however, exists to prevent the private damage action using a capacity to deceive standard from going awry, resulting in clogged dockets and policies dictated by minor cases of little or no concern to the public at large. The capacity to deceive test, which was borrowed by the Texas attorney general from FTC actions, was never designed to be used in the private action for damages.<sup>31</sup> The FTC Act, in fact, grants no private cause of action. Moreov-

25. Cf. 16 C.F.R. § 409.1 (1977) (durability of the household lightbulb); *id.* §§ 259.1, .2 (mileage which automobile gets per gallon of gasoline must be clearly specified).

26. See, e.g., proposed rule on cigarettes in relation to health hazards of smoking. 30 Fed. Reg. 9485 (1965); 29 Fed. Reg. 8325 (1964) (to have been codified in 16 C.F.R. § 408).

27. Whether the forced disclosure of the ethical stance of the seller violates the first amendment is questionable. See note 78 *infra* and accompanying text. Nevertheless, the beginnings of an ethical investor test in securities law may be discerned. See, e.g., Bryan v. Aston, [1976] FED. SEC. L. REP. (CCH) ¶ 95,730 (W.D. Ky. 1976). But see address by A.A. Sommer, Jr., "The Slippery Slope of Materiality," reprinted in MATERIALITY: AN EVOLVING CONCEPT UNDER THE SECURITIES LAW (PLI 1975).

28. See, e.g., FED. R. CIV. P. 60(b)(5) which provides for modification of an extant order when the underlying circumstances supporting the order change.

29. See COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE ON REGULATORY COMMISSIONS 128 (1949); E. COX, R. FELLMETH & J. SCHULZ, THE CONSUMER AND THE FEDERAL TRADE COMMISSION 165 (1969); R. POSNER, *supra* note 23, at 5, 17.

30. See Pitofsky, *supra* note 23, at 687-92; Thain, *Advertising Regulation: The Contemporary FTC Approach*, 1 FORDHAM URB. L.J. 349 (1973).

31. "If the conduct could mislead the ignorant, the unthinking and the credulous, it violates the law." Hill, *supra* note 10, at 613.

er, decisions cited by the attorney general,<sup>32</sup> ostensibly demonstrating acceptance of that standard by Texas courts, are either injunctive actions prosecuted by the Government alone, or cases in which a private action was brought and the materiality issue was discussed only peripherally.<sup>33</sup>

Examination of the functions a materiality standard performs in a private action for damages not only helps to define the contours of a workable standard of materiality, but also demonstrates that a stricter standard than the mere capacity to deceive any consumer standard is necessary. The phrase "capacity to deceive" implies that the asserted falsehood "might" deceive the class of consumers to whom it is directed. To prove the tort of common law fraud, however, the courts have required proof that a misrepresentation "would deceive" the reasonable consumer.<sup>34</sup> Between the "might deceive" standard inherent in the capacity to deceive test and the "would deceive" standard applied in the fraud cases lies the "significant propensity to deceive" test which has been applied in recent securities litigation.<sup>35</sup>

The capacity to deceive standard implies that a misrepresentation need not be the sole cause of a consumer's purchase and may mislead only a few consumers. The would deceive standard, on the other hand, implies that the misrepresentation must be *the* factor in the reasonable consumer's decision to purchase. In the mass marketing situation, the consumer would have to prove that a specific representation, out of all that daily deluge the public, would cause the reasonable consumer to purchase.<sup>36</sup> The significant propensity test requires that the misrepresentation be a major but not the only factor in the consumer's decision to purchase.

Just as the DTPA clearly was not intended to act as a device to insure the consumer against a bad bargain, neither was it intended to require absolute proof that a misrepresentation would cause an injury in all instances. The

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32. *Id.* at 613 & n.28.

33. *Goodman v. FTC*, 244 F.2d 584, 602 (9th Cir. 1957); *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676, 679 (2d Cir. 1944); *Bourland v. State*, 528 S.W.2d 350, 355 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.); *Wesware, Inc. v. State*, 488 S.W.2d 844, 848 (Tex. Civ. App.—Austin 1972, no writ). Only one case, *Spradling v. Williams*, 553 S.W.2d 143 (Tex. Civ. App.—Beaumont 1977, writ filed) has expressly followed the capacity to deceive standard in the private damage action and has confronted the difficulties posed by that standard.

34. See RESTATEMENT OF TORTS § 538(2)(a) (1938) which states that a fact is material if its existence is a matter to which a reasonable man would attach importance in determining his choice of action.

35. See, e.g., *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 384 (1970). In that case, the Supreme Court defined materiality as a significant propensity to affect the voting process in a proxy contest.

