1979

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OF WHITE KNIGHTS AND BLACK KNIGHTS: AN ANALYSIS OF THE 1979 AMENDMENTS TO THE TEXAS DECEPTIVE TRADE PRACTICES ACT

by

Robert E. Goodfriend* and Michael P. Lynn**

"My own feeling about the Act is that . . . you don’t have white knights and black knights."¹
Witness before the Texas Legislature

CONTENTS

I. INTRODUCTION .............................................. 942

II. A SECTION BY SECTION ANALYSIS ........................... 946
   A. Section 17.43: Cumulative Remedies and Double Recovery .................................. 946
   B. Section 17.45(9): Scienter ................................ 947
   C. Section 17.46(a): Enforcement by Attorney General’s Office .................................... 952
   D. Section 17.46(b)(22): Distant Forum Abuse ........................................ 953
   E. Section 17.46(b)(23): Failure to Disclose Information .................................................. 954
   F. Section 17.46(c): Judicial Construction of the DTPA .................................................. 973
   G. Section 17.46(d): Restriction of Consumer Actions to Laundry List Items .................. 974
   H. Section 17.50(a)(1): Authorization of Consumer Actions ............................................. 979
   I. Section 17.50: Causation and Foreseeability ......................................................... 979
   J. Section 17.50(b)(1): Multiple Damage Recovery ................................................... 982
   K. Sections 17.50(c) and (d): Attorneys’ Fees ............................................................... 986
   L. Section 17.50A: Procedures Governing Offers of Settlement ....................................... 988
   M. Section 17.50B: Damages and Liability Defenses .................................................... 996
   N. Section 17.56: Venue ......................................... 998
   O. Section 17.56A: Statute of Limitations ................................................................. 999

III. CRITIQUE AND EVALUATION ................................ 1002

IV. CONCLUSION ................................................ 1008

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¹ Testimony before the Senate Comm. on Economic Development on S.B. 357, tape 1, at 1 (Mar. 5, 1979) (testimony of Ron Habitzreiter) [hereinafter cited as Testimony on Economic Development]. Transcripts of this testimony obtained by the authors are on file at the Underwood Law Library, Southern Methodist University.
I. INTRODUCTION

Although a few persons have characterized the Texas Deceptive Trade Practices—Consumer Protection Act (DTPA) as a "finely tuned piece of legislative machinery," many of the witnesses who testified before the legislature during the 1978-1979 session believed that the Act was poorly drafted and subject to widespread abuse. Before the 1979 amendments, a seller could be found liable for treble damages for even innocent misrepresentations. There were virtually no defenses to a charge under the original DTPA, and even the defenses adopted in 1977 have proved largely illusory. Furthermore, although the Act ostensibly provides for treble damages in order to give the consumer an effective remedy in cases involving sums otherwise too small to warrant litigation, it contains no limit on the size of claims to which it applies. Accordingly, judgments under the Act have been obtained for several millions of dollars, and even small injuries have been artificially expanded into substantial lawsuits through the use of claims for mental anguish and other forms of consequential damages.
As a result, sellers accused of making misrepresentations or of breaching implied warranties have often been subjected to the unpleasant choice of capitulating to demands believed to be unfounded or of defending the charges at the risk of financial ruin.\(^9\)

The business community quite properly sought redress from the harsh effects of the DTPA at the 1978-1979 legislative session.\(^10\) None of the witnesses before the legislature, however, suggested that the consumer should be left unprotected. Even the most ardent DTPA reformers wanted merely to limit the potential for abuse inherent in what they perceived to be an overly broad and poorly drafted statute.\(^11\) No evidence was presented by those opposing reform that the DTPA had resulted in more accurate marketing information. Indeed, most of the examples presented to the legislature to demonstrate the need for additional consumer protection involved fact situations for which sizeable recoveries would have been available under well-recognized principles of common law fraud.\(^12\)

Although efforts to reform the DTPA were certainly not unexpected, the press greeted these efforts with alarm\(^13\) and tended to exaggerate the effects of the 1979 amendments.\(^14\) The level of rhetoric in the press reflected the extreme statements of the partisans. Opponents of the amendments contended that they would "turn the state's current consumer protection stat-

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8. Testimony on Economic Development, supra note 1, tape 1, at 28 (defendant sued by farmer for $27,754.67 for lower crop yield than previous year in connection with crop spraying job costing farmer $210).
9. See Testimony on Economic Development, supra note 1, tape 1, at 38 (testimony of Mark Hanna, representing the Texas Association of Realtors). Hanna contends that most members of the Texas Association of Realtors are small businessmen with modest incomes. He states that there are hundreds of suits pending across the state, any one of which could put the defendant out of business.
10. See McNeely, supra note 4, at 7, col. 1, for a list of some business groups that sought modification of the DTPA in the 1978-1979 legislative session. Those mentioned in the article include the Texas Automobile Dealers Association, the Texas Association of Realtors, and the Texas Retail Federation.
11. A number of witnesses complained of excessive demands made by plaintiff's attorneys. See Testimony on Economic Development, supra note 1, tape 1, at 5-6, 8 (Ayres), 28-29, 33 (Coates), 36 (Hanna).
12. See notes 90-92 infra and accompanying text.
14. Hightower, Peering Into the Worst Session in Memory, The Texas Observer, June 8, 1979, at 2 ("Realtors and auto dealers performed a little surgery on the state's Consumer Protection Act, cutting the law's treble-damages provision down to a nub . . . "). Vaughan, A Little Hurry-Up Deal, The Texas Observer, June 22, 1979, at 16 (refers to the "bill that gutted the 1973 Consumer Protection Act"); Woolley, Pondering the Accomplishments of the Lobbieslature, Dallas Times Herald, June 1, 1979, § C, at 3, col. 4 ("The legislature also corrected a couple of its past mistakes. It realized that some consumers actually were getting some protection from the Consumer Protection Act, so it amended it into a Consumer Destruction Act.").
ute into a paper tiger,"15 and would leave the Act "on the books in name only."16 On the other hand, business groups argued that the Act is "a law for lawyers more than consumers."17 As it turned out, however, neither position accurately characterized the Act as it finally emerged from the legislative session.

The 1979 amendments are what one would expect from the circumstances that produced them, a compromise between contending factions. It is true that an attempt was made to limit the harsh effects of the Act; it is not true, however, that the Act as amended no longer protects the consumer. In fact, in some respects the 1979 reformation confers greater rights on the consumer than the original Act. For example, the failure to disclose information concerning goods or services may now be actionable under the DTPA in circumstances that would not have given rise to a claim at common law or under the old DTPA.18 Thus, the new amendments may have created a duty to speak in situations where none existed before. The 1979 amendments also substituted "producing cause" for the "adverse effect" requirement and thereby may have deleted any foreseeability test for damages.19

On the other hand, the consumer is now limited to actual damages and attorneys' fees for innocent misrepresentations. To obtain treble damages under the amended Act, the consumer must prove that the defendant had actual awareness of the falsity, deception, or unfairness of the act or practice.20 While this is a more rigorous requirement than under the old DTPA, it is still less stringent than the common law. Thus, damages that are essentially punitive may be awarded under the 1979 Act for something far less than the conventional showing of malice or intent to injure required at common law.21

The amended Act also provides the defendant with a few meaningful

17. McNeely, supra note 4, § C, at 7, col. 1. One of the witnesses before the Committee on Economic Development also complained that the Act "has the effect actually of making a lot of consumer attorneys wealthy." Testimony on Economic Development, supra note 1, tape 1, at 21. Indeed, lawyers were deeply involved on both sides of the controversy. The legislative activities of lawyers with consumer practices who were involved in opposing the 1979 amendments are briefly discussed in Bishop, Consumer Act Misunderstood, Austin American-Statesman, Feb. 23, 1979, § A at 3, cols. 1 & 2 (criticizing the Austin American-Statesman for relying on statements by legislator with consumer oriented law practice); McNeely, supra note 4, at 7, col. 3; Testimony on Economic Development, supra note 1, tape 1, at 17 (witness with 60% to 70% of his practice in consumer related matters). See also Tiede, Senate Consumer Rights Leaders End Filibuster, Gain Concessions, Dallas Times Herald, Apr. 10, 1979, § B, at 4, col. 3 ("'I'm providing the hall,' Hobby said. . . . 'But this is a question of plaintiffs lawyers arguing with defense lawyers, and I can't make much of a contribution.'").
18. See discussion of § 17.46(b)(23) at notes 76-172 infra and accompanying text.
19. See note 221 infra and accompanying text.
20. See notes 40-54 & 233-36 infra and accompanying text.
21. See note 46 infra and accompanying text.
defenses that seem to be patterned after the common law. For example, a
seller who relied in good faith upon written information furnished by
others and merely passed the information along to the consumer, will now
be able to assert a defense to a claim for damages.\(^{22}\)

While the final product of the 1979 revisions is difficult to evaluate at
this time, it appears that the legislature made a small but generally solid
step forward. The drafting of the amendments, however, like that of the
original DTPA, is not exceptional. Phrases and words clothed in a long
history of common law are sprinkled throughout the statute with little in-
dication that the legislature fully appreciated the effects of the terminology
used.\(^{23}\) Nevertheless, the clear intent of the legislature was to mitigate the
harsh effects of the pre-amendment DTPA and it appears to have made
measurable progress toward that goal. As discussed more fully in part III
of this Article, however, the Act needs further revision.

The 1979 amendments to the DTPA became effective on August 27,
1979. The full impact of these amendments will not be felt in the courts
immediately, however, since the legislature provided that the amendments
were to be applied prospectively only.\(^ {24}\) The Act expressly states that it
has no effect either procedurally or substantively on any cause of action
that arose either in whole or in part prior to its effective date.\(^ {25}\) Thus, cases
are likely to be governed by the 1977 DTPA for some time to come. For
that reason, this Article attempts, in discussing the amendments to the
DTPA, to compare their effects to case law under the old statute wherever
possible.

An effort has also been made to draw upon authorities from jurisdic-
tions outside Texas to supplement Texas decisions or to deal with issues
not covered by Texas cases. Frequent analogies have also been made to
federal case law, including cases arising under both the Federal Trade
Commission Act and the federal securities laws. The references to federal
case law are not limited to cases arising under the Federal Trade Commiss-
ion Act, however, partially because such cases are frequently not helpful
in analyzing the amended Act, and partially because the Texas appellate
courts appear to have overemphasized Federal Trade Commission cases in
interpreting the Act to the exclusion of other potentially more relevant au-
thorities.\(^ {26}\) Furthermore, this broader approach to federal law is validated
by the amendment to section 17.46(c)(2), which deletes reference to inter-
pretations of the Federal Trade Commission Act in private consumer ac-
tions and provides instead that in construing the DTPA, Texas courts
"shall not be prohibited from considering relevant and pertinent decisions
of courts in other jurisdictions."\(^ {27}\) This change should have a beneficial

\(^{22}\) 1979 Tex. Sess. Law Serv., ch. 603, § 1, at 1331 (to be codified at TEX. BUS. & COM.
CODE ANN. § 17.50(B)(a)) [hereinafter cited as 1979 DTPA].
\(^{23}\) See notes 216-29 infra and accompanying text.
\(^{24}\) 1979 DTPA § 17.46 note.
\(^{25}\) Id.
\(^{26}\) See notes 176-81 infra and accompanying text.
\(^{27}\) 1979 DTPA § 17.46(c)(2).
effect on future judicial decisions under the Act since both courts and practitioners will now feel free to search out the best available precedent.

This Article does not purport to be an exhaustive analysis of the DTPA or even of the 1979 amendments. Several topics discussed in this Article could, if fully developed, become the basis for other articles. Of necessity, therefore, much of the analysis is stated succinctly and, in certain respects, incompletely. Similarly, there are passages from the recent amendments that could be analyzed only in terms of the literal meaning of the words since neither pertinent case law nor legislative history could be found. Finally, no attempt has been made to review developments concerning the DTPA not directly related to the amendments. What follows, then, is a section by section analysis of only those portions of the DTPA amended by the Sixty-sixth Texas Legislature.

II. A Section by Section Analysis

A. Section 17.43: Cumulative Remedies and Double Recovery

The DTPA has never been the consumer's exclusive remedy for undermade and oversold products. From its inception, the Act has provided that its remedies are in addition to remedies provided by other laws.28 Negligence, products liability, breaches of contract and warranty, as well as common law fraud actions, provide alternative and useful methods of recovery in a variety of fact situations. By enacting the DTPA the legislature has merely engrafted another statutory cause of action onto those already in existence. As amended, section 17.43 now states explicitly that no recovery is permitted under both the DTPA and another law for both actual damages and penalties for the same act or practice.29 Thus, the new amendment merely clarifies the pre-amendment principles of law that would have precluded multiple recovery.30

In Riverside National Bank v. Lewis,31 the only decision discussing the issue of multiple recovery under the pre-amendment language, the court denied recovery of both punitive and treble damages on the grounds that

29. As amended, § 17.43 provides:
   The provisions of this subchapter are not exclusive. The remedies provided in this subchapter are in addition to any other procedures or remedies provided for in any other law; provided, however, that no recovery shall be permitted under both this subchapter and another law of both actual damages and penalty for the same act or practice. A violation of a provision of law other than this subchapter is not in and of itself a violation of this subchapter. An act or practice that is a violation of a provision of law other than this subchapter may be made the basis of an action under this subchapter if the act or practice is proscribed by a provision of this subchapter or is declared by such other law to be actionable under this subchapter. The provisions of this subchapter do not in any way preclude other political subdivisions of this state from dealing with deceptive trade practices.

1979 DTPA § 17.43.
1979 DTPA AMENDMENTS

this would constitute a double recovery based on the same act. The underlying premise of *Riverside* is that an award of exemplary damages can be justified only if there are uncompensated actual damages to support it. If the consumer has recovered damages under another theory of liability for the same act, he has already been compensated for actual damages. In that event, there can be no recovery under the DTPA and hence no judgment for treble damages. If, on the other hand, the consumer has been awarded a judgment on the DTPA theory of his case, he has been compensated for his actual damages; in that case, because punitive damages may be awarded only where actual damages also have been awarded, the consumer would be precluded from recovering any actual or punitive damages based upon any other coextensive theory of liability. Double recovery was therefore precluded by principles of law already enunciated in cases and statutes prior to the 1979 amendment. Thus, the 1979 amendments to section 17.43, which expressly proscribe multiple recovery, merely clarify existing law.

Section 17.43 was further amended to emphasize that violations of other laws do not necessarily result in a violation of the DTPA. Thus, the defendant who is found to have violated the Truth-in-Lending Act, for example, is not automatically in violation of the DTPA. On the other hand, another statute may expressly provide for a remedy under the DTPA. For example, a violation of the Mobile Home Standards Act is expressly made a violation of the DTPA by the Mobile Home Standards Act itself. Whether conduct not specifically proscribed by the DTPA is nonetheless a violation of the Act therefore depends on whether the statute that does specifically proscribe the conduct makes an express reference to the DTPA.

B. *Section 17.45(9): Sciente*er

Prior to the 1979 amendments, only four of the twenty-two proscriptions contained in section 17.46(b) included a knowledge or scienter requirement, and only one of those four actually used the term “knowingly.” The other three proscriptions used terms such as “intent” or “fraudulently.” The 1979 amendments now require that a consumer prove that a defendant knowingly violated the DTPA to recover treble damages. Scient-

32. *Id.* at 561.
33. *Fort Worth Elevators Co. v. Russell*, 123 Tex. 128, 70 S.W.2d 397 (1934).
35. *See* *TEX. REV. CIV. STAT. ANN.* art. 5221(f), § 17(d) (Vernon Supp. 1978-1979).
37. 1977 DTPA §§ 17.45(9), (10) & (17).
38. 1979 DTPA § 17.50(b)(1). The plaintiff can recover treble damages, even without a
enter need not be proven, however, to recover actual damages.39

**Knowledge Requirement.** “Knowingly” is now defined in section 17.45(b)(9) as actual awareness of the falsity or unfairness of the act giving rise to the consumer’s claim.40 In the context of a breach of warranty, “knowingly” is defined as actual awareness of the act or practice constituting the breach.41 Although “awareness” is not defined by the Act, the words of the statute, as well as the use of the term “awareness” in other contexts, indicate that the statute requires a greater degree of conscious action or wrongdoing by the defendant than is required for actual damages at common law.

To prove common law fraud in Texas, a consumer must demonstrate that the seller intended that his statement of a present fact would be relied upon by the consumer.42 The consumer is not required to prove that the seller knew his statement was false or that the seller intended to deceive the consumer.43 Innocent misrepresentations of a past or existing fact are actionable at common law.44 Statements made by the seller in reckless disregard of the truth are also actionable.45 Exemplary damages at common law, however, may be awarded only when the consumer proves the seller acted maliciously or with the intent to injure him.46

By comparison, the 1979 amendments require actual awareness of the falsity for recovery of up to treble damages.47 No scienter, not even the intent to induce a purchase required for common law fraud,48 is necessary in the proof of actual damages under the 1979 DTPA, except for those provisions of the “laundry list” that specifically require it.49 Similarly, to

showing of knowledge, for the first $1,000 of actual damages. See notes 233-39 infra and accompanying text.

39. 1979 DTPA § 17.50(b)(1).
40. Id. § 17.45(9) provides:
   ‘Knowingly’ means actual awareness of the falsity, deception, or unfairness of the act or practice giving rise to the consumer’s claim or, in an action brought under Subdivision (2) of Subsection (a) of Section 17.50, actual awareness of the act or practice constituting the breach of warranty, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

41. Id.
44. Custom Leasing, Inc. v. Texas Bank & Trust Co., 516 S.W.2d 138, 144 (Tex. 1974).
45. Id. at 143.
46. Dennis v. Dial Fin. & Thrift Co., 401 S.W.2d 803, 805 (Tex. 1966); Briscoe v. Laminack, 546 S.W.2d 695, 697 (Tex. Civ. App.—Texarkana 1977, writ ref’d n.r.e.).
47. 1979 DTPA §§ 17.45(9), .50(b)(1).
48. See note 42 supra and accompanying text.
49. See note 36 supra and accompanying text. The following discussion between Senators Meier and Doggett reflects the intent of the drafters:
recover treble damages, the consumer has a far lighter burden to shoulder under the DTPA than in common law suits for exemplary damages. On the other hand, the scienter requirement is not satisfied by proof of negligence or recklessness. Actual awareness, and not the fact that the defendant reasonably should have known that a condition existed, must be proved by the consumer in order to recover treble damages. The Act expressly provides that actual awareness may be inferred from objective manifestations. The Act, however, does not speak of constructive knowledge or of knowledge imputed by law; therefore, only actual awareness of a falsity appears to be sufficient. Accordingly, under this standard, a defendant is not chargeable with actual knowledge of a fact simply because he had access to it. Similarly, an agent's knowledge will not be imputed to the principal simply because of the agency relationship, although the principle may be liable for punitive damages when he expressly authorizes or ratifies the conduct giving rise to the treble or punitive damages.

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DOGGETT: Sen. Meier, let me ask you a question about this amendment, because I think what you've done is a positive step as to this amendment. Do I understand that you are deleting for purposes of a recovery of actual damages and attorneys' fees the requirement of knowingly in Subsections 5 and 7 of Section 17.46(b)?

MEIER: And—yes sir, that's all it does.

DOGGETT: All right. And that is as—so that in terms of getting actual damages and attorneys' fees, there is no requirement of scienter, of knowingly or intentionally, you do have the requirement of unconscionability to get treble damages, but there's no state of mind, intend, knowingly or whatever, that you have to do to get your actual damages?

Debate on Amendments to S.B. 357, Senate Floor, Apr. 10, 1979, at 8-9 [hereinafter cited as Senate Floor Debate]. Transcripts of this debate obtained by the authors are on file at the Underwood Law Library, Southern Methodist University.

50. The term "aware" is commonly defined as "having or showing realization, perception or knowledge." Webster's Seventh New Collegiate Dictionary 61 (1971). See, e.g., Daniels v. Berry, 148 S.C. 446, 146 S.E. 420, 424-25 (1929) (Court found that bank directors were not liable for damages under allegation that they should have known a condition existed when the statute required them to be "aware" of a corporation's insolvency. "Aware" defined as: "apprised; informed; cognizant; conscious."); Raney v. Mack, 504 S.W.2d 527, 534 (Tex. Civ. App.—Texarkana 1974, no writ) (no liability for fraudulent concealment unless defendant "aware" of undisclosed facts).

