Lenders and the Texas DTPA: A Step Back from the Brink

James W. Paulsen
LENDERS AND THE TEXAS DTPA: A STEP BACK FROM THE BRINK

James W. Paulsen*

TABLE OF CONTENTS

I. INTRODUCTION ............................................. 489
II. THE RISE AND RUMORED FALL OF THE RIVERSIDE RULE ......................................................... 493
   A. THE BIRTH OF THE TEXAS DTPA ......................... 493
   B. THE RIVERSIDE DECISION ................................ 495
   C. WHITTLING AWAY AT RIVERSIDE ....................... 501
      1. The "Collateral Services" Doctrine .................. 501
      2. The Inexplicably Inconsistent "Inextricably Intertwined" Standard ..................................... 505
         a. A Doctrine is Born: Knight v. International Harvester ........................................ 505
         b. The Doctrine Expands: Flenniken ..................... 508
         c. The Doctrine Disintegrates: "Clarifying" Flenniken in the Case Law ............................... 510
   D. REPUDIATING RIVERSIDE: LOANS AS "SERVICES" ...... 517
III. EXPLORING LEGISLATIVE INTENT ......................... 519
    A. LEGISLATIVE HISTORY AND INTENT OF THE DTPA: THE ORIGINAL ENACTMENT ....................... 520

* Assistant Professor of Law, South Texas College of Law. B.F.A., 1976, Texas Christian University; J.D. 1984, Baylor University; LL.M. 1992, Harvard University.

The author wishes to thank Karen Neeley, Jean Powers, Robert Norcross, Robin Russell, and John Worley for reviewing and commenting on various drafts of this article. This article also has benefited from the assistance of a succession of able student assistants, including Anne C. Ritchie, Paul H. Cannon, Albert G. "Alec" Alexander, and Lisa Tilton-McCarthy. Nonetheless, all errors, mistakes, and omissions are attributable solely to the author.

In the spirit of full and fair disclosure, it should be noted that the author may have some bias. Before entering the teaching field, the writer was a litigator with a substantial lender liability practice. He was one of the counsel of record in Victoria Bank & Trust Co. v. Brady, 811 S.W.2d 931 (Tex. 1991), a lender liability case with a substantial DTPA issue, at least at the court of appeals level. See Victoria Bank & Trust Co. v. Brady, 779 S.W.2d 893 (Tex. App.—Corpus Christi 1989), aff’d in part, rev’d in part, 811 S.W.2d 931 (Tex. 1991).

He also has served as a member of the board of directors of the Texas Association of Bank Counsel. He has no involve or financial interest, however, in any currently pending case in which the issue of DTPA liability for lending transactions is raised.

In recognition of this possible bias, the writer has consciously attempted to present a comprehensive discussion of all authority, both pro and con, as well as providing as much background as possible for sources that may not be readily available to all readers. It is hoped that readers will reciprocate by evaluating the legal and policy issues raised in this article on their own merits and by forgiving the otherwise excessive length.

487
B. THE LEGISLATIVE HISTORY AND INTENT OF THE DTPA:
   Post-RIVERSIDE ............................................. 527
   1. The 1977 Venue Amendment to the "Laundry List" ... 528
   2. The 1983 Amendments to the DTPA, the Home
      Solicitations Transactions Act, and the Texas Debt
      Collection Act ............................................. 530
   3. The 1987 Credit Services Organizations Act ....... 533

C. LENDING AS DISTINCT FROM A "PURCHASE OR LEASE":
   AN UNTRIED STATUTORY ARGUMENT ....................... 535
   1. The Difference Between a Loan and a Purchase ..... 537
   2. The Difference Between a Loan and a Lease ...... 539
   3. Precedent from Other Jurisdictions ................. 540

D. STATUTORY INTERPRETATION AIDS IN THE DTPA:
   LITTLE AID IN LENDER DISPUTES ....................... 542
   1. Out-of-State Authority ................................ 542
   2. FTC Rulings ............................................. 548
   3. Attorney General Enforcement Activities .......... 549

IV. PUBLIC POLICY AND COMMON SENSE ..................... 550
   A. AN OVERVIEW OF TEXAS LENDING .................... 551
      1. The Economic Environment ......................... 551
      2. The Regulatory Environment ....................... 553
      3. The Possibility of Preemption .................... 557
   B. SOME CONSEQUENCES OF APPLYING THE DTPA TO
      LENDING TRANSACTIONS ................................ 559
      1. Perverting Public Policy: The DTPA as the Exclusive
         Tool of the Rich ..................................... 560
      2. Killing the Goose: Impact on Credit Availability and
         Terms .................................................. 564
      3. No Way to Run a Business: Impact on Regulation and
         Banking Practices ................................... 566

V. DRAWING THE BOUNDARIES BETWEEN THE DTPA
   AND LOANS ................................................. 569
   A. DISENTANGLING THE "INEXTRICABLY INTERTWINED"
      DOCTRINE ............................................... 569
         1. The Possibility of Restricting the "Borrower's
            Objective" Test ..................................... 569
         2. The Wisdom of Restricting the "Borrower's Objective"
            Test ................................................ 574
   B. COLLATERAL AND NOT-SO-COLLATERAL SERVICES ...... 577
   C. LENDING AS A SERVICE ................................ 582

VI. CONCLUSION ................................................. 583
THE Texas Deceptive Trade Practices-Consumer Protection Act (DTPA), enacted in 1973, is a fearsome weapon in the arsenal of attorneys representing commercial plaintiffs. The Texas DTPA prohibits a wide variety of false or misleading acts in connection with the sale of goods or services, permits treble damages for "knowing" violations, eliminates most common law defenses, and authorizes the recovery of attorneys' fees. While a number of other states have enacted deceptive trade practice legislation, the Texas statute is unique both in the amount of litigation it has spawned and in the frequency of legislative amendment.

In the 1980s, the collapse of the Texas oil economy and depressed real estate market ushered in an era of lender liability suits. A number of headline cases ensued, prosecuted on both traditional and innovative
theories of liability. From the beginning of the "lender liability crisis" to the present day, however, the role of the Texas DTPA as a borrowers' weapon has been unclear. While expanded use of the DTPA has been termed "[t]he most dramatic development in lender liability under Texas law,"10 this development also has been described as "probably [leading] to more confusion, on the part of courts and practicing attorneys, than may be found in any other DTPA area."11

In 1980, in Riverside National Bank v. Lewis,12 the Texas Supreme Court decided that the borrowing of money was neither a "good" nor a "service," and that an aggrieved debtor therefore lacked standing to bring a consumer claim under the Texas DTPA.13 The decision initially was interpreted as precluding lender liability under the DTPA.14 In the years that immediately followed, however, a succession of further decisions created significant exceptions to this rule, culminating in the Texas Supreme Court's observation that Riverside has been "limited . . . to its facts."15 Many DTPA claims against lenders now are based on "collateral services" provided to a borrower in the course of a lending relationship16 or on the theory that a loan is "inextricably intertwined" with a consumer transaction.17

As these judicially-developed exceptions have begun to swallow up the seemingly clear rule of Riverside, commentators have criticized the River-

---

12. 603 S.W.2d 169 (Tex. 1980).
13. Id. at 175-76.
14. Professor John Krahmer, a long-time observer of Texas banking law, has characterized the Riverside holding as a "seemingly broad exception to bank liability." John Krahmer et al., Banks and the Texas Deceptive Trade Practices Act, 18 TEX. TECH L. REV. 1, 8 (1987).
15. La Sara Grain Co. v. First Nat'l Bank of Mercedes, 673 S.W.2d 558, 566 (Tex. 1984).
17. See, e.g., Knight v. Int'l Harvester Credit Corp., 627 S.W.2d 382, 389 (Tex. 1982).
side court's rationale as "superficial"\(^{18}\) or simply "incorrect,"\(^{19}\) and the Riverside rule as "continually limited and narrowed"\(^{20}\) to the point that it is "almost extinct."\(^{21}\) Lower courts, emboldened by an apparent Texas Supreme Court trend to read Riverside more and more strictly, now issue opinions plainly inconsistent with its holding. In a 1989 ruling on a $70 million appeal, for example, a Houston court of appeals effectively repudiated Riverside.\(^{22}\) Because the bank failed while a rehearing was pending, the decision never became final.\(^{23}\) In 1990, the Amarillo Court of Appeals initially permitted a debtor to sue a bank on a DTPA theory based on pleadings that appeared to assert nothing more than "services" necessarily incident to a loan.\(^{24}\) The court reversed its ruling as a result of a spirited rehearing motion,\(^{25}\) but then reversed its ruling again on further rehearing,\(^{26}\) coming close to setting a rather embarrassing appellate record.\(^{27}\)

20. Id. at 35.
23. A Texas intermediate appellate court has jurisdiction to modify its judgment for at least 30 days, or longer, if a timely motion for rehearing or motion to extend time to file a motion for rehearing is filed. See, e.g., Tex. R. App. P. 100(a), (g). Thus, a mandate is not issued until at least 45 days after judgment, or longer, if a timely rehearing motion is filed. Tex. R. App. P. 86(a). West Publishing Company typically does not print a Texas court of appeals opinion until all timely motions for rehearing have been overruled. For this reason, the MBank Abilene opinion has never been published. Ordinarily, an unpublished Texas court of appeals opinion cannot be cited as authority. Tex. R. App. P. 90(i). The MBank Abilene court, however, made a Rule 90 determination to publish the opinion. Compare MBank Abilene Slip op. at 90 with Tex. R. App. P. 90(c). Accordingly, while the precedential value of the opinion is doubtful, there should be no formal prohibition on citation. Accord David M. Gunn, "Unpublished Opinions Shall Not Be Cited as Authority": The Emerging Contours of Texas Rule of Appellate Procedure 90(i), 24 St. Mary's L.J. 115, 132 (1992) (stating that the "better view would appear to be that the case has the dignity of published status").
27. The current winner in the "most frequently withdrawn majority opinions by a single court on a single appeal" sweepstakes is apparently Jensen v. Jensen, 665 S.W.2d 107 (Tex. 1984), with three different opinions. See James W. Paulsen, Jensen III and Beyond: Exploring the Community Property Aspects of Closely Held Corporate Stock in Texas, 37 Baylor L. Rev. 653, 657 n.13 (1985). Herndon falls short of Jensen only in the fact that the second opinion was only a modification of the first, rather than a completely new opinion.
The Texas Supreme Court does not appear to relish the prospect of resolving the conflict. Early in 1991, for example, the Fort Worth Court of Appeals, citing the "limited nature" of the Riverside holding, decided that borrowers could make a DTPA claim for supposed lender misconduct based simply upon the fact that the loan proceeds were used to purchase goods or services. A few months later, the Houston Court of Appeals (Fourteenth District) ruled that an inventory loan did not fall within the DTPA's ambit in the absence of some complaint regarding the quality of the inventory. The Texas Supreme Court denied writ, despite this clear conflict between the two opinions. Moreover, in an opinion issued the last day before the Supreme Court of Texas took its 1991 summer recess, the high court specifically declined an opportunity to issue further guidance on the question of lender liability for DTPA violations.

The current situation was summed up concisely by the United States Fifth Circuit in an opinion issued late in 1992, when the court observed that "[t]he Texas courts of appeal are obviously split on this issue." The Fifth Circuit declined to impose DTPA liability on a lender "[b]ecause Riverside has yet to be expressly overruled."

This article suggests, contrary to the apparent trend of authority, that the Riverside decision is correct. Moreover, the Riverside court's reasoning barely scratches the surface of legal and policy arguments that ought to be considered before borrowers, as a class, could ever be considered as DTPA "consumers." Thus, while the author would readily concede to critics of the decision that the Texas Supreme Court's holding in Riverside is "limited," that limitation is simply a demarcation of legal territory that has not yet been explored fully in a judicial opinion or otherwise.

Perhaps the best proof that a few new things remain to be said about lender liability under the Texas DTPA is the fact that no reported lender decision since Riverside has examined the underlying statutory language at any length, despite the fact that the DTPA has undergone some legislative revision at each of the nine succeeding legislative sessions. Nor, for

---

29. Central Texas Hardware v. First City, Texas—Bryan N.A., 810 S.W.2d 234, 237 (Tex. App.—Houston [14th Dist.] 1991, writ denied). This decision has been criticized in a student note. See Reese, supra note 21.
30. Accord Reese, supra note 21, at 615 (noting Central Texas Hardware's "general inconsistency with prior Texas cases" and arguing that this inconsistency "should have mandated" the granting of an application for writ of error "in order to avoid further confusion and inconsistency").
31. In Victoria Bank & Trust Co. v. Brady, 811 S.W.2d 931, 935 n.6 (Tex. 1991), the Texas Supreme Court declined to address a DTPA claim against a lender "[a]s a result of the disposition of the other issues." The lender was found liable for tortious interference with contract, presumably for the same conduct forming the basis of the DTPA claim, rendering the DTPA point moot.
32. Walker v. FDIC, 970 F.2d 114, 123 n.16 (5th Cir. 1992).
33. Id.
34. A handy listing of the legislative revisions enacted at each session may be found in Appendix B to Richard M. Alderman, The Lawyer's Guide to the Texas Deceptive Trade Practices Act (1993). In DTPA jurisprudence, the version of the act which
that matter, did the Riverside court ever examine the legislative debate leading up to enactment of the DTPA, despite the fact that the decision is grounded entirely on statutory construction.\textsuperscript{35} In addition, to the author's knowledge, no DTPA lender decision has looked for guidance to “relevant and pertinent decisions of courts in other jurisdictions,”\textsuperscript{36} despite the fact that a 1979 amendment to the DTPA\textsuperscript{37} now permits such inquiries.

This article will demonstrate that the current Texas DTPA, by its own language and under settled rules of statutory construction, does not apply, and was never intended to apply, to loan transactions. This reading of the statute is eminently reasonable because consumer rights in loan transactions are already protected by an impressive array of state and federal statutes. In addition, a decision to apply the DTPA to ordinary lender-borrower relationships will only hurt average Texans and damage the Texas economy, while having little or no beneficial effect on lending practices. The article concludes by examining the current state of the Riverside rule and its exceptions, and by suggesting resolutions of these issues that will balance judicial decisions with the legislature's apparent intentions.

II. THE RISE AND RUMOURED FALL OF THE RIVERSIDE RULE

A wealth of case law and secondary authority has grown up around the Texas DTPA in the twenty years or so that it has been in existence. Since the DTPA's application to lenders is one of the most litigated of all issues arising under the statute, a sizable body of case law exists on this limited topic alone. While a review of these decisions is critical to understanding the current state of near incoherence in the law, a complete discussion of the development of these doctrines inevitably runs the risk of verging on incoherence. Therefore, of necessity, the discussion that follows is selectively comprehensive, in the sense that some cases or legal developments are not mentioned, while others are treated in excruciating detail.

A. THE BIRTH OF THE TEXAS DTPA

The DTPA, when enacted in 1973, was recognized as a major accomplishment of the so-called “reform legislature,” spurred to action by the “Sharpstown scandal.”\textsuperscript{38} For such an important piece of legislation, the

\textsuperscript{35} Goossens is that which was in effect at the time of the alleged deceptive acts or practices. Woods v. Littleton, 554 S.W.2d 662, 666 (Tex. 1977); see also infra note 64.

\textsuperscript{36} TEX. BUS. & COM. CODE ANN. § 17.46(c)(2) (Vernon 1987).


\textsuperscript{38} The Sharpstown scandal, for those not steeped in Texas political lore, was a major political disaster arising from the failure of Sharpstown State Bank. The Texas Legislature passed legislation setting up a state insurance fund, permitting Sharpstown State Bank to withdraw from federally insured and regulated programs. The bank's failure and subse-
DTPA’s origins are remarkably unclear. Nonetheless, it safely can be said that the language of the Texas DTPA was derived from at least three sources: prior Texas consumer law, a California statute, and bits and pieces of one or more uniform laws. While a complete genealogy of the Texas DTPA is beyond the scope of this article, and may not be possible in any event, some of the legislative history and statutory analogies will be discussed later.

Even at the outset, however, it is useful to take a moment’s look at the DTPA’s Texas roots. A predecessor statute was enacted in 1967 and codified as Chapter 10 of the Texas Consumer Credit Code. In some respects, this 1967 “Deceptive Trade Practices Act” was simply carried forward in the 1973 Texas DTPA. Both the 1967 legislation and the 1973 DTPA contained a general prohibition on “false, misleading, or deceptive acts or practices in the conduct of any trade or commerce” and both set out a “laundry list” of specifically proscribed business practices. Both statutes provided for enforcement by the Texas Attorney General and for injunctions and civil penalties in the event of violations.

The 1973 legislation, however, differed from the earlier statute in several critical respects. The new Texas DTPA created a private cause of action for “consumers,” restricted common law defenses, and offered the powerful incentive of statutory treble damages. In addition, while

References:
39. See infra notes 449-58 and accompanying text.
40. One commentator has traced portions of the DTPA to the Uniform Deceptive Trade Practices Act, as imported into Texas through former Chapter 10 of the Consumer Credit Code. See David F. Bragg, Now We’re All Consumers! The 1975 Amendments to the Consumer Protection Act, 28 BAYLOR L. REV. 1, 3 (1976).
41. See infra notes 265-369 and accompanying text.
42. See infra notes 432-61 and accompanying text.
45. The phrase “laundry list” commonly refers to a list of specifically proscribed practices, currently numbering 23. See, e.g., M. Keith Dollahite, Comment, Whirlpool and DTPA Rescission Under the ‘Laundry List’: A ‘New and Improved’ Way to Wash-Out Contracts?, 35 BAYLOR L. REV. 656 (1983) (an article that deserves some sort of notoriety, if only for the sheer number of bad puns in the title).
46. Compare Act of May 8, 1967, 60th Leg., R.S., ch. 274, § 2, ch. 10, 1967 Tex. Gen. Laws 609, 658 (repealed 1973) with TEX. BUS. & COM. CODE ANN. § 17.46(b) (Vernon 1987). While there is considerable overlap between the two “laundry lists,” a number of additions and deletions were also made in enacting the Texas DTPA in 1973.
49. TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon 1987).
50. Id. § 17.506(a).
51. Id. § 17.50(b) (Vernon 1987 & Supp. 1994).
the 1967 statute required both the Texas Consumer Credit Commissioner and the Texas Attorney General's office to cooperate in enforcing its provisions,\textsuperscript{52} the 1973 act eliminated the Consumer Credit Commissioner's enforcement authority, vesting sole administrative responsibility in the Consumer Protection and Antitrust Division of the Attorney General's office.\textsuperscript{53} This change in responsibility was reflected in statutory arrangement: Prior deceptive trade provisions were removed from the Consumer Credit Code and placed in the Texas DTPA, part of the Texas Business and Commerce Code.\textsuperscript{54}

A private cause of action under the DTPA is available only to a "consumer," as specially defined in the act.\textsuperscript{55} The definition of "consumer," and of the terms within that definition, have been some of the most amended and fought-over sections of the Texas DTPA.\textsuperscript{56} Likewise, most of the legal battles over application of the DTPA to loan transactions have been fought over the threshold question of whether borrowers are DTPA "consumers." The opening salvo was fired in \textit{Riverside National Bank v. Lewis}.\textsuperscript{57}

\section*{B. THE \textit{RIVERSIDE} DECISION}

The facts in \textit{Riverside} are deceptively commonplace. In February 1975, James Lewis bought a new Cadillac El Dorado, financing the purchase through Allied Bank.\textsuperscript{58} When the check for Lewis's first car payment bounced, Allied requested that Lewis obtain a loan from a different bank. Lewis contacted Riverside National Bank and applied for a loan to refinance the car. According to Lewis, a junior loan officer told him that the loan had been approved. In fact, a more senior loan officer at Riverside

\begin{itemize}
\item \textsuperscript{53} TEX. BUS. & COM. CODE ANN. § 17.45(8) (Vernon 1987).
\item \textsuperscript{55} TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon 1987).
\item \textsuperscript{56} As enacted in 1973, a "consumer" was defined in the DTPA as "an individual who seeks or acquires by purchase or lease, any goods or services." Act of May 21, 1973, 63d Leg., R.S., ch. 143, § 1, 1973 Tex. Gen. Laws 322, 323. The definition of "goods" was restricted to "tangible chattels bought for use," and "services" definitionally excluded "commercial and business use." \textit{Id.} During the 1975 legislative session, partnerships and corporations were added to "individuals" in the definition of "consumer," and real property was included as a DTPA "good." Act of Apr. 10, 1975, 64th Leg., R.S., ch. 62, § 1, 1975 Tex. Gen. Laws 149. In 1977, governmental entities became potential consumers and the requirement that "services" could not be leased for commercial or business purposes was dropped. Act of May 10, 1977, 65th Leg., R.S., ch. 216, § 1, 1977 Tex. Gen. Laws 600. Finally, in 1983, "business consumers" with assets of $25 million or more were excluded from the DTPA's ambit. Act of May 19, 1983, 68th Leg., R.S., ch. 883, 1983 Tex. Gen. Laws 4943-44.
\item \textsuperscript{57} 603 S.W.2d 169 (Tex. 1980).
\item \textsuperscript{58} The facts are summarized in \textit{Riverside}, 603 S.W.2d at 171-72. Since Lewis won a jury verdict and the Texas Supreme Court has no fact jurisdiction, all fact disputes were resolved in Lewis's favor. To some extent, the recitation of facts in this article follows the same pattern.
\end{itemize}
already had reviewed and denied the loan. The car was repossessed and sold by Allied Bank for less than the loan balance. Lewis was forced to pay the remaining deficiency. At trial, Lewis admitted that he had misrepresented his payment history and net income when he applied for the Riverside loan but claimed the junior loan officer had told him to do so. A jury found Riverside National Bank liable for fraud and DTPA violations.