36. The FTC or the fact-finder in a DTPA case may rely upon its own common sense (the hunch), expert testimony, surveys, or dictionary definitions to determine whether the reasonable consumer would misunderstand or be misled by the asserted misrepresentation. A survey which attempts to demonstrate the number of typical consumers who would be misled by the alleged misrepresentation is the most objective evidence. For example, in *Rhodes Pharmacal Co.*, 49 F.T.C. 263 (1952), *aff'd*, 208 F.2d 382, 386-87 (7th Cir. 1954), *rev'd on other grounds*, 348 U.S. 940 (1955), the Commission found that a survey which demonstrated only 9% of those surveyed were misled by the advertisements was sufficient to demonstrate the deceptive capacity of the advertisement. A 14% figure has also supported the materiality finding. *Benrus Watch Co.*, [1963-1965 Transfer Binder] TRADE REG. REP. (CCH) ¶ 16,541. Presumably, a "would deceive" standard would substantially raise these percentages. For suggested guidelines on interpreting consumer surveys, which with slight alteration could be used as a jury instruction, see Gellhorn, *Proof of a Consumer Deception Before the Federal Trade Commission*, 17 U. KAN. L. REV. 559, 572 (1969).

twenty acts specifically proscribed by the DTPA concern major factors in the decision of the reasonable consumer to purchase a good or service.<sup>37</sup> Thus, a falsehood, to be actionable under the Act, should have more than the mere possibility of affecting the reasonable consumer's decision to act; the misrepresentation should also be a significant factor in the consumer's decision to act. Materiality in such cases serves two important functions: first, it insures that the consumer bear his share of the responsibility in arriving at the decision to purchase or otherwise act on a misrepresentation; secondly, it is the only element linking the particular omission or misrepresentation with the asserted injury.

Proving that the misrepresentation possessed the capacity to deceive any consumer, however, does not raise the level of materiality above that required to screen the trivial or irrelevant misrepresentation.<sup>38</sup> The most transparent puff, which was not intended to be taken literally, could be actionable.<sup>39</sup> The barker at the fair who tells the crowd that the creature in a side show comes from the deepest recesses of Africa could hardly be making a representation to be taken literally. Nor could the oil company which advises you that it puts a "tiger in your tank" be taken at its word. To be sure, there are those who will be deceived by such statements, but there must exist a minimal level of sophistication which is to be expected of the reasonable consumer. That minimal level of competence may be less than the average capability of the typical consumer, and perhaps when advertising is directed at a particular subclass of consumers, such as children, the objective test must reflect a still lower standard.<sup>40</sup>

As a general standard of materiality, the capacity to deceive any consumer is simply not appropriate in the case of the private damage suit. Indeed, such a low standard could actually force the advertiser to reduce the quantity and quality of the information disseminated, thereby perpetuating consumer ignorance. Such a perverse effect might well result if the advertiser, in an attempt to provide every consumer with all relevant information, feels constrained to choose between submitting a multi-page disclaimer similar to a securities' prospectus, larded with technical and legal descriptions, or risking the effects of a crippling damage suit. Moreover, even if the merchant attempts to tell all, there would be no guarantee that all the relevant information could be portrayed in a sufficiently attractive package to hold the typical consumer's attention. Those problems would be magnified for

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37. See, e.g., DTPA §§ 17.46(b)(2), (5), (12). See also *Byrd v. Ford*, 539 S.W.2d 213 (Tex. Civ. App.—Dallas 1976, no writ).

38. Pitofsky accurately pinpoints the proper goal to be achieved in applying the materiality standard: "[P]rotection of consumer against advertising fraud should not be a broad theoretical effort to achieve truth, but rather a practical enterprise to insure the existence of reliable data which in turn would facilitate an efficient and reliable competitive market process." Pitofsky, *supra* note 23, at 671. See also Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961).

39. See K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* 9-16 (1976); Buchanan, *In Defense of Caveat Emptor*, 38 U. CHI. L. REV. 64 (1970); Darby & Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J. L. & ECON. 67 (1973).

40. See, e.g., *ITT Continental Baking Co. v. FTC*, 1976-1 Trade Cas. ¶ 60,758 (2d Cir. 1976); *Korber Hats, Inc. v. FTC*, 311 F.2d 358 (1st Cir. 1962).



the merchant selling a new or technically innovative product and the small merchant who would not have the financial or technical means to determine what may be material information.<sup>41</sup>

The most appropriate standard of materiality would require that the falsehood should have a significant propensity to deceive the reasonable consumer in the class of person to whom the advertisement is directed. Under such a standard, the plaintiff-consumer would not be allowed to speculate about whether a representation "may" deceive; rather, he would be required to prove that the representation probably would be a significant factor in the decision of the reasonable consumer within the audience to whom the advertisement was directed. The "significant factor" test would encourage the consumer to search out the truth of matters asserted in the market place. At the same time, preserving a moderate burden of proof would be consonant with the deterrent purpose of the Act.<sup>42</sup>

In practice the issues submitted to the fact finder would first inquire whether certain alleged misrepresentations were made. If so, the fact finder would be asked if those misrepresentations were material to the reasonable consumer within the class of persons to whom they were directed. A material misrepresentation would in turn be defined as one which would be a significant factor in affecting the consumer's decision to take the action resulting in his injury. Of course, when the product is complex and the consumer has no real alternative to accepting the merchant's representation as true, the responsibility of the consumer to ascertain the truth of the matter asserted would be only that of the reasonable consumer; the effective consumer advocate could stress the inability of the typical or reasonable consumer to do anything but accept the product as it was presented to him.