51. See note 40 supra.


53. See, e.g., General Ins. Co. of America v. Commerce Bank, 505 S.W.2d 454, 457 (Mo. Ct. App. 1974) (bank not liable under statute requiring "actual knowledge" merely because it could have discovered breach of trust by inspection of public records or by piecing together facts known by bank employees).

54. Generally, a principal is liable for the actual damages suffered as a result of an agent's misconduct committed within the scope of the principal's business. See Citizens Standard Life Ins. Co. v. Munly, 518 S.W.2d 391 (Tex. Civ. App.—Amarillo 1974, no writ); Fleming v. Lon Morris College, 85 S.W.2d 277 (Tex. Civ. App.—El Paso 1935, no writ). The principal, however, is generally not liable for the exemplary damages of his agent except where the specific conduct giving rise to the claim was authorized or ratified by the principal. Bankers Life Ins. Co. v. Scurlock Oil Co., 447 F.2d 947, 1004 n.12 (5th Cir. 1971); Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627, 630 (Tex. 1967); Ledisco Fin. Serv., Inc. v. Viracola, 533 S.W.2d 951, 957 (Tex. Civ. App.—Texarkana 1976, no writ). But see Royal Globe Ins. Co. v. Bar Consultants, 577 S.W.2d 688, 694 (Tex. 1979); Medical Slenderizing v. State, 579 S.W.2d 569, 574 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.). See also
Whether a corporation is liable for treble damages if it has within its files information that would make a statement false is an open question. Arguably, liability for treble damages in such situations would encourage the dissemination of correct information throughout the corporate hierarchy. The DTPA, however, requires actual awareness of falsity for treble damages; mere knowledge of information by a corporate representative without knowledge by that same person of the statements that were made should not be actionable. The Act seems to require the defendant to be conscious that the disseminated information is false. Because it is an organic whole, a corporation cannot be aware or conscious of the falsity of a statement unless one or more of its representatives are aware of the statement, the correct information, and the relationship between the two. It would therefore seem appropriate to require proof of actual knowledge of the falsity by those corporate representatives who were actively engaged in the transaction before treble damages are awarded. Such a rule would satisfy the literal meaning of the language of the DTPA in treble damages cases without encumbering the consumer's right to actual damages.

Section 17.45(9) also deals with the type of information of which the defendant must be aware. The Act provides that the defendant must be aware of the falsity, deception, or unfairness of the act or practice for the plaintiff to recover treble damages. Proof that the defendant knew the falsity of a statement is applicable only to misrepresentation cases; actual knowledge of the unfairness of the deceptive act or practice relates to unconscionability claims.

Breach of Warranty Claims. The amendments provide yet a third standard for breach of warranty claims: actual awareness of the act or practice constituting the breach of warranty. Since the inception of the Uniform Commercial Code (UCC), an innocent and unknowing breach of warranty has given rise to a claim for actual damages. Punitive damages, however, are not awarded under the UCC for simple breach of warranty. In contrast, under the pre-amendment DTPA, treble damages were automati-

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Longoria v. Atlantic Gulf Enterprises, 572 S.W.2d 71, 72 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

55. 1979 DTPA §§ 17.45(9), .50(b)(1).

56. A few courts interpreting the pre-amendment DTPA required scienter, or at least proof that the unconscionable act was not performed in good faith. See Southwest Lincoln-Mercury v. Ross, Inc., 580 S.W.2d 2, 5 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ); Singleton v. Pennington, 568 S.W.2d 367, 381-82 (Tex. Civ. App.—Dallas 1978, no writ). In Singleton the court of appeals implied an intent element under the 1975 DTPA definition of unconscionability to preserve the constitutionality of the Act. Id. The 1977 amendments to the DTPA specifically defined the act or practice of unconscionability and thereby probably resolved this particular challenge to the Act's constitutionality. Tex. Laws 1977, ch. 216, § 1, at 600.

57. 1979 DTPA § 17.45(9).

58. See J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 9-1, at 272 (1972) ("A seller can fully believe that the representations he makes are accurate and yet find himself liable for the breach of an express warranty.").

The 1979 amendments seem to return to a middle ground between the UCC standard and the pre-amendment DTPA standard, permitting punitive damages for breach of warranty only when there is a showing that the act constituting the breach was committed knowingly. The words of the amendment suggest that the seller needs to know only of the act or practice that ultimately causes the breach and need not be aware that his conduct constitutes a breach of warranty. Application of this provision may be complicated, however, by differences in the types of warranties involved.

If, for example, a merchant knows at the time of sale that his product does not conform to the promises made on the container or label, or that he is not the rightful owner of the goods, sale of the goods constitutes a knowing breach of an implied warranty of merchantability or title that will subject him to treble damages. In such circumstances, the defendant's knowledge of the act or practice constituting the breach consists of an awareness of a defect or nonconformity in the goods or services at the time of sale. The same result would seem to pertain to express warranties where the defendant was aware at the time of sale that his product would not perform as promised. Such conduct would seem sufficiently reprehensible to justify punitive damages.

In cases involving warranties of repair, however, awareness of the act or practice constituting the breach may consist of nothing more than a refusal to make the repairs, conduct that will always be deliberate and knowing. If the refusal to repair arises from a good faith dispute as to the scope of the warranty or the cause of the breakdown, punitive damages would not seem appropriate. Nonetheless, the Act as written may authorize punitive damages even in such circumstances.

Unconscionability Claims. The scienter requirement is more easily applied to unconscionability claims. A consumer may claim, for example, that a sale involving a gross disparity in value between the consideration received and the consideration paid constitutes unconscionable conduct. To recover treble damages in such circumstances, the plaintiff must prove that the defendant was aware of the unfairness of the transaction. Since the value of the property when sold is therefore at issue, experts will be called to assess that value. Some of the relevant factors may be highly

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60. See Woods v. Littleton, 554 S.W.2d 662, 669 (Tex. 1977).
61. 1979 DTPA § 17.45(9) ("actual awareness of the act or practice constituting the breach"). Such language is reminiscent of the state of mind required for an intentional tort. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 8, at 31 (4th ed. 1971).
62. See TEX. BUS. & COM. CODE ANN. § 2.314(b)(6) (Tex. UCC) (Vernon 1968) (implied warranty of merchantability includes warranty that goods will conform to the promises or affirmations of fact made on the container or label if any); Id. § 2.312 (implied warranty that the title conveyed shall be good and its transfer rightful).
63. See Ford Motor Co. v. Tidwell, 563 S.W.2d 831, 834-35 (Tex. Civ. App.—El Paso, writ ref’d n.r.e.) (in suit for breach of an implied warranty, plaintiff must prove that goods were defective at the time of sale).
subjective and some highly technical. The seller's best defense may well be that he is not an expert and was not aware of the specific facts that allegedly created the price disparity; or, he may simply claim that, in good faith, he evaluated the property differently from the expert. If the consumer cannot prove the defendant's awareness of the bargain's unfairness, he will be entitled only to actual damages.

Time of Representations. Section 17.45(9) does not specify when the deceptive act or practice must take place. If after the effective date of the 1979 amendments a seller unknowingly misrepresents the quality of a boat at the time of sale, the consumer will not be entitled to treble damages. If, on the other hand, the seller learns the falsity of his statement after the initial meeting with the buyer when the statement was made but prior to the closing of the transaction, the seller will be liable under section 17.46(b)(23) for failing to correct the misrepresentation. Furthermore, the seller could be liable for the additional damages caused by post-sale misrepresentations, if he is aware of their falsity at the time they are made. Hence, awareness of the falsity of a representation and awareness of the unfair nature of a deceptive act need not coincide with the sale. Such awareness may arise either before the sale or after it, as long as it is coincident with an unlawful act or practice that is the producing cause of the consumer's damage.

Conclusion. The various scienter elements engrafted on the DTPA by the 1979 amendments constitute a significant change in the Act. The new definition of "knowingly," coupled with the 1979 amendment allowing the jury to award treble damages, provides a vehicle by which evidence of the relative culpability of the defendant may be presented to the jury. The 1979 amendments have thus significantly reduced the harsh effect of automatic trebling and given the jury a large measure of discretion in punishing a defendant for knowing violations of the Act.

C. Section 17.46(a): False, Misleading, or Deceptive Acts Declared Unlawful and Made Subject to Enforcement by the Attorney General's Office

Prior law simply declared unlawful any false, misleading, or deceptive acts or practices. The 1979 amendment to section 17.46(a) restates this prohibition but expressly commits enforcement activities under this sec-

65. See notes 128-29 infra and accompanying text.
66. In Woods v. Littleton, 554 S.W.2d 662 (Tex. 1977), the Texas Supreme Court held that deceptive acts or practices taking place after the cause of action arose will give rise to liability. See also Lynn, Anatomy of a Deceptive Trade Practices Case, 31 Sw. L.J. 867, 877 (1977).
67. 1977 DTPA § 17.46(a) provided: "False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."
68. 1979 DTPA § 17.46(a) provides: "False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful and are subject to
tion to the consumer protection division of the attorney general's office. The significance of this change is apparent only by reference to amended section 17.46(d) and section 17.50(a)(1), which now limit private consumer actions for false, misleading, or deceptive acts or practices to the so-called "laundry list" items enumerated in section 17.46(b). The consumer may no longer sue for false, misleading, or deceptive acts or practices that are not specifically set forth in the laundry list. Following this change, the authority to take action against unlisted deceptive acts or practices is vested solely in the attorney general's office.

Amended section 17.46(a) makes express reference to the sections of the Act that describe the powers and activities of the attorney general's office, specifically section 17.47 (restraining orders), section 17.58 (voluntary compliance), section 17.60 (reports and examinations), and section 17.61 (civil investigative demand).

D. Section 17.46(b)(22): Distant Forum Abuse

Section 17.46(b)(22) proscribes filing suit against a consumer based on a consumer transaction for goods, services, loans, or credit extensions, primarily for personal, family, household, or agricultural use, when the plaintiff knows or has reason to know that the consumer does not reside in the county where the suit was brought or in the county where the contract was signed. Prior to the 1979 amendments, section 17.46(b)(22), previously numbered 17.46(b)(21), excepted from liability plaintiffs who initiated suits against consumers when the consumer resided in a city with a population of less than 250,000 if the suit was filed in the nearest county with a population of 250,000 or more. The pre-amendment Act further excepted suits filed pursuant to the multi-party provisions provided by Texas venue laws. The 1979 amendments delete those two exceptions. Therefore, af-

action by the consumer protection division under Sections 17.47, 17.58, 17.60, and 17.61 of this code.

69. The "consumer protection division" is defined to mean "the antitrust and consumer protection division of the attorney general's office." 1977 DTPA § 17.45(8).

70. The change in this section would not appear to affect the authority of a district or county attorney to seek injunctive relief for false, misleading, or deceptive acts or practices under § 17.48(b), as long as written notice is given to the attorney general's office.


72. 1979 DTPA § 17.46(b)(22) provides that deceptive practices include:

   filing suit founded upon a written contractual obligation of and signed by the defendant to pay money arising out of or based on a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household, or agricultural use in any county other than in the county in which the defendant resides at the time of the commencement of the action or in the county in which the defendant in fact signed the contract; provided, however, that a violation of this subsection shall not occur where it is shown by the person filing such suit he neither knew or had reason to know that the county in which such suit was filed was neither the county in which the defendant resides at the commencement of the suit nor the county in which the defendant in fact signed the contract.

the effective date of the amendments, any suit described by new section 17.46(b)(22) is per se a deceptive act or practice.

Since there are no reported cases construing section 17.46(b)(22) as it existed between 1977 and 1979, 74 and since there is no legislative history to suggest why the exceptions to subsection (22) were deleted, it is difficult to ascertain the purpose behind the amendment.

As presently worded, subsection (22) raises at least one interesting issue: Is it a deceptive trade practice to file suit outside the county where the consumer resides or where the contract was signed, if the suit is filed in federal court? In other words, if venue is proper in federal court in a particular district, is it a deceptive trade practice to bring suit in that court? Although no case, either federal or state, has confronted the issue yet, it appears that the supremacy clause of the United States Constitution should prevail over the DTPA as it would over any statute or order preventing or punishing free access to the federal courts. 75

E. Section 17.46(b)(23): Failure to Disclose Information that Would Alter the Consumer’s Decision to Buy

Section 17.46(b)(23) is one of the most significant and far reaching amendments of the 1979 Act. According to this provision, the knowing failure to disclose information that would have altered the consumer’s decision to buy constitutes a false, misleading, or deceptive act or practice under the Act. Specifically, the amendment declares unlawful “the failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.” 76 As a result of this amendment, defendant-sellers may now be liable for treble damages under section 17.50(b)(1) because of their knowing omissions.

Under the old Act, the extent of a defendant’s liability for omissions in the sale of goods and services was unclear. Prior to the recent amendments, several courts had indicated that the simple nondisclosure of information did not give rise to liability under the Act. 77 In certain circumstances, however, nondisclosure of information may have been a violation of section 17.46(a) even under the old Act. It seems likely, for example, that liability under the 1977 Act could be predicated upon half-truths or failure to disclose information necessary to prevent other statements from being misleading since such conduct constitutes common law

74. In O'Shea v. International Business Machs. Corp., 578 S.W.2d 844 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.), the court found 1977 DTPA § 17.46(b)(21) inapplicable because the event occurred prior to the 1977 amendments.
76. 1979 DTPA § 17.46(b)(23).
See generally Restatement (Second) of Torts § 551 (1977); Keeton, Rights of Disappointed Purchasers, 32 Texas L. Rev. 1, 3-6 (1953).

The obligation to disclose material facts that are not readily discoverable by the other party through the exercise of ordinary care and diligence is still an evolving concept under the common law and should therefore be applied cautiously in DTPA cases arising under the old act. Most of the cases to date in this area involve the nondisclosure of facts so "basic to the transaction" that their nondisclosure amounts to "a form of swindling, in which the plaintiff is led by appearances into a bargain that is a trap." Restatement (Second) of Torts § 551, Comment I (1977). The cases usually involve such things as the sale of houses that are riddled with termites or constructed over a landfill, or the sale of animals that are diseased. See note 83 supra. In the formulation of the rule adopted by the Restatement (Second) of Torts, the disclosure obligation runs only to "facts basic to the transaction." Restatement (Second) of Torts § 551(e) (1977). But see Keeton, supra note 83, at 6. This is a more rigorous and limited concept than "material" facts. See Restatement (Second) of Torts § 551, Comment j (1977). A fact is basic to the transaction if it goes to the essence of the transaction and is "an important part of the substance of what is bargained for or dealt with." Id. Material facts, on the other hand, are facts that are "important and persuasive inducements to enter into the transaction, but [do] not go to its essence." Id.

Another reason for caution in applying these authorities to pre-1979 DTPA cases is the harshness of the sanctions available under the act. Many of the common law disclosure cases are rescission cases, although a few involve claims for actual damages. See note 83 supra. These cases, however, seem to be based on evolving concepts of fairness to the buyer rather than on the need to punish or deter the seller. See Keeton, supra note 83, at 6. Fur-
duty to speak under either the common law\(^8\) or the Federal Trade Commission Act,\(^6\) there is apparently no duty of affirmative disclosure under the old DTPA.\(^7\) The addition of subsection (23) to the laundry list of deceptive acts or practices thus substantially broadens disclosure obligations under the Act.

The impetus for adopting subsection (23) was apparently the proposed abolition of private consumer actions under section 17.46(a). Senator Meier's bill, S.B. 357, limited consumer actions to the specific laundry list items enumerated in section 17.46(b) of the 1977 Act so that a consumer whose grievance did not fall within the laundry list had to resort to common law remedies, to other statutes, such as article 27.01 of the Texas Business and Commerce Code,\(^8\) or to enforcement action by the attorney general's office under the DTPA. Consumer forces within the senate reacted to Senator Meier's amendment by proposing an addition to the laundry list that prohibited the failure to disclose a past or existing material fact.\(^9\) Its proponents argued that passage of the amendment was necessary to provide the consumer with a remedy for cases in which deception was accomplished through nondisclosure. To illustrate this problem, legislators were asked to imagine the plight of a consumer who buys a home constructed over a nuclear waste disposal site or landfill and is not told of these facts.\(^9\)

Its proponents argued that passage of the amendment was necessary to provide the consumer with a remedy for cases in which deception was accomplished through nondisclosure. To illustrate this problem, legislators were asked to imagine the plight of a consumer who buys a home constructed over a nuclear waste disposal site or landfill and is not told of these facts.\(^9\) Proponents of the disclosure amendment argued that S.B.

\(^{85}\) See ABC Packard, Inc. v. General Motors Corp., 275 F.2d 63, 67-69 (9th Cir. 1960); Papile v. Robinson, 4 Conn. Cir. Ct. 307, 231 A.2d 91, 94 (1967).


\(^{87}\) See note 77 supra. It has been suggested that "an advertisement should set forth whatever the purchaser would normally want to know about the nature and use of the product," E. Kintner, A Primer on the Law of Deceptive Practices 105 (1971), and that there is a duty to disclose all information required to make an "informed choice." Morse, A Consumer's View of FTC Regulation of Advertising, 17 U. Kan. L. Rev. 639, 640 (1969). These are undoubtedly worthy goals although not necessarily workable ones. It seems doubtful that the present state of the law reaches so far. See note 86 supra. Certainly, this is not a proper standard for the imposition of treble damages under the DTPA, particularly prior to the 1979 amendments. But see Texas Consumer Litigation, supra note 2, § 3.04, at 77 & n.31.


\(^{89}\) Senate Floor Debate, supra note 49, at 5.

\(^{90}\) Id. Other examples cited to illustrate the need for a disclosure requirement in-
357 would completely eliminate the duty to disclose in such a situation.  

This example of a buyer who is not told that the house he has purchased was constructed over a landfill or nuclear waste disposal site presents a classic case of common law fraud for which the buyer has a clear cause of action. Therefore, even if S.B. 357 would have prevented a private consumer action for nondisclosure under the DTPA, the consumer would have had a remedy for nondisclosure of basic facts at common law. Furthermore, a DTPA suit on the consumer's behalf could have been maintained by the attorney general's office to recover actual damages or restoration of property. Under the circumstances, the practical effect of adding subsection (23) to the Act was not, as its supporters argued, to provide the consumer with a means of redress where no remedy would otherwise have existed, but to insure that nondisclosures would be punished as severely as affirmative misrepresentations, i.e., by awards of treble damages and attorneys' fees. Such sanctions for nondisclosures arguably would not have been available if the Act had been amended without the addition of subsection (23). Whether treble damages and attorneys' fees are appropriate sanctions for nondisclosure is a question that apparently was never addressed by the legislature. Since treble damages under the Act were initially justified as a needed incentive for consumer actions involving small claims that could not otherwise be brought, the example of a defrauded home buyer whose home is built over a nuclear waste disposal site or landfill and whose claim is likely to be in the tens of thousands of dollars, while of considerable emotional appeal, is not really responsive to the issue.

Moreover, the legislature apparently failed to consider carefully the potential scope of subsection (23). The example of a buyer who discovers that his house was built over a nuclear waste disposal site or landfill is a persuasive argument for a remedy precisely because the fact concealed is basic to the transaction. Such a fact must be disclosed even under the common law. If subsection (23) were limited to the disclosure of facts "basic to the transaction," or if it were so construed by the courts, it

91. Id. at 5-6.
93. 1977 DTPA § 17.47(d) provides that in an action instituted by the state under § 17.47 the court may award actual damages to compensate identifiable persons who were injured as a result of the unlawful practice. See Bourland v. State, 528 S.W.2d 350, 358 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).
94. Hill, supra note 5, at 614.
96. See RESTATEMENT (SECOND) OF TORTS § 551, Comment j, at 123 (1977). See also discussion at note 84 supra. Arguably, the requirement that the consumer would not have
reasonably might be viewed as a necessary and proper addition to the laundry list, an addition that merely restored consumer rights that probably existed under section 17.46(a) prior to the 1979 amendments. The provision, however, may also be susceptible of a much broader and more open-ended application than its proponents realized or intended.

The best way to discuss the possible interpretations of the new subsection is to analyze each of the component elements of the subsection. A seller or other participant in a transaction is guilty of a false, misleading, or deceptive act or practice if five conditions are met:

1. There is a failure to disclose,
2. information concerning goods or services,
3. known at the time of the transaction,
4. intended to induce the consumer to enter into a transaction, and
5. the consumer would not have entered into the transaction had the information been disclosed.