On appeal, the Houston Court of Appeals (First District) affirmed Lewis’s DTPA recovery. While recognizing that the question of whether the DTPA applies to a bank’s agreement to extend credit was “a case of first impression in Texas,” the court of appeals decided the issue in Lewis’s favor with remarkably little substantive discussion. The Texas Supreme Court’s five-to-four decision that Lewis was not a DTPA “consumer” is considerably more informative. Both the majority and dissenting opinions focused on the language and legislative intent of the DTPA. Both the majority and dissenting opinions agreed that the Texas DTPA is to be construed liberally to protect consumers. Both opinions also emphasized that only the 1973 version of the DTPA was at issue, and that the statute had been amended since.

The court’s unanimity began to unravel with the dissenting opinion’s claim that “[i]t is undisputed that the deceptive trade practices provisions of the Consumer Credit Code applied to lenders before 1973” and that the decision to carry over these provisions into the DTPA therefore should mandate a similar result. Reasoning from the DTPA’s broad prohibition of “false, misleading, or deceptive acts or practices in the conduct of any trade or commerce” and the equally broad definition of “trade and commerce” contained in the act, the dissenting opinion con-

60. Riverside, 572 S.W.2d at 560.
61. The court simply decided: “We consider that by seeking to obtain the extension of credit from a bank, Lewis was seeking to purchase services and was, under the provisions of § 17.45, a consumer.” Id. at 561.
62. The majority and dissenting opinions join issue over the question of whether a loan of money is a “service,” under the statutory definition contained in Tex. Bus. & Com. Code Ann. § 17.45(2) (1975 Version). Compare Riverside, 603 S.W.2d at 174-76 with Riverside, 572 S.W.2d at 178 (Campbell, J., dissenting).
63. Compare Riverside, 603 S.W.2d at 173 with Riverside, 572 S.W.2d at 177 (Campbell, J., dissenting).
64. The majority opinion opens its discussion of the DTPA by observing that “the statutory provisions that govern this case are those that were in effect at the time that the alleged deceptive acts occurred,” i.e., May 1975. Riverside, 603 S.W.2d at 172 (emphasis added). The dissent carefully notes 1979 amendments affecting the availability of consumer remedies and interaction with FTC regulations. Id. at 179 (Campbell, J., dissenting).
65. Riverside, 603 S.W.2d at 178 (Campbell, J., dissenting). No authority is offered in the dissenting opinion for the conclusion that the pre-1973 deceptive trade practices provisions of the Consumer Credit Code applied to lenders, nor do the authors know of any.
67. In 1973, as today, “trade and commerce” are defined as: the advertising, offering for sale, lease, or distribution of any good or service, of any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value, wherever situated, and shall in-
cluded that these provisions "leave[ ] no doubt the Legislature intended the [DTPA] to apply to lending practices or the extension of credit." 68

The majority opinion neither agreed nor disagreed with the dissenters' contention that it is "undisputed" 69 or that there is "no doubt" 70 the DTPA was intended to cover loan transactions. Instead, the majority opinion correctly observed that, whatever the scope of the Attorney General's enforcement authority, the private cause of action created by the 1973 DTPA is not unfettered. While the Consumer Protection Division of the Attorney General's office indeed was given carte blanche to investigate and enjoin false, misleading, or deceptive acts "in the conduct of any trade or commerce," 71 language that surely could include banking, 72 the private cause of action is restricted to "consumers." 73 To the majority of the Texas Supreme Court in Riverside, then, the real question was whether a borrower qualified as a "consumer." 74

The majority opinion implicitly concluded that, so far as the threshold question of "consumer" status is concerned, the DTPA's rule of liberal [construction] simply does not come into play. 75 The relevant provision of the DTPA states only that:

This subchapter shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions,

| 68. Riverside, 603 S.W.2d at 177 (Campbell, J., dissenting). |
| 69. Id. at 178. |
| 70. Id. at 177. |
| 71. TEX. Bus. & Com. Code Ann. § 17.46(a), 17.47(a) (Vernon 1987 & 1994 Supp.); see also Riverside, 603 S.W.2d at 173. |
| 72. See infra notes 473-74 and accompanying text. |
| 73. TEX. Bus. & Com. Code Ann. § 17.50(a) (Vernon 1987); see also Riverside, 603 S.W.2d at 173. |
| 74. The Texas Supreme Court stated emphatically that "a person who brings a private lawsuit under section 17.50 must be a consumer, as defined in section 17.45(4)." Riverside, 603 S.W.2d at 173 (court's emphasis). It is worth noting that the Montana Supreme Court has since adopted the Texas Supreme Court's Riverside analysis in determining whether a similar definition of "consumer" should be a threshold standing requirement under Montana's Unfair Trade Practices and Consumer Protection Act. See Doll v. Major Muffler Centers, Inc., 687 P.2d 48, 52-53 (Mont. 1984). |
| 75. The majority opinion states that "the rule of liberal [construction] should not be applied in a manner that negates the statutory definition of the word 'consumer.'" Riverside, 603 S.W.2d at 173. The opinion also notes that the interpretation favored by the dissenters would "constitute a judicial deletion" of the specific DTPA definition of "consumer." Id. |

Some might argue that the courts have not always observed this distinction, and have exercised liberality in expanding the basic definition of "consumer." See, e.g., Kennedy v. Sale, 689 S.W.2d 890, 893 (Tex. 1985) (stating third party beneficiaries qualify as consumers); Big H Auto Auction, Inc. v. Saenz Motors, 665 S.W.2d 756, 758 (Tex. 1984) (stating purchasers for resale qualify as consumers).
and breaches of warranty and to provide efficient and economical procedures to secure such protection.\textsuperscript{76}

This rule of liberal construction, though designed "to protect consumers," does not logically expand the definition of "consumer." To read the legislature's mandate in this way would be equally as illogical as concluding that, if fond grandparents decide upon a policy of liberality toward their grandchildren, they also have decided to be liberal in defining whom they will consider to be their grandchildren.

Under the 1973 version of the DTPA, a "consumer" was defined as "an individual who seeks or acquires by purchase or lease, any goods or services."\textsuperscript{77} James Lewis was certainly an "individual."\textsuperscript{78} The question of whether the act of borrowing money was a "purchase or lease" was apparently not raised.\textsuperscript{79} The remaining question, and the focus of the opinion, was whether money is a "good" or "service."

The Texas Supreme Court had little trouble dismissing the notion that money could be considered as a DTPA "good." The 1973 definition of "good," not amended in any relevant respect since, was "tangible chattels bought for use."\textsuperscript{80} The court observed that the Texas Uniform Commercial Code, part of the same statutory code as the Texas DTPA, repeatedly excludes "money" when defining "goods."\textsuperscript{81}

The question of whether money or similar intangibles can be considered "goods" for purposes of the DTPA seems to be well settled. In addi-
tion to money, accounts receivable, stock certificates, securities, certificates of deposit, savings certificates, insurance policy proceeds, franchises, limited partnerships, and trust interests have all been excluded by court decision from the definition of DTPA "goods." If the Texas Legislature was dissatisfied with these consistent interpretations of the act, the DTPA could have been amended at a subsequent session to include intangible property, as some other states have done and as has specifically been suggested to the Texas Legislature on at least one occasion.

Thus, the pivotal question in the Riverside opinion boiled down to whether a simple loan of money could be considered a "service." The statutory definition of "services" was, and still is today, partially circular and generally not enlightening. The 1973 version of the DTPA defined "services" as "work, labor and services for other than commercial or business use, including services furnished in connection with the sale or repair of goods." The court determined that "[m]oney, as money, is quite obviously neither work nor labor," and "services," as part of the same legislative list, should be viewed similarly. Moreover, since "services"

83. Swenson v. Engelstad, 626 F.2d 421 (5th Cir. 1980).
91. See infra note 442 and accompanying text.
92. In 1988 interim hearings before the Joint Committee on the Deceptive Trade Practices Act, Mr. Tom Smith, director of Public Citizen of Texas, recommended that the DTPA be amended to include nontangible goods, such as money. See Joint Committee on Deceptive Trade Practices Act, Summary of Testimony 11 (Aug. 12, 1988) (transcript on file at Texas Bankers Association, Austin).
93. See TEX. BUS. & COM. CODE ANN. § 17.45(2) (Vernon 1987) (" 'Services' means work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods.").
94. Accord DAVID F. BRAGG ET AL., TEXAS CONSUMER LITIGATION 24 (Michael Curry ed., 2d ed. 1982) ("It is apparent that the statutory definition of 'services' is of little value.").
96. Riverside, 603 S.W.2d at 174.
97. The Texas Supreme Court cited the principle of statutory construction that words grouped in a list should be given similar meanings. Id. at 174 n.2.
ordinarily are thought of as involving some sort of activity, and money is not an activity, the Texas Supreme Court held that "Lewis' attempt to acquire money, or the use of money, was not an attempt to acquire services." 98

The Riverside court carefully limited this definition-bound holding in three respects, each of which has created ample opportunities for judicial activism. First, the Texas Supreme Court noted the possible presence of "collateral services"99 such as financial counseling, loan processing or bill-paying which, if they became "the subject of the complaint,"100 might give rise to a DTPA claim. This observation has resulted in a host of "collateral service" decisions from intermediate courts.101 Second, after emphasizing that "there [was] no evidence that Lewis sought to acquire anything other than [the] use of money,"102 the court dropped a footnote comment: "Nor do we have before us a case where in connection with a sale of tangible personal property on credit, the seller misrepresents to the buyer the terms of the credit."103 This limitation on Riverside has been explored, confused, and possibly even explained, in a number of later Texas Supreme Court decisions.104 It commonly is described as the "inextricably intertwined" doctrine.105 Finally, the court rejected the notion that services necessarily exist in the lending of money because the argument was "not supported by the evidence adduced at trial" and therefore was "merely hypothetical."106 This hypothesis has since become the subject of a substantial law review article and at least a little judicial discussion.107

Borrowers, lenders, and their attorneys surely would have been spared a lot of uncertainty if the Riverside decision had not left so many troublesome questions unanswered. One should not, however, judge the Riverside court too harshly. The case involved only $3,277.50 in actual damages,108 the deficiency following the sale of a used car. Even good attorneys—and the briefs in Riverside were quite good—will be limited in the amount of in-depth research expense that can be justified for a comparatively small case. It therefore may have been wise judicial policy for the Texas Supreme Court to write a very limited decision in Riverside, reserving other questions for cases presenting the issues more directly, and perhaps with more money at stake.

98. Id. at 175.
99. Id.
100. Id. at 175 n.5.
101. See infra notes 109-42 and accompanying text.
102. Riverside, 603 S.W.2d at 175.
103. Id. at 176 n.5.
104. See infra notes 143-251 and accompanying text.
106. Riverside, 603 S.W.2d at 175.
107. See Krahmer, supra note 14; see also infra notes 252-63 and accompanying text.
108. Riverside, 603 S.W.2d at 172.
C. Whittling Away At Riverside

After Riverside, courts often have found particular lending transactions to fall within one of the three possible exceptions to the Riverside rule just discussed. The principal exceptions are situations in which the lender offers "collateral services," not simply a loan, or in which the lender is "inextricably intertwined" with the underlying consumer transaction. A substantial body of authority has grown up around each. While there has been comparatively less discussion of the third, or "loans as services" exception, such exception merits examination because adoption of the doctrine would mean the practical reversal of Riverside.

1. The "Collateral Services" Doctrine

In Riverside, as just discussed, the Texas Supreme Court noted the borrower's argument that "services" exist in the process of determining whether to loan money, but rejected the argument as "merely hypothetical" because no evidence was presented on the point at trial. In a footnote, however, the court carefully reserved the point for a possible further decision.

Accordingly, we do not pass upon the question whether a bank's misrepresentation concerning its activities, such as the availability of financial counseling, the cost of processing a loan or the ability to pay a customer's monthly bills, could constitute a deceptive act in connection with a sale of "services." We only hold that where those activities are not the subject of the complaint, then the presence of such collateral activities in a transaction otherwise not covered by the DTPA does not subject the parties to liability under the DTPA. Unfortunately, despite this broad hint that the "collateral services" question was an appropriate subject for future discussion, the Texas Supreme Court has not revisited the issue in the context of a lending transaction since Riverside.

One clue of the Texas Supreme Court's position on the scope of "collateral services" is found in Thompson v. First Austin Company, a case that in some respects is Riverside's shadow. In Thompson, the Fort Worth Court of Appeals ruled that a lender was not liable under the DTPA for failure to follow through on a supposed promise to delay foreclosure on a home loan. The Thompson borrowers argued that they had purchased "services" from their lender, the services being various actions taken by the lender in the process of administering the loan and foreclosing on the deed of trust. The Fort Worth court rejected this contention out of hand:

109. Id. at 175.
110. Id. at 175 n.5.
111. 572 S.W.2d 80 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).
112. Id. at 81.
113. As stated in the court of civil appeals opinion, "[s]ervices detailed in Thompson's brief were: Receipt of credit for loan payments, application of proceeds of condemnation,
We hold that Thompsons did not purchase a service; "a note and deed of trust." Rather, it is the reverse: Thompsons purchased the use of money with the "note and deed of trust." The provisions in the deed of trust are for the benefit of First Austin in securing repayment of its loan and the options provided therein are First Austin's. Such provisions apply to Thompsons only in the sense that they provided for them to perform their duties in return for what they had already received in full—the money to pay for their house.\(^{114}\)

The Texas Supreme Court declined to grant the Thompsons' application for writ of error with an "n.r.e." or "no reversible error" notation. In Texas, an "n.r.e." decision is precedential, but often of uncertain meaning.\(^{115}\) In this particular case, however, the Texas Supreme Court's notation probably carries more weight than usual. The initial decision to deny the application was accompanied by a per curiam opinion to the effect that the DTPA issue was reserved for decision in Riverside,\(^{116}\) on which an application for writ of error had been granted the preceding week.\(^{117}\) The rehearing motion in Thompson was not formally overruled by the Texas Supreme Court for some sixteen months, the same day the high court also overruled the rehearing motion in Riverside.\(^{118}\) Given this apparent link between the two cases, and the fact that the merits of the Thompson court's reasoning were argued to the Texas Supreme Court in the Riverside briefs, it probably is safe to assume that the Thompson decision was scrutinized with great care before the "n.r.e." label was finally attached.

Modern financial institutions do many things other than simply lend money, and they have been held liable under the DTPA for such activities. The Texas Supreme Court has held that mishandling a checking account can result in DTPA liability.\(^{119}\) Texas intermediate courts also have classified some activities that were or easily could be "collateral" to lending as subjecting a lending institution to DTPA liability. The list currently

---

\(^{114}\) Id. at 81-82.


\(^{118}\) See Riverside, 23 Tex. Sup. Ct. J. 497, 498 (July 16, 1980). Both rehearing motions were denied on the same day; the Thompson rehearing was denied with a notation that the previous per curiam opinion was withdrawn. Id.

\(^{119}\) La Sara Grain Co. v. First Nat'l Bank of Mercedes, 673 S.W.2d 558, 564 (Tex. 1984); see also McDade v. Texas Commerce Bank, 822 S.W.2d 713, 719 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (finding similar result with IRA trustee actions); Thomas C. Cook, Inc. v. Rowhanian, 774 S.W.2d 679 (Tex. App.—El Paso 1989, writ denied) (finding similar result with travelers checks); Plaza Nat'l Bank v. Walker, 767 S.W.2d 276, 278 (Tex. App.—Beaumont 1989, writ denied) (finding similar result with savings account); Farmers & Merchants State Bank v. Ferguson, 605 S.W.2d 320, 324 (Tex. Civ. App.—Fort Worth 1980), reformed and aff'd, 617 S.W.2d 918 (Tex. 1981) (finding similar result with checking account).
includes preparation of documents,\textsuperscript{120} processing title documents,\textsuperscript{121} providing or promising to provide insurance,\textsuperscript{122} brokering loans,\textsuperscript{123} and providing advice about certificates of deposit.\textsuperscript{124} Conversely, some activities that could have been considered "collateral" to lending, including application of proceeds of insurance\textsuperscript{125} and activities surrounding foreclosure\textsuperscript{126} or sales of mortgaged property,\textsuperscript{127} have been held not subject to the DTPA. Financial institutions also have been held not subject to the DTPA for issuing a certificate of deposit,\textsuperscript{128} or for making and accepting ordinary deposits\textsuperscript{129} or savings certificates.\textsuperscript{130}

Clearly, "there is somewhat of a flux presently,"\textsuperscript{131} so far as the question of what "collateral services" might be subject to the DTPA is concerned. In \textit{Riverside}, the Texas Supreme Court observed that there was no evidence that Lewis "sought to acquire anything other than [the] use of money."\textsuperscript{132} Banks and thrifts do provide a myriad of "services," and are even commonly referred to as the "financial services" industry.\textsuperscript{133} Commentators therefore recognized very early that the high court's refusal to treat loans per se as goods or services "may not present as great

\textsuperscript{120} First Tex. Sav. Ass'n v. Stiff Properties, 685 S.W.2d 703, 706 (Tex. App.—Corpus Christi 1984, no writ).
\textsuperscript{125} \textit{English}, 660 S.W.2d at 524.
\textsuperscript{126} \textit{Thompson}, 572 S.W.2d at 81-82.
\textsuperscript{127} Longview Sav. & Loan Ass'n v. Nabours, 673 S.W.2d 357 (Tex. App.—Texarkana 1984, aff'd by, 700 S.W.2d 901 (Tex. 1985).
\textsuperscript{128} Chesshir, 613 S.W.2d at 62. \textit{But cf.} \textit{Ritenour}, 704 S.W.2d at 899 (holding that providing advice about a certificate of deposit did not fall under DTPA).
\textsuperscript{129} Genico Distrib., Inc. v. First Nat'l Bank, 616 S.W.2d 418, 420 (Tex. Civ. App.—Texarkana 1981, writ ref'd n.r.e.). \textit{But cf.} \textit{La Sara Grain Co.}, 673 S.W.2d at 564 ("The services provided by a bank in connection with a checking account are within the scope of the DTPA.") \textit{and Ferguson}, 605 S.W.2d at 324 (holding DTPA does apply to banks).
\textsuperscript{130} Kilgore Fed. Sav. & Loan Ass'n v. Donnelly, 624 S.W.2d 933, 939 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.).
\textsuperscript{132} \textit{Riverside}, 603 S.W.2d at 175.
an obstacle as it seems, if the plaintiff is creative in pleading his case."134

Today, creative pleadings may make the difference between having a DTPA "collateral services" cause of action or not.