## II. RELIANCE AND CAUSATION

Once the materiality of a misrepresentation is proven, the plaintiff-consumer must demonstrate that the misrepresentation caused him harm. In an action for common law fraud the courts have traditionally required the plaintiff-consumer to demonstrate that he relied upon the misrepresentation.<sup>43</sup> The question submitted to the fact finder in such cases is: In view of the experience and education of the plaintiff, can it be said that the misrepresentation caused the alleged injury?<sup>44</sup> Deterrence at all costs should not be sought; rather, deterrence should be the goal so long as it coincides with the policy of compensating the injured consumer.<sup>45</sup>

Despite express language in the DTPA which requires that a misrepresentation adversely affect the consumer,<sup>46</sup> and despite the opinion of a former

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41. R. POSNER, *supra* note 23, at 4-9.

42. Since this significant propensity test is midway between the "would deceive" standard and the "might deceive" standard, one would expect the percentage of reasonable consumers deceived to fall between the standards. *See* note 36 *supra* and accompanying text.

43. W. PROSSER, *supra* note 8, at 714.

44. *See, e.g.,* Bynum v. Signal Life Ins. Co., 522 S.W.2d 696, 700 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

45. If the DTPA is purely punitive, the statute should be characterized as criminal and the traditional constitutional safeguards such as state prosecution, indictment, and a burden of proof standard of beyond a reasonable doubt should be required.

46. DTPA § 17.50.

chief of the consumer protection division that causation is a necessary element,<sup>47</sup> the Texas attorney general has recently submitted that the consumer's reliance is not an issue in a case brought pursuant to the DTPA.<sup>48</sup> Since causation and reliance relate the injury suffered by the plaintiff to the act of the defendant,<sup>49</sup> the attorney general is again at odds with the opinion of his staff and has created confusion regarding subtle problems of proof, damages, and causation.<sup>50</sup>

The courts should fashion a causation element to limit the liability of the representor and to limit damages once liability is found. In the face-to-face transaction the courts should closely examine the precise representation made by the defendant, and determine if, in view of the plaintiff's knowledge or experience, the representation caused the alleged injury.<sup>51</sup> When, however, the goods or services are mass marketed, detailed examination of the precise representation relied upon will be all but impossible; the plaintiff-consumer may not be able to identify the precise misrepresentation and may also have difficulty proving that the alleged misrepresentation caused the product's loss of market value when there are many factors which may contribute to that decline.

For example, if a product is purchased because of a misrepresentation, the plaintiff will not be given more than a reasonable time after he discovers the misrepresentation to take corrective action on his own behalf to avoid further damages. Thus, while the misrepresentation may have caused the "purchase," the "injury" caused by the purchase is limited by the consumer's subsequent behavior.<sup>52</sup> If a consumer purchases a new but defective car which carries a warranty against defects in workmanship and parts, and he later discovers a defect and has a reasonable time to take corrective measures to protect himself and the car, the consumer should be responsible for those damages which were caused by his ignoring the defect. If the consumer discovers the defect before an accident, the consumer would probably recover the value of the car as represented less the value of the car actually purchased. If the car is involved in an accident which injures the plaintiff, the plaintiff's own reckless disregard for a discovered defect may have

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47. Address by Joe Longley to the Consumer Section, Texas Bar Association (July 3, 1976). See also Maxwell, *Damages Under the Deceptive Trade Practices—Consumer Protection Act*, in DAMAGES C-1 (Professional Development Program, State Bar of Texas, Sept. 29, 1977).

48. See Hill, *supra* note 10, at 613.

49. See RESTATEMENT (SECOND) OF TORTS §§ 548, 548A (1965).

50. See *Spradling v. Williams*, 553 S.W.2d 143, 149 (Tex. Civ. App.—Beaumont 1977, writ filed), in which Judge Keith, dissenting, properly criticized the majority opinion for upholding a submission of the materiality standard in terms of "capacity or tendency to deceive an average or ordinary person, even though that person may have been ignorant, unthinking or credulous." *Id.* at 149 n.8. Judge Keith, however, was right for the wrong reasons; instead of focusing on the unduly low materiality standard, he argued that the particular plaintiff in this case was too sophisticated to rely on the misrepresentation. Until the various elements of the DTPA cause of action are analyzed in terms of the policy behind the Act the courts will remain adrift.