1. A Failure to Disclose. The term "failure to disclose" is not defined under the amended Act, and although precise formulation of the DTPA disclosure requirement must await further judicial development, some of the problems that are likely to arise can be anticipated. One of the questions that almost certainly will be asked is whether subsection (23) requires disclosure of information that is open and obvious to the consumer from an examination of the product itself. Suppose, for example, that several days after his purchase, the buyer of an automobile notices small indentations in the hood and some paint overspray on one of the car's quarter panels. Can the consumer revoke acceptance of the automobile or sue for treble damages on the ground that the seller did not disclose these imperfections, even though the buyer had an opportunity to inspect the vehicle before purchase? Under the pre-amendment Act, the consumer was not entitled to rescission since the matters complained of did not substan-

97. See notes 137-59 infra and accompanying text.
98. It is not surprising that the term is not defined since the conceptual difficulty involved has discouraged definitional efforts in other laws. The term "disclosure" is not defined, for example, by rule 10b-5, 17 C.F.R. § 240.10b-5 (1978), which imposes disclosure obligations in connection with the purchase or sale of securities. One commentator has suggested that "full disclosure" for purposes of rule 10b-5 might be defined "as proper dissemination of a statement which conveys the true state of affairs to a reasonable investor." A. Jacobs, The Impact of Rule 10b-5, § 64.04, at 3-230 (1979).

The Privacy Act of 1974, 5 U.S.C. § 552a(b) (1976), prohibits the disclosure of information by agencies of the federal government unless the disclosure is pursuant to the procedures or exceptions created by the Privacy Act. The term "disclosure" is not defined in the Act. See Harper v. United States, 423 F. Supp. 192, 197 (D.S.C. 1976), where the court suggested that "the term be taken to denote the imparting of information which in itself has meaning and which was previously unknown to the person to whom it is imparted."


99. Cf Freeman Oldsmobile Mazda Co. v. Pinson, 580 S.W.2d 112 (Tex. Civ. App.--Eastland 1979, writ ref'd n.r.e.) (consumer brought action under the pre-amendment DTPA on these facts and was denied rescission).
tially impair the value of the automobile. This resolution concerned the availability of a particular remedy, however, rather than the existence of a violation. Assuming that the seller is willing to correct the defects and that no claim for breach of warranty would prevail, could a consumer suing under the amended Act insist on his right to treble damages under a theory of nondisclosure?

Under the common law there is no duty to disclose material facts that are equally available to both buyer and seller. Even under the federal securities laws, there is often no duty to disclose facts about which the investor is presumably aware. In many cases, there is no obligation under the federal securities laws to disclose information to which the buyer already has access. It is arguable, of course, that these precedents should not control a defendant's disclosure obligation under the DTPA. It may be argued plausibly that subsection (23) was intended to reach beyond the common law and to impose strict liability for nondisclosure of material facts known to the defendant in all situations, including those in which undisclosed information is readily available to the consumer. The securities cases may be distinguished on the ground that purchasers of securities have been held to have a duty of reasonable diligence or due care, while it is not yet clear whether any similar duty exists under the DTPA.

100. Id. at 114.
101. See Kohler v. Kohler Co., 208 F. Supp. 808, 824 (E.D. Wis. 1962), aff'd, 319 F.2d 634 (7th Cir. 1963); Moore & Moore Drilling Co. v. White, 345 S.W.2d 550, 555 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.); Long v. Martin, 234 S.W. 91, 94 (Tex. Civ. App.—Amarillo 1921, writ dism'd w.o.j.). See also note 106 infra and accompanying text. The Restatement (Second) of Torts § 551, Comment k (1977) states:

When the facts are patent, or when the plaintiff has equal opportunity for obtaining information that he may be expected to utilize if he cares to do so, or when the defendant has no reason to think that the plaintiff is acting under a misapprehension, there is no obligation to give aid to a bargaining antagonist by disclosing what the defendant has himself discovered.

102. See Spielman v. General Host Corp., 538 F.2d 39, 41 (2d Cir. 1976); cf. Johnson v. Wiggs, 443 F.2d 803, 806 (5th Cir. 1971) (defendant who had been charged with a § 10b violation, "was not required to say that which had been publicly proclaimed in several ways on several occasions"); Kohler v. Kohler Co., 319 F.2d 634, 642 (7th Cir. 1963) (in the context of a § 10b action under the Securities Exchange Act, the court held that "[s]uch a standard requires the insider to exercise reasonable and due diligence not only in ascertaining what is material as of the time of the transaction but in disclosing fully those material facts about which the outsider is presumably uninformed and which would, in reasonable anticipation, affect his judgment" (emphasis added)).

103. See, e.g., Hirsch v. duPont, 553 F.2d 750, 763 (2d Cir. 1977); Hafner v. Forest Laboratories, Inc., 345 F.2d 167, 168 (2d Cir. 1965);

104. Hirsch v. du Pont, 553 F.2d 750, 763 (2d Cir. 1977); Vohs v. Dickson, 495 F.2d 607, 623 (5th Cir. 1974); Financial Indus. Fund, Inc. v. McDonnell Douglas Corp., 474 F.2d 514, 517, 521 (10th Cir. 1973); Clement A. Evans & Co. v. McAlpine, 434 F.2d 100, 103-04 (5th Cir. 1970); A. Jacobs, supra note 98, § 64.01(b), at 3-206 n.70.

105. The due diligence defense in Texas is narrow. When one has been induced into a contract by fraudulent representations, the person committing the fraud cannot defeat a claim for damages based upon a plea that the party defrauded might have discovered the truth by the exercise of proper care. Isenhower v. Bell, 365 S.W.2d 354, 357 (Tex. 1963). On the other hand, the party claiming fraud may not shut his eyes and ears to matters equally open and available to him upon reasonable inquiry and investigation. Moore & Moore Drilling Co. v. White, 345 S.W.2d 550, 555 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.).
On the other hand, there are several important reasons for believing that defendants should not be held liable under the amended Act for failing to disclose information that is as readily available to the buyer as to the seller. First, the standard of disclosure in equal access circumstances need not be the same as when information is more readily available to the seller. When the buyer is given rights of inspection, for example, arguably the seller’s disclosure obligation should not extend to defects plainly visible during inspection. Furthermore, the Act does not require disclosures to be verbal. Affording the buyer a full opportunity to inspect the property is, in fact, a disclosure of open and obvious defects. As the Court of Appeals for the Seventh Circuit stated in *Eason v. General Motors Acceptance Corporation*:

"It is not necessarily true that the strict standards of disclosure which appropriately apply to transactions in which there is a dramatic disparity in the parties’ access to material information will automatically and totally apply to negotiated transactions in which the parties typically rely on contract warranties and pre-closing inspections or audits as a basis for the investment decision. A flexible statute which emphasizes the relevance of the context in which a transaction takes place should neither limit its protection to an arbitrarily defined class of purchasers and sellers, nor arbitrarily assume that every purchaser and every seller is entitled to precisely the same disclosure."

The defendant who has afforded a consumer full rights of inspection, or who has otherwise widely disseminated information to the public, should be held to have satisfied his disclosure obligations under subsection (23) because, absent special circumstances to the contrary, he apparently did not intend "to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed." In short, a defendant who is sued for failing to disclose information that is already public or readily observable from an inspection that has in fact occurred, should be able to defend, not only on the ground that disclosure has in fact been made, but also on the ground that any alleged inadequacy in the disclosure was the result of a good faith belief that the consumer already had the information and not the result of any intention to induce.

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*See also* Dallas Joint Stock Bank v. Harrison, 138 Tex. 84, 156 S.W.2d 963 (1941); Rodgers v. Insurance Co., 513 S.W.2d 113, 119 (Tex. Civ. App.—Fort Worth 1974, writ ref’d n.r.e.). The party claiming fraud is chargeable with knowledge of all facts that could have been discovered by a reasonably prudent person similarly situated. Thigpen v. Locke, 363 S.W.2d 247, 251 (Tex. 1962). How these rules will be applied under the DTPA which, according to the Texas Supreme Court is designed for the protection of the "ignorant, the unthinking and the credulous," Spradling v. Williams, 566 S.W.2d 561, 563, 564 (Tex. 1978), has yet to be determined.


107. 490 F.2d 654, 660 n.28 (7th Cir. 1973).

108. 1979 DTPA § 17.46(b)(23).
the consumer to enter into a transaction into which he otherwise would not have entered.

Apart from determining what information must be disclosed, the courts must decide to whom disclosures must be made. This determination requires answering a number of related questions. For example, will the disclosure obligation extend only to the immediate consumer, or will it also extend to subsequent consumers who may purchase the goods second-hand? Will disclosure to agents or experts retained by the consumer be sufficient (disclosures to physicians in the sale of prescription drugs, for example), or must disclosure be made to the consumer himself? Will intermediate vendors or middlemen be entitled to disclosure?

Secondly, how will such disclosures be implemented? Will it be sufficient to publicize such disclosures in the media, or will direct communication with the consumer be necessary? Will labels be adequate, or must special disclosure books or prospectuses be delivered to the consumer or kept in stores and updated periodically? Additionally, how specific must disclosures be in order to be adequate? Will it be sufficient to disclose that a product may be hazardous to a user's health or will it also be necessary to describe in detail the specific danger?

Finally, will the required disclosure vary with the seller's sophistication?


110. See Cohen v. Citizens Nat'l Trust & Sav. Bank, 143 Cal. App. 2d 480, 300 P.2d 14, 16-17 (1956), in which the court stated that a vendor owes the duty of disclosure to a third party if the vendor intended that the third party rely on material representations made by the vendor.

111. See Davis v. Wyeth Laboratories, Inc., 399 F.2d 121, 131 (9th Cir. 1968) (warnings to physicians held insufficient where drug dispensed at mass clinics put manufacturer on notice that warnings were not reaching the consumer).

112. See Person v. Latham, 582 S.W.2d 246 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.).

113. See W. Prosser, supra note 61, § 96, at 647, which states:

The warning must be sufficient to protect third persons who may reasonably be expected to come in contact with the product and be harmed by it; and where it is not practical to reach all such people, the seller must do what is reasonable in the way of labels, literature to be distributed, or warnings to those who can be expected to pass them on.

114. Senator Meier objected to a proposed amendment to the DTPA in the senate that was substantially similar to subsection (23) as finally adopted. One of the grounds for his opposition was fear of the considerable burden he believed the disclosure requirement would impose on commerce. Among other things, he speculated that such a requirement would impose on the seller the burden of preparing a prospectus or booklet in which to make the necessary disclosures:

The danger in adopting an amendment of this type allows any disgruntled purchaser to go back and barge through the entire negotiations as between the buyer and the seller. And attempt to find and foist up some fact and convince a court or jury that that fact was material to the transaction or sale, is that you put a total burden upon sales and commerce, because every seller is going to have to go and prepare a prospectus or a booklet or a document, and maybe a brochure, Senator, trying to set out completely every conceivable fact that could ever be dredged up, dug up.

Senate Floor Debate, supra note 49, at 8-9.
For example, will a less complete disclosure be required of the occasional seller, such as a person selling his own home or holding a garage sale, than will be required of a merchant?

Unfortunately, these are only a few of the many questions that remain to be answered about the disclosure aspects of subsection (23). Considerable judicial interpretation is therefore needed to make the disclosure obligation meaningful and to establish its boundaries.

(2) Information Concerning Goods or Services. The second element of the disclosure obligation under the 1979 DTPA is the requirement that the disclosure relate to "information concerning goods or services." There is probably little question that information concerning defects in goods or services comes within this formulation. The disclosure obligation, however, may not be limited to disclosure of nonconformities or defects in the goods or services themselves. Since the term "concerning" is imprecise and relative, and since there are many ways in which information can concern goods or services, the judicial interpretation given this provision will have a profound impact on the scope of subsection (23).

Consider, for example, the following facts. The purchaser of a computer claims that he was not told of the manufacturer's financial problems when he made his purchase. He claims that he would not have bought the company's product had he known of such problems since the company's financial collapse would make it difficult, if not impossible, for him to obtain parts and service. The purchaser sues, claiming nondisclosure of information under subsection (23) that "concerns" the product he purchased. Is the company's financial situation at the time of the consumer's transaction "information concerning goods or services"?

The consumer probably would argue that subsection (23) requires such information to be disclosed because the financial viability of the company is inextricably intertwined with the value of the product. On the other hand, the defendant would argue that such information need not be disclosed because it is information concerning the company as a whole rather than information concerning the goods or services themselves. No definitive resolution of these conflicting viewpoints is possible at this time. One practical effect of requiring the disclosure of complete financial information each time a sale is made, however, would be the imposition on sellers of substantial disclosure costs that could significantly increase the costs of a product or service, a cost that small businesses might be wholly unable to afford.

Another difficult question involves the duty, if any, to disclose quality control information concerning a particular product. Suppose that a company's internal quality control reports showed that twenty percent of the products manufactured were defective and that an estimated five percent of these defective products were ultimately sold. Is the manufacturer under an obligation to furnish this information to buyers of its products? Is this quality control data "information concerning goods or services," or
is it more properly characterized as information concerning the manufacturing process itself? In some instances information of this type would be profoundly helpful to consumers in choosing among competing products. Is any seller who knowingly fails to furnish consumers with quality control information in his possession, particularly of a negative character, therefore liable for treble damages under the Act? Once again the answer is unclear, but the wording of subsection (23) does not clearly rule out the possibility that such information might have to be disclosed.

Three additional examples further illustrate the uncertain scope of the new amendments. The first concerns information about generic substitutes. Would the failure to disclose that the seller's product contains the same ingredients as lower priced generic substitutes constitute a failure to disclose information “concerning goods or services”? Information concerning the availability of such substitutes may in fact be material information in that it could alter a reasonable consumer’s purchasing decision and might induce him not to buy the seller's product. Furthermore, such information is arguably information concerning goods, although the information does not concern the seller’s goods as much as it does someone else's. Does subsection (23) require such information to be disclosed? The answer will probably depend on whether the courts limit the seller’s disclosure obligation to information about the goods or services that are the subject of the transaction in suit, or whether the disclosure obligation also extends to information about other goods or services that might help the consumer to decide whether to buy the particular product or service at issue in the case. Only the first approach effectively limits the seller’s disclosure obligation to information concerning his own goods or services.

The second example concerns information about model discontinuance. Suppose a manufacturer is planning a major change in the composition of his product and knows he will be phasing out the particular model that is currently being sold. Does the manufacturer have an obligation under subsection (23) to disclose these intentions to the consumer, who might decide to wait for the new and presumably improved product if he knew of the manufacturer's plans? Arguably, the information concerning model discontinuance concerns the goods being sold. Does subsection (23) require such information to be disclosed even though premature disclosure of the manufacturer's plans might harm his competitive position in the marketplace?115

Finally, if real estate is involved, is the information to be disclosed limited to the condition of the premises for sale, or would it also include information about the adequacy or purity of the water supply, the quality of

115. See SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 850 n.12 (2d Cir. 1968) (en banc), in which the court of appeals stated that under the federal securities laws the timing of a disclosure was a matter for the business judgment of corporate executives in circumstances where a valuable corporate purpose would be served by delaying the disclosure, so long as the undisclosed information was not used to trade in the corporation's stock or selectively furnished to outsiders.
nearby schools, the availability of bus service, and the character of the neighborhood?

Whatever the answers to these questions, it is clear that subsection (23) will pose difficult interpretive problems for the courts and that the phrase "information concerning goods or services" is likely to be of critical importance in avoiding unrealistic and unworkable applications of the Act. The courts must eventually decide whether the information required to be disclosed by the Act is limited in some fashion, perhaps to information that directly describes the performance, characteristics, or dangers of the product or service itself, or whether the duty to disclose also extends to collateral matters such as the manner in which the product is made, or to similarities between the seller's products or services and the products or services of other vendors. It is suggested that a rather close nexus should be required between the undisclosed information and the particular goods or services at issue in the suit.

(3) **Known at the Time of the Transaction.** The requirement that the information to be disclosed be "known at the time of the transaction" follows the common law rule that disclosure is required when the true facts known to one party are not readily discoverable by the other party. This rule appears to be based upon the defendant's actual knowledge of the undisclosed fact and in this respect imposes a scienter requirement similar to an action for fraudulent concealment. Subsection (23) therefore requires actual knowledge rather than merely constructive knowledge.

116. In arriving at a workable interpretation of the phrase "concerning goods or services," the courts may look to TEX. BUS. & COM. CODE ANN. art. 2.313 (Tex. UCC) (Vernon 1968), which states, *inter alia*, that express warranties are created by any affirmation of fact "which relates to the goods." Courts in other jurisdictions have held that an express warranty relating to goods involves statements or representations that have reference to the character, quality, or title of goods. See Atlanta Tallow Co. v. John W. Eshelman & Sons, 110 Ga. App. 737, 140 S.E.2d 118, 126 (1964); Vasco Trucking, Inc. v. Parkhill Truck Co., 6 Ill. App. 3d 572, 286 N.E.2d 383, 386 (1972). The Texas courts have described a material representation as one "that relates to the condition, kind, and quality of the property". Putnam v. Bromwell, 73 Tex. 465, 467, 11 S.W. 491, 492 (1889).

117. See cases cited at note 83 supra and accompanying text.

118. Moore & Moore Drilling Co. v. White, 345 S.W.2d 550, 555 (Tex. Civ. App.—Dallas 1961, writ ref’d n.r.e.) ("[a]ctionable fraud has certain fundamental characteristics; (1) there must be a misrepresentation as to material facts . . . or failure to disclose facts *within the knowledge of the parties sought to be charged*" (emphasis added)); Bullock v. Crutcher, 180 S.W. 940, 941 (Tex. Civ. App.—Texarkana 1915, no writ) ("each party to a contract—'is bound in every case to communicate to the other *his knowledge of material facts*, provided he knows the other to be ignorant of them and they be not open and naked or equally within the reach of his observation'" (emphasis added)).

119. Carrell v. Denton, 138 Tex. 145, 148, 157 S.W.2d 878, 879 (1942) (fraudulent concealment includes actual knowledge that a wrong has occurred). In an action for fraudulent concealment, one cannot be guilty of fraudulently or intentionally concealing facts of which he is unaware. Raney v. Mack, 504 S.W.2d 527, 534 (Tex. Civ. App.—Texarkana 1973, no writ); cf. Phillips Petroleum Co. v. Daniel Motor Co., 149 S.W.2d 979, 989-90 (Tex. Civ. App.—Eastland 1941, writ dism’d judgmt cor.) (defendant’s liability not established by evidence tending to show knowledge on the part of defendant’s bookkeeper-employee).

120. See Teodonna v. Bachman, 404 P.2d 284, 286 (Colo. 1965); Miles v. Love, 1 Kan. App. 2d 630, 573 P.2d 622, 625 (1977); Alexander v. Johnson Furnace Co., 543 S.W.2d 539,
investigate or to discover facts not actually known to him. On the other hand, neither does the Act require a specific intent to defraud or knowledge of the incorrect impression produced by the statements or omissions made. Subsection (23) simply requires that the defendant have actual knowledge of the existence of the undisclosed information.

This standard appears to be slightly less demanding than the "knowingly" standard defined in section 17.43(9) as "actual awareness of the falsity, deception or unfairness of the act or practice giving rise to the consumer's claim." Since treble damages are recoverable under section 17.50(b)(1) only if the defendant's conduct was "committed knowingly," it will probably be necessary to submit more than one scienter issue to the jury in a suit based upon a failure to disclose when the plaintiff is seeking treble damages.

One of the issues that eventually must be resolved under subsection (23) is the extent to which knowledge of an agent or employee can be imputed to his principal. The Texas Supreme Court's recent holding in Royal Globe Insurance Co. v. Bar Consultants, Inc., which found the principal liable for the deceptive acts or practices of his agent, may not be controlling when liability depends on a finding of knowledge or scienter. No such finding was necessary to liability in the Royal Globe case. Courts have traditionally been reluctant to impute actual knowledge of wrongdoing by an agent to his principal, particularly in cases involving punitive damages.

542 (Mo. Ct. App. 1976); Staff v. Lido Dunes, Inc., 47 Misc. 2d 322, 262 N.Y.S.2d 544, 547 (Sup. Ct. 1965). But see Weikel v. Sterns, 142 Ky. 513, 514, 134 S.W. 908, 909 (1911). A defendant might be deemed to have constructively knowledge of a fact if he could have learned it with due diligence. See A. Jacobs, supra note 98, § 63, at 3-180.19.

121. Senator Clower in sponsoring an amendment to S.B. 357 that was the precursor to subsection (23), stated: [It] does not impose any duty on any seller in the State of Texas to go out and search up any facts that he does not know in the ordinary course of his business, or that's common knowledge. It simply must require him if he knows of these facts that he must disclose them.