The present flux in the law can be demonstrated by considering two decisions which, though beginning with very similar facts, manage to arrive at very different conclusions. In First State Bank, Morton v. Chesshir,135 Mr. and Mrs. Chesshir assigned a $10,000 certificate of deposit as security for a loan to their son, though they claimed the assignment was limited to $4,000. After the son defaulted and the bank cashed the entire CD, the Chesshirs sued, claiming DTPA consumer status "on the theory that their purchasing of the certificate of deposit was a purchase of services from the bank."136 The Amarillo appeals court declined to hold the bank liable, noting that "[t]he Chesshirs do not contend that they sought or acquired, or that the bank provided, any other service in the transaction."137

In the second case, First Federal Savings & Loan Ass'n v. Ritenour,138 Mr. Ritenour asked First Federal to place a "hold" on a jointly-held certificate of deposit (CD) so that his wife could not withdraw funds without his approval. After Mrs. Ritenour managed to withdraw some money, Mr. Ritenour sued, claiming that First Federal misrepresented its services, i.e., that the "hold" would protect the money. The Corpus Christi appeals court acknowledged that the CD, like the loan in Riverside or the CD in Chesshir, was neither a good nor a service. Mr. Ritenour, however, presented evidence that "First Federal offer[ed] a broad range of services to the public, paid for out of profits made from depositors."139 The court acknowledged that Mr. Ritenour paid no fee for the specific advice or for the "hold," but reasoned that "the need for such services... was contemplated by First Federal by instituting a customer service department" and that the service became available to Mr. Ritenour when he purchased the certificate of deposit.140 It is difficult to avoid the conclusion that the only real difference between the two cases is the way the pleadings were phrased.141 If Ritenour is correct, then indeed "[t]he...
range of possibilities [for DTPA recovery] is limited only by the skill of attorneys who can artfully frame the transaction through pleading and proof." This does not, however, sound like a very rational way to run a legal system.

2. The Inexplicably Inconsistent "Inextricably Intertwined" Standard

Borrowers' attempts to hold their lenders liable under the Texas DTPA on a "collateral services" theory have not been the only—or even the principal—avenue of attack on the Riverside doctrine. Since Riverside, on at least a half-dozen occasions, the Texas Supreme Court has tried to explain, expand upon or limit what now is known as the "inextricably intertwined" doctrine. The difficulty of the issue is apparent from the sheer number and procedural convolution of the cases. In the three years immediately following the doctrine's modest debut in Knight v. International Harvester Credit Corporation, the Texas Supreme Court issued four decisions on the subject. Of these decisions, one generated two opinions in the court of appeals, one produced two opinions in the Texas Supreme Court, and one racked up a total of four opinions, two in the court of appeals and two more in the supreme court. The language of these decisions sometimes is vague, confusing, or inconsistent with other decisions. Nonetheless, since this dubious line of authority represents virtually all the Texas Supreme Court's post-Riverside DTPA jurisprudence, the cases must be studied closely for what little light they can shed upon the subject.

a. A Doctrine is Born: Knight v. International Harvester

If the adage that "bad facts make bad law" has a corollary, it might be that confusing facts ultimately make confused law. Knight v. International Harvester, the first major "lender" decision on the DTPA issued by the Texas Supreme Court after Riverside, truly is a confusing case, made worse because the facts were undisputed and therefore are not fully set out in the opinion. James Knight bought a used International
Harvester dump truck on credit. Some time later, he brought a class action suit, based on supposedly prohibited provisions in the installment sales contract. After suit was filed, but before trial, the chapter of the Texas Consumer Credit Code upon which some of Knight's complaints were based was repealed by the Texas Legislature. The principal question on appeal was whether repeal of the statute extinguished Knight's related claims. The Texas Supreme Court held that it did.\(^\text{150}\)

The DTPA question arose from Knight's sole surviving claim, that the installment sales contract contained a DTPA-prohibited waiver provision.\(^\text{151}\) The Texas Supreme Court held that the waiver provision was not permitted and that inclusion of the waiver in the installment sales contract was a DTPA violation.\(^\text{152}\) The seller of the dump truck, Etex International, certainly was liable. The critical question for later DTPA litigation was whether International Harvester Credit Corporation also was liable.

It is extremely important to have a clear understanding of the peculiar nature of the transaction at issue in Knight. Knight signed an installment sales contract with Etex; International Harvester Credit Corporation was a simultaneous assignee of the contract. Thus, International Harvester was not a pure lender in the transaction; to the contrary, Texas law carefully distinguishes between installment sales and loans.\(^\text{153}\) International Harvester admitted that it drafted the Etex installment sales contract; the contract contained International Harvester's logo and the assignment was accomplished through a preprinted provision on the back of the contract.\(^\text{154}\) The cumulation of these "realities of the transaction" meant, to the Texas Supreme Court, that International Harvester and Etex "were so inextricably intertwined in the transaction as to be equally responsible for the conduct of the sale."\(^\text{155}\)

The Texas Supreme Court gave no hint as to the origin of the "inextricably intertwined" language in Knight, by citation or otherwise.\(^\text{156}\) It cer-

\(^{150}\) Knight, 627 S.W.2d at 385.

\(^{151}\) This writer respectfully disagrees with another commentator's statement that "the basis of the complaint [in Knight] rested on the actions of the defendant lender in the transaction," McCormick, infra note 253, at 730, at least if the statement is meant to refer to International Harvester's actions as a lender.

\(^{152}\) Knight, 627 S.W.2d at 386.

\(^{153}\) The statute at issue in Knight, for example, specifically states: "None of the provisions of this Chapter shall affect or apply to any loans or to the business of making loans under or in accordance with the laws of this State, nor shall any of the provisions of the loan or interest statutes of this State affect or apply to any retail installment transaction." Tex. Rev. Civ. Stat. Ann. art. 5069-7.09 (Vernon 1987). The distinction between loans and installment sales also is critical in other areas of DTPA analysis. See infra notes 383-90 and accompanying text.

\(^{154}\) Knight, 627 S.W.2d at 389.

\(^{155}\) Id.

\(^{156}\) In a later case, even the Texas Supreme Court seemed to have some uncertainty regarding the phrase's derivation, commenting only that it "finds its recent origin in connection with the DTPA" in Knight. Qantel Bus. Sys., Inc. v. Custom Controls Co., 761 S.W.2d 302, 305 (Tex. 1988).
tainly does not derive from the statute or prior DTPA case law. The words “inextricably intertwined” apparently were first used in a brief submitted by Knight’s counsel and were later picked up by the court. So far as the attorney who drafted the brief can recall, the language was just a nice-sounding phrase, not consciously drawn from any particular source. Indeed, the phrase “inextricably intertwined” is a favorite of legal writers. A recent computer check of reported decisions reveals that on any working day, an average of one appellate judge somewhere in the United States is writing the words “inextricably intertwined” into a decision, on subjects as varied as criminal evidence, federal jurisdiction, or admiralty.

Unfortunately, the fact that the Texas Supreme Court apparently plucked a felicitous phrase of flexible meaning from the legal aether and plugged it into the Knight opinion may well have served to obscure the court’s intended rationale. In point of fact, International Harvester’s DTPA liability could have been predicated upon the simple fact that, as assignee of an installment sales contract, it took the contract subject to Knight’s defenses. Although the Texas Supreme Court did not explicitly discuss the limitations on “holder in due course” status imposed by Chapter 7 of the Consumer Credit Code, the opinion does note the limitations of “holder” status generally. Alternatively, International Harvester could have been held liable because it drafted the offending waiver provision.

The court’s opinion, regrettably, did not explain matters so clearly. Instead, the Texas Supreme Court distinguished Riverside on the basis that the Riverside borrower “sought only the extension of credit from River-

---

157. Accord Gall & Bowen, supra note 11, at O-5.
158. See Post-Submission Brief of James Knight at 12, Knight v. Int’l Harvester Credit Corp., 627 S.W.2d 382 (Tex. 1982).
159. Interview with Ms. Franci Beck (May 13, 1991). Ms. Beck, a relatively recent law graduate at the time Knight was decided, is now with the Susman, Godfrey firm in Houston, Texas.
160. See, e.g., United States v. Williford, 764 F.2d 1493, 1497 (11th Cir. 1985).
163. The operative events in Knight, and the filing of the suit, took place in 1978. See Knight, 627 S.W.2d at 384. Section 7.08, until its repeal in 1979, provided in part:
No right of action or defense of a buyer arising out of a retail installment sale which would be cut off by negotiation, shall be cut off by negotiation of the contract to any third party unless such holder acquires the contract in good faith and for value and gives notice of the negotiation to the buyer as provided in this Article, and within thirty days of the mailing of such notice receives no written notice of any facts giving rise to any claim or defense of the buyer.

164. Knight, 627 S.W.2d at 387.
165. Accord Gall & Bowen, supra note 11, at O-5 (stating that “[i]t is, frankly, difficult to reconcile Qantel and Knight, unless the fact that International Harvester Credit Corp. provided the forms itself which violated the DTPA explains the Knight decision”).
side Bank, and nothing more." To the *Knight* court, "[t]he present case is different. Knight's objective in the transaction was the *purchase of a dump truck*."

The court added:

In *Riverside*, the bank had nothing to do with the sale of the vehicle, which had taken place months before the refinancing was ever attempted. In our case, however, there was a single transaction—the sale of a truck on an installment basis. The alleged DTPA violations arose out of this transaction. Knight was a "consumer" as to all parties who sought to enjoy the benefits of that sale.

To a good number of later courts and commentators, the quoted language has come to mean that whenever loan proceeds are used to buy a good or service, the lender automatically is subject to possible DTPA liability.

The fallacy of that position will be discussed later.

**b. The Doctrine Expands: *Flenniken***

The next Texas Supreme Court decision on the subject after *Knight*, and another major contributing cause of most present-day confusion, was *Flenniken v. Longview Bank & Trust Co.* The Flennikens entered into a standard construction contract with their homebuilder: They signed a mechanic's lien contract and deed of trust to the builder, who then assigned the note and lien to Longview Bank & Trust in return for interim construction financing. The tie-in between the transactions was demonstrated, as is common in such transactions, by the fact that the Flennikens' deed of trust to the builder named a Longview Bank & Trust vice-president as substitute trustee.

The contractor, who abandoned the project, was convicted of misappropriating construction funds and sentenced to five years in prison. After negotiations with the Flennikens failed, the bank foreclosed on the property and sold it to another contractor. The Flennikens then sued the bank, claiming that the foreclosure was wrongful, and that the bank should be held liable under the DTPA because the foreclosure was an "unconscionable action" under the DTPA. After one false start, the Tyler Court of Appeals set aside a jury verdict favoring the Flennikens,

---

166. *Knight*, 627 S.W.2d at 389 (emphasis added).
167. *Id.* (court's emphasis).
168. *Id.*
169. See infra, e.g., notes 622 and 623.
170. See infra discussion at notes 617-649 and accompanying text.
172. 661 S.W.2d 705 (Tex. 1983).
173. *Id.* at 706.
174. *Id.*
reasoning that the Flennikens did not qualify as DTPA consumers. The two court of appeals opinions reflect the fluid state of the law. The initial opinion noted that neither party had briefed the just-issued decision in Knight, the revised opinion was bolstered by extensive discussion of another recent Texas Supreme Court decision.

The court of appeals recognized that the principal problem lay in deciding between the general rule of non-liability set out in Riverside and the Knight exception for loans "inextricably intertwined" with a consumer transaction. The appeals court resolved the question in favor of the bank. While acknowledging that the Flennikens qualified as consumers, the court viewed the assignment of the Flennikens' construction contract to the bank as "another transaction," separate from the original construction contract. In Knight, the appeals court reasoned, the sales contract bore International Harvester Credit Corporation's logo and a preprinted assignment form, presumably also drafted by IHCC. Thus, the Knight credit sale "was not severable but was a single transaction."

Four members of the Texas Supreme Court agreed with the Tyler Court of Appeals and, in fact, adopted the lower court's opinion as their dissent. The majority of the court felt otherwise. In an opinion heavily laced with italics for emphasis, the supreme court criticized the Tyler panel for "erroneously suggest[ing] that the Flennikens were required to seek or acquire goods or services from the Bank in order to meet the statutory definition of consumer." The court unequivocally rejected the "two transaction" analysis, in language that has often been quoted since:

From the Flennikens' perspective, there was only one transaction: the purchase of a house. The financing scheme [the contractor] arranged with the Bank was merely his means of making a sale. The Bank's unconscionable act in causing the sale of the Flennikens' property and the partially built house arose out of the Flennikens' transaction with [the contractor]. The Flennikens, therefore, were consumers as to all parties who sought to enjoy the benefits of that transaction, including the Bank.

The Texas Supreme Court went to great pains to review the qualifying language in Riverside that permitted it to reach this result without doing

---

178. Flenniken, 642 S.W.2d at 571.
180. The principal difference between the two court of appeals decisions in Flenniken is the addition of the discussion of Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535 (Tex. 1981), in the later opinion. See Flenniken, 642 S.W.2d at 570.
181. Flenniken, 642 S.W.2d at 571.
182. Id. at 570-71; see Knight, 627 S.W.2d at 389.
183. Flenniken, 642 S.W.2d at 571.
184. Flenniken, 661 S.W.2d at 708 (Pope, C.J., dissenting).
185. Id. at 707 (court's emphasis).
186. Id.
violence to the earlier holding. In *Riverside* "the sole basis"\(^{187}\) of the consumer's DTPA claim was the bank's failure to lend. The consumer "sought only to borrow money in an attempt to avoid repossession of his car,"\(^{188}\) There was "nothing else for which he paid or which he sought to acquire,"\(^{189}\) he "sought nothing else"\(^{190}\) and the "sole complaint about the transaction concerned the Bank's failure to make him the loan."\(^{191}\)

With all this use of emphasis and repeated reference to *Riverside*, one might think that the issue was settled, albeit by a bare majority of the court. One problem, however, is that the Texas Supreme Court made no reference in *Flenniken* to *Thompson v. First Austin Co.*\(^{192}\) the "shadow case" to *Riverside* that is factually far closer in point to *Flenniken* than the *Riverside* decision itself.\(^{193}\) In *Thompson*, like *Flenniken*, a home mortgage was in question.\(^{194}\) In *Thompson*, like *Flenniken*, the lender's decision to foreclose was the supposedly wrongful act.\(^{195}\) In *Thompson*, however, the Texas Supreme Court implicitly approved a holding that the bank's "services" surrounding foreclosure did not give rise to a DTPA cause of action, a decision that certainly is not at all easy to reconcile with *Flenniken*.\(^{196}\)

c. The Doctrine Disintegrates: "Clarifying" *Flenniken* in the Case Law

The difficulty in reconciling *Flenniken* with *Thompson*, however, pales to insignificance when compared to the problems one encounters in trying to square *Flenniken* with *Ogden v. Dickinson State Bank*.\(^{197}\) In a sense, *Ogden* is the bread and *Flenniken* the meat of a legal sandwich: *Ogden* generated two five-to-four opinions from the Texas Supreme Court; one was released five months before *Flenniken*\(^{198}\) and a new one issued three months after.\(^{199}\)

The facts in *Ogden* also form a striking parallel to those in *Flenniken*; in fact, the Flennikens claimed Texas Supreme Court jurisdiction on "con-

\(^{187}\) *Id.*

\(^{188}\) *Id.* (citing *Riverside*, 603 S.W.2d at 173).

\(^{189}\) *Flenniken*, 661 S.W.2d at 708 (citing *Riverside*, 603 S.W.2d at 173).

\(^{190}\) *Id.* (citing *Riverside*, 603 S.W.2d at 174).

\(^{191}\) *Id.* (citing *Riverside*, 603 S.W.2d at 175).

\(^{192}\) 572 S.W.2d 80 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

\(^{193}\) This decision is discussed in more detail *supra* at notes 111-18 and accompanying text.

\(^{194}\) *See supra* note 111 and accompanying text.

\(^{195}\) *See Thompson*, 572 S.W.2d at 81.

\(^{196}\) *See supra* notes 114-18 and accompanying text.

\(^{197}\) 662 S.W.2d 330 (Tex. 1984).


\(^{199}\) *Ogden*, 662 S.W.2d 330 (Tex. 1983).
flicts” grounds because their case was “on all fours” with Ogden. Both Ogden and Flenniken involved home construction contracts with assignments to lenders. Both cases involved defaults by the construction contractors after partial performance but substantially full payment. Both involved unsuccessful subsequent negotiations with the homeowners, and both involved claims of wrongdoing in connection with the decision to foreclose. Yet, in Ogden, unlike Flenniken, the lender ultimately won.

Ogden can be distinguished from Flenniken on at least one easy basis: In Ogden, the Texas Supreme Court decided that the bank had the contract right to foreclose on the property; in Flenniken, the lender for some reason conceded that the foreclosure was wrongful. The vehemence of Justice Spears’s dissent in Ogden, however, belies any such easy distinction. Spears’s dissenting opinion correctly points out the fact that the Ogden majority failed even to mention Flenniken, despite the fact that the facts in Flenniken were “virtually identical” to those in Ogden. The core of the dissenting justices’ complaint was summed up in a simple, but devastating, comparison:

In Flenniken, as here, the homeowners chose a builder to construct a house for them, and gave him a mechanic’s and materialman’s lien contract and a mechanic’s lien note. In Flenniken, as here, the builder assigned the lien contract and note to a bank as security for interim construction financing. The builder in Flenniken failed to finish the house, and the bank foreclosed on the buyer’s property.

In Flenniken, the jury found that the foreclosure was an unconscionable course of action. Hence, the Flennikens had a claim under § 17.50(a)(3) of the DTPA. In the instant case, the jury found that the bank had attempted to collect the sum of $66,000 plus interest and attorney’s fees when it had no right to do so. Those acts would be “laundry list” violations under § 17.46(b) of the Act, giving rise to a cause of action under § 17.50(a)(1). Because a violation of either provision gives rise to liability under the act, Flenniken and this case are indistinguishable. Yet the majority says that the Flennikens recover under the DTPA, but the Ogdens do not.

In short, to the dissenting justices, the majority opinion in Ogden “effectively carves out for lenders an exemption that no one else enjoys.”

---

200. The Texas Supreme Court is required by statute to assume jurisdiction of an application for writ of error in the event of a conflict between two court of appeals decisions. Tex. Gov’t Code Ann. § 22.001(a)(2) (Vernon 1988).
202. The facts are summarized well in Ogden, 662 S.W.2d at 331-32.
203. Id. at 333.
204. Id.
205. Longview Bank & Trust Co. v. Flenniken, 642 S.W.2d 568, 570 n.2 (Tex. App.—Tyler 1982), rev’d, 661 S.W.2d 705 (Tex. 1983).
206. Ogden, 662 S.W.2d at 336 (Spears, J., dissenting).
207. Id. at 337 (Spears, J., dissenting).
208. Id. at 334.
In view of the strong language employed in the dissent, it is hard to believe that *Ogden* can truly be reconciled with *Flenniken* on the basis of any simple factual distinction. This suspicion is strengthened by the fact that the majority could have amended the *Ogden* opinion at any time during the three and one-half months that the case was on rehearing to mention *Flenniken*. For that matter, the *Flenniken* opinion also could have been amended during this time, as the *Flenniken* rehearing motion was not overruled until one week before *Ogden* became final. Neither opinion, however, was reworked or explained.

Close on the heels of *Flenniken* and *Ogden*, the Texas Supreme Court also decided *La Sara Grain Co. v. First National Bank of Mercedes*, a case that should not have been very significant. *La Sara Grain* primarily involved a bank's innocent involvement in an embezzlement scheme, whereby a dishonest employee of the grain company persuaded the bank to issue checks and honor withdrawals with less than the required number of signatures. The Texas Supreme Court held that these actions—which could be classified as "collateral services"—could subject the bank to DTPA liability.