51. See, e.g., *Ramos v. Levinston*, 536 S.W.2d 273 (Tex. Civ. App.—Corpus Christi 1976, no writ); *Bynum v. Signal Life Ins. Co.*, 522 S.W.2d 696, 700 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

52. See, e.g., Redder, *Measuring Buyers' Damage in 10b-5 Cases*, 31 BUS. LAW. 1839 (1976); Note, *Mitigation of Damages Through the Use of Stock Market Indicators*, 47 IND. L.J. 367 (1972).

caused the injury.<sup>53</sup> In the above example, the consumer's "unreasonableness" would be introduced to mitigate or lessen damages,<sup>54</sup> not to shield totally the defendant from liability.<sup>55</sup>

When the consumer does not cause the injury, the court should be more liberal in allowing proof of causation and in some cases should shift the burden of proof to the defendant to prove what segment of the asserted harm was not caused by the defendant's conduct. If, for example, a plaintiff purchases a security for one hundred dollars but finds that the seller over-represented the security's value by twenty-five percent, the true injury suffered by the investor at the time of the purchase would be twenty-five dollars.<sup>56</sup> Assume that before the investor can take any action to recover the twenty-five dollars, the company in which he invested leaves the market, reducing the value of the security to zero. Did the seller's misrepresentation, which admittedly caused the purchase and perhaps the injury of twenty-five dollars to the investor, cause the remaining seventy-five dollar loss? The court should probably allow the full one hundred dollar recovery since the cause of the security's decline in value would normally be impossible to isolate, and the investor would find it impossible to prove that the particular misrepresentation which induced the purchase also caused the total injury.<sup>57</sup> The defendant, however, should have the opportunity to rebut the plaintiff's prima facie case that the misrepresentation which induced the purchase also caused the injury by proving that it was an intervening cause and not the defendant's conduct that injured the plaintiff-consumer.<sup>58</sup> Such a solution would offer the defendant protection from exaggerated consumer claims

53. *Ladd v. Knowles*, 505 S.W.2d 662, 670 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.). RESTATEMENT (SECOND) OF TORTS § 433A (1965) codifies the general rules for such apportionments:

Apportionment of harm to causes

(1) damages for harm are to be apportioned among two or more causes where:

- (a) There are distinct harms, or
- (b) There is a reasonable basis for determining the contribution of each cause to a single harm.

(2) damages for any other harm cannot be apportioned among two or more causes.

54. *See, e.g.*, *Feit v. Leasco Data Processing Equip. Corp.*, 332 F. Supp. 544, 586 (E.D.N.Y. 1971) (some portion of diminution of Leasco's price due to market factors which would have affected any security and thus, to that extent, plaintiff's damages not caused by the omissions in registration statement). *See also Beecher v. Able*, 374 F. Supp. 341 (S.D.N.Y. 1974).

55. *See, e.g.*, *Dupuy v. Dupuy*, 551 F.2d 1005, 1017 (5th Cir. 1977); Comment, *The Due Diligence Requirement for Plaintiffs Under Rule 10b-5*, 1975 DUKE L.J. 753. A similar result is reached if the issue is framed in terms of products liability. *See, e.g.*, *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977).

56. *See Lynn, supra* note 5, at 704.

57. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 433B, Comment d at 1444 (1965), which states: "As between the proved tortfeasor who has clearly caused harm and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm caused [by other factors] should fall upon the former." *Accord, Carras v. Burns*, 516 F.2d 251, 257-59 (4th Cir. 1975).

58. *See Rochez Bros. v. Rhoades*, 491 F.2d 402, 410 (3d Cir. 1973), *cert. denied*, 425 U.S. 993 (1976) (burden of proving the plaintiff's non-reliance is on the defendant). *But see* *Chis-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 376 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973) (burden of reliance not rebuttable); ALI FED. SECURITIES CODE § 1402(f)(2) at 90 (Mar. 1973 draft) (permitting reduction of the out-of-pocket damages to the extent that the defendant proves that the violation did not cause the loss). *See generally* Comment, *Measure of Damages for Misrepresentation Under the Texas Deceptive Trade Practices Act*, 29 BAYLOR L. REV. 135 (1977). *But see* Maxwell, *supra* note 47, at C-5.

while preserving the meritorious private cause of action under the DTPA. In this way the deterrent purpose of the Act would actually be enhanced.

Some support for the above causation analysis is found in *Woods v. Littleton*,<sup>59</sup> a recent Texas Supreme Court decision interpreting the DTPA. In that case plaintiffs brought suit based on common law fraud and the DTPA. The plaintiffs in *Woods* purchased a newly constructed house more than a year before the effective date of the DTPA. According to the evidence, the sewer system and septic tank in the new house did not work properly from the day the house was purchased.<sup>60</sup> Several attempts were made by the defendant to correct the problem, the last such attempt being made in June or July of 1973. At some point after May 21, 1973, the effective date of the DTPA, the defendants were found to have told the plaintiffs that they had put the system in good working order.<sup>61</sup> In fact, the system was not workable and the plaintiffs brought suit against the seller, alleging that the refusal to complete the work was a deceptive act which caused a reduction in the value of the home.