Senate Floor Debate, supra note 49, at 5. This approach may be contrasted with the negligence or recklessness standard, which does impose a duty to investigate. See Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 364 (2d Cir. 1973), cert. denied, 414 U.S. 910 (1975); Lanza v. Drexel & Co., 479 F.2d 1277, 1306 n.98 (2d Cir. 1973); 5 A. Jacobs, supra note 98, § 63, at 3-108.18-19.


125. 1979 DTPA § 17.43(9). This standard is closer to actual scienter in which the speaker is conscious of wrongdoing. See Myzel v. Fields, 386 F.2d 718, 734-35 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968).

126. 1979 DTPA § 17.50(b)(1).

127. 577 S.W.2d 688, 694 (Tex. 1979).

128. See Bankers Life Ins. Co. v. Scurluck Oil Co., 447 F.2d 997, 1004-05 n.12 (5th Cir. 1971); United States v. Ridgelea State Bank, 357 F.2d 495, 498-99 (5th Cir. 1966) (refusing to
The courts must also deal with the aspect of subsection (23) that requires that the defendant's knowledge exist "at the time of the transaction." The term "transaction" is a word of flexible meaning that may comprehend a series of many occurrences\(^1\) and include events over a prolonged period of time;\(^2\) therefore, subsection (23) appears to impose on the defendant a continuing duty to disclose any information concerning the goods or services that he learns prior to the actual consummation of the sale, regardless of whether he had the information when negotiations first began.

(4) The Intention of Inducing the Consumer into a Transaction. The intentional non-disclosure of facts for the purpose of inducing action by another is fraudulent at common law.\(^3\) Accordingly, the requirement in subsection (23) that the defendant's failure to disclose information be "intended to induce the consumer into a transaction" derives from the common law and is an important limitation on the scope of a defendant's liability for non-disclosure under the Act. If a defendant can offer credible reasons for his non-disclosure other than a desire to see the transaction consummated, he may be able to avoid liability under subsection (23).

One possible application of this requirement has already been mentioned: If the defendant can demonstrate that the undisclosed facts were open and obvious or had been widely publicized, he may legitimately contend that he believed the buyer was already in possession of the information in question and had no need for further disclosure.\(^4\) Even if he was wrong in his assessment of the buyer's knowledge, he can point to prior disclosures or the granting of inspection rights as evidence that he had no intention to induce the buyer into a transaction by his silence.

This intention requirement is also important in cases in which the defendant had no pecuniary interest in the consummation of the transaction. Consider, for example, the situation in which a prospective home buyer

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\(^1\) Custom Leasing, Inc. v. Texas Bank & Trust Co., 516 S.W.2d 138, 143 (Tex. 1974); RESTATEMENT OF RESTITUTION § 8 (1937). An intention that the nondisclosure be acted upon is one of the elements of an action for fraudulent concealment. Teodono v. Bachman, 404 P.2d 284, 285 (Colo. 1965).

\(^2\) See note 108 supra and accompanying text.

\(^3\) See note 108 supra and accompanying text.

\(^4\) See note 108 supra and accompanying text.
employs a home inspection service to examine a house and advise him as to its condition. The inspection service makes its examination and collects its standard fee, but fails to disclose to the buyer numerous defects that are discovered after the buyer purchases the home. Buyer then sues the home inspection service alleging, among other things, a violation of subsection (23). In these circumstances, the home inspection service's primary defense probably would be lack of knowledge, assuming that it simply failed to discover the defects in question before the buyer purchased the house. In addition, it could defend on the grounds that it was not motivated by a pecuniary interest in the consummation of the transaction since its fee would be the same whatever was disclosed in its report. Accordingly, its failure to disclose information concerning the property probably was not intended to induce the consumer to purchase its services.\footnote{133. The absence of a pecuniary interest in the consummation of the sale would not be relevant, however, if the inspection service had made affirmative misrepresentations. See, e.g., Spicer v. Great Serv., Inc., 580 S.W.2d 14 (Tex. Civ. App.—San Antonio 1979, no writ) (misrepresentation of condition of air conditioning and heating system in connection with home sale).}

Contrast this situation with a case in which the defendant is a real estate broker acting as agent for the seller. The broker has an obvious monetary interest in making the sale since his commission depends upon it. Accordingly, a broker's failure to disclose information to the consumer that was known to the broker at the time of the transaction might well have been "intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed."\footnote{134. 1979 DTPA § 17.46(b)(23).} A seller's broker would therefore appear to have a duty under subsection (23) to disclose known defects in the property to the buyer even if (and particularly if) such disclosure would be likely to prevent consummation of the sale.\footnote{135. Such a duty may also have existed at common law. See Saporta v. Barbagelata, 220 Cal. App. 2d 463, 33 Cal. Rptr. 661 (1963).} A similar duty exists, of course, between the buyer and his own broker.\footnote{136. See Neff v. Bud Lewis Co., 89 N.M. 145, 548 P.2d 107, 110 (Ct. App. 1976).}

The "intention to induce" requirement may also be significant in cases involving the failure to disclose facts that do not appear material under the circumstances known to the seller, but that may be of considerable consequence to a particular buyer. For example, a buyer might purchase a house with the intention of making certain improvements, such as adding a second story, only to discover that soil conditions around the house are such that the improvements cannot be made or can only be made at considerable extra expense. If such a buyer were to sue the seller under subsection (23) for failure to disclose these limitations, the seller might defend on the grounds that without knowledge of the buyer's particular needs, he could not have known that these facts would influence the decision to buy. Accordingly, even though the information in question was known to the seller, he could argue that his nondisclosure was not intended to induce a transaction that otherwise would not have occurred.
The Consumer Would Not Have Entered the Transaction Had the Information Been Disclosed. This provision is essentially a materiality requirement. Like other materiality requirements, it is designed to insure "that a cause of action cannot be established by proof of a defect so trivial, or so unrelated to the transaction . . . that correction of the defect or imposition of liability would not further the interests protected." 137

In selecting a materiality requirement for subsection (23), the legislature looked to the strict materiality standard for common law fraud actions, 138 and not to the more relaxed materiality requirements for affirmative conduct under the 1977 DTPA, 139 or to standards governing suits under the federal securities laws, 140 the Federal Trade Commission Act, 141 or other federal statutes. 142 Subsection (23) imposes liability for a nondisclosure only in circumstances where the trier of fact believes that the information withheld would actually have altered or changed the consumer's decision to buy. In short, the transaction must be one that the consumer "would not have entered" if the information had been disclosed. This is precisely the standard used in common law fraud cases. 143 It is clearly different from "the capacity to deceive" standard of Federal Trade Commission cases 144 and affirmative conduct cases under the 1977 DTPA, 145 from the "capacity to influence" standard of federal bank loan cases, 146 and from the "substantial likelihood" and "significant propensity" standards of the federal securities laws. 147

Given the multiplicity of materiality standards under federal law, it is perhaps fortunate that subsection (23) was not adopted in the form in which it was originally presented to the senate. In its initial form, the amendment prohibited failure to disclose a known past or existing material fact. 148 After being defeated in the senate, 149 that amendment was exten-

138. See H.W. Broaddus Co. v. Binkley, 126 Tex. 374, 88 S.W.2d 1040 (Tex. Comm'n App. 1936, opinion adopted); Riverside Nat'l Bank v. Lewis, 572 S.W.2d 553, 558 (Tex. Civ. App.—Houston [1st Dist.], 1978, writ granted); Shepard v. Rubin, 462 S.W.2d 316, 320 (Tex. Civ. App.—Dallas 1970, no writ); Connor v. Buckley, 380 S.W.2d 722, 724 (Tex. Civ. App.—Waco 1964, no writ); cf. RESTATEMENT (SECOND) OF TORTS § 538(2)(a) (1977) ("would attach importance in making his choice"). See also Senate Floor Debate, supra note 49, at 13. The Senate debate shows that the legislature had the common law definition of "material" in mind when subsection (23) was under consideration. See note 150 infra.
141. Goodman v. FTC, 244 F.2d 584, 602 (9th Cir. 1957).
142. See, e.g., 18 U.S.C. § 1014 (1976) (prohibiting the making of false statements to a bank in order to obtain a loan); United States v. Braverman, 522 F.2d 218, 228 (7th Cir. 1975).
143. See note 138 supra.
144. See Goodman v. FTC, 244 F.2d 584 (9th Cir. 1957).
145. See note 139 supra.
146. See United States v. Braverman, 522 F.2d 218, 228 (7th Cir. 1975).
148. See Senate Floor Debate, supra note 49, at 5.
149. Id. at 14.
sively revised, and in its final form the amendment fixes the standard of materiality for nondisclosure cases by requiring that the consumer would not have entered the transaction if the information had been disclosed. The amendment thus avoids the necessity for further judicial interpretation that would have been required had the term "material fact" been used.

One problem that may still need judicial clarification, however, is whether materiality under subsection (23) is based on the objective standards of the hypothetical reasonable consumer or on the subjective values of the individual plaintiff. Ordinarily, this would not be a difficult question to answer since, as the United States Supreme Court has stated: "The question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor." Nevertheless, subsection (23) uses the term "the consumer" twice, as if referencing the particular consumer who is plaintiff in the case, and the applicable Texas cases all discuss materiality in terms of the plaintiff's conduct rather than the conduct of a hypothetical reasonable purchaser. The issue may therefore be submitted to the fact finder in terms of the effect of the nondisclosure on the conduct of the particular plaintiff rather than in terms of the effect of the nondisclosure on a reasonable consumer.

The type of proof that will be required to show that the omitted information would have altered the consumer's decision to purchase will, of course, vary with the facts of each case. Courts have held, however, that

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150. Adoption of a stricter materiality standard in nondisclosure cases than in cases involving affirmative misrepresentations appears to result from a legislative concern for the excessive burden that a less narrowly defined disclosure requirement would place on the seller. Senator Meier had criticized the disclosure requirement as requiring the seller to prepare a prospectus, booklet, or brochure in order to meet his disclosure obligations. Id. at 9. In responding to this criticism, Senator Clower emphasized the role of the materiality requirement in limiting the seller's disclosure obligations:

Now, let's talk about what kind of facts we're talking about. I'm not talking about a prospectus or a brochure about the facts about product for sale. I'm not talking about any fact. In the Texas Digest there are compilation[s] of cases that are indeterminately long that define what is a material fact.

And a material fact is, in plain English, a material fact. . . .

Id. at 13.

152. 1979 DTPA § 17.46(b)(23) (emphasis added).
153. See note 138 supra. It might be argued that subsection (23) contains a reliance rather than a materiality requirement. See List v. Fashion Park, Inc., 340 F.2d 457, 463 (2d Cir.), cert. denied, 382 U.S. 811 (1965). The courts, however, have generally moved away from reliance and toward materiality in nondisclosure cases since it is difficult to prove reliance on an omitted fact. See Affiliated Ute Citizens v. United States, 406 U.S. 128, 153 (1972) ("Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery."). Moreover, the Texas courts have required proof that the transaction would not have been entered into but for the misrepresentation (an issue described as involving materiality) even where reliance on the misrepresentation was separately found. See Connor v. Buckley, 380 S.W.2d 722, 723-24 (Tex. Civ. App.—Waco 1964, no writ). It would not appear necessary to determine whether reliance or materiality is the more appropriate analogy, however, since the necessary factual determination can be made by the jury in terms of the language of the statute itself.
materiality is determined at the time the alleged wrongful conduct oc-
curs. Accordingly, subsequent events cannot make an omission mate-
rial that was unimportant when it occurred, nor can they make an
important fact immaterial by showing that subsequent events rendered it
unimportant.

Arguably, limiting a seller's disclosure obligation to material facts, that
is, facts that would actually alter a consumer's decision to buy, sufficiently
defines the disclosure obligation to permit effective compliance with the
Act. In some situations this may be true. There will be many other
situations, however, in which the information concerning a product or
service will be so abundant that distinguishing the material from the in-
material facts will be more a matter of guesswork than judgment. The
materiality test is by no means easy to apply. Courts themselves have dis-
agreed about which facts were material in a given set of circumstances,
and lay jurors have been unable to apply the concept without detailed gui-
dance from a court. It is therefore likely that the average merchant will
also have difficulty in deciding what must be disclosed. Unfortunately,
this task will not be made any easier by the fact that subsection (23) trans-
fers this complex disclosure obligation into an environment (the depart-
ment store, for example) where literally tens of thousands of products are
on sale at any given time. Adequate disclosure in these circumstances may
prove nearly impossible to achieve.

Conclusions. This analysis of the legal components of a nondisclosure
claim suggests that there are numerous problems that the courts must re-
solve in administering claims under subsection (23). Moreover, in light of
existing common law protections, adding this provision may have been
unnecessary and undesirable. There is a serious possibility that subsection
(23) may have a substantially unsettling influence on the finality of trans-
actions, including those that are basically fair and without any genu-
inely injurious effects on the consumer. If, for example, consumers can
persuade courts that subsection (23) extends beyond the duty to disclose
basic defects in the product or service itself to such matters as generic sub-
stitution, model discontinuance, quality control data, and financial infor-

154. See City Nat'l Bank v. Vanderboom, 422 F.2d 221, 230 (8th Cir. 1970) (validity of
claim of fraudulent misrepresentation in stock purchase transaction is determined "in light
of the facts existing at the time of the misrepresentation").
155. See A. Jacobs, supra note 98, § 61.02[a], at 3-72.
156. See Sonesta Internat'l Hotels Corp. v. Wellington Assocs., 483 F.2d 247, 254 (2d
Cir. 1973).
157. See, e.g., Senate Floor Debate, supra note 49, at 13, quoted at note 150 supra.
158. See, e.g., TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 451-64 (1976) (Supreme
Court reversing court of appeals' determination that nondisclosures were material as a mat-
ter of law).
(jury foreman advising judge that jury unable to understand special issue without a defini-
tion of "material fact").
160. Senator Meier attempted to warn his colleagues that subsection (23) would have this
effect. See note 114 supra.
information, then few transactions are likely to be immune from challenge under the DTPA.

Moreover, disclosure beyond a certain point may not be as beneficial to the consumer as it is sometimes believed to be. A growing body of empirical evidence questions the impact of disclosures on consumer buying patterns,\textsuperscript{161} particularly among the poor.\textsuperscript{162} Even if one assumes, however, that disclosure will alter consumer buying habits, it is not entirely clear that a disclosure provision like the one contained in the DTPA will alter those habits for the better.

The information that must be disclosed in order to avoid liability under subsection (23) is essentially negative in character. It is information that if known would have discouraged the consumer from entering into the transaction. One possible danger of such a requirement is that the sellers who most diligently comply with their disclosure obligations may be penalized by having consumers turn away from their products to the products of sellers whose disclosures are less complete and therefore less alarming. There is no guarantee, however, that the products sold by the second group of sellers will in fact be superior to those sold by the first group. Quite the reverse may be true. In that event, the disclosure obligation will have helped to induce consumers to purchase inferior products, an effect certainly not intended by the legislature.

Another potential problem is the cost of compliance to the seller and thus indirectly to the consumer. There is no indication in the legislative history of the amended Act that any attempt was made to obtain such information before subsection (23) was adopted. Cost will vary, of course, with the means as well as the degree of disclosure. Advertising is a relatively expensive means of disclosure;\textsuperscript{163} product labeling costs considerably less. Product labeling, however, is less effective than advertising\textsuperscript{164} and is likely to have increasingly less impact on the consumer as the labeling becomes more extensive and complex.\textsuperscript{165} Subsection (23) provides the seller with no guidance as to how his disclosure obligations under the Act are to be discharged. The cost of disclosure is therefore likely to remain a highly variable item with each seller and each type of product. Until the cost is somehow measured and the indirect cost to the consumer determined, it must remain an article of faith that the benefits of such disclosure outweigh the costs.

Unfortunately, the cost of subsection (23) is not limited to the cost of attempted compliance. Litigation expenses and attorneys' fees are also likely to be significant hidden cost items, particularly if compliance with

\textsuperscript{161} See Whitford, \textit{The Functions of Disclosure Regulation in Consumer Transactions}, 1973 \textit{Wis. L. Rev.} \textit{400, 403 & n.21.}

\textsuperscript{162} See generally Note, \textit{Consumer Legislation and the Poor}, 76 \textit{Yale L.J.} 745 (1967).

\textsuperscript{163} Whitford, \textit{supra} note 161, at 447.

\textsuperscript{164} \textit{Id.} at 443-44. Whitford concludes, however, that there is insufficient information to assess the full impact of product labeling disclosure. \textit{Id.} at 444.

\textsuperscript{165} \textit{Id.} at 443-44. As already noted, it is unclear whether these types of disclosures, as opposed to direct communication with the consumer, will be adequate. \textit{See} text accompanying notes 109-14 \textit{supra}. 
subsection (23) proves difficult to achieve. There is every indication that compliance with subsection (23) will not be easy. The scienter requirement, which is quite high, may afford some measure of protection to the seller once the litigation is started. The problem is avoiding litigation entirely, and that problem may prove to be a difficult one. For one thing, subsection (23) is in some respects broader than the antifraud provisions of the federal securities laws and the disclosure requirements of the Federal Trade Commission Act. The problem is further aggravated by the absence of any administrative rules or regulations describing a seller's disclosure obligations under subsection (23). The securities laws provide those engaged in securities transactions with detailed guidance as to the specific information that must be disclosed in many types of transactions. The same is true of truth-in-lending requirements. Furthermore, the Securities and Exchange Commission and the Board of Governors of the Federal Reserve System are available to help parties and their lawyers achieve compliance with the disclosure requirements of the federal laws involved. No comparable administrative guidelines or assistance is available to those who may wish to comply with subsection (23). Although the attorney general's office has general enforcement responsibility for the Act, its lawyers probably could offer little more than an educated guess as to the application of subsection (23) in any particular instance since their only guidance is the statute itself and possibly imperfect analogies to common law fraud or federal trade commission cases.

A final problem with subsection (23) is that it applies to the occasional seller who is likely to be as unsophisticated as those who buy from him. The person selling his own home, for example, or holding a garage sale is subject to the disclosure requirements of subsection (23), yet most likely will never understand how to comply with them or even know that they exist. Furthermore, subsection (23) exposes these and other sellers to treble damages, a sanction so harsh that it has not been thought necessary as a punishment for nondisclosure of material facts even under the antifraud provisions of the federal securities laws.

166. See discussion at notes 117-36 supra and accompanying text.
167. See notes 86-87, 102-03 supra and accompanying text.
168. See, e.g., 17 C.F.R. §§ 229.1-.20 (1979) (Regulation S-K: information required in registration statements); id. § 240.14a-101 (Schedule 14A: information required in proxy statements); id. § 240.14d-100 (Schedule 14D-1: information required in tender offers).
171. The effects of this penalty could be as dramatic as those imagined in the example of the homeowner who buys a house that was constructed over landfill (see notes 90-94 supra and accompanying text); an individual selling his own home, for example, who unsuccessfully defends himself against a subsection (23) claim, could lose the entire equity that it had taken him a lifetime to build and that he planned to use for retirement.

172. See Carras v. Burns, 516 F.2d 251, 259-60 (4th Cir. 1975) (denial of punitive damages on ground that 1934 Securities Act prohibits recovery in excess of actual damages); deHaas v. Empire Petroleum Co., 435 F.2d 1223, 1229-32 (10th Cir. 1970) (punitive damages
It is hoped that the legislature will reevaluate subsection (23) in the next legislative session. It sets an unrealistically high disclosure standard that will be widely violated and, given time, is likely to generate an enormous amount of litigation of questionable benefit to the consumer. The need for subsection (23) should be carefully evaluated in light of existing remedies. If retained at all, the disclosure obligation should be limited to known defects in the product or service itself, to facts basic to the transaction, or to a prohibition on half-truths. Furthermore, treble damages for nondisclosures should either be abolished entirely, or an exemption or reduction in penalties should be considered for the occasional seller. A provision that is consistent with the realities of the marketplace is more likely to benefit consumers than one that establishes unreachable goals.

F. Section 17.46(c): Judicial Construction of the DTPA

Prior to the 1979 amendments, section 17.46(c) provided that it was the intent of the legislature that the courts be guided by the interpretations given the Federal Trade Commission Act by federal courts in construing section 17.46(a) in private consumer actions. The 1979 amendments now expressly provide that the courts are not prohibited from considering pertinent decisions of courts in other jurisdictions. The 1979 modification is an apparent attempt to free the courts from the necessity of following interpretations of the Federal Trade Commission Act when those interpretations would be inappropriate in the context of treble damage recovery.