The bank also was persuaded to make a loan in La Sara's name without proper authorization. The Texas Supreme Court determined that no DTPA violation had occurred, under the facts of the case. The language the court used in reaching that modest conclusion, however, has provided ample ammunition for borrowers suing their lenders ever since. The court began by discussing *Knight* and *Flenniken* in some detail, stating that the Texas Supreme Court had "twice limited [Riverside] to its facts, emphasizing that [the borrower] sought only the extension of credit from Riverside, and nothing more." In the course of holding that no DTPA cause of action was established, the opinion also stated that there was "no evidence . . . that [the dishonest employee] represented to the bank that the loan was to purchase or lease goods or services, that the bank thought the loan was for that purpose, or that the loan was one of a series with which La Sara obtained goods or services." As with similar language in *Flenniken*, this language now is relied upon by some courts for the conclusion that lenders are liable on an "inextricably intertwined" theory whenever a loan's purpose is the acquisition of goods or services. The most curious aspect of the *La Sara* opinion, however, is the fact that it does not discuss the contrary *Ogden* holding at all, an omission that one is tempted to explain by the fact that the *La Sara* majority opinion was

---

209. The second, ultimately final, decision in *Ogden* was issued October 5, 1983; the rehearing was overruled January 18, 1984. See *Ogden*, 662 S.W.2d at 330.

210. While the Texas Supreme Court's decision in *Flenniken* was issued July 6, 1983, the motion for rehearing was not overruled until January 11, 1984. *Flenniken*, 661 S.W.2d at 705.

211. 673 S.W.2d 558 (Tex. 1984).

212. Id. at 564.

213. Id. at 566.

214. Id. at 567.
written by Justice Franklin Spears, the author of the bitter dissent in *Ogden*, and a philosophical foe of lenders.215

*Kish v. Van Note*,216 though not quite as critical a piece in the “inextricably intertwined” judicial jigsaw puzzle, deserves mention. Factually, the case was quite similar to *Flenniken* and *Ogden*, at least if one substitutes a swimming pool for a house as the subject of the controversy.217 The Kishes contracted for a backyard swimming pool, with bank financing. The bank paid the contractor in full before the work was ever begun. The pool cracked, the Kishes stopped paying, and the bank’s mortgage insurer sued.

As in *Ogden*, the Texas Supreme Court took two runs at an opinion. In its first opinion, the court decided, among other things, that the bank was not a holder in due course and should have been held liable under the DTPA.218 In the second opinion, with no direct explanation, the court reversed course and held that “[n]either [the mortgage insurance company] nor the bank violated the Deceptive Trade Practices Act.”219 Both *Kish* opinions are unanimous and written by the same author; neither opinion contains any real explanation of the reasoning, so far as the DTPA issue is concerned.

*Home Savings Association v. Guerra*220 shed some light on *Kish* and cut back dramatically on the “inextricably intertwined” theory of lender liability. The facts in *Home Savings* were very similar to those in *Flenniken*, *Ogden*, and *Kish*, except that defective rock siding, not a home or pool, was the culprit. The Guerras signed a ten-year note to pay for the siding, the contractor assigned the note to Home Savings and, when the siding later crumbled, the Guerras sued the bank.221 The *Home Savings* opinion focused on the fact that the original contract was subject to an FTC rule subjecting a subsequent holder of the paper to “all claims and defenses which the debtor could assert against the seller,” providing that “recovery . . . by the debtor shall not exceed amounts paid by the debtor hereunder.”222 Since the Guerras had a DTPA claim against the contractor, the court permitted them to recover against Home Savings, but limited their recovery to the amount that they actually had paid under the contract.223 The court stated that its decision was “in harmony” with *Kish*,224 thus intimating that *Kish* also may have been decided on the same grounds,

215. See infra note 495.
216. 692 S.W.2d 463 (Tex. 1985).
217. The facts are set out in the supreme court opinion, *Kish*, 692 S.W.2d at 465.
218. This is implicit in the first opinion’s ruling that “[t]he Kishes should . . . have been awarded recovery on all their claims.” *Kish v. Van Note*, 28 Tex. Sup. Ct. J. 267, 269 (Feb. 27, 1985), opinion withdrawn, 692 S.W.2d 463 (Tex. 1985).
219. *Kish*, 692 S.W.2d at 468.
220. 733 S.W.2d 134 (Tex. 1987).
221. *Id.* at 134.
222. *Id.* at 135 (citing 16 C.F.R. § 433.2 (1976)).
223. *Id.* at 136.
224. *Id.* at 137.
despite the fact that the court in Kish "did not discuss the purpose or intent of the FTC rule."\textsuperscript{225}

The Home Savings decision did not, however, reduce the "inextricably intertwined" rule to equivalency with FTC limitations on the holder in due course doctrine. The court emphasized the fact that in Home Savings (and, presumably, Kish) the lender simply had not committed an independent violation of the DTPA.\textsuperscript{226} There was, to the court, no "derivative liability" under the DTPA:

Although a consumer suing under the DTPA need not establish contractual privity with the defendant, he must show that the defendant has committed a deceptive act which is the producing cause of the consumer's damages. . . . The DTPA does not attach derivative liability to a defendant based on an innocent involvement in a business transaction. . . . To hold a creditor liable in a consumer credit transaction, the creditor must be shown to have some connection either with the actual sales transaction or with a deceptive act related to financing the transaction.\textsuperscript{227}

At this late point in the legal development of the "inextricably intertwined" doctrine, the Texas Supreme Court's relatively clear explanation in Home Savings, and its interpretation and explanation of prior case law, came as a breath of fresh air. Curiously, however, while the Texas Supreme Court cited both Knight and Flenniken for the italicized conclusion just quoted, and went on to explain the Knight holding in some detail, there is no discussion whatever of Flenniken.\textsuperscript{228} In Knight, as the Home Savings court pointed out, International Harvest Credit Corporation committed "a deceptive act related to financing the transaction" by drafting the prohibited waiver provision.\textsuperscript{229} The issue would be much less clear in Flenniken, however, where the bank simply was foreclosing on a lien to collect money it had in fact paid to the contractor. Ultimately, the fact that the Flenniken lender chose to concede the commission of an unconscionable act,\textsuperscript{230} possibly for strategic reasons,\textsuperscript{231} may have served to obscure the true basis of lender liability—if any there was—under the DTPA.

Yet another piece was added to the "inextricably intertwined" puzzle by the Texas Supreme Court in Qantel Business Systems, Inc. v. Custom Controls Co.\textsuperscript{232} Qantel was not a lender liability suit. Rather, the prob-

\textsuperscript{225} Home Savings, 733 S.W.2d at 137. The Kish decision prominently reprints the same FTC provision that is discussed explicitly in Home Savings. Compare Home Savings, 733 S.W.2d at 135 with Kish, 692 S.W.2d at 465.
\textsuperscript{226} Home Savings, 733 S.W.2d at 136, 137.
\textsuperscript{227} Id. at 136 (emphasis added; citations omitted).
\textsuperscript{228} See id. at 136-37.
\textsuperscript{229} Id. at 136.
\textsuperscript{230} Flenniken, 642 S.W.2d at 570 n.2.
\textsuperscript{231} In fairness to the attorneys in Flenniken, it should be remembered that the decision to concede the commission of an unconscionable act was made at a time when Riverside and Thompson seemed to set out the controlling law. It thus may have made good sense at the time to focus the appeal on a perceived "sure-fire" winning point of error.
\textsuperscript{232} 761 S.W.2d 302 (Tex. 1988).
lem was a defective computer software package. The seller, Qantel's sole Texas distributor, supposedly promised to modify a Qantel software package to meet the buyer's particular needs.\(^{233}\) The DTPA claim against Qantel was apparently not based on anything Qantel did, but upon the close relationship between Qantel and the distributor.

The court of appeals held that there was sufficient evidence of a close relationship between the seller and Qantel—including common telephone numbers and the appearance of Qantel's logo on the seller's letterhead—to raise a colorable claim that Qantel was “inextricably intertwined” with the software sale, by analogy to *Knight*.\(^{234}\) The Texas Supreme Court did not agree. The court conceded that “[w]e are aware that the term ‘inextricably intertwined’ has been urged as another method of establishing vicarious liability under the DTPA.”\(^{235}\) The court rejected this notion, however, explaining that the “inextricably intertwined” doctrine “is not an additional theory of vicarious liability under the DTPA.”\(^{236}\) Again, the cases that the Texas Supreme Court chose not to discuss in its opinion are instructive: Despite the fact that the Texas Supreme Court chose *Qantel* as a vehicle to clarify the “inextricably intertwined” doctrine, the opinion does not cite, much less discuss, either *Flenniken* or *La Sara Grain*.

The final piece in the puzzle, at least to date, is *Colonial Leasing Co. of New England v. Kinerd*,\(^{237}\) a case that the *Qantel* court knew was in the appellate pipeline at the time it released *Qantel*.\(^{238}\) The *Kinerd* case, which provides what is still the most recent hint as to the direction in which the “inextricably intertwined” doctrine may be evolving,\(^{239}\) involved a “dollar lease” agreement for radiator equipment. Kinerd could not pay cash to the equipment supplier. Colonial Leasing, therefore, bought the equipment from the supplier and “leased” it to Kinerd. The lease was non-cancelable and Kinerd had the option of “buying” the equipment for one dollar at the end of the lease term. Kinerd was unhappy with the quality of the equipment, sued Colonial Leasing and the supplier, and won.

A primary question on appeal was whether Colonial Leasing was acting as a lender, a vendor, a lessor, or as some combination of these. Since the court of appeals viewed the arrangement as a lease, Colonial Leasing avoided usury penalties.\(^{240}\) The jury found, however, that the equipment

---

\(^{233}\) Custom Controls Co. v. MDS Qantel, Inc., 746 S.W.2d 261, 262 (Tex. App.—Houston [1st Dist.] 1987), rev’d, 761 S.W.2d 302 (Tex. 1988).

\(^{234}\) *Id.* at 263-64.

\(^{235}\) *Qantel*, 761 S.W.2d at 305.

\(^{236}\) *Id.*

\(^{237}\) 733 S.W.2d 671 (Tex. App.—Eastland 1987), rev’d, 800 S.W.2d 187 (Tex. 1990).

\(^{238}\) The *Kinerd* case was cited in both the court of appeals and supreme court opinions in *Qantel*. See Custom Controls Co. v. MDS Qantel, Inc., 746 S.W.2d 261, 263 (Tex. App.—Houston [1st Dist.] 1987), rev’d, 761 S.W.2d 302, 305 (Tex. 1988).

\(^{239}\) The facts appear to have been contested. This article largely draws from the Texas Supreme Court's opinion, 800 S.W.2d at 188-89.

\(^{240}\) *Kinerd*, 733 S.W.2d at 672.
supplier had made misrepresentations about the value of the equipment and that Colonial Leasing had "acted together with" the supplier.\textsuperscript{241} This finding, Kinerd argued, established DTPA liability on the "inextricably intertwined" theory. The court of appeals did not agree, stating that "the concept of being 'inextricably intertwined' relates to the standing of a plaintiff to file suit under the . . . [DTPA], not to a defendant's liability under the Act."\textsuperscript{242}

Once again, the Texas Supreme Court took two tries to issue a cryptic opinion.\textsuperscript{243} The supreme court viewed the transaction as a sale for an unconscionably high price.\textsuperscript{244} In addition, the court determined that Colonial Leasing charged usurious interest in financing the sale.\textsuperscript{245} Accordingly, Colonial Leasing was liable for treble damages under the DTPA as a seller, and additional damages under Texas usury law as a lender.\textsuperscript{246} Although the final determination was that Colonial Leasing was not an "inextricably intertwined" case at all, the opinion does offer one tantalizing tidbit of legal advice for lenders. Replying to an argument that Colonial Leasing should not be subject to DTPA liability because, no matter what the equipment was really worth, Colonial Leasing only charged what it actually paid for it (plus interest or a finance charge), the court stated: "Colonial's argument might have merit if it had acted only as a lender in this transaction. Colonial, however, also sold the equipment to Kinerd."\textsuperscript{247}

When one compares the painstaking distinctions made by the \textit{Kinerd} court between the different roles in which Colonial Leasing acted in the transaction with the breezy lumping-together that characterizes the explanations for lender liability in \textit{Knight} and \textit{Flenniken}, \textit{Kinerd} does appear as a ray of hope for lenders. Later in this article, a restrictive formulation of the "inextricably intertwined" doctrine, based on the developments leading to \textit{Kinerd}, will be explored.\textsuperscript{248} Even at this early point in the analysis, however, several generalizations can be safely made about the development of Texas Supreme Court jurisprudence on the subject. First, while it is popular to view the "inextricably intertwined" theory of lender liability as inexorably expanding in scope, Texas Supreme Court cases simply do not bear out this conclusion. The doctrine hit its high water mark to date in the 1983 \textit{Flenniken} opinion. No matter what the subsequent decisions—\textit{Ogden}, \textit{La Sara Grain}, \textit{Kish}, \textit{Home Savings}, \textit{Qantel}, and \textit{Kinerd}—might say, no Texas Supreme Court decision in more than a decade actually has held a lender liable because

\begin{itemize}
\item \textsuperscript{241} The jury findings are summarized in the court of appeals opinion. \textit{Id.} at 672-73.
\item \textsuperscript{242} \textit{Id.}
\item \textsuperscript{243} The first, withdrawn, opinion can be found at 33 Tex. Sup. Ct. J. 585 (June 20, 1990). Both opinions are discussed in some detail in Mark S. McQuality \& Eliot Shavin, \textit{Creditor and Consumer Rights}, 45 Sw. L.J. 245, 245-48 (1991).
\item \textsuperscript{244} \textit{Kinerd}, 800 S.W.2d at 191.
\item \textsuperscript{245} \textit{Id.} at 190.
\item \textsuperscript{246} \textit{Id.} at 192.
\item \textsuperscript{247} \textit{Id.} at 191.
\item \textsuperscript{248} \textit{See infra} discussion at notes 615-49 and accompanying text.
\end{itemize}
that lender was "inextricably intertwined" in a consumer transaction. Second, even the rhetoric of the decisions does not point to an expansion of the "inextricably intertwined" doctrine. Language in Qantel and Kinerd, in particular, suggests a contrary conclusion. Third, the Flenniken decision itself should perhaps be taken with a grain of salt. Far from proving that Riverside is "limited . . . to its facts," it may be Flenniken that is limited by its own facts—in particular, the fact that the lender admitted a DTPA predicate act. Finally, the legal underpinnings of the doctrine are not at all clear, despite the impressive outpouring of cases over the past decade. The "inextricably intertwined" doctrine might be a rule of standing, it might be another way of expressing the limits of "holder in due course" status, or it might be nothing more than a catchy phrase that just has not turned into a workable legal doctrine.

D. Repudiating Riverside: Loans as "Services"

Both the "collateral services" and "inextricably intertwined" doctrines, expanded to their logical limits, could leave very little room for operation of the original Riverside rule. These exceptions to the general rule of Riverside already have been criticized as reducing the question of "consumer" status for DTPA purposes more to a challenge for artful pleaders than reasoned legal distinctions. Additionally, though, there is sentiment for an even more direct assault on Riverside.

In a 1987 Texas Tech Law Review article, Professor John Krahmer argued that the Texas Supreme Court's rationale in Riverside is fundamentally flawed, that the very existence of financial institutions depends on rendering "services," and that the service of "financial intermediation" lies at the core of a typical loan transaction. If this reasoning were accepted by the courts, it would be a practical reversal of Riverside, though on a ground explicitly left open to future discussion by the Riverside decision.

249. 761 S.W.2d at 305 ("'Inextricably intertwined' is not an additional theory of vicarious liability under the DTPA.").
250. 800 S.W.2d at 191 ("Colonial's argument might have merit if it had acted only as a lender in this transaction.").
251. La Sara Grain, 673 S.W.2d at 566.
252. See, e.g., Krahmer, supra note 14, at 36 (stating that Riverside's chief current purpose "is to serve as a pleading and proof guide").
253. See generally Krahmer, supra note 14; see also Clyde R. "Skip" McCormick, Lender Liability and the Texas Deceptive Trade Practices Act, 22 Tex. Tech L. Rev. 719, 742 (noting the "financial intermediation" argument with apparent approval). Professor Krahmer, who teaches banking law at the Texas Tech Law School, writes the SMU Law Review's Annual Texas Survey contribution on commercial transaction law, and produces the Texas Association of Bank Counsel's newsletter, is well above the average commentator on this subject.
254. The Texas Supreme Court noted in Riverside the argument that services necessarily exist in the lending of money, but dismissed the question as "merely hypothetical" since the theory had not been supported by evidence at trial. See Riverside, 603 S.W.2d at 175.
To date, judicial acceptance of the "financial intermediation" theory is limited to one near-miss. In *MBank Abilene v. LeMaire*, several plaintiffs sued MBank for breach of an oral promise to lend money to their oil and gas company. While the opinion of the Houston Court of Appeals (Fourteenth District) is not particularly clear on the point, it appears that the bank supposedly violated the DTPA by acting unconscionably in accelerating indebtedness, making demands on a promissory note, foreclosing on real estate, misrepresenting the quality of its own services and disparaging the services offered by other potential lenders, warranting that it could meet the plaintiffs' financial needs better than other lenders, and failing to disclose material information regarding its services.

While denying a DTPA recovery on other grounds, the Houston Court of Appeals had little difficulty in deciding the threshold issue that the *LeMaire* plaintiffs had standing to sue as DTPA "consumers." The reasoning is brief and, though not conclusive, suggests that the court endorsed Professor Krahmer's suggestion that DTPA "services" are inherent in any lending transaction.

MBank says the plaintiffs did not seek or acquire goods or services by purchase or lease. *See Tex. Bus. & Com. Code § 17.45(4).* The core of this argument is that money is neither a good nor a service; consequently a pure loan transaction lies outside the DTPA. The supreme court has indeed so held in *Riverside Nat'l Bank v. Lewis,* 603 S.W.2d 169 (Tex. 1980). This case, however, has been limited to its facts. *Knight v. International Harvester Corp.,* 627 S.W.2d 382, 388 (Tex. 1982). Subsequent opinions lead to the inescapable conclusion that standing is proper in this case. *See La Sara Grain v. First Nat'l Bank of Mercedes,* 673 S.W.2d 558 (Tex. 1984); *Flenniken v. Longview Bank & Trust Co.,* 661 S.W.2d 705 (Tex. 1983). "The economic realities of the banking relationship, when coupled with the social policies embodied in the DTPA, mandate that courts turn their emphasis away from the artificial standing issue and focus on the merits of the customer's complaint." Krahmer, Lovell & McCormick, *Banks and the Deceptive Trade Practices Act,* 18 Tex. Tech L. Rev. 1, 44 (1987).

MBank failed while a motion for rehearing was pending in the court of appeals, so the decision never became final. Moreover, in a subsequent decision, the Fourteenth Court of Appeals seems to have retreated from the *LeMaire* reasoning. In *Central Texas Hardware, Inc. v. First City, Texas—Bryan, N.A.*, the court addressed a claim by a borrower that the bank breached a loan commitment for, among other things, the purchase of seasonal inventory. The core of the complaint was that the bank held up financing while negotiating with the Small Business Admin-

---

256. Id. at 70-74.
257. Id. at 41.
258. See supra note 9.
istration for a guarantee of a greater percentage of the proposed loan.\textsuperscript{260}

The court denied a DTPA recovery, since there was no complaint regarding the quality of inventory that would have been purchased, nor any complaint about bank services other than those necessarily involved in processing the loan.\textsuperscript{261} Even so, still relying on Professor Krahmer's work, the court refused to assess "groundless suit" attorneys' fees\textsuperscript{262} against the borrowers.\textsuperscript{263}

If the "financial intermediation" theory ever were adopted by Texas courts, it would constitute a practical reversal of Riverside and would render both the "collateral service" and "inextricably intertwined" doctrines unnecessary. Indeed, this simplification of doctrine is among the chief benefits urged by its supporters.\textsuperscript{264} In an area as convoluted and incoherent as the application of the DTPA to lenders, simplicity may well be seen as a worthy goal in itself, particularly if a reader has just finished wading through the tortuous history of the "inextricably intertwined" doctrine. No matter whether one believes that the Texas Legislature intended to include or exclude lenders when it enacted the DTPA, most anyone would agree that the lawmakers never intended the fine distinctions in meaning now being made by some courts in applying the "collateral services" and "inextricably intertwined" doctrines. While the "financial intermediation" theory has at least the virtue of providing a clear answer to the question, a far better approach might be to devote some effort to discerning the Texas Legislature's real intent. That task will now be attempted.