Relying upon two previous court of civil appeals cases,<sup>62</sup> the Texas Supreme Court concluded that the date of the event which gives rise to the cause of action rather than the date of the sale determines the applicability of the Act, stating: "Although the sale which initiated the chain of events which led to the act complained of accrued prior to the effective date of the Act, that fact does not preclude recovery under the Consumer Protection Act for a deceptive practice occurring after the effective date of the Act."<sup>63</sup> To reach that result, the court focused upon when the deceptive practice occurred and whether it caused the alleged injury, and not upon whether the deceptive act caused the initial sale of the house.<sup>64</sup> Having determined that the deceptive act and not the sale caused the injury, the court concluded that the damages would be computed from the time of the deceptive act and not from the time of the sale. Thus, proof of the value of the house as represented at the time of the sale was irrelevant.<sup>65</sup> The plaintiff recovered damages for mental anguish measured from the date of the deceptive act.<sup>66</sup>

If calculated from the date of the sale, however, both types of damages would have been dramatically higher. Most of the reduction in the value of the house probably occurred at the time of the sale or soon thereafter, because the problems in the Woods' home were known soon after the time of the sale. The construction company's failure to fix the problem would probably have done little to decrease that value further, so the damage resulting from the subsequent deceptive act, measured by the difference

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59. 554 S.W.2d 662 (Tex. 1977).

60. *Id.* at 664.

61. *Id.*

62. *Id.* at 665-66 (citing *Town & Country Mobile Homes, Inc. v. Stiles*, 543 S.W.2d 664 (Tex. Civ. App.—El Paso 1976, no writ); *Crawford Chevrolet, Inc. v. McLarty*, 519 S.W.2d 656 (Tex. Civ. App.—Amarillo 1975, no writ)).

63. 554 S.W.2d at 665.

64. *Id.*

65. *Id.* at 672.

66. As a matter of law damages for mental anguish are not recoverable in an action for common law fraud. *Hudson & Hudson Realtors v. Savage*, 545 S.W.2d 863, 868 (Tex. Civ. App.—Tyler 1977, no writ). Therefore, plaintiffs may not have lost that component of their damages.

between the value of the home as represented and its value as actually sold, would of necessity have been quite low. Further, most of the mental anguish suffered by the Woods probably occurred when the problem was discovered and not when the construction company failed to correct the problem. Thus, the Woods would have foregone substantial damages if they had maintained their actions solely under the DTPA.<sup>67</sup>

In certain circumstances, then, the plaintiff will have an incentive to plead that the deceptive act occurred at the time of the sale, while the defendant will attempt to characterize the deceptive act as having occurred at a later date. Moreover, a plaintiff who finds that the statute of limitations bars his action if the deceptive act occurred at sale will argue that the deceptive act occurred at a later date.

In summary, in the face-to-face transaction when the consumer and seller are on equal footing, the consumer should be required to prove actual causation to maintain an action for damages. If the product is mass marketed or if the product is highly complex, the consumer should have to demonstrate at the least that his own intervening unreasonable behavior did not cause the injury of which he complains.<sup>68</sup> Apart from these two situations, reliance or causation should be presumed particularly when the misrepresentation is an omission,<sup>69</sup> nevertheless, that presumption should be rebuttable, and the defendant should be given the opportunity to prove that other factors were relied upon or caused the plaintiff's injury.

### III. TREBLE DAMAGES

The element of causation distributes responsibility between the representor and the consumer to determine the truth of the matter asserted in a misrepresentation. Proving causation, with its shifting burdens of proof and presumptions, is by far the most difficult aspect of the DTPA. Once the injury is established and proven to have been caused by a material misrepresentation, however, proven damages must be trebled.<sup>70</sup> The Texas Supreme Court in *Woods* held that the monetary losses proven to have been suffered by the plaintiff, *must* be trebled by the court;<sup>71</sup> according to *Woods*, the trial court has no discretion in the matter.

Section 17.50(b) of the DTPA provides that

[i]n a suit filed under this section, each consumer who prevails *may* obtain:

- (1) three times the amount of actual damages . . . ;
- (2) an order enjoining such acts or failure to act;

67. *But see* note 66 *supra*.

68. Of course, a plaintiff may recover those additional losses suffered in attempting to extricate himself from the result of a deceptive act. *See* *Specter v. Mermelstein*, 45 F.2d 474, 480-81 (2d Cir. 1973); *Beecher v. Able*, 374 F. Supp. 341 (S.D.N.Y. 1974). *See also* *Meadowlake Foods, Inc. v. Estes*, 148 Tex. 13, 219 S.W.2d 441 (1949); ALI FED. SECURITIES CODE § 215A, Comment (4)(b) at 5 (Mar. 1973 draft); RESTATEMENT (SECOND) OF TORTS § 548(a), Comment b at 24 (1977).

69. Proving that one would have acted had the omitted information been available is a speculative proposition at best. *See* *Affiliated Ute v. United States*, 406 U.S. 128 (1972); Note, *The Reliance Requirement in Private Actions Under SEC Rule 10b-5*, 88 HARV. L. REV. 584 (1975).

70. *Woods v. Littleton*, 554 S.W.2d 662 (Tex. 1977).

71. *Id.* at 669.