This modification is particularly important given the almost uniform adherence exhibited by Texas courts to interpretations of the Federal Trade Commission Act. For example, in *Royal Globe Insurance Co. v. Bar Con*...
The Texas Supreme Court held that an agent's lack of actual authority is not a defense to a claim for treble damages against his principal if the agent was acting within the apparent scope of his authority. Adopting the analysis contained in an FTC injunction case, the court reasoned that because the principal selected the agent to act in the venture, it was fair to impose upon the principal the entire risk that the agent might exceed his instructions. The result reached by the supreme court was not mandated by the DTPA and is arguably contrary to the court's own prior decisions. Before it was amended, section 17.46(c) provided that the courts were to be guided by the Federal Trade Commission Act only with regard to their interpretations of section 17.46(a), which broadly proscribes all deceptive acts and practices. Section 17.46(c) never required the court to look to the Federal Trade Commission Act when, as in Royal Globe, the allegations concerned the enumerated proscriptions contained in section 17.46(b). Moreover, the court in Royal Globe failed to discuss its own decision in Fisher v. Carrousel Motor Hotel, Inc., which adopted the Restatement position clearly limiting a principal's liability for exemplary damages. Why treble damages should be awarded in the Royal Globe context and punitive damages not awarded in essentially the same fact situation under the common law was never explained by the court. The mere recitation of FTC cases is not an adequate justification for an entirely new rule in DTPA cases when the FTC cases cited as authority concern government enforcement actions for injunctive relief and not claims for punitive damages.

The 1979 amendment to section 17.46(c) should encourage courts to search for the most appropriate legal precedent without regard for its source and thereby improve the quality of decision-making under the Act. No longer will Texas courts be restricted to an interpretation of law that, while suitable in a government enforcement action, may be entirely inappropriate in a treble damage case.

G. Section 17.46(d): Restriction of Consumer Actions to Laundry List Items

Section 17.46(d), when read with section 17.50(a)(1), provides that a consumer may sue only for false, misleading, or deceptive acts or practices

176. 577 S.W.2d 688, 694 (Tex. 1979).
177. Id. (citing Standard Distribs., Inc. v. FTC, 211 F.2d 7, 15 (2d Cir. 1954)).
179. 424 S.W.2d 627, 630 (Tex. 1967).
180. RESTATEMENT (SECOND) OF TORTS § 909 (1979) (punitive damages awarded against the principal only when the principal authorized the doing and the manner of the act; the agent was unfit and the principal was reckless in employing him; the agent was employed in a managerial capacity and was acting within the scope of his employment; or, the principal ratified or approved the act).
181. Goodman v. FTC, 244 F.2d 584 (9th Cir. 1957) (cease and desist order); Standard Distribs., Inc. v. FTC, 211 F.2d 7 (2d Cir. 1954) (cease and desist order).
1979 DTPA AMENDMENTS

specifically enumerated in the subdivisions of section 17.46(b). This is a significant change from prior law and appears to be responsive to the constitutional difficulties that were perceived to exist in section 17.46(a) of the 1977 statute.

In Singleton v. Pennington the Dallas court of civil appeals considered the constitutionality of section 17.46(a) under due process standards. The issue before the court on motion for rehearing was whether the general prohibition against false, misleading, or deceptive acts or practices contained in section 17.46(a) gave the defendant fair notice at the time of the transaction that innocent misrepresentations not specifically described in the Act would subject him to treble damages. The defendant in Singleton had sold the plaintiff a used boat. Prior to sale the defendant informed the plaintiff that the boat, motor, and trailer had been repaired and were in "excellent condition" and "just like new." Within two months of the sale the gear housing on the motor had to be repaired. The plaintiff sued for violations of the DTPA and recovered both actual and exemplary damages.

On appeal, the Dallas court found that the defendant's statements did not fall within the specific prohibitions in section 17.46(b). It then addressed defendant's argument, raised for the first time on appeal, that section 17.46(a) was unconstitutionally vague since the term "false, misleading or deceptive acts or practices" was defined nowhere in the Act. After determining that the treble damage provision of the Act was penal in nature, the court reviewed a number of United States Supreme Court cases dealing with the specificity requirements of penal statutes and concluded that section 17.46(a) did not give fair notice to the defendant that his conduct would subject him to the treble damage penalty. The court avoided finding the statute unconstitutionally vague, however, by construing section 17.46(a) to require that false or misleading statements concern-

182. 1979 DTPA § 17.46(d) provides: "For the purposes of the relief authorized in Subdivision (1) of Subsection (a) of Section 17.50 of this subchapter, the term 'false, misleading, or deceptive acts or practices' is limited to the acts enumerated in specific subdivisions of Subsection (b) of this section."


185. Id. at 374.

186. The "void for vagueness" doctrine requires that a statute be declared void on its face if the statute "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). See L. Tribe, American Constitutional Law 718-20 (1978); Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960).

187. 568 S.W.2d at 369.

188. The exemplary damages were limited to $500 as a result of a pretrial stipulation.

Id.

189. Id. at 381.

190. Id. at 375-76.

191. Id. at 377.

192. Id.
ing the need for repair services must be made "knowingly" in order to be actionable under the Act.193 Because the United States Supreme Court had previously relied on the requirement of intent or willfulness in upholding, against due process attacks, statutes that otherwise would have been held unconstitutionally vague,194 the court found section 17.46(a) constitutional.195 The evidence was undisputed that the defendant in Singleton did not know that his statement was false at the time he made it;196 therefore, the decision of the trial court was reversed and judgment rendered in defendant's favor.

A similar concern with the constitutionality of section 17.46(a) was expressed by Chief Justice Greenhill in his concurring opinion in Spradling v. Williams.197 The chief justice stated:

I should like to point out that the Court's opinion makes no holding with regard to penal damages for the violation of an unlisted or unspecified act.

I have grave doubts about the constitutionality of penal damages for the violation of "unlisted" and unspecified unlawful acts. It is one thing for the Legislature to create a cause of action in tort or contract for actual damages caused by reliance on unfair and deceptive trade practices; but it is another thing for it to create a penalty of triple damages for the violation of unwritten, unlisted and unspecified unlawful acts.198

Unfortunately, the chief justice did not explain the legal basis for distinguishing actual damages caused by unfair and deceptive trade practices from treble damages for the violation of "unwritten, unlisted and unspecified unlawful acts." In other contexts, however, it has been recognized that the standards of certainty under the due process clause vary with the severity of the sanctions imposed.199

Taken together, Singleton and Spradling created sufficient doubts about

193. Id. at 379-80. This interpretation was based in part on language in § 17.46(c) that directed courts to be guided by the laundry list items in § 17.46(b) in construing § 17.46(a), and in part on the determination that the provisions of subdivision (13) of § 17.46(b) that dealt with the need for repair services were most closely analogous to the facts before the court. Subdivision (13) of § 17.46(b) contains a scienter requirement of its own.


195. 568 S.W.2d at 380-81.

196. Id. at 369.

197. 566 S.W.2d 561, 564-65 (Tex. 1978).

198. Id. at 565 (emphasis added).

199. Note, supra note 186, at 69 n.16. Generally speaking, the certainty required of a statute is higher in criminal than in civil statutes. Winters v. New York, 333 U.S. 507, 515 (1948); Horn v. Burns & Roe, 536 F.2d 251, 255 (8th Cir. 1976); Massachusetts Welfare Rights Org. v. Ott, 421 F.2d 525, 527 (1st Cir. 1969). Where a civil statute imposes a forfeiture or penalty, however, it will be tested according to the more stringent due process requirements applicable to criminal statutes. Jordan v. De George, 341 U.S. 223, 231 (1951); Singleton v. Pennington, 568 S.W.2d 367, 376 (Tex. Civ. App.—Dallas 1977, writ filed). Indeed that test was applied in Singleton to the imposition of treble damages under the DTPA. See Testimony on Economic Development, supra note 1, tape 1, at 3, 10 & 11. This
the constitutionality of imposing treble damages for violations of section 17.46(a) to make legislative reform of this provision desirable. That reform has been accomplished in section 17.46(d) and section 17.50(a)(1) by limiting treble damage actions to conduct that violates the specific prohibitions of section 17.46(b). The broad language of section 17.46(a) prohibiting "false, misleading, or deceptive acts or practices" remains unchanged, except that its enforcement is now limited to actions by public officials.\textsuperscript{200} The constitutional dangers resulting from the vagueness of the proscription, however, will be far less severe in most public enforcement actions because the relief available in such cases is more limited. The attorney general is not authorized to sue for treble damages. He is authorized to sue for injunctive relief,\textsuperscript{201} actual damages or restoration of property to injured parties,\textsuperscript{202} civil penalties not to exceed $2,000 per violation and $10,000 in the aggregate,\textsuperscript{203} and civil penalties of not more than $10,000 per violation or a total of $50,000 for violation of the terms of an outstanding injunction.\textsuperscript{204} With the exception of the $2,000 to $10,000 penalty, the relief sought is either compensatory or prospective; therefore, these sanctions are less subject to constitutional attack than private consumer actions, even if conduct not within the laundry list is the subject of public enforcement.

Compensatory relief in the form of actual damages or restoration of property obtained in violation of the statute, \textit{i.e.}, rescission, is exclusively civil in character and should be judged according to the more relaxed constitutional standards governing civil proceedings.\textsuperscript{205} Similarly, the section granting injunctive relief and civil penalties for violation of an outstanding injunction should be subjected to a less stringent standard of certainty since no sanctions are imposed until after the defendant has been put on notice by the injunction itself that his conduct is unlawful.\textsuperscript{206} As long as public enforcement proceedings are confined to prospective remedies of this type,\textsuperscript{207} the meaning of the phrase "false, misleading, or deceptive acts

\textsuperscript{1979} See note 69 supra and accompanying text.
\textsuperscript{200} See note 69 supra and accompanying text.
\textsuperscript{201} 1977 DTPA § 17.47(a), (b).
\textsuperscript{202} Id. § 17.47(d).
\textsuperscript{203} Id. § 17.47(e).
\textsuperscript{204} Id. § 17.47(c).
\textsuperscript{205} See note 199 supra.
\textsuperscript{206} Collings, \textit{supra} note 194, at 209, argues:
Where statutory sanctions are purely of prospective effect, it may be unnecessary to require the same definiteness as where the penal sanction comes only after the issuance or violation of an injunction or other court order. If there can be no deprivation of life, liberty or property until a court order is issued and violated, the statutory language can be quite vague; it is the order itself which should be specific. Conversely, however, if such deprivation can happen, for example where the statute permits an injured private person to sue for treble damages, even before any court enforcement order, it seems rather obvious that statutory definiteness must be required if due process is to be regarded.
\textit{See also} Note, \textit{supra} note 186, at 77 n.15.
\textsuperscript{207} The FTC's authority to enter cease and desist orders is prospective in character. The purpose of such orders is "to prevent illegal practices in the future," FTC v. Ruberoid
or practices” can be developed and extended on a case-by-case basis much like the phrases “unfair or deceptive acts or practices”208 and “unfair methods of competition”209 have developed under the Federal Trade Commission Act.210 The FTC procedure vests in a public body with broad expertise and no personal financial stake in the outcome of the litigation the task of developing, under close judicial scrutiny, the rules necessary to regulate harmful practices unforeseen by the legislature.211 The DTPA strives for this same flexibility by giving the attorney general similar prosecutorial powers, and simultaneously limiting the self-interested private litigant’s right to pursue treble damages to well-defined violations. In short, the 1979 amendments permit the continued evolution of the DTPA to meet new forms of deceptive consumer practices, while at the same time avoiding a constitutional confrontation that seemed imminent under the old Act.

The attorney general could, of course, force a resolution of the constitutional issue by suing for a $2,000 to $10,000 civil penalty under section 17.47(c) in a case involving conduct not enumerated in the laundry list. Such an action would pose many of the same notice problems that concerned the courts in Singleton and Spradling.212 That confrontation need not occur in the context of a public enforcement action,213 however, if in the exercise of an informed discretion the attorney general’s office limits its use of civil penalties to laundry list violations, conduct previously declared unlawful by the courts in injunctive proceedings, or undefined violations committed with actual knowledge that they were unfair or deceptive and in violation of the Act.214

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209. Id.

212. See notes 192-98 supra and accompanying text.


H. Section 17.50(a)(1): Authorization of Consumer Actions for False, Misleading, or Deceptive Acts or Practices that are Enumerated in Section 17.46(b)

The amendment to this section implements the limitation imposed by section 17.46(d) by authorizing consumer actions for false, misleading, or deceptive acts or practices only to the extent that such acts or practices are enumerated in section 17.46(b).

I. Section 17.50: Causation and Foreseeability

The 1979 legislature amended section 17.50 by substituting the term "producing cause" for the term "adversely affected" and thereby may have modified the Act to allow recovery of unforeseeable damages. Although prior to the 1979 amendments a few commentators had suggested that courts should use a producing cause standard in cases under the DTPA, no court has analyzed the ramifications of such a change. Several courts, however, have submitted language that approximates the causation-in-fact language found in the definition of producing cause.

215. See notes 182-214 supra and accompanying text.
216. 1979 DTPA § 17.50(a) provides: "A consumer may maintain an action where any of the following constitute a producing cause of actual damages . . . ."
217. Senator Meier presented § 17.50(a) to the senate, stating in part:
   Mr. President, members, in the discussions had, pertaining to the intent of the language beginning on line 4, page 7, of the bill in its present form, in attempting to define when there could be relief under section 17.50, we had adopted language which provided that if there was a sustaining of actual damages as a result of any of items 1 through 4, listed in § 17.50(a), that there would be a cause of action. Language was suggested in our discussions yesterday, which I believe says the same thing, but just in a different manner, to the effect that where any of the following, referring that thereby referenced to sections 1 through—subsections 1 through 4 in 17.50(a), constitute a producing cause of actual damages, then you'd have a cause of action under those items.
   And I think it's a clarification of the language that was in the bill to begin with, and suggest its adoption.

   Senator Doggett: [I]f I understand by using producing cause then, a court would know that in submitting a charge they would use producing cause of damages as their measure—as appropriate yardstick to the jury.
   Senator Meier: Yes, Senator. And I think that's what's customarily being practiced today, is—and how these cases are being submitted.
   Senator Doggett: Thank you.

220. For examples of those cases using causation-in-fact language, see Note, Special Issue Submission in Cases Controlled by the Texas Deceptive Trade Practices Act: Spradling v. Wil-
By expressly adopting producing cause rather than its more conventional brother proximate cause, it may be claimed that the legislature deleted the concept of foreseeability as a necessary element of causation.221 Under the amended Act, a consumer may argue that he need prove only that damages were in fact caused by a deceptive act or practice. He may contend that he is not limited to those damages that were foreseeable at the time the deceptive act or practice took place.

Under this argument, the consumer who purchases a defective part for a machine may recover lost profits under the 1979 Act even though the seller had no reason to know that the particular part would be used in the consumer's business. Such a result, however, would be a significant departure from the rule in contract cases, which limits consequential damages for breach of warranty to those within the contemplation of the parties.222 A producing cause standard would also be a significant departure from the rule in fraud cases in which a proximate cause standard has been used to diminish the spectrum of potential damages.223 Because the producing cause standard might be interpreted to require the court to apply a simple causation-in-fact test rather than focus on the objective foreseeability of damage, it could result in a substantially greater damage award to the plaintiff.

Traditional limitations on the scope of damages will probably continue to exist, however, even under the amended Act, due to judicial interpretations of the term “actual damages” in section 17.50. The courts in applying the old Act have interpreted the term “actual damages” in accordance with the settled rules of the common law and have limited the scope of

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221. Compare the following definition of producing cause: "An efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of, if any. There can be more than one producing cause." Rourke v. Garza, 530 S.W.2d 794, 801 (Tex. 1975) (quoting with approval issue submitted by trial court), with the prevailing proximate cause definition: "a natural and continuous sequence, which produces an event and without which the event would not have occurred; and in order to be a proximate cause, it must have been reasonably foreseen that such event, or some similar event, was likely to have resulted from such cause." Turner v. Clark, 412 S.W.2d 707, 711 (Tex. Civ. App.—Amarillo 1967, writ ref’d n.r.e.). Texas courts have recognized that proximate cause is in essence composed of two elements: cause-in-fact and the foreseeability of the result. See, e.g., Farley v. MM Cattle Co., 529 S.W.2d 751, 755 (Tex. 1975); Lumpkins v. Thompson, 553 S.W.2d 949, 956 (Tex. Civ. App.—Amarillo 1977, writ ref’d n.r.e.). Texas courts have acknowledged that the foreseeability concept is not an element of producing cause. Hartzell Propeller Co. v. Alexander, 485 S.W.2d 943, 946 (Tex. Civ. App.—Waco 1972, writ ref’d n.r.e.). See also C.A. Hoover & Son v. O.M. Franklin Serum Co., 444 S.W.2d 596, 598 (Tex. 1969).


damages even in cases utilizing a producing cause standard.\textsuperscript{223a} Under this interpretation, lost profits would not be recoverable in misrepresentation cases under the DTPA since they are not recoverable in an action for common law fraud.\textsuperscript{224} This approach is illustrated by recent DTPA cases dealing with damage claims for mental anguish.

Courts traditionally have refused recovery for mental anguish, reasoning that such injuries were too remote and were not within the contemplation of the parties.\textsuperscript{225} The few Texas courts that have directly addressed that issue in the context of the DTPA have reached the same result, but on the ground that the DTPA uses the term "actual damages," which at common law has been held not to include mental anguish unless caused by an intentional tort or accompanied by physical injury to the plaintiff.\textsuperscript{226}

To the extent that recovery for mental anguish has been denied at common law because of a lack of foreseeability,\textsuperscript{227} it could be argued that the adoption of a producing cause standard reinstates mental anguish as a recoverable element of damages under the Act. The DTPA cases that have rejected recovery of damages for mental anguish, however, do not support such a view since they limit the scope of recoverable damages even though a producing cause standard was used in the jury charge. Furthermore, such cases are not based exclusively on a foreseeability rationale. In American Transfer & Storage Co. v. Brown,\textsuperscript{228} for example, the court emphasized the subjective and elusive character of such damages: "If such damages are recoverable, the plaintiff can always testify concerning his subjective reactions and thus inject an element of damage that can rarely be rebutted, has no monetary measure, and is subject to no limits but the sympathy of the jury and the conscience of a reviewing court."\textsuperscript{229} These! considerations remain as valid under the amended Act as they were under the old statute.

On the other hand, there is legislative history from this past legislative session that lends some credence to the view that recovery of damages for mental anguish may now be allowable under the Act. Senate Bill 357 as it originally passed the senate defined actual damages to exclude mental

\textsuperscript{223a} See cases cited at note 226 infra.
\textsuperscript{224} See George v. Hesse, 100 Tex. 44, 93 S.W. 107 (1906); Hudson & Hudson Realtors v. Savage, 545 S.W.2d 863 (Tex. Civ. App.—Tyler 1976, no writ); Womack v. Lagow, 200 S.W. 878 (Tex. Civ. App.—Fort Worth 1917, no writ).
\textsuperscript{228} 584 S.W.2d 284 (Tex. Civ. App.—Dallas 1979, writ filed).
\textsuperscript{229} Id. at 297. See also Harned v. E-Z Fin. Co., 151 Tex. 641, 649-50, 254 S.W.2d 81, 86 (1953).
This provision was later deleted in the house and portions of the house debate indicate a legislative intention to permit recovery for mental anguish.\textsuperscript{231}

One commentator has argued that this legislative history requires that the term "actual damages" be read to include all damages, whether economic, physical, or mental.\textsuperscript{232} While this conclusion appears to be the view of at least some of the legislators in the house and is a fair inference from the debates, the term "actual damages" as used in the old Act was never changed, no definition of actual damages was ever adopted, and there is no indication that the house view of the term "actual damages" was concurred in by the senate. Therefore, even though the senate's attempt to explicitly restrict the meaning of actual damages was defeated, the original meaning of actual damages in the Act remained unchanged. Such an absence of change would appear to establish that the prior judicial interpretations of the term "actual damages" were not incorrect.

The adoption of a "producing cause" standard may nonetheless revive the mental anguish issue by arguably eliminating the foreseeability requirement. This change is not dispositive, however, since foreseeability may be derived from the term "actual damages" in those cases that involve special or consequential damage claims. Moreover, the inherently subjective and uncertain character of damages for mental anguish when unaccompanied by physical injury remains an important independent argument against allowing recovery for such damages under the Act, particularly when any damages awarded may be subject to trebling.

\textbf{J. Section 17.50(b)(1): Multiple Damage Recovery}

Prior to the enactment of the 1979 amendments\textsuperscript{233} the DTPA required

\textsuperscript{230} Senate Bill 357 as it originally passed the senate provided: "'Actual damages' means pecuniary loss including reasonably foreseeable incidental and consequential damages and does not include any payment for mental or physical pain or anguish except in cases where the act complained of resulted primarily in damages for physical injury to the person."