\section*{III. EXPLORING LEGISLATIVE INTENT}

Perhaps the strangest aspect of DTPA doctrine, so far as its application to lenders is concerned, is the almost complete lack of attention given by courts to basic questions of statutory construction. If one did not know better, a review of recent case law might lead one to conclude that the "Riverside rule" is a common law doctrine fallen upon hard times. The words of the Riverside decision, the exceptions, and the variations in phrasing of the tests that have been developed in lines of cases since Riverside are more typical of a common law rule in the process of redefinition than the construction of a much-amended statute.

Yet the Texas DTPA is a statute, and a statute rich in clues to the legislature's intent in enacting and, on several occasions, amending the act.

\textsuperscript{260} Id. at 236.
\textsuperscript{261} Id. at 236-37.
\textsuperscript{262} Under the current version of the DTPA, a successful defendant can recover court costs and attorneys' fees on a finding that the DTPA claim was "groundless and brought in bad faith, or brought for the purpose of harassment." \textsc{Tex. Bus. \\& Com. Code} \textsection 17.50(c) (Vernon 1987).
\textsuperscript{263} \textit{Central Texas Hardware}, 810 S.W.2d at 237-38.
\textsuperscript{264} See, e.g., Krahmer, \textit{supra} note 14, at 44 (stating, in support of this approach, that requiring bank customers to engage in pleading maneuvers to assert a DTPA cause of action is "a wasteful practice").
The Texas DTPA also contains specific statutory guidance on how it should be read, and it is surrounded by other statutes shedding considerable light on the place of the DTPA in the universe of Texas consumer protection laws. This section will explore the legislative history\textsuperscript{265} of the statute, amendments to the statute, and relevant provisions in similar legislation. Analogous decisions from other jurisdictions also will be examined, as the DTPA suggests. The conclusion, and it is a relatively clear conclusion, is that the Texas Legislature never meant the DTPA to apply to lending transactions.

A. LEGISLATIVE HISTORY AND INTENT OF THE DTPA: THE ORIGINAL ENACTMENT

Any attempt to reconstruct the legislative history of the DTPA more than two decades after the event is fraught with difficulty.\textsuperscript{266} The fact that the DTPA was enacted in 1973, however, is very helpful. Beginning with the 1973 legislative session, tape recordings of floor debate and com-

\textsuperscript{265} The DTPA was enacted as a new chapter in the Texas Business and Commerce Code. Consequently, the Texas Code Construction Act, \textsc{Tex. Gov't Code Ann.} §§ 311.001-.032 (Vernon 1988 & Supp. 1994), serves as a guide to statutory construction. The Code Construction Act permits a court to consider the legislative history of a statute "whether or not the statute is considered ambiguous on its face." \textsc{Tex. Gov't Code Ann.} § 311.023(3) (Vernon 1988). Therefore, in at least one case, the Texas Supreme Court has properly resorted to close analysis of the legislative history to explain aspects of the DTPA. \textit{See}, e.g., \textsc{Big H Auto Auction, Inc. v. Saenz Motors}, 665 S.W.2d 756 (Tex. 1984).

This rule under the Code Construction Act stands in sharp contrast to the older Texas rule that legislative history should control only when the words of the statute are unclear or ambiguous. Old Article 10 of the Revised Civil Statutes, codified as Chapter 312 of the Texas Government Code, sets out rules for the general construction of statutes. Courts are instructed to "diligently attempt to ascertain legislative intent." \textsc{Tex. Gov't Code Ann.} § 312.005 (Vernon 1988). Judicial decisions, however, have stated that when the language of a statute is "plain and clear," no aids in statutory construction are necessary. \textsc{Salazar v. State}, 169 S.W.2d 169, 170 (Tex. Crim. App. 1943); \textit{see also}, e.g., \textsc{Robinson v. Steak and Ale No. 105 Club}, 607 S.W.2d 286, 288 (Tex. Civ. App.—Texarkana 1980, no writ) (stating that extrinsic aids are not necessary "when the legislative intent is clearly expressed").

\textsuperscript{266} Speaking before a senate joint committee hearing in 1988, Karen Neeley (then general counsel of the Texas Bankers Association, now general counsel of the Independent Bankers Association of Texas) commented:

\begin{quote}
My purpose this morning is to discuss, to some extent, some of the historical background on the intent portion of the DTPA. As I was getting ready for this particular hearing, I was reminded of one of my grandmother's favorite anecdotes. She was an English teacher until she was 71 and could quote reams of different stories and poetry. One that she particularly liked concerned one of the English poets. One of his readers came to him and said "What did you mean when you wrote this particular poem?" He turned to her and he said, "Madam, when I wrote that poem, only God and I knew. Now only God knows." I have a funny feeling that this may be the ultimate conclusion that we have with regard to the original intent with regard to the Deceptive Trade Practices Act.
\end{quote}

\textit{Interim Hearings before the Joint Comm. on the Deceptive Trade Practices Act} 2, 70th Leg. (Aug. 12, 1988) (tape available from Senate Staff Services Office; transcript on file at the Texas Bankers Association, Austin).
mittee hearings, as well as bill records, have been available to the general public. In light of the fact that there were about twenty hours of committee hearings and floor debate before the DTPA was enacted, one might expect that the statute's legislative history could offer a rich lode of information on legislative intent. Nonetheless, neither the parties nor the Texas Supreme Court in Riverside seem to have considered these sources of legislative intent.

The legislative history materials available on the 1973 enactment of the DTPA are instructive; in fact, they demonstrate almost conclusively that the legislature meant to exclude lenders from the DTPA's reach, thus validating the Texas Supreme Court's decision in Riverside. Before examining the bill record in detail, however, it is useful to give a little context for the debate. As already mentioned, the DTPA did not simply spring into existence in 1973. While some aspects of the bill were new to Texas law, many features of the DTPA carry through from old Chapter 10 of the Consumer Credit Code, specifically repealed in the process of the DTPA's enactment. Most of the Consumer Credit Code, as the title suggests, applies specifically to credit sales. Chapter 10, which before 1973 was virtually the only piece of Texas consumer legislation directed against deceptive trade practices, prohibited generally "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce."

Justice Campbell's dissenting opinion in Riverside placed heavy emphasis on the fact that the DTPA originated in the Consumer Credit Code. His observations deserve to be quoted at length, although this writer disagrees with the correctness of the conclusion:

It is undisputed that the deceptive trade practices provisions of the Consumer Credit Code applied to lenders before 1973 and there is no language in the Code indicating that the amendment and movement of those provisions to the Business and Commerce Code in any way changed that result. Similarly, the DTPA as amended in 1973 and as it now exists, makes no mention of an exclusion for lenders. This lack of specific language of exclusion takes on added signifi-

---

268. Id.; see also LEGISLATIVE REFERENCE LIBRARY, COMPILING TEXAS LEGISLATIVE HISTORY (undated and unnumbered pamphlet).
270. See supra notes 38-40 and accompanying text.
271. Some portions of the DTPA were drawn from a California statute. This is discussed in some detail infra at notes 449-58 and accompanying text.
cance in view of Section 17.49 which provides for exemptions from
the Act without mentioning lenders.275

It may well be true that, prior to 1973, Chapter 10 of the Consumer
Credit Code theoretically applied to lenders. Unfortunately, it is hard to
tell one way or another. Before enactment of the DTPA, the Consumer
Credit Commissioner's office had been criticized for "languid enforce-
ment of the Code,"276 caused by "insensibility to the consumer, coupled
with compassion for the lending industry."277 While the author knows of
no record of enforcement of Chapter 10 against lenders, the general pro-
hibition against "false, misleading or deceptive acts, or practices in the
conduct of any trade or commerce" is arguably broad enough to include
lending transactions.278 On the other hand, the Texas Legislature simply
may have included the original Deceptive Trade Practices Act within the
Consumer Credit Code because many, perhaps most, consumer goods are
bought on credit.279

None of this speculation, however, would establish that the Texas Leg-
islature meant to create a private cause of action for "consumers" in lend-
ing transactions. The fact that the DTPA was excised from the Consumer
Credit Code and placed in a different statute, under different enforce-
ment authority, would argue for precisely the opposite conclusion. It
hardly would be rational for the Texas Legislature to set up two simulta-

275. Riverside, 603 S.W.2d at 178 (Campbell, J., dissenting).
276. Lloyd Doggett (project coordinator) et al., Comment, Consumer Credit Regulation
277. Id.
278. As discussed earlier, see supra notes 65-73 and accompanying text. Justice Camp-
bell's dissenting opinion in Riverside argues that the "trade or commerce" provision car-
ried over into the DTPA "includes loan transactions." Riverside, 603 S.W.2d at 177-78.
This provision, however, applies only to enforcement actions by the Attorney General's
office, and not to private consumer actions. See TEX. BUS. & COM. CODE ANN.
§§ 17.46(a), 17.50(a)(1) (Vernon 1987). The "trade or commerce" provision would also be
subject to the legislative proviso that courts should be guided "to the extent possible"
by the interpretations given to Section 5(a)(1) of the Federal Trade Commission (FTC) Act.
See id. § 17.46(c)(1). This section of the FTC Act specifically excludes banking, although
the full story is somewhat more complicated. See infra notes 462-71 and accompanying
text.

The pre-1973 act generally prohibited "false, misleading, or deceptive acts or practices in
the conduct of any trade or commerce," which certainly could include lending practices. In
1969, however, Article 5069-10.02 was amended to instruct courts interpreting the scope
of the Texas act's prohibitions to be guided by interpretations of the FTC Act. [Acts of 1969,
61st Leg., p. 1504, ch. 452, § 1]. As the dissent notes, albeit in discussion of a somewhat
different argument, the FTC Act expressly denies to the FTC any authority to regulate
national banks. 15 U.S.C. § 45(a)(6); see Riverside, 603 S.W.2d at 179 (Campbell, J., dis-
senting). This certainly would seem to indicate some legislative intent that lending transac-
tions not be included within the pre-1973 act's scope. See also infra note 441 and
accompanying text.

One observer, surveying state deceptive trade practices law, concludes that "[c]ourts
have had little trouble in finding that banking and credit activities are included within the
'scope of trade and commerce.' " James R. Cox, State Consumer Protection or Deceptive
Trade Practices Statutes: Their Application to Extensions of Credit and Other Banking Ac-

279. In the early 1970s, for example, it was estimated that 53% of all auto purchases
and 60% of department store sales were made on credit. Doggett, supra note 276, at 1013-
14.
neous avenues for administrative policing of small loans, i.e., through the Office of the Consumer Credit Commissioner under the Consumer Credit Code and through the Texas Attorney General's Antitrust and Consumer Protection Office under the DTPA. Yet this result would occur if loan transactions were intended by the legislature to be included within the DTPA.

The DTPA's legislative history is clear on the subject of whether loans were meant to be included. Surprisingly, at least to those who know something of the Texas Legislature, the issue of whether loans were to be included within the DTPA was a question to which the legislature gave some conscious consideration. During house hearings, for example, Attorney General John Hill—acknowledged by the bill's sponsor to be the real drafter—could have laid the entire issue to rest in one exchange:

REP. ALLRED: Would this bill cover things such as small loan companies where a person feels aggrieved or anything of that nature?

ATTORNEY GENERAL HILL: I'm going to defer on that to Joe [Longley] if you don't mind, David, because that's been greatly discussed in recent conferences, and I'm frankly not clear on where we are. If you don't mind, I'm going to ask that you re-ask that later.

Unfortunately, the question was not re-asked. Fortunately, the answer to Representative Allred's question is apparent from the legislative record.

The version of the DTPA that ultimately passed into law was not the version originally introduced. Rather, it was a committee substitute. As enacted, the DTPA provides a cause of action for consumers in four enumerated instances: a violation of the "laundry list," breach of warranty, unconscionable actions, or violations of Article 21.21 of the Texas


281. TEX. BUS. & COM. CODE ANN. § 17.45(8) (Vernon 1987).

282. Representative Carl Parker began committee hearings on the DTPA by stating: "Let me confess that I have no pride of authorship in this bill; I am proud to be the House sponsor, however. It was drafted in the Attorney General's office and has been nurtured under their care and feeding over there." The Texas Deceptive Trade Practice-Consumer Protection Act: Hearings on Tex. H.B. 417 Before the House Comm. on Bus. & Indus., 63d Leg. 1 (Feb. 27, 1973) [hereinafter DTPA House Hearings].

283. Joe Longley, now a plaintiffs' attorney in Austin, has maintained a continuing interest in the DTPA. He is a principal author of BRAGG, supra note 94. His view of the scope and purposes of the DTPA is, to put it mildly, expansive. In 1989, commenting on criticisms of the breadth of the DTPA, Mr. Longley reportedly stated: "The only businessmen who have anything to fear from the DTPA are liars, cheats and thieves." Diane Burch, Lobbyists Flock to DTPA Fight, TEX. L.AW., Jan. 30, 1989, at 14, col. 1.

284. Ms. Levatino, now Elizabeth Lacey, is a justice of the Virginia Supreme Court. When interviewed by telephone several years ago, she had no independent recollection of the disposition of financial institution liability in negotiations surrounding enactment of the Texas DTPA.


An analog provision of the superseded bill contained substantially similar language for the first three enumerated instances, but contained no private cause of action for violations of the Insurance Code.

The early bill did, however, have a fourth category, which did not survive committee action. Under the original version of the DTPA bill, a consumer could maintain a private cause of action for “a failure by any person to comply with the provisions of Chapter 2, 3, 4, 5, or 7” of the Consumer Credit Code. Had this provision survived to final enactment, consumers clearly would have had a private cause of action against lenders: Chapter 3 of the Consumer Credit Code deals with small loans, Chapter 4 regulates installment loans, and Chapter 5 covers secondary mortgage loans. Since the original bill also contained a relatively restrictive definition of consumer, the inclusion of Chapters 3 through 5 of the Consumer Credit Code would have pretty well run the gamut of "consumer" loans potentially subject to the DTPA.

The deletion of this provision from the original bill was deliberate; it was mentioned specifically by the bill's sponsor at the beginning of House committee hearings. While the exact reasons for this shift in philosophy are not readily apparent from the legislative record, deletion of consumer loans from the DTPA's umbrella would be in line with the Senate Interim Study Committee's earlier observation that "there is a definite distinction between deceptive acts and practices and regulation of credit." It is perhaps worth mentioning that the vice-chair of that com-

---

288. The language of the relevant section of the superseded bill is as follows:
   Sec. 17.52. RELIEF FOR CONSUMERS. (a) A consumer may maintain an action if he has been adversely affected by any of the following:
   (1) the use or employment by any person of an act or practice declared to be unlawful by Section 17.46 of this subchapter or regulations issued under this subchapter;
   (2) a failure by any person to comply with an express or implied warranty;
   (3) any unconscionable action or cause [sic] of action by any person; or
   (4) a failure by any person to comply with the provisions of Chapter 2, 3, 4, 5, or 7, Title 79, Revised Civil Statutes of Texas, 1925, as amended (Articles 5069-2.01 et seq., Vernon's Texas Civil Statutes), or the rules or regulations promulgated under these chapters.
289. Id.
293. "Consumer" was defined in the original bill as "an individual who seeks or acquires by purchase or lease, any goods or services for personal, family, or household purposes." Tex. H.B. 417, 63d Leg. (1973) (§ 17.45(4); emphasis added).
294. DTPA House Hearings, supra note 282, at 5.
committe—State Senator Jack Hightower—now is a member of the Texas Supreme Court. 296 It also appears from records of the debate that the decision to exclude loans from the DTPA’s ambit was intended to accomplish more than just a prohibition on a private cause of action. Extensive discussion of the division of regulatory responsibilities makes it clear that the Attorney General’s office was never meant to have enforcement powers against lenders through the DTPA. 297 A colloquy that occurred during Senate debate is instructive on the intended regulatory effect of the DTPA, as well as the act’s application to lenders in general. The question was whether the Attorney General, or the Antitrust and Consumer Protection Division of the Attorney General’s office, should be designated to

296. The composition of the Texas Supreme Court presents a strange problem for those interested in arguing legislative intent, to wit: Two current and two former members of the Texas Supreme Court were involved in the original enactment of the DTPA. As president of the Texas Consumer Association, former Justice Lloyd Doggett helped draft the DTPA. John L. Hill, Introduction, 8 St. Mary’s L.J. 609, 612 (1977). Justice (then Senator) Jack Hightower was vice-chair of the Senate Interim Committee on Consumer Protection. Tex. Senate Interim Comm. on Consumer Protection Minutes 2, 61st Leg. (Nov. 21, 1969). Former Justice (then Senator) Oscar Mauzy was the DTPA’s Senate floor sponsor. Hill, supra, at 612. Justice (then Senator) Bob Gammage was present during Senate floor debate. Debate on Tex. S.B. 45 on the Floor of the Senate, 63d Leg. 6 (Apr. 13, 1973) (transcript available from Senate Staff Services Office).

In theory, whether some members of the court who were involved in the DTPA’s passage should be of no real importance. Texas historically has recognized a clear division between the different branches of government, with an explicit “separation of powers” provision enshrined in the Texas Constitution. Tex. Const. art. II, § 1. In addition, “legislative intent” is not the intention of individual legislators, but a “fiction or figure of speech,” 2A Norman J. Singer, Sutherland Statutory Construction § 45.06 (4th ed. 1984 rev. & Supp. 1991) (describing the process of determining the intent of the legislature, not the subjective intent which may be entertained by individual legislators). See, e.g., James M. Landis, A Note on “Statutory Interpretation,” 43 Harv. L. Rev. 886 (1930).

Ideally, then, members of the Texas Supreme Court who were involved in the DTPA’s passage as legislators or lobbyists would respect their new role as members of the judicial branch and carefully base their decisions on comparatively objective indices of legislative intent. In any event, one former member of the court deliberately and publicly deviated from the ideal. Concurring with a decision to extend the DTPA’s provisions to implied warranties, Justice Mauzy drew on his personal knowledge as Senate sponsor of the bill to discuss a “political agreement” and “horse trading” whereby Attorney General John Hill agreed not to include implied warranties in the bill to secure passage. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 361 (Mauzy, J., concurring). Justice Mauzy felt this exclusion of language from the bill should not bind the court, explaining: “I fail to see how those political compromises that were so necessary to achieve a worthwhile result in the legislative process 14 years ago can in any way be construed as ‘an improper excursion into the legislative arena.’” Id. Justice Mauzy continued, explaining the majority’s decision to deviate from the doctrine of stare decisis by reversing a two-year-old decision:

The simple truth of the matter is that the dissent was right in 1985 and the majority was wrong. The people, speaking through the elective process, have constituted a new majority of this court which has not only the power but the duty to correct the incorrect conclusion arrived at by the then-majority in 1985 on this question.

Id. One would hope that in a future case properly presenting the issue, the current Texas Supreme Court would honor the Texas Legislature’s decision to exclude lending practices from the DTPA’s original scope, whether that decision was the result of a political horse trade or not.

297. The Attorney General’s office does not appear to share this view in its enforcement activity. See infra notes 473-74 and accompanying text.
enforce the DTPA. The interchange was between Senator Oscar Mauzy,298 the Senate sponsor of the DTPA, and an unidentified senator:

SEN. MAUZY: Well, you see, for example, there has been a Consumer Protection Division created over in the Consumer Office in the Consumer Credit Commission by statute.

UNIDENTIFIED: Yes, Senator, but I don't believe they are involved in this bill.

SEN. MAUZY: No, no, I know.

UNIDENTIFIED: They have been eliminated from this bill.