(3) an order necessary to restore to any party to the suit any money or property, real or personal, which may have been required in violation of this subchapter; and

(4) any other relief which the court deems proper . . . .<sup>72</sup>

In *Woods* the court reasoned that the position of the word "may," as used in the introductory phrase of section 17.50(b), has as its subject, each consumer. Therefore, the court continued, using "may" as a preface to the four remedies gives the consumer discretion to choose among the four, but does not give the trial court discretion to alter the kind of remedy provided.<sup>73</sup> The court buttressed its decision with an analysis of the use of the term "may" in other statutes and found that in at least one instance the word "may" had been used in a similar fashion.<sup>74</sup> Further support was dredged-up from the Act's express general intent of aiding the small consumer in recovering for consumer fraud.<sup>75</sup> That consumers of any size and sophistication may bring suit for treble damages, against others who may not be as sophisticated, was never mentioned. Indeed, in its original opinion the supreme court quoted an exchange between two Texas senators relating to the 1977 amendments to the DTPA to demonstrate that the legislature understood that without the 1977 amendments providing for certain DTPA defenses, treble damages would be mandatory.<sup>76</sup> In suggesting that an exchange between two senators in subcommittee some four years after the passage of the initial Act gives some indication of what the legislature meant when it passed the Act in 1973, the court departed from the Texas rule of statutory construction which does not allow the court to use the reflections of a subsequent legislature as evidence of a prior legislature's intent.<sup>77</sup>

Even if the court reached the correct interpretation of the DTPA by requiring that the trial court treble all damages which are proven, it is conceivable that the interpretation so reached renders DTPA unconstitutional in certain fact situations. Furthermore, it is probable that the court's interpretation will reduce consumers' effective use of the recently revised Texas class action procedure.

#### A. First Amendment

The United States Supreme Court recently ruled in *Virginia State Board*

72. DTPA § 17.50(b) (emphasis added).

73. 554 S.W.2d at 669.

74. *Id.* at 670. The court referred to a statute concerning new bonds for executors and administrators, presently found at TEX. PROB. CODE ANN. § 203 (Vernon 1956), discussed in *National Sur. Corp. v. Ladd*, 131 Tex. 295, 115 S.W. 600 (1938).

75. 554 S.W.2d at 665. The court referred to DTPA § 17.44.

76. 20 Tex. Sup. Ct. J. 400, 407 (June 29, 1977). The following exchange was quoted by the Texas Supreme Court:

'FARABEE: At the present time, the Texas Consumer Protection Act makes no provision for alleviation of the rather harsh remedy of treble damages. Isn't that correct?

'JONES OF HARRIS: That is correct, yes.

'FARABEE: And under your bill, there would be certain provision, set out in Section 17.58 [*sic*] to give some alleviation of that remedy, for example, a bona fide error, is that correct?

'JONES OF HARRIS: Would provide a defense against treble damages, yes.'

*Id.* This exchange was deleted from the opinion on rehearing.

77. *Rowlan Oil Co. v. Texas Employment Comm'n*, 162 Tex. 607, 263 S.W.2d 140 (1953); *Morris v. Calvert*, 329 S.W.2d 117 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.).

of *Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>78</sup> that commercial speech is entitled to first amendment protection. That ruling alters prior law which characterized commercial speech as something less than protected speech.<sup>79</sup> Narrowing its holding, however, the Court added that "[U]ntruthful speech, commercial or otherwise has never been protected for its own sake."<sup>80</sup> Further, the Court stated:

[M]uch commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely.<sup>81</sup>

The Court suggests that commercial speech may be more closely regulated by the Government than non-commercial speech to protect the free exchange of commercial information. Closer inspection and enforcement of the laws prohibiting false advertising is warranted because the profit motive inherent in commercial speech makes that form of speech hardier than non-commercial speech; in addition, the truth of commercial speech is more easily discerned than political or social commentary.<sup>82</sup>

By ruling that the DTPA requires the trial court to treble damages in all cases, even in those situations in which the truth of the matters asserted may not be easily discerned, the Texas Supreme Court may have transformed an otherwise constitutional regulatory act into an unconstitutional one which effectively prohibits commercial speech. Although the purpose of the act is to deter misrepresentation in the market place, the Texas Supreme Court interpretation of the DTPA goes far beyond that purpose; in certain cases, it may deter the advertiser from rendering any opinion or any statement which could be taken as an opinion about the effect or performance of a product. For example, a consumer who for years purchases a drug from a pharmacist and who later finds that the drug sold to him causes cancer might bring an action against the pharmacist for the effects of the disease if the pharmacist's representations to the consumer did not include an analysis of the possibility that the drug could cause cancer. Is the pharmacist's opinion, or the opinion of anyone who produces a high technology product, more easily proven true than social or political commentary? How can a merchant disclose the potential difficulties in a new and untested product? Since many product claims are based wholly upon untested opinion, the DTPA may suppress commercial speech and may thereby violate the first amendment.<sup>83</sup>

Yet the *Woods* court, without even a hint of analysis, brushed aside the first amendment argument, characterizing it as having "dubious merit."<sup>84</sup> Surely, if the DTPA required actual damages to be multiplied by one hun-

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78. 425 U.S. 748 (1976).