\textsuperscript{231} See Maxwell, \textit{The 1979 Amendments to the Texas Deceptive Trade Practices—Consumer Protection Act}, in \textit{STATE BAR OF TEXAS, TEXAS CONSUMER LAW—FOR GENERAL PRACTITIONERS} A-8 (1979). Maxwell quotes the following exchange in the house:

\begin{quote}
Rep. Gibson: \ldots Would it [the DTPA's phrase "actual damages" without a specific statutory definition] include \ldots any damages that were incurred by the plaintiff such as mental anguish?

Rep. Hill: \ldots It would include any damages that you could convince the jury had occurred as a result of the violation of the Deceptive Trade Practices Act. Rep. Gibson: \ldots So, in other words, any damages involving mental anguish, any damages that were consequential from (tortious) act of the defendant would be included in your amendment, is that correct?

\end{quote}

\textsuperscript{id}.

\textsuperscript{232} See id. at A-9 ("The logical conclusion to be drawn from the fact that the legislature specifically considered, and rejected, a restrictive definition of 'actual damages' is that the term is to be read to embrace \textit{any} damages to a consumer, be they economic, physical or mental.").

\textsuperscript{233} 1979 DTPA § 17.50(b)(1) provides:

In a suit filed under this section, each consumer who prevails may obtain:
the court to treble a consumer's actual damages. Testimony in both the house and senate during the recent amendment of the DTPA, however, revealed concern that an award of treble damages for innocent misrepresentations was too harsh a penalty and might ultimately increase the cost of goods or services to the consumer.\(^{234}\) The initial drafts of S.B. 357, which after modification evolved into the 1979 amendments, required the consumer to prove that a deceptive act was both intentional and unconscionable before multiple damages were recoverable.\(^{235}\) The conference committee diluted that requirement and substituted a provision requiring that the jury, rather than the court, determine whether damages should be trebled after a finding that there was a knowing violation of the Act.\(^{236}\)

The 1979 amendments still provide that the consumer is entitled to both actual and punitive damages for inadvertent deceptive acts or practices;\(^{237}\)

\(^{1}\) the amount of actual damages found by the trier of fact. In addition the court shall award two times that portion of the actual damages that does not exceed $1,000. If the trier of fact finds that the conduct of the defendant was committed knowingly, the trier of fact may award not more than three times the amount of actual damages in excess of $1,000 . . . .

234. Senator Meier opened the proceedings on S.B. 357 before the Committee on Economic Development, stating in part: "I'd like to . . . say to the committee that as you hear from the witnesses, there'll be many examples of how the act in its present form has been not only inequitable but retarding to commerce in Texas . . . ." Testimony on Economic Development, supra note 1, tape 1, at 1. Representative Jones suggested the central theme concerning the amendment of the DTPA in the following statement:

I am concerned that as time passes an excessive number of treble damages awards will greatly increase the cost of doing business. Prices will be increased to cover judgments paid, and judgments anticipated. By overcompensating the few we risk harm to the collective group of all consumers. And while I'm sure that a majority of consumers support making the wrong[ed] consumer whole, as well as punishing the knowing commission of a deceptive trade practice, I do not believe that the majority of consumers want to enrich the few at the expense of the many.

Moreover, treble damages are punitive in nature, and while they might be justified in 90% of the cases, they should not be tolerated if they produce injustice in 10% of the cases.

Transcript of Hearings of the State Affairs Committee, House of Representatives on H.B. 744, Feb. 26, 1979, at 3-4 [hereinafter cited as State Affairs Committee Hearings]. Transcripts of these hearings obtained by the authors are on file at the Underwood Law Library, Southern Methodist University.

235. Before the conference committee revisions, S.B. 357 provided that the jury could award up to treble damages if the defendant's acts were unconscionable. Unconscionability was in turn defined as:

"[T]aking advantage of a person's lack of knowledge, ability or experience." Such action must now be an intentional taking advantage of. Previously, the requirements for an action to be unconscionable were that there was a taking advantage or a gross disparity in the value received and consideration paid. Now both of these requirements must be met for an action to be unconscionable.

Meier, Bill Analysis: S.B. 357, at 1. A transcript of this bill analysis is on file at the Underwood Law Library, Southern Methodist University. After conference committee, "knowingly" was defined as it appears in the 1979 DTPA § 17.45(9).

236. 1979 DTPA § 17.50(b)(1).

237. It is evident from the following colloquy that the legislature intended that actual damages be recoverable without any proof of scienter.

Senator Doggett: [I]n terms of getting actual damages and [attorneys'] fees, there is no requirement of scienter, of knowingly or intentionally, you do have
treble damages, however, are only automatically computed to the extent that the consumer's actual damages do not exceed $1,000.\textsuperscript{238} As to actual damages over $1,000, multiple recovery under the amended Act is allowed only if the deceptive act or practice is found to have been knowingly made. In that event, the trier of fact may award "not more than three times the amount of actual damages in excess of $1,000."\textsuperscript{239}

If, for example, the jury finds that the consumer has suffered $1,400 actual damages, the consumer will receive an award of $3,400, comprised of $1,400 of actual damages, plus $2,000 awarded by the court (two times that portion of the actual damages that does not exceed $1,000). This $3,400 consists of an effective trebling of the first $1,000, plus the remaining $400 of actual damages. Under the pre-amendment law, that consumer, on the same proof, would have been entitled to three times the $1,400, or $4,200. If, under the amended law, the consumer proves that the defendant knowingly committed the deceptive act or practice, he also would be entitled to ask the jury to award up to $4,200, that being three times the amount of actual damages awarded in excess of $1,000 plus the $3,000 awarded on the trebling of the first $1,000 of actual damages. The difference, then, is that under earlier law trebling was automatic no matter what the actual damages were. Under the amended DTPA, only the first $1,000 of actual damages is automatically trebled; multiple damages on actual damages exceeding $1,000 requires proof of a knowingly deceptive act.

To simplify the submission of the trebling issue in jury trials, the court should first ask the jury to determine the amount of actual damages and then instruct the jury to subtract $1,000 from that amount if actual damages exceed $1,000. The court should then advise the jury that they may award additional damages not to exceed three times the amount of the remainder, but only if they find that the deceptive act or practice was committed knowingly. Thus, in cases where the actual damages exceed $1,000 the court can determine the correct amount of the judgment by adding

\textsuperscript{238} 1979 DTPA § 17.50(b)(1).

\textsuperscript{239} Id.

the requirement of an unconscionability to get treble damages, but there's no state of mind, intent, knowingly or whatever, that you have to do to get your actual damages?

Senator Meier: That's correct, Senator.

Senate Floor Debate, supra note 49, at 2-3.

\textsuperscript{238} 1979 DTPA § 17.50(b)(1).

\textsuperscript{239} Id. It has been suggested that the amended Act allows damages for knowing violations in excess of the treble damages allowed under the old statute. See Maxwell, The 1979 Amendments to the Texas Deceptive Trade Practices—Consumer Protection Act, in STATE BAR OF TEXAS, TEXAS CONSUMER LAW—FOR GENERAL PRACTITIONERS A-7 (1979). Under this approach, a successful consumer could recover four times the amount by which the consumer's actual damages exceed $1,000. For example, in a case involving $1,400 actual damages, the consumer would receive $1,400 (actual damages) + $2,000 (court awarded bonus damages) + $1,200 (treble the amount of damages in excess of $1,000 [i.e., $400]), for a total of $4,600.

The error in the above computations is found in trebling the $400 figure (i.e., $1,200) and then adding that amount to an actual damage figure of $1,400, a figure that already contains $400 in excess of $1,000. Under this approach, the amount in excess of $1,000 (i.e., the $400 figure) is actually quadrupled, even though § 17.50(b)(1) clearly states that the "trier of fact may not award more than three times the amount of actual damages in excess of $1,000."
$2,000 to the sum of the actual damages plus the punitive damages found. If, on the other hand, the jury finds actual damages of less than $1,000, no further jury findings on damages are necessary and the amount of the judgment can be determined simply by trebling the amount of actual damages found. The jury should be carefully instructed that it need not multiply the actual damages exceeding $1,000 by a whole number, but may award any fractional multiple of actual damages up to three times actual damages.\(^{240}\)

The legislature was apparently as concerned about the deterrent effect as about the compensatory aspects of the Act; thus, it would seem to follow that the jury should be instructed to consider the defendant’s culpability in assessing damages.\(^{241}\) Accordingly, the jury should be instructed that the multiple damages awarded are not solely to compensate the consumer, but also are awarded to deter the defendant then before the jury, as well as to deter others similarly situated.

It is unclear whether the jury should be advised that plaintiff could receive up to a $2,000 “bonus” under the 1979 DTPA. On the one hand, section 17.50(b)(1) provides that the court, rather than the jury, shall award twice the actual damages not in excess of $1,000. On the other hand, newly amended section 17.50(b)(1) grants the jury more authority in determining what exemplary damages should be awarded in achieving the twin goals of complete recovery and full deterrence than was granted in old section 17.50(b)(1).

There are no appellate decisions in Texas that discuss the propriety of disclosing the potentiality of a multiple damage award to the jury. In Pollock & Riley, Inc. v. Pearl Brewing Co.,\(^{242}\) confronted with a closely analogous question, the Court of Appeals for the Fifth Circuit held that the jury should not be apprised that antitrust awards are trebled. The court reasoned that if the jury knew that the damages would be trebled, they might reduce the actual damages award and thereby undermine the punitive purposes of the Clayton Act. The court stated that it was the jury’s duty to ascertain actual damages and the court’s duty to treble those damages.\(^{243}\) Thus, according to the court, as trebling antitrust damages is not relevant to any function performed by the jury, the jury should not be informed of the trebling.

The Fifth Circuit’s analysis is persuasive as to the mandatory multiple damage provision of the pre-1979 DTPA, but it is not controlling in situa-

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\(^{240}\) There is no express provision mandating an integer as a multiplier. Section 17.50(b)(1) simply provides that the jury may award “not more than three times the amount of actual damages.” Thus, the jury should be instructed that it can select a figure not more than three times the amount of actual damages.

\(^{241}\) In Mayer v. Duke, 72 Tex. 445, 453, 10 S.W. 565, 569 (1889), the court stated that a jury shall consider: (1) the degree of the outrage produced by the evil, (2) the frequency of the evil, and (3) the size of the award held to deter similar wrongs in the future. See also Lubbock Bail Bond v. Joshua, 416 S.W.2d 523, 530 (Tex. Civ. App.—Amarillo 1967, no writ).

\(^{242}\) 498 F.2d 1240, 1242 (5th Cir. 1974).

\(^{243}\) Id. at 1243.
tions where the jury has the duty to determine the amount of any exemplary damages. Accordingly, the Pollock analysis may control pre-amendment DTPA cases, but should not control post-amendment cases since the 1979 amendments clearly grant the jury responsibility for awarding punitive damages.244 Rather than shielding the jury from the fact that punitive damages may be levied in apprehension that such knowledge would result in less punishment, the Sixty-Sixth Texas Legislature delegated to the trier of fact the ultimate decision of the amount of punitive damages, if any, to be awarded. Preventing the jury from considering the fact that as much as a $2,000 fine will automatically be levied against a defendant found liable under the Act irrespective of his state of mind is to withhold information that is highly relevant to the jury's function of determining the amount of any additional punitive damages that may be necessary to punish and deter the defendant.245 Thus, the trebling provision of section 17.50(b)(1), unlike the treble damage provision in its predecessor, should be disclosed to the jury if punitive damages are sought.

K. Sections 17.50(c) and (d): Attorneys' Fees

Section 17.50(c) provides for an award of reasonable and necessary attorneys' fees and court costs to a defendant if the plaintiff's DTPA suit was groundless and brought in bad faith or for the purpose of harassment.246 Section 17.50(d) provides for an award of court costs and reasonable and necessary attorneys' fees to the plaintiff who prevails in any suit under the DTPA.247 Both of these provisions were amended in 1979 by deleting the requirement that attorneys' fees be "reasonable in relation to the amount of work expended,"248 substituting instead the requirement that such fees be "reasonable and necessary."249

By requiring that attorneys' fees be necessary as well as reasonable, the 1979 amendments make the DTPA consistent with interpretations of article 2226, the principle Texas attorneys' fees statute.250 Further, by elimi-
nating the requirement that attorneys’ fees be reasonable in relation to the amount of work expended, the 1979 amendments eliminate the possibility that an attorney fee award could be made for work actually expended in a case but unnecessary to the prosecution of the claim. Accordingly, the amendments appear designed to discourage attorney fee awards for unnecessary work. If that was the purpose of the amendment, however, it may have been unnecessary. Although article 2226 recites only that the court may award reasonable fees, that statute has been interpreted as requiring proof that attorneys’ fees are both reasonable and necessary to the claim asserted. It is difficult to imagine a court awarding fees simply on the basis of the hours expended on DTPA litigation without regard for whether the work was necessary.

The amendments would also appear to be superfluous in the context of attorneys’ fees in multiple claim cases. For example, under existing law, the party seeking attorneys’ fees in cases where some claims are subject to attorneys’ fees awards and some are not is required to allocate the work expended among the various claims, including those claims for which he seeks recovery under article 2226. At least two courts, interpreting the pre-amendment DTPA, have arrived at this same result without the amended language. Of course, to the extent that proof of a claim in which attorneys’ fees are recoverable may overlap with proof of claims in which they are not, the plaintiff should be allowed to recover for the entire case. Use of the term “necessary,” however, was not essential to achieve such a result.

Defendants may also recover attorneys’ fees under the Act. Section 17.50(c) has provided from its inception that “[o]n a finding by the court” of a groundless or bad faith lawsuit, the defendant “may,” and after the 1979 amendments, “shall” be awarded reasonable attorneys’ fees. The issue is therefore one for the court to determine and does not concern the jury. Unfortunately, the Act gives the court no guidance in determining

251. Senator Doggett: Senator, do I understand then, by putting in reasonable and necessary that this will insure that any work expended is not unnecessary work being done, but only that work which the court or the jury in the—whomever is the trier of fact, finds was necessary work expended in one of these cases?
Senator Meier: Yes sir, that's right, Senator. It's a standard accepted practice of having the trier of fact determine that the attorneys [sic] fees actually rendered were both reasonable in the terms of everyone of the concepts of—that we looked at in terms of reasonability, and that they were necessary in the light of the attendant circumstances.


253. For a general discussion of the recoverability of attorneys’ fees, see 1 S. SPEISER, ATTORNEYS’ FEES § 12:3 (1973).


255. See, e.g., Brown v. Bathke, 588 F.2d 634, 637 n.5 (8th Cir. 1978).

256. But see Bray v. Curtis, 544 S.W.2d 816 (Tex. Civ. App.—Corpus Christi 1976, writ ref’d n.r.e.), where the trial court had presented the issues under a § 17.50(c) case to the jury. See also O’Shea v. International Business Machs. Corp., 578 S.W.2d 844, 848 (Tex. Civ.
whether a suit is groundless. Presumably, if the issues raised by the suit survive a motion for directed verdict there are at least some facts that form the basis of a lawsuit. Accordingly, if a DTPA claim survives an application for directed verdict, it would be logically inconsistent for the court to find the plaintiff's case groundless under section 17.50(c).

If the plaintiff loses his DTPA claim on a motion for either directed verdict or summary judgment, the defendant must then show that the suit was instituted in "bad faith," or "for the purpose of harassment in order to recover attorneys' fees." The defendant attempting to prove "bad faith" or "harassment" will probably be required to prove that the consumer's claim was motivated by a malicious or discriminatory purpose. Personal ill will or spite on the part of the consumer toward the defendant is relevant to the issue of malice, although ill will is not a prerequisite to a finding of malice. Even if no ill will existed between the parties, the defendant may be able to show that the consumer was motivated by a reckless disregard for the defendant's rights. In such cases, malice may be inferred from proof that the consumer did not have a good faith belief that there was a basis for his claim. Although not an absolute defense, the fact that the consumer acted on the advice of counsel should be one factor considered.

L. Section 17.50A: Procedures Governing Offers of Settlement

This section was extensively modified by the 1979 amendments. Under the 1977 version of the Act section 17.50A provided several different affirmative defenses to an award of treble damages, including bona fide error, a seasonable offer of settlement by the defendant, failure by the consumer to give written notice of his complaint prior to suit, or failure to allow the defendant a reasonable opportunity to cure an alleged breach of warranty. The 1979 Act abolishes the bona fide error and opportunity to cure defenses, creates several new defenses that are separately stated.
in section 17.50B, and substantially alters the written notice and settlement offer procedures.

Section 17.50A now contains five subsections, (a) through (e). Subsection (a) places an affirmative obligation on the aggrieved consumer seeking damages under section 17.50(b)(1) to give written notice to the po-

(Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.); Import Motors, Inc. v. Matthews, 557 S.W.2d 807, 809 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.). The abolition of the opportunity to cure defense in the 1979 Act therefore would appear to return the Act to its pre-1977 status in which notice and opportunity to cure were still required. But see United Postage Corp. v. Kammeyer, 581 S.W.2d 716, 721 (Tex. Civ. App.—Dallas 1979, no writ), in which a jury finding that the defendant did not have a sufficient opportunity to cure the defect was disregarded by the court because the claim arose prior to the effective date of the 1977 amendments to the Act.

Abolition of the bona fide error defense would also appear to be of little practical significance since the amended Act provides that punitive damages based on actual damages in excess of $1,000 are recoverable only if the prohibited conduct was committed knowingly. 1979 DTPA § 17.50(b)(1). In most, if not all cases, this scienter requirement will give the defendant much broader protection for clerical error or other forms of inadvertent conduct than the bona fide error defense did under the old act.

267. See discussion of § 17.50B at text accompanying notes 309-25 infra.

268. The amended § 17.50A reads:

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

(b) If the giving of 30 days' written notice is rendered impracticable by reason of the necessity of filing suit in order to prevent the expiration of the statute of limitations or if the consumer's claim is asserted by way of counterclaim, the notice provided for in Subsection (a) of this section is not required, but the tender provided for by Subsection (c) of this section and by Subsection (d), Section 17.50B of this subchapter may be made within 30 days after the filing of the suit or counterclaim.

(c) Any person who receives the written notice provided by Subsection (a) of this section may, within 30 days after the receipt of the notice, tender to the consumer a written offer of settlement, including an agreement to reimburse the consumer for the attorneys' fees, if any, reasonably incurred by the consumer in asserting his claim up to the date of the written notice. A person who does not receive such a written notice due to the consumer's suit or counterclaim being filed as provided for by Subsection (b) of this section may, within 30 days after the filing of such suit or counterclaim, tender to the consumer a written offer of settlement, including an agreement to reimburse the consumer for the attorneys' fees, if any, reasonably incurred by the consumer in asserting his claim up to the date the suit or counterclaim was filed. Any offer of settlement not accepted within 30 days of receipt by the consumer shall be deemed to have been rejected by the consumer.

(d) A settlement offer made in compliance with Subsection (c) of this section, if rejected by the consumer, may be filed with the court together with an affidavit certifying its rejection. If the court finds that the amount tendered in the settlement offer is the same or substantially the same as the actual damages found by the trier of fact, the consumer may not recover an amount in excess of the amount tendered in the settlement offer or the amount of actual damages found by the trier of fact, whichever is less.

(e) The tender of an offer of settlement is not an admission of engaging in an unlawful act or practice or of liability under this Act. Evidence of a settlement offer may be introduced only to determine the reasonableness of the settlement offer as provided for by Subsection (d) of this section.

tential defendant at least thirty days before filing suit advising the defendant of the consumer's specific complaint and "the amount of actual damages and expenses, including attorneys' fees, if any, reasonably incurred by the consumer in asserting the claim."[269]

This subsection makes at least four important changes in the notice requirement. First, notice is now "a prerequisite to filing a suit,"[270] whereas under the old Act the plaintiff's failure to provide notice afforded the defendant a defense to treble damages only.[271] Because the notice requirement is imposed by statute rather than by common law, it is mandatory, and suits brought without proper notice are thus not maintainable.[272] Accordingly, the plaintiff must plead and prove notice in (b)(1) cases[273] or risk a gauntlet of special exceptions[274] and motions for directed verdict.[275] Therefore, compliance with the notice requirement in suits alleging violations of the laundry list is particularly important under the amended Act.

The Act was further modified by requiring the consumer to advise the potential defendant of the consumer's "specific complaint." Prior law only required written notice of the "consumer's complaint," without requiring the consumer to define precisely what was at issue.[276] This change appears designed to eliminate notices that are merely pro forma efforts to comply with the statute, providing so little detail to the defendant that he cannot properly evaluate the plaintiff's claim. Such vague notices frustrate the purpose of section 17.50A, which is designed primarily to facilitate out-of-court settlement of claims.