SEN. MAUZY: All I am saying is that this concept of a special division to enforce these rights is really nothing new.

UNIDENTIFIED: Well, I realize that you are talking about the Consumer Credit, Consumer Protection—no, the small loans, regulatory, they are the ones that are out of this bill. They are not involved in this. So really we are just addressing ourselves to the Attorney General and his agency.

SEN. MAUZY: That's correct.299

Such a statement by the sponsor of a bill during floor debate is rightly regarded as “the clearest possible expression”300 of legislative intent.301

---

298. Big H Auto Auction, 665 S.W.2d at 758 (identifying Senator Mauzy as a participant in the Senate floor debate).

299. Debate on Tex. S.B. 45 on the Floor of the Senate, 63d Leg. 11 (Apr. 13, 1973) (transcript available from Senate Staff Services Office) (emphasis added). The quoted exchange differs slightly from the “official” Senate transcript. One of the authors personally audited the original tapes at the Texas State Archives, added several words omitted from the transcript, and changed two words that were incorrectly transcribed. The substance of the exchange is not affected, however, regardless of whether one consults the transcript or the original tapes.


301. This exchange is not, of course, the only evidence of legislative intent to exclude lenders from the DTPA, and from the Attorney General's regulatory authority. For example, the House hearing record contains a telling exchange between Robert Sneed, an attorney testifying on behalf of an insurance industry group, and Representative Temple. The dispute was over the question of whether the proposed DTPA regulation of insurance practices would conflict with the State Board of Insurance's regulations.

REP. TEMPLE: Again, we come to the subject of dual regulation, which I am not ready to admit this is, but let's assume for a moment it is . . . . Now, I don't know how many different agencies regulate the banking industry, but right offhand, I can think of state bank, for example, is very closely regulated by the FDIC, the Department of Banking of the State of Texas, it comes under the Commercial Code, I believe. I don't feel that this has weakened their banking system. I feel that it probably strengthened it . . . .

MR. SNEED: Well, I think that you have—you cannot compare it from the standpoint of apples and oranges. You have the primary jurisdiction, and the operation of the FDIC in connection with the state is an auditing basis only, not a policy making decision. . . .

REP. TEMPLE: But maybe a clear example would be—I don't necessarily agree with that either, but—let's go with the comparison between the banks being under the . . . Consumer Credit Code, and let's assume that the Texas Department of Banking is the primary—

MR. SNEED: But see, Mr. Temple—

REP. TEMPLE: I'm saying, you've got two very comfortable types of things there and it hasn't seemed to have worked a very hardship on the banking industry.

It is difficult to imagine this exchange occurring without some mention of the fact that banks were to be regulated under the DTPA, as well as under the Consumer Credit Code.
Senator Mauzy’s floor comments, in particular, already have been considered by the Texas Supreme Court to be instructive in determining the intent of the legislature in enacting the DTPA.

There is no indication in the Riverside opinion or in the briefs of counsel (or in any subsequent decision, for that matter) that the deliberate deletion of consumer loans from the draft DTPA ever was called to the attention of the Texas Supreme Court. It is interesting to speculate on what the vote total would have been in Riverside had the court known the statute’s legislative history. In fact, one need not go far to discover a striking parallel. Just one week after the Texas Supreme Court granted the application for writ of error in Riverside, the court issued a unanimous decision on a question of statutory construction—whether a 1971 amendment to the Texas Workers’ Compensation Act permitted recovery for mental trauma. The court, in an opinion written by one of the justices who later joined in the Riverside dissent, placed great emphasis on the fact that the word “mental” was included in the original bill, but was excised before passage. The court declared that “[t]he deletion of a provision in a pending bill discloses the legislative intent to reject the proposal,” and concluded: “Courts should be slow to put back that which the legislature has rejected.” Using the same reasoning, Riverside also should have been a unanimous decision.

B. The Legislative History and Intent of the DTPA: Post-Riverside

One minor mystery in this area of the law is the question of why, despite frequent amendment of the DTPA and other consumer statutes, no Texas Supreme Court case since Riverside has examined the legislative intent underlying the DTPA, or the possible impact of post-1973 amendments to the DTPA. Flenniken, for example, was decided under the 1975 version of the act, Knight, Ogden and La Sara under the 1977 and FDIC regulations, had that in fact been the Legislature’s intent. This committee history may not be controlling, but it certainly should be viewed as persuasive of the legislature’s intent. Cf. Transportation Ins. Co. v. Maksyn, 580 S.W.2d 334 (Tex. 1979).

302. Id. at 337-38.
303. Id. at 338. The same reasoning has been used by the Texas Supreme Court to conclude that buyers for resale can maintain a DTPA action because the 1973 legislature deleted the word “final” from the original phrase “purchased for final use” before the DTPA was enacted. See Big H Auto Auction, 665 S.W.2d at 757-58.
304. Flenniken, 661 S.W.2d at 706 n.1.
305. The contract in Knight was signed and the suit was filed in 1978. See Knight, 627 S.W.2d at 384.
307. The operative facts in Ogden occurred in 1978. See Ogden, 662 S.W.2d at 334.
308. Part of the wrongful acts complained of in La Sara involved the 1975 version of the DTPA; part involved the 1977 version. See La Sara, 673 S.W.2d at 565.
Yet not one of these decisions explored the language of subsequent amendments, or the legislative history accompanying those amendments. This is unfortunate because several legislative enactments and revisions since Riverside confirm the intended exclusion of loan transactions from the ambit of the DTPA.

1. The 1977 Venue Amendment to the “Laundry List”

A 1977 amendment adding a new line item to the DTPA “laundry list” is probably the single most interesting change in the DTPA since its enactment, so far as lenders are concerned. The 1977 amendment, now found as “laundry list” item 22, prohibits, in relevant part, the practice of:

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 . . . .

The significance of a legislative list in the DTPA that adds “loans or extensions of credit” to “goods or services” is intuitively obvious. The fact that it has escaped the attention of courts struggling with the issue of whether the DTPA applies to lenders perhaps can be attributed to the fact that subsection (22) is a “seldom-used provision” of the laundry list.

The Texas Supreme Court, however, already has recognized the significance of such a variation from the “goods or services” restriction on the statutory definition of a “consumer,” although in a slightly more attenuated fashion. In Riverside, when the court initially determined that a loan was not a “good or service” under the DTPA, the Texas Supreme Court placed heavy emphasis on the fact that the same legislature which passed the DTPA also enacted the Home Solicitations Transactions Act. In contrast to the DTPA, the legislature defined “consumer” in the Home Solicitations Act as “an individual who seeks or acquires real or personal property, services, money, or credit for personal, family or

309. The operative facts in Home Savings arose in 1984. See Home Savings, 733 S.W.2d at 134.
312. TEX. BUS. & COM. CODE ANN. § 17.46(b)(22) (Vernon 1987) (emphasis added).
313. ALDERMAN, supra note 34, at 77.
314. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987).
household purposes."

The legislative intent to exclude "money" and "credit" from the DTPA, so far as consumer actions were concerned, was clear to the Texas Supreme Court:

Obviously, the Legislature knew how to include the extension of credit and borrowing of money within the scope of coverage of protective legislation, when it intended to cover such transactions. The simple addition of the words "money or credit" within the definition of "consumer" in the DTPA would have accomplished such a purpose in the DTPA. The Legislature's exclusion of these terms from the DTPA, in light of its contemporaneous inclusion of the same terms in the Home Solicitations Transactions Act, evidences a clear legislative intent that the extension of credit was not to be covered under the DTPA.

The fact that the Texas Legislature defined "consumer" to include "loans" in one statute passed in 1973 yet did not include "loans" in the similar definition contained in the 1973 DTPA is certainly strong evidence of legislative intent to exclude loans from DTPA coverage. The 1977 amendment of the DTPA itself, referring to "goods, services, loans or extensions of credit," surely is entitled to even more weight as an expression of legislative intent. The Texas Supreme Court has counseled that, in interpreting the DTPA, "[l]egislative intent should be determined from the language of the entire Act and not isolated portions."

Use of the disjunctive "or" in subsection (22) makes it very clear that "goods" and "services," as used elsewhere in the same act, should not include "loans" or "extensions of credit."
Considered in full context, then, the addition of subsection (22) to the laundry list of DTPA violations demonstrates clearly that the Texas Legislature did not intend loans, per se, to be consumer transactions under the DTPA. It is a specific amendment, deliberately considered, that one precise type of lender abuse is peculiarly amenable to DTPA enforcement. However, were lenders already generally subject to the DTPA, as has been argued by some, use of the words “loans” and “extensions of credit” simply would not have been necessary.

2. The 1983 Amendments to the DTPA, the Home Solicitations Transactions Act, and the Texas Debt Collection Act

As just described, when the Texas Supreme Court in Riverside considered the difference between the definition of “consumer” found in the DTPA and the much broader definition of the word contained in the Home Solicitations Transactions Act, the court suggested that “[t]he simple addition of the words ‘money or credit’ within the definition of ‘consumer’ in the DTPA” would have sufficiently indicated the legislative intent to include loan transactions within the scope of DTPA consumer actions. The Texas Legislature has amended the DTPA definition of “consumer” since Riverside yet has not taken the Texas Supreme Court up on its suggestion to add “money or credit” to the definition. This raises a presumption that the Texas Legislature approves of the Texas Supreme Court’s construction of the term “consumer” in Riverside.

Legislative action since Riverside does more than raise a mere formal presumption, however. The actions of the 1983 Texas Legislature in particular demonstrate some very serious thought to the question of DTPA consumer status, and a clear determination that loans are not meant to be within the DTPA’s general coverage. The legislature did amend the DTPA definition of “consumer” in 1983, by restricting that definition in two respects. First, the provision granting consumer status to a “governmental entity” was replaced with language restricting possible consumer status to “this state, or a subdivision or agency of this state.” Second, the legislature denied consumer status to “business consumers,” persons

Debate on Tex. H.B. 2059 on the Floor of the Senate, 65th Leg., R.S. (May 19, 1977) (tape available from Senate Staff Services Office).

321. Riverside, 603 S.W.2d at 175; see also supra notes 315-17 and accompanying text.
323. See, e.g., Patton v. American Home Mut. Life Ins. Co., 185 S.W.2d 420, 422 (Tex. 1945) (re enactment without change after judicial construction implies adoption of construction); Brackenridge v. Roberts, 267 S.W. 244, 247 (Tex. 1924), reh’g denied, 270 S.W. 1001 (Tex. 1925) (stating that “[w]hen a statute has been construed by the court of last resort of a state, and the same is substantially re-enacted, the presumption prevails that the Legislature adopted such construction”); Hilliard v. Wilkerson, 492 S.W.2d 292, 295 (Tex. Civ. App.—Fort Worth 1973, writ granted, dism’d as moot) (stating that “[w]here, after a statute has been construed by a state’s highest court, the legislature reenacts the statute, whether by adoption of revised statutes or by amendment, the act of the legislature carries with it the construction previously placed upon the law by the court”).
or entities with assets of $25 million or more seeking goods or services for commercial or business use.\textsuperscript{325}

The 1983 legislature also beefed up the remedies available under the Home Solicitations Transactions Act,\textsuperscript{326} making a violation of the act actionable under the DTPA, with language incorporating the venue and remedies provisions of the DTPA.\textsuperscript{327} A parallel amendment to the Texas Debt Collection Act\textsuperscript{328} accomplished the same result in that statute.\textsuperscript{329} Thus, a person who is extended credit in a home solicitation transaction may seek DTPA remedies for a violation of an enumerated item in the list of "deceptive trade practices" set out in the Home Solicitations Transactions Act, even though that same person does not qualify as a DTPA "consumer" in general.\textsuperscript{330} The 1983 legislature therefore implicitly\textsuperscript{331} declined the Texas Supreme Court's invitation in \textit{Riverside} to rewrite the general definition of "consumer" in the DTPA to conform to the broader definition of "consumer" in the Home Solicitations Transactions Act.\textsuperscript{332}

The 1983 amendment of the Texas Debt Collection Act also has a bearing on the Legislature's intended scope of the DTPA. Advocates of expanding the DTPA to lending transactions argue that the act should reach false or deceptive practices in the course of debt collection by lenders. In \textit{Thompson v. First Austin Company},\textsuperscript{333} for example, the debtors argued the lender should be subject to DTPA liability for first promising that it did not intend to foreclose, then foreclosing anyway.\textsuperscript{334} The Texas Debt Collection Act addresses a number of specific prohibited acts that lenders sometimes commit in the course of debt collection, including wrongful

\textsuperscript{325} \textit{Id.} §§ 2, 3.


\textsuperscript{331} Legislative history on this amendment is sparse. The only person speaking for the bill was a representative of the Texas Attorney General's office, who explained that the bill "puts to rest some of the arguments that have been recently raised with respect to the relationship of these two statutes [the Home Solicitations Transactions Act and the Debt Collection Act] and the Deceptive Trade Practices Act." \textit{Hearings on Tex. S.B. 668 Before the Senate Jurisprudence Comm.}, 68th Leg., R.S., (May 3, 1983) (taped statement of David A. Talbot, Jr., chief of the Consumer Protection Division, Attorney General's office) (transcript available from Senate Staff Services Office). \textit{Riverside} is not mentioned in the very brief discussion on the bill. The bill analysis in the House simply states that "[c]urrent law is ambiguous regarding the prohibition of double recovery under the Texas Deceptive Trade Practices Consumer Protection Act." \textit{House Comm. on Bus. & Comm., Bill Analysis, Tex. S.B. 668, 68th Leg., R.S.,} (1983).

\textsuperscript{332} \textit{See} \textit{Riverside}, 603 S.W.2d at 175.

\textsuperscript{333} 572 S.W.2d 80 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.); \textit{see also supra} discussion at notes 111-18.

\textsuperscript{334} \textit{Id.} at 81.
threats of repossession and sale. The statute also spells out several specific "unconscionable" and "deceptive" debt collection activities.

The Texas Debt Collection Act was passed at the same legislative session as the DTPA. It strains credulity to think that unconscionable or deceptive activities of lenders in their debt collection efforts needed a separate statute if these activities already were considered by the legislature to be subsumed within the general prohibition on "unconscionable" or "deceptive" acts contained within the DTPA. It would be even more odd for the legislature to have confined a cause of action for unconscionable or deceptive debt collection practices only to debts contracted for "personal, family, or household purposes," while simultaneously expanding the DTPA far beyond these limits. Moreover, had the Texas Legislature intended the DTPA to apply to all debt collection practices, all lenders, and all loans, it could have accomplished that purpose in 1983 simply by amending the definition of "consumer" within the DTPA. Instead, the legislature kept the restrictions on the type of loan and particular prohibited acts already contained within the Texas Debt Collection Act and simply appended DTPA relief to the existing statute. As a result, the statutes explicitly permit the Attorney General's enforcement powers to be used to curb violations of the Debt Collection Act and Home Solicitations Transactions Act, while leaving consumer remedies largely unaffected.

Taken in conjunction, the decision of the 1983 legislature to tighten the general definition of "consumer" within the DTPA, the decision to permit

335. TEX. REV. CIV. STAT. ANN. art. 5069-11.02(g) (Vernon 1987).
336. Id. § 11.04.
337. Id. § 11.05.
339. TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (Vernon 1987).
340. Id. § 17.50(a)(1).
341. TEX. REV. CIV. STAT. ANN. art. 5069-11.01(d) (Vernon 1987).
342. The 1973 DTPA did not contain, nor does it contain today, any such restriction on the definition of a "good." TEX. BUS. & COM. CODE ANN. § 17.45(1) (Vernon 1987). The 1973 act's definition of "services" did contain a proviso that the services be "for other than commercial or business use." This restriction was removed, however, by a 1977 amendment. See Act of May 21, 1973, 63d Leg., R.S., ch. 143, § 1, 1973 Tex. Gen. Laws 322, 323, amended by Act of May 10, 1977, 65th Leg., R.S., ch. 216, § 1, 1977 Tex. Gen. Laws 600.
344. TEX. REV. CIV. STAT. ANN. art. 5069-13.03(c) (Vernon 1987).
DTPA relief for the narrowly defined categories of "consumers" under the Home Solicitations Transactions Act, and the similar decision to provide DTPA remedies for violations of the Texas Debt Collection Practices Act, argue most strongly against any legislative intent—before or during the 1983 legislative session—that lending activities in general be actionable under the DTPA. This set of amendments, however, is far from the only indication of legislative intent.

3. The 1987 Credit Services Organizations Act

In Riverside, the plaintiff's primary complaint was that Riverside National Bank's loan officer promised to lend him money, although the officer knew, or should have known, that no money would be forthcoming. To the four dissenting justices, these facts should have been sufficient to demonstrate DTPA "services" in the lending process. Even the majority decision reserved judgment on the question of whether "services existed in the lending of money, and in the process of determining whether to lend money," commenting that the argument was not supported by trial evidence and therefore "merely hypothetical." The theoretical validity of this view, and of the "collateral services" doctrine, will be examined in slightly more detail later. The answer to this question, however, should first be determined, if at all possible, by reference to legislative intent. The Credit Services Organizations Act provides some valuable insight into the legislature's intent, so far as "services" associated with lending are concerned. The Credit Services Organizations Act was passed in 1987 and is codified as Chapter 18 of the Texas Business & Commerce Code—immediately following the DTPA. The purpose of the legislation was to crack down on so-called "credit repair" companies—organizations that promise to get credit or eliminate bad credit references for a fee. The language of the act, however, is arguably broad enough to cover the precise "services" supposedly rendered by Riverside National Bank's loan officer.

The act extends to "a person who, with respect to the extension of credit by others and in return for the payment of money or other valuable consideration" provides, or promises to obtain "an extension of credit for a buyer." The act prohibits "false or misleading representations" or

---

345. Riverside, 603 S.W.2d at 171.
346. Id. at 178 (Campbell, J., dissenting).
347. Id. at 175.
348. See infra notes 696-704 and accompanying text; see also supra notes 109-42, and 252-64 and accompanying text.
352. TEX. BUS. & COM. CODE ANN. § 18.02(a)(2) (Vernon 1987).
353. Id. § 18.03(3) (Vernon 1987 & Supp. 1994).
engaging in a "fraudulent or deceptive act" regarding the credit services. Violation of the act can subject a credit services provider to criminal penalties and punitive damages. Violation of the Credit Services Organizations Act also is a violation of the DTPA.

Based on this information, one might conclude that the Texas Legislature had determined not only to repeal Riverside legislatively, but also to add some enforcement "teeth" that go beyond even the harshest DTPA penalties. Three provisions in the Credit Services Organizations Act, however, would have prohibited its application to create DTPA liability in Riverside or limited its applicability in similar situations. First, and by far the most important, the legislation specifically exempts any regulated lender, FDIC or FSLIC-insured bank or thrift, or credit union. Riverside National Bank thus would have been exempt by statute. Second, the act is definitionally limited to extensions of credit "offered or granted primarily for personal, family, or household purposes." While the Riverside borrower's Cadillac El Dorado would have passed muster under this standard, many other transactions, such as the dump truck in Knight, the computer software system at issue in Qantel, or the radiator equipment in Kinerd would not. Finally, the statute extends only to those who offer assistance in obtaining extensions of credit "from others," not those who extend credit directly.