79. See *Valentine v. Crestenson*, 316 U.S. 52 (1942); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 417-73 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

80. 425 U.S. at 771.

81. *Id.*

82. *Id.* at 780-81 (Stewart, J., concurring).

83. See *Warner-Lambert Co. v. FTC*, 46 U.S.L.W. 2087 (U.S. Aug. 23, 1977); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 472 (1971).

84. 554 S.W.2d at 671.

dred, there would be a prohibitory effect on the advertiser's first amendment rights. The vitality of commercial speech, the concept which undergirds the Supreme Court's analysis in *Virginia State Board of Pharmacy*, is undercut if huge punitive damages are awarded without regard to the intent and purpose of such speech. Moreover, when the character of a representation drifts into the expression of an opinion which is not readily subject to an objective determination of truth or fancy, the DTPA does abridge the merchant's freedom of speech.<sup>85</sup> In such cases, the thrust of the DTPA should be to emphasize that the results which are advertised are based upon opinion or theory which is not yet provable.<sup>86</sup> The purpose of the DTPA is to increase correct market information; therefore, when it is impossible to determine what is "correct information," the DTPA should encourage, rather than suppress, debate and argument about a product's capabilities. If interpreted otherwise, suppression of opinion not readily verifiable is an unconstitutional application of the DTPA.

### B. *Bona Fide Error Defense*

For transactions entered into after May 23, 1977, the constitutionality of the DTPA is complicated by the 1977 amendment to the Act, which provides for a "bona fide error defense." Adopted almost verbatim from the Federal Truth-in-Lending Law,<sup>87</sup> the crucial language of the defense reads:

In an action brought under section 17.50 of this subchapter actual damages only and attorney's fees reasonable in relation to the amount of work expended and court costs may be awarded where the defendant:

- (1) proves that the action complained of resulted from bona fide error notwithstanding the use of reasonable procedures adopted to avoid error.<sup>88</sup>

85. In *Bates v. State Bar*, 97 S. Ct. 2691, 2707, 53 L. Ed. 2d 810, 834 (1977) the Supreme Court again reasoned that:

Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation . . . . Moreover, concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether speech is truthful and protected.

86. See, e.g., *FTC v. Nat'l Comm'n on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1975), cert. denied, 426 U.S. 919 (1976).

87. 15 U.S.C. § 1640(c) (1970).

88. § 17.50(a) provides in full:

In an action brought under Section 17.50 of this subchapter, actual damages only and attorney's fees reasonable in relation to the amount of work expended and court costs may be awarded where the defendant:

(1) proves that the action complained of resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid the error; or

(2) proves that he had no written notice of the consumer's complaint before the suit was filed, or that within thirty (30) days after he was given written notice he tendered to the consumer (a) the cash value of the consideration received from the consumer, or the cash value of the benefit promised whichever is greater, and (b) the expenses, including attorney's fees, if any, reasonably incurred by the consumer in asserting his claim against the defendant; or

(3) In the case of a suit under 17.50(a)(2) the defendant proves that he was not given reasonable opportunity to cure defect or malfunctions before the suit was filed.

Tex. Laws 1977, ch. 216, § 1, at 600.



Thus, the defendant who proves that he adopted all reasonable means necessary to avoid a misrepresentation will be liable only for actual damages and attorney's fees.

The Texas attorney general has argued forcefully that the bona fide error defense would mitigate the harsh effects of treble damages.<sup>89</sup> Yet the evolution of the defense in the Federal Truth-in-Lending context lends little support to the attorney general's position.<sup>90</sup> From its inception, the bona fide error defense has been limited by the federal courts to clerical errors; it does not extend to errors of law or judgment.<sup>91</sup> Thus, if the merchant creates a false impression because of a typographical or printing error, he may raise a bona fide error defense. If, however, the merchant misrepresents a product's qualities or characteristics because he honestly believes that he should omit certain matters from the advertisement, the merchant is liable.

Therefore, if Texas courts follow the federal courts' interpretation, they will hold that the bona fide error defense does not insert a negligence standard as a defense to a DTPA action. Substantive misrepresentations would still be condemned without regard to fault or the intent of the merchant; the Act would remain one which essentially imposes strict liability on the person who makes a misrepresentation. If the federal interpretation is followed, no appreciable change in the scope of the liability imposed by the Act would be affected by the amendment, and the abridgement of a merchant's first amendment speech rights would not be altered significantly by the bona fide error defense. In the end the decision of the constitutionality of the DTPA will rest upon an analysis of the degree to which the DTPA prohibits the advertiser from expressing opinions which are not readily ascertainable either as true or false.