Amended section 17.50A also adds the requirement that written notice be given "at least 30 days before filing the suit."[277] Prior law allowed the defendant to avoid treble damages by showing that he received no written notice "before suit was filed."[278] Thus, under the old law the plaintiff could send notice to the defendant one day and file suit the next and still recover treble damages if he prevailed at trial. This possibility was inconsistent with the spirit of a notice provision designed to enable the parties to settle their differences before going to court. The amended Act affirmatively requires the plaintiff to refrain from suit for at least thirty days after giving notice so that the out-of-court settlement process will have a reasonable chance to operate before the courts become involved.

269. 1979 DTPA § 17.50A(a).
270. Id. (emphasis added).
271. 1977 DTPA § 17.50A(2).
274. See Kinnear v. Scurlock Oil Co., 334 S.W.2d 521, 525 (Tex. Civ. App.—Beaumont 1960, writ ref'd n.r.e.).
276. 1977 DTPA § 17.50A(2).
277. 1979 DTPA § 17.50A(a).
278. 1977 DTPA § 17.50A(2).
The final and perhaps most important addition to subsection (a) of section 17.50A requires that the consumer state in his written notice the "amount of actual damages and expenses, including attorneys' fees, if any, reasonably incurred . . . in asserting the claim." By requiring the consumer to provide the defendant with this information, a basis for settlement discussions is more quickly established. Under prior law the consumer was not required to state the amount of his damages and attorneys' fees in the notice. As a result, the defendant had to request such information from the consumer in order to make a settlement offer under section 17.50A(2), and rely on the consumer's cooperation. If however, the information was not forthcoming within thirty days after written notice was given, the defendant had to choose between making a guess as to the amount to be tendered or not tendering at all and thereby losing all hope of establishing a section 17.50A(2) defense to treble damages. Because of this dilemma, the courts may eventually impose a duty on the consumer to cooperate with the defendant in ascertaining the amount of the consumer's damages and expenses in cases filed under the old Act. The amended Act, by making this obligation explicit and requiring the information to be furnished with the notice itself, avoids unnecessary delays in initiating the settlement process. It is arguable, however, that the statute is still deficient in that it fails to provide a mechanism for discouraging the consumer from making inflated damage and attorney fee demands that can destroy the efficacy of the settlement process.

279. 1979 DTPA § 17.50A(a).
280. 1977 DTPA § 17.50A(2).
282. The Act contains no incentive for the consumer to accurately and fairly estimate his damages. In fact, precisely the opposite may be true since he loses his claim for treble damages if the defendant tenders the amount of the plaintiff's claim. An exaggerated demand, therefore, is potentially beneficial to the consumer because it has the capacity for producing either an inflated settlement or else discouraging any settlement offer, leaving the plaintiff's claim for treble damages intact. The problem has not gone unnoticed in legislative hearings, but it has yet to be dealt with effectively. As one witness testified during the hearings on S.B. No. 357:

Unfortunately, this [notice requirement] of the statute has no teeth in it. By that I mean that there is nothing to prevent the plaintiff in most of these cases from simply giving a pro forma notice, in other words just literally to comply with the statutory mandate and then going ahead and instituting his suit for treble damages. Since he loses nothing, ah, by doing so, the plaintiff has no real incentive to try to resolve his differences with the seller and that was one of the purposes, I think, that the act had because our courts were being literally inundated with deceptive trade practices cases. We wanted to try to achieve some sort of a method whereby consumers would have an opportunity to conciliate before resorting to the litigation process and that, of course, has not proven true. . . . Now, in the common case that we get and I'm speaking now in defending, ah, in some of my practices, defending car dealers, the common thing that we get is we get a letter from somebody who has purchased a car and they'll say you represented to me that I was going to get an AM-FM stereo radio and I checked it out and I actually only have an AM-FM radio
Section 17.50A(b) creates two exceptions to the notice requirement discussed above. Under this provision, notice is not required if suit must be filed to prevent the expiration of the statute of limitations or if the consumer's claim is asserted as a counterclaim. In such circumstances, the offer of settlement described in sections 17.50A(c) and (d) may be made within thirty days after the suit or counterclaim is filed. This provision is new and covers a number of contingencies not dealt with under the old law.

Section 17.50A(c) allows the defendant to tender to the consumer a written offer of settlement, including attorneys' fees, within thirty days after receipt of the notice, or within thirty days of the filing of a suit or counterclaim in cases covered by subsection (b). Any offer of settlement not accepted within thirty days of receipt by the consumer is deemed rejected. This provision differs from the old Act in a number of important respects.

First, the new Act does not appear to require a tender of expenses as well as attorneys' fees. Section 17.50A(c) simply requires that the written settlement offer include "an agreement to reimburse the consumer for the attorneys' fees, if any, reasonably incurred by the consumer in asserting his claim."283 "Expenses" are not mentioned. Under the old Act, the defendant had to tender "the expenses, including attorney's fees, if any, reasonably incurred by the consumer in asserting his claim against the defendant."284 This deletion of expenses from the tender provision of section 17.50A(c) is puzzling in light of the fact that section 17.50A(a) of the new Act still requires the amount of expenses, including attorneys' fees, to be included in the notice sent to the defendant. Requiring a statement of the amount of expenses to be included in the notice sent to the defendant might seem inconsistent with not requiring the defendant to include such expenses in the settlement offer. The notice of expenses is necessary, however, because of an additional settlement offer procedure in section 17.50B(d) that does contain a requirement that expenses be included in any tender made under that provision.285

The tender provisions of the new Act also differ from the old Act by expressly limiting the amount of attorneys' fees to be tendered to those fees and of course the dealer, if that's the case, in most instances would be delighted to change out the radio because it was an error on our part if the radio wasn't correct to begin with but instead we get a letter from the lawyer that says my client has suffered the following damages: A. he wants the purchase price of his car returned, B. he wants $25,000 worth of attorneys [sic] fees, C. he wants $50,000 worth of mental anguish. Now what do I do? How do I advise that client? Because the consumer has complied literally with the statute but of course not with the spirit of the statute and there is no requirement that he make his allegations in his demand letter reasonable or temperate or that there be any real legitimate attempt to conciliate those differences and this is one of the things that I think is most seriously wrong with the act as it stands now.

Testimony on Economic Development, supra note 1, tape 1, at 5-6 (statement of Jack Ayres).
283. 1979 DTPA § 17.50A(c).
284. 1977 DTPA § 17.50A(2) (emphasis added).
285. See discussion of § 17.50B(d) at notes 321-25 infra and accompanying text.
incurred by the consumer "up to the date of the written notice"²⁸⁶ or "up to the date the suit or counterclaim was filed."²⁸⁷ This new language is probably not so much a substantive change as a clarification of prior law. It makes clear that the defendant need not tender future attorneys' fees and suggests by implication that the attorneys' fee amount to be included in the consumer's notice under section 17.50A(a) should be similarly limited.

One of the most significant differences between the tender provisions of subsection (c) and the old Act is that the new statute permits the tender of a "written offer of settlement" instead of a tender of the "cash value of the consideration received from the consumer or the cash value of the benefit promised, whichever is greater."²⁸⁸ This change avoids the necessity for tendering money, a requirement that may have existed under the old "cash value" standard and may still exist under section 17.50B of the 1979 Act.²⁸⁹

At common law, in order to be legally sufficient a tender must be in "current coin of the realm"²⁹⁰ and the tenderer must relinquish possession of the sum tendered.²⁹¹ Neither readiness and ability to pay²⁹² nor the tender of a check are sufficient.²⁹³ Adoption of an offer of settlement standard is therefore a marked improvement over the old Act because it avoids these common law requirements. To the extent that the old "cash value" standard required a tender of money in conformity with common law tender requirements, it established a less flexible procedure that may have impeded the early settlement of disputes or created a trap for unwary defendants. If a tender under the old Act had to meet common law tender requirements, then a defendant who believed that he had limited his liability under the Act to single damages by making a reasonable settlement offer or tendering a check in payment of the claim might be in for a rude surprise when judgment was entered.²⁹⁴

Finally, subsection (c) places a limit of thirty days on the consumer's
time to respond to the defendant's offer; after thirty days the offer is deemed rejected. This provision prevents the plaintiff from unreasonably delaying his response to the defendant's offer in order to monitor the development of the lawsuit. Allowance of such delay would effectively defeat the purpose of the settlement procedure since a great deal of court time and unnecessary expenses could be incurred if the plaintiff unreasonably delays in deciding whether to accept or reject the settlement offer.\textsuperscript{295}

Section 17.50A(d) provides a procedure for the filing with the court of any settlement offer that has been rejected along with an affidavit certifying to its rejection. Subsection (d) then provides:

If the court finds that the amount tendered in the settlement offer is the same or substantially the same as the actual damages found by the trier of fact, the consumer may not recover an amount in excess of the amount tendered in the settlement offer or the amount of actual damages found by the trier of fact, whichever is less.\textsuperscript{296}

This provision makes a number of important changes. First, and perhaps most significant, it substitutes "actual damages" for the phrase "the cash value of the consideration received from the consumer or the cash value of the benefit promised, whichever is greater,"\textsuperscript{297} which appeared in the 1977 Act. This is an improvement over the old Act since the term "benefit promised" is of uncertain legal meaning and difficult to apply.\textsuperscript{298}

Secondly, a defendant who makes a reasonable settlement offer has a defense to treble damages even if the amount tendered is somewhat less than the amount of damages ultimately found by the trier of fact. Under the new Act a court need only find that the amount tendered was the same or "substantially the same" as the actual damages found by the trier of fact.\textsuperscript{299} Thus, a defendant who made a reasonable settlement offer prior to trial will not be penalized with treble damages simply because his offer was not identical to the amount of actual damages found by the trier of fact.\textsuperscript{300}

Mere silence in response to the tender, however, is not a waiver of the tender defects. Moore v. Copeland, 478 S.W.2d 573, 578 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.).\textsuperscript{295} The 1979 amendments do not appear to deal with settlement offers that must be accepted in less than 30 days. Since the act is silent on the question, it would seem that the defendant, as master of his own offer, could place any reasonable conditions on its acceptance not contrary to law.\textsuperscript{296}

1979 DTPA § 17.50A(d).

1977 DTPA § 17.50A(2).

See Texas Consumer Litigation, supra note 2, § 8.06, at 193; Comment, Deceptive Trade Practices Act, supra note 281, at 536.

The amount of variance allowed by the term "substantially the same" will have to be established by future cases and will probably turn on the circumstances of each case. The term "substantially the same," like the term "approximately," would appear to contemplate a reasonable variance between what was aimed at and what was achieved. See, e.g., Syring-Workman, Inc. v. Colbert, 532 S.W.2d 708, 710 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.); Norton v. Menard Lumber Co., 523 S.W.2d 791, 793 (Tex. Civ. App.—San Antonio 1975, no writ).\textsuperscript{299}

300. It is worth noting that § 17.50A(d) deals with the avoidance of treble damages in terms of the similarity between the amount of the tender and the amount of actual damages found by the trier of fact; it does not mention attorneys' fees. This omission raises a number of interesting possibilities. Suppose a tender was for more than the actual damages awarded by the trier of fact, but contained either no offer of attorneys' fees or an inadequate offer,
Finally, it is theoretically possible for a plaintiff under the amended Act to receive less than the full amount of his actual damages since, in the event of an adequate tender rejected by the consumer, the plaintiff is limited to the lesser of the amount tendered or the amount found by the trier of fact. If the amount tendered is only slightly less than the amount found by the trier of fact, the consumer will thus be limited to the lesser amount. In such circumstances, however, the variance from the amount of actual damages can never be large since the court must first find that the tender is substantially the same as the amount of actual damages found by the trier of fact before such a limitation becomes applicable.

The final paragraph in section 17.50A, subsection (e), deals with the admissibility and purpose for which settlement offers may be introduced at trial. The first sentence of this provision provides that the tender of an offer of settlement is not an admission of engaging in an unlawful act or practice or of liability under the Act. This part of the provision closely tracks the common law rules on the admissibility of settlement offers.  

The second sentence of subsection (e) appears to go beyond the common law, however, in providing that “[e]vidence of a settlement offer may be introduced only to determine the reasonableness of the settlement offer as provided for by Subsection (d) of this section.” Subsection (d) permits the settlement offer to be filed with the court together with an affidavit certifying to the offer’s rejection. Subsection (e) purports to make this procedure the exclusive method for introducing the settlement offer. Accordingly, subsections (d) and (e) when read together would appear to prohibit introduction of settlement offers before the jury for any purpose other than to show the reasonableness of the settlement offer.

Such a comprehensive restriction on the admissibility of settlement offers in DTPA cases appears to be broader than the limitations imposed by the common law. The adoption of an exclusionary rule of evidence, even though attorneys’ fees were later awarded by the court. Would such a tender be sufficient to avoid treble damages? The defendant could argue that attorneys’ fees are irrelevant to the limitation on trebling in subsection (d). The plaintiff, however, could argue in response that subsection (d) refers only to a settlement offer made in compliance with subsection (c), and subsection (c) requires the tender offer to include a tender of attorneys’ fees. The defendant who makes no offer to reimburse the plaintiff for attorneys’ fees is probably not therefore entitled to avoid treble damages since his offer was not made in compliance with the Act.


302. 1979 DTPA § 17.50A(e) (emphasis added).

303. The common law rule declaring compromise offers inadmissible as evidence is replete with exceptions. See Robertson Tank Lines, Inc. v. Watson, 491 S.W.2d 706, 709 (Tex. Civ. App.—Beaumont 1973, writ ref’d n.r.e.) (evidence that defendant voluntarily paid for damage to witness’s automobile admissible for impeachment purposes to show bias or prejudice); Charter Oak Fire Ins. Co. v. Adams, 488 S.W.2d 548, 550 (Tex. Civ. App.—Dallas 1972, writ ref’d n.r.e.) (independent admission of liability admissible even though coupled with an offer of compromise); Travelers Ins. Co. v. Barrett, 366 S.W.2d 692, 694 (Tex. Civ. App.—El Paso 1963, no writ) (offer in settlement admissible to show due dili-
based upon public policy considerations, is nevertheless a matter properly within the sphere of the legislature. It is well recognized that the legislature can, within certain limits, establish, change, or alter rules of evidence. Here the legislative restriction is designed to encourage out-of-court settlement of claims by removing, insofar as practical, any fear that the settlement offer will be used at trial. Within constitutional limits, such a restriction would appear to be valid. Until the scope of this legislative protection is established by judicial decisions, however, prudence dictates that settlement offers in DTPA cases avoid admissions of liability or discussions of other independent facts that might be admissible at common law.

M. Section 17.50B: Damages and Liability Defenses

Sections 17.50A provides a defense to treble damages. Sections 17.50B(a)-(c), on the other hand, provide a series of absolute defenses to damages, attorneys' fees, and court costs, although not to injunctive re-
To establish a defense under section 17.50B(a), a defendant must prove that prior to the consummation of the transaction, the consumer was given written notice of the defendant's good faith reliance upon information supplied by the government or a private source. Moreover, the defendant must show that he did not know and could not reasonably have known of the inaccuracy of the information. Finally, the defendant must prove that the information relied upon was the producing cause of the alleged damage.

Adoption of section 17.50B signals a return to the common law rule that imposes no liability for statements made on information and belief. The DTPA, however, differs from the common law rule regarding such statements in two significant respects. First, the DTPA requires that the information relied upon be in writing. Under the common law, verbal as well as written statements are defenses to liability. Secondly, unlike the common law, the 1979 amendments require the defendant to exercise reasonable diligence in assessing whether the information conveyed to the consumer is accurate and complete. Hence, the defendant's unreasonable reliance upon exaggerated or incomplete statements of a manufacturer or government agency may not shield the defendant from liability.

Once the defendant raises a section 17.50B(a) defense, the consumer may bring suit against the third party supplying the information if it was reasonably foreseeable that the information conveyed would reach the

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<td>310</td>
<td>Section 17.50B(a) speaks of actions brought under § 17.50; injunctive relief is sought under § 17.48. Senator Meier stated his intent to the senate: As the bill was laid out and discussed earlier, it had language in there that these defenses go to the complete cause of action. In the revised language we're talking about the defenses going to the award of damages or [attorneys'] fees. For instance, in those instances where there could be a suit for injunctive relief. [sic] There would not under these defenses apply a—a situation where it would—they—they could arise by showing those, ah, items of fact being within the defense, and prevent a suit for injunction. Senate Floor Debate, supra note 49, at 39.</td>
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<td>1979 DTPA §§ 17.50B(a)(1)-(3).</td>
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<td>Id. § 17.50B(b).</td>
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<td>See Boles v. Aldridge, 107 Tex. 209, 175 S.W. 1052 (1915).</td>
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consumer. Whether a suit against the source of information must await the defendant’s raising a section 17.50B(a) defense or whether a suit can be commenced independently against the source is unclear from the wording of the statute. Since subsection (c) does not expressly limit suits against the source of the information, it should be interpreted as allowing such suits if there is a DTPA violation of a type that requires no privity under statutory or common law. In cases where privity is required, the consumer could bring suit against the third party source only after the section 17.50B(a) defense is raised. If construed as requiring the plaintiff to delay suit against the source in all cases until the defendant asserts a section 17.50B defense, the amendment would be a marked departure from common law fraud and would significantly limit the applicability of the DTPA.

Section 17.50B(d) provides an absolute defense to the cause of action, rather than a defense just to damages, if the defendant proves that after he received a specific complaint outlining the amount of actual damages, attorneys’ fees, and court costs he tendered that total amount within thirty days of his receipt of the notice. Under this section, unlike section 17.50A, a settlement offer is not sufficient. There must be a tender of “the amount of actual damages claimed.” This defense would therefore appear to require a cash tender. A section 17.50B(d) defense is absolute and, if proved by the defendant, the consumer’s entire claim, including any prayer for injunctive relief, must be dismissed. A consumer who proceeds with litigation notwithstanding proper tender by the defendant under section 17.50B(d) may be exposing himself to a claim for attorneys’ fees on the basis that his suit was groundless and brought in bad faith.

In the face of such a risk, a tender complying with the requirements of section 17.50B(d) should end the lawsuit.

N. Section 17.56: Venue

The 1979 amendments have significantly altered the venue provisions of the Act. Prior to the amendments, the consumer could bring suit at the defendant’s residence or principal place of business, or where the defendant

318. Id. § 17.50B(c).
320. See W. Prosser, supra note 61, at 717-24; Restatement (Second) of Torts §§ 531, at 66 (1977).
321. 1979 DTPA § 17.50B(d).
322. Id. § 17.50B(d)(1).
323. See generally note 290 supra and accompanying text.
324. See 1979 DTPA § 17.50B(d).
325. 1977 DTPA § 17.50(c); see notes 256-64 supra and accompanying text.
326. 1979 DTPA § 17.56 provides:
The phrase "had done business" was construed to include every place reached by the defendant's mass solicitation; moreover, the statute was not limited to a specific period of time. Accordingly, if the defendant had ever done business in a particular county, he was subject to suit within that county for an indefinite period of time thereafter.

In an effort to define more narrowly the time period in which a suit could be brought under the DTPA, the legislature amended section 17.56 by deleting the phrase "has done business" and substituting a provision that allows suit in the county where the alleged practice occurred, where the defendant had an established business at the time of suit, or where the defendant solicited the transaction. The legislative history of the amendments indicates that section 17.56 encompasses mass as well as personal solicitation, and that the defendant may be sued in any county in which his advertising reaches a consumer. Accordingly, advertising throughout a state will subject a defendant to suit throughout the state. The only meaningful limitation to venue under section 17.56 is that the solicitation must be the subject of the suit. Thus, a consumer must prove that the solicitation resulted in a transaction forming the basis for the suit in addition to proving that the defendant advertised in the county where the consumer resides. This requirement may prove a practical limitation since many consumers may be unable to remember, or prove, which particular solicitation resulted in the transaction.