The Credit Services Organization Act does use the word "services" in regard to the extension of credit in almost exactly the same context as the Texas Supreme Court considered in Riverside. For that matter, from the description in the case, the Riverside borrower would undoubtedly have been a prime candidate for basic credit repair services as well. Far from showing any legislative intent that lending "services" be subject to the DTPA, however, the limitations and exclusions in the Credit Services Organizations Act indicate that services associated with the extension of credit are not contemplated as within the purview of the DTPA. To state the obvious, the Texas Legislature would have had little need to make a violation of the Credit Services Organizations Act a violation of the DTPA if the DTPA was already intended to apply to such activities by its

354. Id. § 18.03(4).
355. Id. § 18.09(b) (Vernon 1987).
357. Id. § 18.11.
358. One section of the Texas Penal Code, the Deceptive Business Practices Act provides criminal sanctions for deceptive representations made in connection with a sale of services for a fee. TEX. PENAL CODE ANN. § 32.42 (Vernon 1989).
359. TEX. BUS. & COM. CODE ANN. §§ 18.02(b)(1)-(3) (Vernon 1987).
360. Id. § 18.01(3).
361. Riverside, 603 S.W.2d at 171.
362. Knight, 627 S.W.2d at 383.
363. Qantel, 761 S.W.2d at 303.
364. Kinerd, 800 S.W.2d at 188.
365. TEX. BUS. & COM. CODE ANN § 18.02(a) (Vernon 1987).
366. The Riverside borrower failed to make his first payment on time, bounced a check for the late payment and put down gross income, not net, on his loan application at Riverside National Bank. Riverside, 603 S.W.2d at 171.
own terms. Equally as obvious, it would not make sense to restrict the scope of services covered under the Credit Services Organizations Act to "personal, family, or household" credit, or to exempt traditional lenders, if lenders were already subject to the DTPA, and if services associated with all loans, not just these "consumer" loans, were already actionable under the DTPA.

One familiar precept of statutory construction is that "the Legislature is never presumed to have done a vain thing in the enactment of a statute."367 For this reason, "[a] construction should not be adopted, if it can be avoided, that will render any part of the act inoperative, negatory or superfluous."368 It may be possible to explain how the legislature could have perceived some need to adopt the Credit Services Organizations Act even if lending "collateral services" were already included in the DTPA. It may also be possible to explain the exclusion of traditional lenders from this act in such a way that the exclusion would logically mesh with a theory of general lender liability under the DTPA. This writer, however, knows of no such way. The simplest explanation of the Credit Services Organization Act's language is that lenders in general, and at least some services collateral to lending activities, are not meant to be covered by the DTPA. And in legislative construction, as with the philosopher's guide of "Occam's razor," the simplest explanation generally is the best.369

C. LENDING AS DISTINCT FROM A "PURCHASE OR LEASE": An Untried Statutory Argument

To date, Texas courts and commentators struggling with the application of the DTPA to lenders have focused almost exclusively on the question of whether money is a "good" or "service." The DTPA definition of "consumer," however, contains another restriction that has not yet been addressed by a Texas court. The DTPA requires that goods or services be acquired "by purchase or lease."370 Put simply, acquisition of money by loan should not give rise to a private cause of action under the Texas DTPA because a loan is neither a purchase nor a lease.

The point is intuitively obvious. The DTPA contains no special definition of "purchase or lease." When a statute contains no specific definition, words in the statute are to be given their common and accepted meaning.371 No sane person would walk into a bank and announce: "I

369. Cf. Donlon v. Jewett, 26 P. 370 (Cal. 1891) (preferring a construction that affords "a simpler and more probable explanation of the discrepancies in the statute than any other").
370. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987).
371. Big H Auto Auction, 665 S.W.2d at 758 (specific application to DTPA); see also Satterfield v. Satterfield, 448 S.W.2d 456, 459 (Tex. 1969).
want a car. Who do I talk to about leasing some money to get it?” In short, financial institutions do not sell or lease money; they make loans.372

The basic legal distinction between a loan and a purchase or lease was perhaps best set out in a federal decision, United States v. Investors Diversified Services, Inc.373 The Clayton Act makes it unlawful to “lease or make a sale or contract for sale” on the condition that the lessee or purchaser not deal with a competitor.374 A very similar provision is found in the Texas Free Enterprise and Antitrust Act.375 The Minnesota District Court faced the question of whether a borrower’s complaint that a real estate lender requiring borrowers to purchase required insurance solely from the lender stated a cause of action under the Clayton Act. The court’s reasoning, holding lenders to be excluded, is worth setting out at some length.

It is difficult to conceive of a transaction for a loan of money as being a lease, sale, or contract for sale of a commodity. Certainly, the loan is not a sale in the usual business sense. A sale is an absolute transfer of property or something of value for a consideration from the seller to the buyer . . . . A loan of money, on the other hand, is an advance of money or credit upon an understanding that an equivalent is to be returned to the lender by the borrower on demand or within a specified time. In the United States money is merely a medium of exchange, not something which is bought and sold in exchange for something else. One does not “sell” money in the usual business sense. Money is used to “purchase” other articles or things. That is, other articles or things are sold in exchange for money. Money is not sold in exchange for other articles or things. Nor is money “leased” in the usual sense of that term. When money is loaned, only its equivalent, not the article or thing loaned, is to be returned.376

372. This author disagrees with the strained language used by the Texas Supreme Court in Riverside, suggesting that the interest rate can be looked at as the “purchase price of the loan.” Riverside, 603 S.W.2d at 175.

One scholarly commentary offers a succinct example of the distinction between purchases, leases and loans, so far as an ordinary person is concerned:

[S]uppose a person wishes to obtain the use of an automobile for business purposes. She goes to a car dealer, who explains that she may buy a car for cash, she may finance the purchase, or she may lease the car. Depending upon the terms of the transaction, the economic result will be different. Upon consultation with her accountant and attorney, she will decide in what form she wishes to acquire the use of the car. Her economic position will be different depending upon which transaction she chooses. To her, these are distinct transactions.

Corinne Cooper, Identifying a Personal Property Lease Under the UCC, 49 Ohio State L.J. 195, 198 (1988).

Another court construing the Clayton Act has concluded that the words "lease," "sale" and "purchaser" are "so clear that they require no construction."

The fact that Texas courts have not addressed the question of whether a loan is a purchase or lease for DTPA purposes is not surprising. Once the Riverside court determined that money is not a "good or service," it would have been superfluous to decide whether a loan could be considered a "purchase or lease" of money. When the issue has become relevant, however, Texas courts have repeatedly recognized that the "purchase or lease" requirement is a real restriction on the scope of the DTPA. Thus, contests\(^3\) games of chance,\(^7\) goods delivered on consignment,\(^3\) services for which no money was paid or gratuitous borrowings\(^2\) have been held not to constitute the "purchase or lease" of goods or services sufficient to establish consumer status. If the soundness of the Riverside reasoning is being questioned, however, as a growing number of courts and writers seem to be doing, it seems fair to examine alternative grounds on which Riverside could have been sustained. In consequence, some further discussion is warranted.

1. The Difference Between a Loan and a Purchase

The fundamental distinction between loans and sales is reflected in Texas and national law. The Texas Consumer Credit Code, for example, repeatedly distinguishes between credit sales and loans. Chapter 6, governing retail installment sales, explicitly provides that

\[^3\text{78. Hall v. Bean, 582 S.W.2d 263 (Tex. Civ. App.—Beaumont 1979, no writ) (boat race contestant held not to have purchased the prize).}\]
\[^3\text{79. Rutherford v. Whataburger, Inc., 601 S.W.2d 441 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) (contest winner not a consumer because contest not linked to purchase of merchandise).}\]
\[^3\text{81. Tri-Legends Corp. v. Ticor Title Ins. Co. of Calif., No. A14-93-00946-CV, 1994 Tex. App. LEXIS 2336, *21 (Tex. App.—Houston [14th Dist.] Sept. 22, 1994, writ req.) (holding that a title commitment provided without charge is not actionable under the DTPA); Longview Sav. & Loan Ass'n v. Nabours, 673 S.W.2d 357, 362 (Tex. App.—Texarkana 1984, aff'd on other grounds, 700 S.W.2d 901 (Tex. 1985) (holding no liability because "[a] gratuitous act is not a purchased service within the meaning of the Act"); Bancroft v. Southwestern Bell Tel. Co., 616 S.W.2d 335 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (no cause of action because no fee paid for omitted yellow pages advertisement); Exxon v. Dunn, 581 S.W.2d 500 (Tex. Civ. App.—Dallas 1979, no writ) (no cause of action because services of an automobile repair shop had not been obtained "by purchase or lease."). The Bancroft decision, it should be noted, has been overruled to the extent that good faith prospective purchasers, persons whose "objective was to purchase or lease," can recover under the DTPA. Martin v. Lou Poliquin Enter., Inc., 696 S.W.2d 180, 184 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (emphasis added).}\]
[n]one of the provisions of this Chapter shall affect or apply to any loans or to the business of making loans under or in accordance with the laws of this State, nor shall any of the provisions of the loan or interest statutes of this State affect or apply to any retail installment transaction.383

Identical language is contained in the chapter on motor vehicle installment sales.384 The general definition of “interest” in the Consumer Credit Code also excludes “any time price differential however denominated arising out of a credit sale.”385 In short, the clear scheme of the Consumer Credit Code is that installment loans and retail installment sales are “mutually exclusive concepts.”386

The distinction between a “purchase” and a “loan” also becomes important in the context of financing transactions involving accounts receivable. Businesses commonly will finance ongoing operations through the sale—or through loans based upon the security of—accounts receivable. Since a business may wish to retain some control over the collection of these accounts, and a lender or buyer may prefer this in any event, sales of accounts receivable often may end up resembling secured loans, and vice versa. As Judge Learned Hand once put it, “[s]uch transactions are somewhat ambiguous and admit of definitions as loans or sales on slight differences. . . . It is possible, as we have suggested, to construe these transactions either way.”387 The drafters of the Uniform Commercial Code likewise recognize that “[c]ommercial financing on the basis of accounts . . . is often so conducted that the distinction between a security transfer and a sale is blurred.”388 In consequence, accounting standards389 and court decisions390 sometimes must go to great pains to distinguish between “sales” and “secured loans” involving accounts receivable.

383. TEX. REV. CIV. STAT. ANN. art. 5069-6.08 (Vernon 1987).
385. Id. art. 5069-2.01(h).
387. Elmer v. Commissioner, 65 F.2d 568, 569-70 (2d Cir. 1933).
2. The Difference Between a Loan and a Lease

Leases also are legally distinct from installment sales and loans. A moment's attention to the Texas Uniform Commercial Code is instructive. The Texas UCC contains an explicit list of factors which constitute the test for deciding whether a lease is really a secured loan for the purpose of determining the applicability of Article 9 of the U.C.C. The 1993 legislature added a new chapter to the Texas UCC to govern personal property leases, as well as amendments to provide more specific definitional distinctions between leases and security interests. Criteria for identifying a "true" lease are also set out in tax law and accounting standards.

The legal distinctions between loans, purchases, and leases are not semantic. "[T]he legal consequences that follow from each such characterization are extremely different and will, in the final analysis, determine the rights of the parties regardless of their actual intentions." For example, the distinction between a true lease and a secured loan or sale is all-important in bankruptcy law. A lease may be assumed or rejected by a bankruptcy trustee. Under any circumstances, however, the lessor retains rights to the goods. If the transaction is an installment sale or a secured loan, the consequences are very different. The seller or lender may exercise rights in the goods only to the extent of the perfected security interest. If the security interest is not perfected, the seller or lender is relegated to the status of a general unsecured creditor, with no specific rights to the goods.

The distinction between a loan and a lease also has very dramatic lender liability consequences, in particular, for the application of usury law. Usury requires the loan of money; a sale, no matter what the price, does not give rise to a usury claim. The Texas Supreme Court's

391. In this particular context, reference to the Texas UCC also is highly appropriate. After all, in Riverside, interpreting the DTPA, the Texas Supreme Court turned to the Texas UCC's definitions of "money" and "goods" for guidance. See Riverside, 603 S.W.2d at 175; see also supra note 81 and accompanying text.
394. See, e.g., Winick & Rich, supra note 392, at 33-34.
395. Id. at 35. The Winick & Rich article contains several charts setting out differing legal consequences depending upon whether a transaction is a lease, an installment sale, or a loan.
397. See, e.g., Sanders v. National Acceptance Co. of Am., 383 F.2d 606 (5th Cir. 1967).
399. 11 U.S.C. § 544(a)(1) (1993); see also Sommers v. International Business Mach., 640 F.2d 686 (5th Cir. 1981); In re Miller, 545 F.2d 916 (5th Cir. 1977).
400. Holley v. Watts, 629 S.W.2d 694, 696 (Tex. 1982).
decision in *Kinerd v. Colonial Leasing Company*,\(^\text{402}\) previously discussed in some detail,\(^\text{403}\) is illustrative of the pains that Texas courts are required to take to determine the "true" nature of an ambiguous transaction, for usury purposes.

To reiterate, the *Kinerd* decision involved a "dollar lease." Colonial Leasing bought some radiator equipment from a supplier and "leased" it to Kinerd for a fixed term. The lease could not be canceled or prepaid; Kinerd had the "option" to purchase the equipment for one dollar at the end of the lease term.\(^\text{404}\) The parties evidently conceded that, despite the document's title, the transaction was not a lease.\(^\text{405}\) The question was whether the arrangement was an installment sale subject to the Texas DTPA or a loan in violation of Texas usury law. The Texas Supreme Court, in a version of an argument characterized by one justice as "schizophrenic,"\(^\text{406}\) decided that Colonial Leasing was liable under the DTPA as a seller and liable under Texas usury law because it financed the sale.\(^\text{407}\)

Reasonable minds certainly can differ on the legal soundness of the result in *Kinerd*, and the fact that the court found it necessary to withdraw and rewrite its original opinion indicates the difficulty of the issues.\(^\text{408}\) The decision, however, certainly illustrates the practical importance of distinguishing between a true lease, a true sale, and a true loan. The Texas Supreme Court's observation that Colonial Leasing's DTPA defense "might have merit if it had acted only as a lender in [the] transaction"\(^\text{409}\) also comes tantalizingly close to explicit recognition of the definitional distinction between a "loan" and a "purchase or lease" for DTPA purposes. In an appropriate case, the Texas Supreme Court might well extend the *Kinerd* reasoning to its logical conclusion, disallowing a private cause of action for lender liability under the Texas DTPA on a ground other than that recognized in *Riverside*. This would be appropriate since, if the Texas Legislature sees fit to add "loans" to "purchases" and "leases," it can always do so, just as it has done with other statutes.\(^\text{410}\)

3. **Precedent from Other Jurisdictions**

While no Texas court has yet addressed the specific distinction between a loan and a DTPA "purchase or lease" directly, decisions from other

---

\(^\text{402}\) 800 S.W.2d 187 (Tex. 1990).

\(^\text{403}\) See supra notes 237-47 and accompanying text.

\(^\text{404}\) *Kinerd*, 800 S.W.2d at 188.

\(^\text{405}\) The Texas Supreme Court noted that the trial court instructed the jury, without objection, that "although the agreement . . . is called a lease, the transaction is actually a sale and the instrument is a security agreement, securing a sale of goods." *Id.* at 191 n.7.

\(^\text{406}\) *Id.* at 192 n.1 (Gonzalez, J., concurring and dissenting).

\(^\text{407}\) *Id.* at 191.

\(^\text{408}\) The original, withdrawn, opinion can be found at 33 Tex. Sup. Ct. J. 585 (June 20, 1990).

\(^\text{409}\) *Kinerd*, 800 S.W.2d at 191.

\(^\text{410}\) See, e.g., TEX. INS. CODE ANN. art. 3.53, § 2(b)(4) (Vernon Supp. 1994) (defining "debtor," for purposes of credit life, health, and accident insurance, as "a borrower of money or a purchaser or lessee of goods, services, property, rights or privileges").
jurisdictions with analogous statutes are instructive, particularly since the DTPA now permits Texas courts to consider "relevant and pertinent" decisions from other jurisdictions. In Oregon's deceptive trade practices statute, for example, applied to the "sale or offering for sale" of goods or services. In Haeger v. Johnson the Oregon Court of Appeals determined whether a lender was required to comply with a civil investigative demand issued by the attorney general's office. The Oregon court held that "sale" is "a word of precise legal meaning" and that the lending of money was not a sale of a good or service. Oregon courts have adhered to this reading of the statute, despite changing language and unsuccessful legislative attempts to include loans specifically within the statute's ambit.

In Murphy v. Charlestown Savings Bank, the Supreme Judicial Court of Massachusetts interpreted a Massachusetts statute that contained limiting language virtually identical to portions of the Texas DTPA's "consumer" definition. The scenario in Murphy is familiar. Homeowners sued a bank for unfair or deceptive acts in servicing their mortgage and foreclosing on their home. The borrowers argued that payment of interest is consideration for the use of money, and they thus were entitled to a private cause of action under the Massachusetts deceptive trade practices statute.

The court, while recognizing that the argument had "some intuitive appeal" and that the Massachusetts statute had a mandate for broad construction, rejected the argument. The court stated that the plaintiffs presented no authority for the proposition that a loan was a "purchase" of the use of money and that "for that reason alone, we question that the Legislature had home loan mortgages in mind" when it wrote the

---

414. Id. at 534; see also Roach v. Mead, 709 P.2d 246, 249 (Or. Ct. App. 1985).
416. 405 N.E.2d 954 (Mass. 1980).
417. The statute had already been amended at the time of the Murphy decision. Id. at 957. The result would not be the same today. See infra notes 438-39 and accompanying text.
418. The statute in effect at the time of acts complained of in Murphy gave a private cause of action to "[a]ny person who purchases or leases goods, services or property, real or personal." Murphy, 405 N.E.2d at 957.
419. The fact setting in Murphy is very similar to that in Ogden v. Dickinson State Bank, 662 S.W.2d 330 (Tex. 1983), Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705 (Tex. 1983), and Thompson v. First Austin Co., 572 S.W.2d 80 (Tex. Civ. App.—Fort Worth 1978, writ ref’d n.r.e.). These decisions have been discussed in some detail earlier in the article. See supra notes 111-18, 171-210 and accompanying text.
420. Murphy, 405 N.E.2d at 957.
421. Id.
422. Id. at 958.
423. Id.
word "purchases" into the statute. The court then turned to "analogous statutory material and relevant case law," including the UCC and federal consumer credit law, to make some of the same distinctions that have just been set out here.

While it cannot be said that there is no possible way in which a loan could be considered a "purchase or lease," it seems far more reasonable to view a loan as distinct from a sale or lease. In view of the general understanding of those terms, the careful distinctions drawn between loans and installment sales in the Texas Consumer Credit Code (a predecessor statute to the DTPA), and the legal tightrope the Texas Supreme Court walked in Kinerd, it makes no sense to abandon the distinction between loans, sales, and leases when construing the DTPA.

D. STATUTORY INTERPRETATION AIDS IN THE DTPA: LITTLE AID IN LENDER DISPUTES

1. Out-of-State Authority

Every state, as well as the District of Columbia, has some sort of deceptive trade practices legislation. Since 1979, the DTPA has provided explicitly that "[i]n construing this subchapter the court shall not be prohibited from considering relevant and pertinent decisions of courts in other jurisdictions." Nonetheless, no Texas court has yet undertaken

424. Id. at 958-59. The fact that the Supreme Judicial Court of Massachusetts chose to predicate its decision on the "purchase or lease" distinction rather than on the "goods or services" distinction drawn by the Texas Supreme Court in Riverside is explained by an important distinction between the two states' statutes. The Massachusetts statute extended to "goods, services or property." Id. at 957 (emphasis added). The court, therefore, concluded that "the right to the use of money is, in some settings, a valuable property right." Id. The Massachusetts Supreme Court, therefore, addressed an issue the Texas Supreme Court never found necessary to consider in Riverside.

425. Murphy, 405 N.E.2d at 959.

426. Id. at 959-61.

427. The United States Fifth Circuit observed, in a somewhat similar context, that a transaction "could be a true lease for federal tax purposes and a loan for state usury law purposes." Woods-Tucker, 626 F.2d at 414.

428. See, e.g., Cooper, supra note 372, at 196 (stating that "sales, leases, and security interests are distinct transactions and are not different terms for the same rights. Each transaction has its own true nature.").

429. See supra notes 383-86 and accompanying text.

430. The Declaration of Legislative Intent accompanying the 1967 Texas Consumer Credit Code, of which the original Texas Deceptive Trade Practices Act was a part, repeatedly distinguishes between sellers and lenders. For example, the declaration of intent cites "a need for a comprehensive code of legislation to clearly define interest and usury, to classify and regulate loans and lenders, and to regulate credit sales and services." Act of May 8, 1967, 60th Leg., R.S., ch. 274, § 1(5), 1967 Tex. Gen. Laws 608, 609 (emphasis added).