### C. Class Actions

The 1977 amendments dramatically alter the relief which may be granted in class actions under the DTPA and may thereby have doomed the use of the DTPA class action device in Texas. The pre-1977 DTPA contained a class action procedure which allowed consumers who had been damaged in an amount in excess of ten dollars to maintain an action for a class defined and managed in all essential respects like federal rule 23.<sup>92</sup> Further, neither the class nor the representative could recover more than actual damages, in contrast to the individual plaintiff under the DTPA who could recover treble damages. When it became evident that the Supreme Court of Texas would

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89. "Even if plaintiff can show an implied warranty that has been breached, the [bona fide error defense] bars him from recovering treble damages from the seller if the breach was innocent and the seller has implemented reasonable procedures to avoid the breach." Second Post Submission Brief of Amicus Curiae, Office of the Attorney General at 10, *Woods v. Littleton*, 554 S.W.2d 662 (Tex. 1977). This brief was written by Mr. Phil Maxwell. Yet, as further "explained" by Mr. Maxwell in a speech in Dallas on Sept. 29, 1977, the Senate debate on S.B. 664 makes it quite clear that the bona fide error defense is to be construed narrowly and is to follow the interpretation of that same defense in the truth-in-lending context. Maxwell, *supra* note 47, at C-16.

90. For an excellent summary of cases interpreting the bona fide error defense see Annot., 27 A.L.R. Fed. 602 (1976).

91. *Id.*

92. Tex. Laws 1975, ch. 62, § 1, at 149; Tex. Laws 1973, ch. 143, § 1, at 327-30.

adopt a class action procedure all but identical to federal rule 23, the legislature repealed all sections of the DTPA which related to the class action.<sup>93</sup> All DTPA class representatives are now free to seek treble damages for themselves and for the class. Apart from the bona fide error exception, a class can no longer recover solely for actual damages.

The potential liability and abuse of the class action device, particularly when the misrepresentation is innocent, could be magnified in some cases beyond the limits of fairness. The courts, when faced with a situation which will allow windfall treble damages to an entire class while dealing a death blow to a company for an innocent misrepresentation, may find that the class action device is not superior to other available means for "just and efficient adjudication of the controversy" or that recovery in such circumstances violates the due process clause of the Constitution. Therefore, the courts may refuse to certify the class.<sup>94</sup> Similar results reached by federal courts in cases brought pursuant to rule 23 will probably provide guidance and support to the Texas courts in such situations.<sup>95</sup> Mandatory treble damages, coupled with the 1977 amendments, may have created a real potential for abuse, and court reaction to that abuse may limit the consumer class action.

#### IV. CONCLUSION

Some four years after its enactment, the DTPA remains an enigma within the law. Although the Act has been used increasingly to recover for misrepresentation in the marketplace, little light has been shed by reported decisions on the concepts of materiality, reliance, and causation. Moreover, the inconsistent interpretations given the Act by the attorney general and his staff reflect a general confusion about the standards which should be applied to determine whether a falsehood rises to the level of a deceptive act. The new amendments to the Act which create strict liability for misrepresentations for services rendered to a business such as accounting, banking, and insurance, coupled with court decisions requiring mandatory treble damages for both the individual and class action, will engender a flood of litigation giving rise to the need for sensitive analysis of the underlying purpose which the DTPA was enacted to serve.

In view of the Act's increased potential for liability, the statutory defenses and elements of the prima facie case will assume critical importance as the primary battleground on which a case brought pursuant to the DTPA will be won or lost. This Article has sought to review the development of the Act, stressing the policy underlying consumer protection, and to identify developments in securities law, products liability, and common law which may provide instructive analysis. Particular attention has been given to the

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93. See Tex. Laws 1977, ch. 216, § 4, at 605.

94. See *Eovaldi v. First Nat'l Bank*, 57 F.R.D. 545 (N.D. Ill. 1972); *Rattner v. Chemical Bank*, 54 F.R.D. 412 (S.D.N.Y. 1972).

95. To preserve the class action the representative consumer may agree to return two-thirds of the treble damages to the defendant. Cf. *Eovaldi v. First Nat'l Bank*, 57 F.R.D. 545, 548 (N.D. Ill. 1972) (class representative agrees to bring suit for actual damages rather than for the statutory liquidated damages to avoid the due process considerations raised by the defendant).

*Woods v. Littleton* decision and its implications for the necessary elements of a prima facie case, as well as to the availability of the class action procedure. Finally, the constitutional implications of awarding treble damages are examined and the conclusion drawn that in some fact situations the DTPA may pose substantial first amendment difficulties.

The DTPA remains a law of vast potential both for abuse and for legitimately compensating the wronged consumer. It is a grand experiment which requires a profound search for the purpose of the Act. Each element of the prima facie case should be examined against the need to protect the consumer rather than influenced by a misguided desire to purify the advertiser's language at any expense to the merchant. Only by carefully balancing the needs of the consumer with the burden imposed on the merchant in the marketplace can the fairest and most lasting solution be reached.

# SOUTHWESTERN LAW JOURNAL

VOLUME 31

FALL 1977

NUMBER 4

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