O. Section 17.56A: Statute of Limitations

Prior to the 1979 amendments, the DTPA contained no statute of limitations of its own. If a statute contains no limitations period, the general rule is that a suit to enforce an obligation created by the statute is treated as an action for debt; thus, the limitations period for an action for debt should also be applicable to a cause of action brought under the pre-amendment DTPA. If the cause of action is not evidenced by or founded upon a contract in writing, the two-year statute of limitations of article

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327. 1977 DTPA § 17.56.
329. 1979 DTPA § 17.56.
On the other hand, when the cause of action is evidenced by or founded upon a contract in writing, it is governed by the four-year statute contained in article 5527.³³⁴

No reported cases to date have determined the appropriate limitations period under the pre-amendment DTPA.³³⁵ Thus, in actions brought under the Act prior to the 1979 amendments, the applicable limitations period will probably depend on the nature of the cause of action asserted. If the consumer sues to enforce an obligation,³³⁶ his suit will be treated as an action for debt, as noted above. Therefore, if the consumer's cause of action is one for damages based on alleged misrepresentations, the two-year statute presumably would apply.³³⁷ If, however, the consumer's claim is for equitable relief rather than damages, the general four-year limitations period in article 5529 probably would control.³³⁸

Breach of warranty claims under the old DTPA are most likely subject to a four-year limitations period. If they involve the sale of goods, as defined in the UCC, the claim would be governed by the express four-year statute of limitations contained in section 2.725 of the Texas Business and

³³³. TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon 1958), provides in part: "There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description: . . . 4. Actions for debt where the indebtedness is not evidenced by a contract in writing." See Rose v. First State Bank, 122 Tex. 298, 302, 59 S.W.2d 810, 811 (1933); Overton v. City of Houston, 564 S.W.2d 400, 403 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.).

³³⁴. TEX. REV. CIV. STAT. ANN. art. 5527 (Vernon 1958), provides in part: "There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description: 1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing." See Kiel v. City of Houston, 558 S.W.2d 69, 71 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.).

The 1979 Texas Legislature has eliminated the distinction between causes of action evidenced by a contract in writing and those not evidenced by such a writing. 1979 Tex. Sess. Law Serv., ch. 716, § 2, at 1769 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 5527 (Vernon Supp. 1980)). The four-year statute now applies to any action for debt. Id. This amendment will have no effect on the limitations period of claims arising prior to its effective date and the statute will be applied prospectively only. See TEX. CONST. art. I, § 16; Ridolph v. State, 545 S.W.2d 784, 786 (Tex. Crim. App. 1977). Claims arising after the effective date of the amendment are specifically addressed by the 1979 DTPA. See notes 342-46 infra and accompanying text.

³³⁵. But see, e.g., W.R. Weaver Co. v. Burroughs Corp., 580 S.W.2d 76, 79-80 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.), which involved a DTPA claim and discusses the appropriate limitations period for breach of warranty claims, but never discusses directly the question of the appropriate limitations period for DTPA suits.

³³⁶. See 1979 DTPA § 17.50(b), which permits a consumer who prevails in a suit filed under § 17.50 to obtain "(2) an order enjoining such acts or failure to act; . . . (4) any other relief which the court deems proper" (emphasis added).


³³⁸. See, e.g., Austin Lake Estates, Inc v. Meyer, 557 S.W.2d 380, 383 (Tex. Civ. App.—Austin 1977, no writ). TEX. REV. CIV. STAT. ANN. art. 5529 (Vernon 1958) provides: "Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued and not afterward."
Commerce Code. If, on the other hand, the claim involves a breach of warranty in connection with a service based on a written contract, the four-year period contained in article 5527 probably would apply. When the breach of warranty results in a personal injury, however, Texas courts have applied the two-year limitations period for injury done to the person of another.

In the 1979 amendments the legislature purported to adopt a uniform limitations period applicable to all DTPA claims in an apparent effort to simplify the limitations issue. Section 17.56A now provides that a consumer's suit under the Act must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or should have discovered the occurrence of the deceptive act or practice. While purporting to be applicable to "all actions brought under this subchapter," the section makes express reference only to "all claims involving false, misleading or deceptive acts or practices," and makes no reference to breach of warranty claims, unconscionability claims, or insurance claims under article 21.21. Because these claims do not appear to be covered by article 17.56A, the courts may have to analogize to prior case law to determine the applicable limitations periods for these claims.

The 1979 amendments further provide that the two-year statute of limi-


342. 1979 DTPA § 17.56A provides:

All actions brought under this subchapter must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading or deceptive act or practice. The period of limitation provided in this section may be extended for a period of 180 days if the plaintiff proves that failure timely to commence the action was caused by the defendant's knowingly engaging in conduct solely calculated to induce the plaintiff to refrain from or postpone the commencement of the action.

343. See 1979 DTPA §§ 17.50(a)(2)-(4), which makes these claims actionable under the DTPA.

344. Arguably, the legislature intended that these claims be included in their reference to "false, misleading or deceptive acts or practices." This argument is supported by the fact that the legislature has often been inconsistent in its references to these causes of actions. Section 17.44, for example, states that the purpose of the Act is "to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty" but makes no reference to insurance claims. Section 17.44 could be read as indicating that warranty claims are distinct from "deceptive business practices" (a phrase different from the "deceptive trade practices" used elsewhere in the Act), but the laundry list includes some DTPA violations that may overlap warranty claims under the DTPA. See id. § 17.46(b)(12) ("representing that an agreement confers or involves rights, remedies, or obligations which it does not have"); id. § 17.46(b)(19) ("representing that a guarantee or warranty confers or involves rights or remedies which it does not have").
tations period may be extended 180 days when the consumer proves that the defendant engaged in conduct calculated solely to induce the consumer to refrain from filing suit under the Act. Because the consumer must prove that the defendant's only reason for engaging in the particular conduct was to encourage the plaintiff to refrain from filing suit, the consumer will be faced with a heavy burden of proof that may prove insurmountable as a practical matter.

There is some question as to whether the 180-day exception was really needed. The testimony on this provision in the legislative history indicates that the legislature considered the likelihood of the plaintiff's being unfairly induced to allow limitations to run to be only an isolated problem. Nonetheless, the 180-day provision was enacted, perhaps out of an abundance of caution. Although this provision is not likely to have any noticeable impact on an appreciable number of suits under the Act, it may prove helpful to the consumer in unusual circumstances.

III. CRITIQUE AND EVALUATION

The DTPA has been amended in every legislative session since its enactment in 1973. Unfortunately, this process has not improved the Act as much as it has confirmed and even exaggerated its conflicting purposes. What was initially described as a statute designed to give the consumer speedy and adequate redress in cases too small to warrant litigation under existing laws has become something quite different: a statute that encroaches on and even threatens to displace existing law in such diverse areas as products liability, malpractice, real estate, banking, securities, insurance, and other areas.

345. See note 342, supra.
346. State Affairs Committee Hearings, supra note 234, at 32.
348. Hill, supra note 5, at 614.
349. See, e.g., Avery v. Maremont Corp., No. S-75-91-CA (E.D. Tex. Feb. 28, 1978) (suit under the DTPA to recover for personal injuries alleged to have resulted from the sale and advertising of defective shock absorbers).
355. The law of sales, while certainly a proper area for a consumer protection act, is
The problem is one of overreaching. The original Act contained no limitation on the size of the transaction or on the type of consumer goods covered. Accordingly, the remedy of treble damages for breach of warranty or for innocent misrepresentations, which was a justifiable incentive to litigation for plaintiffs involved in relatively small consumer purchases, was extended to large commercial transactions where the treble damage sanction had no readily discernible justification. Treble damages were also made available in suits against private individuals, the so-called occasional seller, and even for innocent misrepresentations in the sale of used goods. Treble damages seem unjustified in such circumstances, particularly since the non-merchant-seller is often as unsophisticated as the consumer to whom he sells and since he is almost by definition a one-time offender. Authorizing treble damages in such circumstances is therefore unlikely to produce any kind of meaningful deterrence and is more likely to impose considerable hardship on an individual who is himself a consumer in almost every other transaction.

The 1975 amendments aggravated these inconsistencies between the Act's purposes and its effects; those amendments broadened the definition of consumer to include partnerships and corporations and enlarged the definition of goods to include real property. The amendments thereby further extended the Act's application to commercial litigation. Although these changes enlarged the Act's coverage to include transactions that were likely to be increasingly displaced or bypassed by the DTPA due to its more attractive penalties. Breach of warranty claims, for example, are likely to be brought with increasing frequency under the DTPA instead of under the UCC. See, e.g., O'Shea v. International Business Mach. Corp., 578 S.W.2d 844, 847 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.) (purchase of typewriter); Valley Datsun v. Martinez, 578 S.W.2d 485 (Tex. Civ. App.—Corpus Christi 1979, no writ) (purchase of used automobile); Preston v. Sears, Roebuck & Co., 573 S.W.2d 560 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.) (purchase of washing machine); Allen v. Parsons, 555 S.W.2d 522 (Tex. Civ. App.—Texarkana 1977, writ granted) (purchase of used pickup truck).

Footnotes omitted. Witnesses before the legislature also stated that they did not understand the purpose for treble damages for innocent misrepresentations. See Testimony on Economic Development, supra note 1, tape 1, at 21. One witness stated: I tried to figure out what the purpose of those treble damages were . . . for an innocent misrepresentation and I haven't come up with one. If we're trying to stop people from making mistakes and that sort of thing I hardly see that treble damages for someone that didn't know that they were making a mistake, are applicable.

(Testimony of Ron Habitzreiter.)

The amounts in controversy in commercial transactions are normally large enough to justify the costs of litigation without an added incentive of treble damages. Arguably, in a commercial context, a mandatory trebling of damages serves little function in furthering the purposes of the DTPA and could cause harsh, inequitable results in instances where there was no intentional or malicious action by the defendant.

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Even though real estate transactions were probably covered by the Act as originally enacted, see Woods v. Littleton, 554 S.W.2d 662, 667-68 (Tex. 1977), the 1975 amendments removed any uncertainty by redefining goods to include real property.

356. See Note, supra note 6, at 222-23. The author notes: The amounts in controversy in commercial transactions are normally large enough to justify the costs of litigation without an added incentive of treble damages. Arguably, in a commercial context, a mandatory trebling of damages serves little function in furthering the purposes of the DTPA and could cause harsh, inequitable results in instances where there was no intentional or malicious action by the defendant.


358. See Bragg, supra note 347, at 1. Even though real estate transactions were probably covered by the Act as originally enacted, see Woods v. Littleton, 554 S.W.2d 662, 667-68 (Tex. 1977), the 1975 amendments removed any uncertainty by redefining goods to include real property.
likely to involve substantial monetary claims, no effort was made to adjust the Act's sanctions accordingly.

In 1977, the process of legislative expansion continued and the coverage of the Act was broadened even further. The definition of "services" was amended to eliminate the restriction to services for "other than commercial or business use." Commercial and business services were thereby brought within the Act. The definition of "merchant" was removed from the Act. This change eliminated another impediment to suits by businesses and permitted awarding treble damages for innocent misrepresentations in almost all commercial transactions. Although the 1977 amendments also added some defenses to treble damages, the defenses did little to moderate the effects of treble damages in most transactions and, of course, had no effect on the increasingly expansive scope of the Act.

The 1979 amendments reflect an adverse reaction to the all-encompassing reach of the DTPA, but do not actually diminish the Act's coverage. The new amendments add a scienter requirement as a precondition to treble damages, and moderate the penalties under the Act by making punitive damages in excess of $2,000 discretionary with the jury. Nevertheless, the opponents of extending the Act's coverage were unable to prevent yet another significant expansion: the disclosure requirement of section 17.46(b)(23). If the growth of litigation under rule 10b-5 of the federal securities laws is any guide, then a whole new dimension of liability has been added by this disclosure requirement.

As it stands today, the DTPA covers too much legal territory with too little flexibility, in both its sanctions and standards of culpability, to deal justly and fairly with the many diverse situations in which it may be invoked. The housewife seeking redress for a defective toaster, the victim of an automobile collision seeking redress for personal injuries, the real estate syndicate suing for defects in title or illegal restrictive covenants in a newly acquired shopping center, and the client or patient whose representation or treatment is inadequate or unprofessional are all consumers in the broadest sense and are all entitled to legal protection. However, whether they all need treble damages and attorneys' fees for their grievances, whether they all need relaxed standards of causation, and whether they all need additional affirmative disclosure protection is another matter entirely. The differences in the sophistication and financial resources of the various plaintiffs, the degrees of culpability of the various defendants and the wide range of complexity in the different transactions make it difficult to achieve uniform standards and remedies that are equally suited to a fair dispo-

360. Id. at 531. Governmental entities were included in the term "consumer." Id. at 526.
362. See note 4 supra and accompanying text.
tion of each type of case. The shortcomings of the DTPA are grounded in an insensitivity to these differences.

Although it may not be politically feasible to make the large scale revisions in the DTPA that are necessary to accommodate these differences, such accommodation is possible—by reversing the expansive coverage of the Act and excluding areas where coverage does not seem appropriate, by increasing the Act's reliance on existing legal standards, or by limiting the Act to claims below a stated dollar amount. The last alternative is particularly promising because it would be least destructive of the consumer's rights and would answer many of the objections made to the Act in this last legislative session. Furthermore, limiting the size of claims that could be brought under the Act would restore the Act to its original purpose of serving the needs of the average consumer. In its present form, the Act is as much a device for introducing treble damages into large business or commercial litigation as it is a means for obtaining redress in the many small transactions that consumers enter regularly.

In addition to the need for a general change in the Act's applicability, there is also a need for revision on a more selective basis. For example, as previously noted, the section imposing liability for omissions should be carefully reevaluated, and the plight of the occasional seller who lacks an organized constituency to speak on his behalf should be addressed. The legislature should also reconsider its adoption of a "producing cause" standard in DTPA cases. The producing cause standard was originally developed in the area of products liability for personal injuries, but is now being utilized in DTPA cases to redress purely economic harm. Because it is questionable whether the Act should be extended to cover personal injuries, and because recovery of large unforeseeable consequential damages is of questionable benefit to the average consumer, but a potentially serious threat to small businesses, a proximate cause standard, containing as it does a foreseeability test, should be reintroduced into the Act. Moreover, claims for mental anguish should not be allowed under the DTPA, particularly in connection with any claim for which treble or punitive damages are also available.

The tender provisions should also be extensively revised to discourage inflated consumer demands and to make the conciliation procedure a workable one. In addition to developing a mechanism for discouraging excessive demands, the legislature should extend the period for responding to the consumer's demand, possibly to within thirty days after suit is filed. One of the reasons that the present tender provision is producing so few settlements is that the thirty-day tender period frequently runs before the defendant is even aware of its significance. In fact, in almost all instances that the authors are aware of, the clients do not even refer the demand letters to their attorneys until the thirty-day tender period has expired. In such cases, the incentive to prompt settlement that the Act tries to create is nullified. Furthermore, consideration should be given to making the tender provision of section 17.50B an offer of settlement rather than a
tender of damages provision, and to requiring the tender of expenses in all settlement offers. The reasons, if any, for requiring a cash tender under section 17.50B, and for eliminating expenses from tenders under section 17.50A(c) are not readily apparent.

The need for treble damages in certain types of breach of warranty cases should also be reexamined. Such damages may be appropriate for cases in which the seller makes knowingly false claims about goods or services or sells them knowing them to be defective. Treble damages do not seem appropriate, however, for legitimate disputes over warranty coverage. Thus, in situations where there is a legitimate warranty dispute, actual damages plus attorneys' fees may be a more appropriate remedy than treble damages.

Finally, the legislature needs to assess carefully the implications of class actions under the Act. As originally drafted in 1973, the Act contained a class action provision that limited class action recoveries to actual damages only. In 1977, the class action provision was deleted from the Act, but the Texas Supreme Court revised rule 42 of the Texas Rules of Civil Procedure in September of that year allowing class actions of the "spurious" type for the first time in Texas. Because rule 42 contains no limitation on the type of damages that may be recovered under it, the net effect of these changes is that class actions can now be maintained under the DTPA for treble damages instead of actual damages as long as the particular case meets the requirements of the rule.

The 1977 legislative history shows no awareness that the repeal of the class action provisions would result in class actions under the Act for treble damages, or that the supreme court, in adopting the class action rule, had considered treble damage actions under the DTPA. The situation is therefore somewhat reminiscent of the problems that developed under the Truth-in-Lending Act: although the implications of class action recoveries in Truth-in-Lending cases were not anticipated by Congress, suits for tens of millions and even billions of dollars were soon filed. When

365. See Civil Procedure Rules Amendment—Official Court Order, 40 TEX. B.J. 563 (1977). The so-called "spurious" class action had been held to be unavailable under the old class action rule. See Commercial Travelers Life Ins. Co. v. Spears, 484 S.W.2d 577, 579 (Tex. 1972).
366. Rule 42 in its present form was originally proposed in an article in the Houston Law Review. See Jaworski & Padgett, The Class Action in Texas: An Examination and a Proposal, 12 Hous. L. Rev. 1005 (1975). The article was a preliminary response to a request by the supreme court to the state bar for a revision of rule 42. Id. at 1007. The supreme court seems to have adopted the amendments suggested by the article without change. Apart from one brief reference to the DTPA, which at that time contained its own class action provision limited to single damage recoveries, the article makes no mention of the possible interaction between a revised class action rule and statutes imposing penalty damages. Accordingly, it is likely that the potential for enormous class action recoveries under the DTPA was not considered by the supreme court when the amendments to the rule were adopted.
368. See Ratner v. Chemical Bank N.Y. Trust Co., 54 F.R.D. 412, 414 (S.D.N.Y. 1972) (potential class action recovery of approximately $13,000,000).
the magnitude of the problem became apparent, Congress quickly enacted legislation placing a ceiling on class action recoveries in such cases.370

Efforts were made in this past legislative session to limit class actions in DTPA cases to actions by the attorney general.371 That effort was successfully resisted by consumer groups, however, and no change in the availability of class actions under the Act was accomplished. The issue was not so much resolved as postponed.

The present status of class actions under the Act is not satisfactory. In cases arising between 1977 and the effective date of the 1979 amendments enormous liabilities for essentially innocent conduct may arise under the Act. Innocent conduct may also result in excessive class action recoveries under the amended Act since automatic trebling is retained for the first $1,000 of actual damages, irrespective of the defendant's state of mind in committing the violation. Because treble damages in such circumstances serve primarily as an incentive to litigate small claims, and because class actions also serve to encourage litigation of small claims, consumer protection does not need both incentives. Permitting the two to be used together can easily result in excessive punishment and overdeterrence.372 Fortunately, a great deal of room for compromise still exists on this issue; possibilities include a return to class actions for actual damages only, or the creation of maximum recoveries similar to those adopted in Truth-in-Lending cases.373

The Texas Supreme Court could also act to alleviate the problem that its adoption of an expanded class action rule helped to create. The New York Court of Appeals, in modernizing and expanding the coverage of its class action rule, provided that no punitive damages could be recovered under the rule without express authorization from the legislature.374 This provision forces debate about and careful legislative consideration of the merits of large punitive class action recoveries, a process that appears to have been bypassed in Texas.


371 Senate Bill 357 as originally passed by the senate contained a provision that stated: "Notwithstanding any other provision of law or rule of civil procedure, a class action may not be brought under Subchapter E of this chapter except by the attorney general." This provision was deleted from the amendments as finally adopted by the legislature.

372 See Developments in the Law—Class Actions, 89 HARV. L. REV. 1318, 1361-62 (1976) ("The increased deterrent effect class actions create may intensify the already heightened deterrent effect of a penalty provision, to a point perhaps counter-productive to statutory policies. Class actions under the original Truth in Lending Act provide an obvious example." (Footnote omitted.)).

373 See note 370 supra.

374 See N.Y. CIV. PRAC. LAW § 901(b) (McKinney 1976). This provision specifically prohibits recovery of penalties in class actions, unless the statute creating the penalty or minimum recovery explicitly authorizes class actions. See also Wesley v. John Mullins & Sons, 444 F. Supp. 117, 119 (E.D.N.Y. 1978).
IV. Conclusion

The 1979 amendments to the DTPA add considerable complexity to an already difficult statute. It is doubtful, however, that the amendment process has yet run its course. If a more permanent version of the Act is ever to be adopted, it must be based on a finer balance between the needs of the consumer and the needs of the business community than has thus far been achieved.

The DTPA has developed on a battleground between contending political factions, each seeking a temporary legal advantage. Yet as one of the participants has noted, there are no white knights and black knights in this struggle.375 The issues to be resolved are far too complex and diverse to be resolved on the basis that all legislative changes that expand consumer rights are good and all changes that protect business interests are bad. The DTPA is a "grand experiment."376 If it is to become something more than that, the interested parties must search more diligently for common ground.

375. See Hearings on Economic Development, supra note 1, tape 1, at 21 (testimony of Ron Habitzreiter) ("My own feeling about the Act is that it's really . . . you don't have white knights and black knights. If that was the case, probably every case would be settled.").
376. Lynn, supra note 66, at 884.