431. The collection of case authority in this section draws heavily on Cox, supra note 278, and to a lesser extent on Jonathan Sheldon, Unfair and Deceptive Acts & Practices § 2.1 (1986).

432. Dunbar, supra note 6, at 427.

433. Tex. Bus. & Com. Code Ann. § 17.46(c)(2) (Vernon Supp. 1994). The rationale for including an explicit provision permitting Texas courts to look to out-of-state analogies was explained in true Texas fashion by the amendment's senate sponsor, responding to a question posed by state Senator (later a supreme court justice) Lloyd Doggett: "Senator,
such an inquiry, at least so far as lenders are concerned. Commentators on the DTPA, however, have observed in general terms that, "when addressing whether borrowing money is tantamount to seeking or purchasing a 'good' or a 'service,' the majority of courts in other jurisdictions have answered the question affirmatively."\(^{434}\) So far as the author can tell, it appears to be something close to a tie, if one considers just the raw numbers. While courts in at least eight states have found banking or lending activities to be subject to their state's deceptive trade practices act, in cases in which the issue of lender coverage was raised,\(^{435}\) at least eight other states,\(^{436}\) including Texas,\(^{437}\) have weighed in on the other

\(^{434}\) In my experience, I find the thread of reason occasionally sparked by even such far away places as New York City." Debate on Tex. S.B. 357 on the Floor of the Senate, 66th Leg., R.S., (May 19, 1977) (tape available from Senate Staff Services Office). This excerpt is also printed in Michael Curry, The 1979 Amendments to the Deceptive Trade Practices—Consumer Protection Act, 32 BAYLOR L. REV. 51, 57 n.34 (1980).


In Idaho First Nat'l Bank v. Wells, 596 P.2d 429 (Idaho 1979), the Idaho Supreme Court declined to extend the protection of the state's consumer protection act to a loan guarantor. The court reasoned that "it would take a strained construction of the act to be able to hold that the signing of a personal guarantee for a loan to a corporation was a 'purchase of goods.'" \textit{Id.} at 432.

The Idaho Supreme Court also concluded, however, that since the state statute expressed the legislative intent that "great weight shall be given" to FTC interpretations, and since the FTC excluded banks from regulation, the guarantors' complaint was not within the intended scope of the statute. \textit{Id.} This would imply that an Idaho court would exclude banks generally from coverage under that state's consumer protection act. This FTC-based reasoning is subject to some doubt, however, particularly as applied to the Texas statute. See discussion \textit{infra} notes 466-71 and accompanying text.

\(^{437}\) Riverside, 603 S.W.2d at 174. At least one out-of-state commentator ranks Texas in the loan-exclusion camp, although observing that "[t]he Texas courts, although ostensibly adhering to this principle, have developed some fine distinctions . . . ." Cox, \textit{supra} note 278, at 219.
Massachusetts courts have ruled both ways on the issue, with a legislative amendment explaining the apparently inconsistent rulings.

The legislative statement authorizing the use of out-of-state authority, however, refers to "relevant and pertinent" court decisions. Unfortunately, most decisions on the subject from other states—on both sides of the issue—are based on statutory considerations that have no parallel in Texas. The principal problem with finding a reasonable analogy among out-of-state decisions is that a number of deceptive trade practice statutes, unlike consumer actions under the Texas DTPA, apply broadly to any entities engaged in "trade or commerce." A number of state statutes, unlike Texas, also include intangibles in their definitions of goods or property. On the other hand, some state decisions favoring

---

438. See Murphy v. Charlestown Sav. Bank, 405 N.E.2d 954 (Mass. 1980) (opining that a loan is not a "purchase" of money); cf. Raymer v. Bay State Nat'l Bank, 424 N.E.2d 515, 521 (Mass. 1981) (holding bank liable on the ground that it engages in "trade or commerce," and observing that Murphy "left the point open").

439. See Raymer, 424 N.E.2d at 521.

440. While this article does not attempt a comprehensive survey of state deceptive trade practice statutes, these court decisions—both favoring and disfavoring lenders—and the underlying statutes should be read and studied with great care before one tries to draw any parallels to Texas. Cf. Cox, supra note 278, at 226 ("[A]ny analysis of a consumer protection or deceptive trade practice statute in the context of the business of banking requires at least a scrutiny of the section containing the general prohibition of deceptive practices, the definitional section, the exemption section, and the section granting private remedies before it can be determined whether the challenged act or practice is subject to the often harsh sanctions of the statute being invoked."); accord Sheldon, supra note 431, § 2.1, at 35 ("It is critical to examine closely the state UDAP statute to determine its scope.").


A 1977 amendment to the North Carolina statute eliminated the term "trade" and defined "commerce" to include "all business activities, however denominated." See Cox, supra note 278, at 215 n.4. Under the amended statute, as might be expected, lenders have been considered to be legitimate targets. See, e.g., Talbert v. Mauney, 343 S.E.2d 5 (N.C. Ct. App. 1986).

The "trade or commerce" language is much like the Attorney General's broad authority under the Texas DTPA, see Tex. Bus. & Com. Code Ann. § 17.46(a) (Vernon 1987), but is far broader than the "consumer" restriction on private causes of action under the Texas DTPA.


See also, e.g., Conn. Gen. Stat. § 42-110a(4) (1993) (referring to "any property, tangible or intangible . . ."); Del. Code Ann. tit. 6, § 2511 (1993) (defining "merchandise" as "any objects, wares, goods, commodities, intangibles, real estate, or services"); Ga. Code Ann. § 10-1-392(9) (Harrison 1994) (defining "trade" or "commerce" as "the advertising,
both lenders and borrowers are subject to easy criticism as subjects for analogy because of specific statutory language including or excluding lending activities.443

When one limits inquiry to “relevant and pertinent” decisions, the pickings are relatively slim. Oregon and Massachusetts decisions contain interesting discussions of whether lending is a “purchase or lease,” based

443. Louisiana has a specific statutory exclusion for lenders. LA. REV. STAT. ANN. § 51:1406(1) (West 1993) (excluding “actions or transactions subject to the jurisdiction of the commissioner of financial institutions”). Nebraska has a more generic exclusion that has been construed to accomplish the same result. See, e.g., NEB. REV. STAT. § 59-1617 (Supp. 1993) (stating that the statute’s provisions “shall not apply to actions or transactions otherwise permitted, prohibited, or regulated under laws administered by any other regulatory body or officer acting under statutory authority of this state or the United States”); McCaul v. American Sav. Co., 331 N.W.2d 795 (Neb. 1983).

At least six other states’ deceptive trade statutes exclude lending activities in whole or in part. See ARK. CODE ANN. § 4-88-101(3) (Michie 1991 & Supp. 1993) (excluding from coverage activities permitted by Arkansas Bank Commissioner); FLA. STAT. ANN. § 501.212(4) (West 1988) (excluding “banks and savings and loan associations regulated by the Department of Banking and Finance or banks or savings and loan associations regulated by federal agencies”); TENN. CODE ANN. § 47-18-111 (1988) (excluding “acts or transactions required or specifically authorized under the laws administered by, or rules or regulations promulgated by, any regulatory bodies or officers acting under the authority of this state or of the United States”); UTAH CODE ANN. § 13-2-1, 13-5-1 and 13-11-1 (1992); VA. CODE ANN. § 59.1-199(D) (Michie 1992) (excluding “[b]anks, savings and loan associations, credit unions [and] small loan companies”).

On the other hand, at least two states explicitly include lending or credit transactions within the statutory ambit. See MD. CODE ANN. COM. LAW § 13-101(c)(1) (1990) (defining a “consumer” to include “an actual or prospective ... recipient of ... consumer credit”); N.M. STAT. ANN. § 57-12-2(D) (1987) (defining “unfair or deceptive trade practice” to include false statements “in connection with the ... loan of goods or services in the extension of credit or in the collection of debts”).
on similar statutory language, and have already been discussed.444 The Kentucky decision is intriguing, but inconclusive. At least two commentators have listed Texas and Kentucky as the only states to derive their deceptive trade practice statutes from the model Unfair Trade Practices and Consumer Protection Law.445 The Kentucky statute is indeed like Texas in that a private cause of action is limited to one who "purchases or leases goods or services."446 Kentucky decisions would therefore seem to be particularly useful. One federal court applying Kentucky law has held that the statute "is inapplicable to commercial lending institutions."447 Unfortunately, this decision gives no hint as to the rationale for the court's conclusion.448

While California law also is tempting, it ultimately offers no real answers. One Texas commentator, writing soon after the DTPA was enacted, stated that "conversations . . . with some of the principal drafters of the Deceptive Trade Practices Act, indicate inspiration for some of the Act's provisions may have stemmed from California law."449 A comparison of the two statutes bears out the truth of this report. The California Consumers Legal Remedies Act450 contains so many points of similarity to the Texas DTPA that it seems clear that the Texas DTPA was either modeled in part on the California statute or both acts share a common source. For example, the definitions of "consumer," "goods," "services" and "person" are very similar.451 The similarity approaches identity when one compares the original language of the California statute with the DTPA bill originally introduced in the Texas House of Representa-

---

444. See supra notes 411-26 and accompanying text.
445. SHELDON, supra note 431, § 3.4.1.2, at 78 n. 99; Dunbar, supra note 6, at 428.
446. KY. REV. STAT. ANN. § 367.220 (Baldwin 1992); see also Cox, supra note 278, at 217.
448. Accord Cox, supra note 278, at 217 n.17 (describing the George decision as holding
449. Eugene M. Anderson, Jr., The Uniform Commercial Code and the Deceptive Trade
450. CAL. CIV. CODE § 1761(a)-(d) (West Supp. 1994).
451. Compare TEX. BUS. & COM. CODE ANN. § 17.45(1)-(4) (Vernon 1987) with CAL.
        CIV. CODE § 1761(a)-(d) (West Supp. 1994). The California statute, in relevant part, currently reads as follows:
        § 1761. Definitions.
        As used in this title:
        (a) "Goods" means tangible chattels bought or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for such goods, and including goods which, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of such real property, whether or not severable therefrom.
        (b) "Services" means work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods.
        (c) "Person" means an individual, partnership, corporation, association, or other group, however organized.
        (d) "Consumer" means an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes.
        CAL. CIV. CODE § 1761 (West Supp. 1994).
In addition, the first thirteen items of the Texas "laundry" list match, in order, the corresponding items of the original California statute, and the two statutes originally contained similar or identical provisions for the title, consumer waivers, cumulative remedies, the exception for media defendants, and construction and application.

Judging from the reported decisions, California financial institutions are frequent defendants under the Consumer Legal Remedies Act. In no decision found by this writer, however, does it appear that the question of whether financial institutions were subject to the statute was even raised. While the reason for this lack of decisions is not known, it is

---

452. The comparable portion of the original version of H.B. 417 read as follows: Sec. 17.45. DEFINITIONS. As used in this subchapter:
(1) "Goods" means tangible chattels bought for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for such goods and including goods which, at the time of the sale or subsequently, are to be affixed to real property as to become a part of the real property whether or not severable.
(2) "Services" means work, labor, and services for other than commercial or business use, including services furnished in connection with the sale or repair of goods.
(3) "Person" means an individual, partnership, corporation, association, or other group, however organized.
(4) "Consumer" means an individual who seeks or acquires by purchase or lease, any goods or services for personal, family or household purposes.


455. Compare Tex. Bus. & Com. Code Ann. § 17.42(a) (Vernon 1987) with Cal. Civ. Code § 1751 (West 1985). The California statute now correlates to the first phrase of Texas § 17.42(a). Prior to a 1989 amendment to the Texas statute, the two provisions would have been identical. There are now some significant differences between the two provisions, including the ability of consumers buying goods worth more than $500,000 and represented by legal counsel to waive the DTPA's provisions. See Tex. Bus. & Com. Code Ann. § 17.42(a) (Vernon Supp. 1994).


460. Another California statute, passed at the same session as the Consumer Legal Remedies Act, defined "consumer" as "any individual who seeks or acquires, by purchase or lease, any goods, services, money or credit." Cal. Bus. & Prof. Code § 302(c) (West 1990) (the California Consumer Affairs Act) (emphasis added). For this reason, if a Cali-
possible that California lenders have not bothered to contest the issue because the Consumer Legal Remedies Act is simply cumulative of potential liability under many other statutes, and a legal fight therefore would be useless.461 All in all, other than suggesting specific statutory arguments, out-of-state authority sheds little light on the problem of lender liability under the Texas DTPA.

2. FTC Rulings

In addition to language permitting courts to consider authority from other jurisdictions, the DTPA also points courts to interpretations issued by the Federal Trade Commission and court decisions construing the FTC Act.462 While this language also deserves some brief exploration, it sheds little light on the question of private DTPA causes of action against lenders. While the language has mutated over the years,463 the current version of the DTPA permits courts to look to judicial decisions interpreting the FTC Act and that such decisions are "relevant and pertinent" authority.464

461. California lenders reportedly are subject to regulation by as many as twenty state agencies. Dunbar, supra note 6, at 438. Other California statutes applicable to lenders, governing unfair business practices, CAL. BUS. & PROF. CODE §§ 17000-17101 (West 1987 & 1994 Supp.), and deceptive advertising, CAL. BUS. & PROF. CODE §§ 17500-17930 (West 1987 & 1994 Supp.), have been described as "far-reaching and unorthodox" and "perhaps the area of greatest legal exposure for financial institutions facing consumer action." WALTER R. SEVERSON & JAMES B. WERSON, DEFENDING FINANCIAL INSTITUTIONS AGAINST CALIFORNIA UNFAIR BUSINESS PRACTICES CLAIMS 2, 1 (1990) (privately printed by the Severson & Werson law firm of San Francisco) (available from the author).

462. TEX. BUS. & COM. CODE ANN. § 17.46(c)(1) (Vernon 1987).


Due to federal restrictions on the FTC's enforcement authority and resulting regulatory convolutions, the legislative suggestion that courts look to FTC interpretations is difficult to implement in the case of bank loans. Courts, therefore, have developed widely varying views of the application of state DTPA statutes to lending. A Texas appeals court has concluded that the Texas legislature's failure to include a specific exemption for banks in the DTPA, similar to that contained in the FTC Act, implies that banking activities are included in the Texas act. The Texas Supreme Court, however, reversed on another ground without mentioning the lower court's reasoning on this point. In contradiction, the Idaho Supreme Court construed similar language directing courts to give "great weight" to FTC interpretations of the Idaho Consumer Protection Act as mandating a conclusion that a loan guarantee was not meant by the statute's framers to be within the statute's purview. In further contrast, a Connecticut court has distinguished between the FTC's "enforcement powers," which do not include banking activities, and its "interpretive powers," which supposedly do. The latter view apparently would exclude banking activities from the range of permitted consumer actions under the Texas DTPA.

3. Attorney General Enforcement Activities

Even if FTC interpretations offer little real assistance, one might argue that the enforcement efforts of the Texas Attorney General's Office shed light on the issue of the DTPA's role in lender disputes. After all, courts often defer to the interpretations given a statute by the agency charged with its enforcement.

465. The FTC's enforcement authority does not extend directly to banks, due to a specific exemption in the statute. 15 U.S.C. § 45(a)(2) (1988). The Federal Reserve Board, however, is specifically empowered to control "unfair or deceptive acts or practices" by banks, as is the Federal Home Loan Bank Board for savings institutions. 15 U.S.C. § 57a(f)(1) (1988). This enforcement authority, however, is severely trammeled by the stricture that Federal Reserve and FHLBB regulations must be substantially similar to their FTC counterparts. Id. And this restriction is tempered further by the proviso that the Federal Reserve and FHLBB can decline to adopt FTC regulations if the acts in question are not unfair or deceptive in the banking context or enforcement would conflict with basic banking policies. Id.; see also Robert P. Chamness & Walter E. Zalenski, Banks Come Under the Reach of the Unfair and Deceptive Acts and Practices Rule, 6 ABA Bank Compliance 20 (1985).


467. The Texas Supreme Court was of the view that the plaintiff was a "business consumer" barred from recovery under the version of the DTPA in effect at the time of the operative acts. Farmers & Merchants State Bank, 617 S.W.2d at 919.


471. This conclusion would follow from the 1979 legislature's decision to excise FTC "interpretations" from the sources of judicial guidance in DTPA consumer actions. See supra note 463 and accompanying text.

472. See, e.g., Dodd v. Meno, 870 S.W.2d 4, 7 (Tex. 1994). "Construction of a statute by the agency charged with its enforcement is entitled to serious consideration, so long as the
some indication in the past that it considers lending activities to be within its enforcement powers.\textsuperscript{473} One problem with drawing any larger conclusions from such declarations, however, is that unlike private consumers, the Texas Attorney General's office operates under the DTPA's broad "omnibus clause," generally prohibiting "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce. . . ."\textsuperscript{474} A more serious problem is the legislative history, tending to show that such enforcement authority was not contemplated by the legislature when the statute was enacted.\textsuperscript{475}

In short, neither the Texas Attorney General's Office, FTC interpretations, or out-of-state judicial decisions offer much help in determining the intended bounds of the Texas DTPA. In any event, the best evidence of intent is the words of the statute, its legislative history, and subsequent amendments. These sources do offer a comparatively rich and as yet untapped lode of interpretive material. Analysis of this material leads to the clear conclusion that the \textit{Riverside} decision was far more limited than needed; lenders were simply never contemplated by the Texas Legislature as legitimate DTPA targets.

\section*{IV. PUBLIC POLICY AND COMMON SENSE}

This section briefly examines some implications of extending the DTPA to lending transactions. While much of this material might appear more appropriate for presentation to the Texas Legislature than for an article examining judicial interpretations of the DTPA, it also is worth considering here. First, if application of the DTPA to lending transactions would not produce the results the act was designed to accomplish, this lends some credence to the conclusion that the Texas Legislature's excision of loans from the DTPA was deliberate. Second, if significant negative consequences could result from applying the DTPA to lenders, as the author suggests, any such extension of the act ought to be accomplished through the legislature, a body better designed to weigh and balance public policy considerations.

The discussion that follows makes a series of related points, first general, then specific. The first subsection reviews the banking debacle of construction is reasonable and does not contradict the plain language of the statute." \textit{Id.} (quoting Tarrant Appraisal Dist. v. Moore, 845 S.W.2d 820, 823 (Tex. 1993)).

473. The Texas Attorney General's Office issued a policy enforcement statement in reaction to complaints that lenders were setting interest lock-in periods for intervals too short to be useful to loan customers. \textit{See} \textit{JACK C. HARRIS, SHOULD MORTGAGE RATE COMMITMENTS BE ENFORCED?} 4-5 (Texas A&M Real Estate Center, January 1991). The Attorney General's Office also filed an amicus curiae brief in \textit{Riverside}, arguing unsuccessfully that "Section 17.46(a) [of the DTPA] was clearly violated by Riverside," though no explanation of the ground for this conclusion was evident. \textit{See} Brief of State of Texas as Amicus Curiae at 18, Riverside Natl' Bank v. Lewis, 603 S.W.2d 169 (Tex. 1980).

474. \textit{TEX. BUS. & COM. CODE ANN.} § 17.46(a) (Vernon 1987). A number of courts in other states have concluded that similar language includes banking practices. \textit{See}, e.g., Cox, \textit{supra} note 278, at 215; \textit{see also supra} note 441.

475. \textit{See supra} notes 297-98 and accompanying text.
the late 1980s and the current recovery, demonstrating the volatility of the current Texas lending environment. The second subsection provides an overview of the extensive system of consumer lending regulation already in place, and the third spotlights one important consequence of that regulation: federal preemption of some applications of the DTPA to consumer loans. The final subsections draw on prior material and predicts specific consequences of a decision to extend the DTPA to lending transactions: co-option by sophisticated business litigants, credit flight, and the thwarting of state and federal regulatory functions.

A. An Overview of Texas Lending

1. The Economic Environment

Texas banking, particularly as experienced during the last decade, truly is "a world unto itself." Detailed analysis of the collapse of the Texas lending industry in the late 1980s is beyond the scope of this article and, at this late date, superfluous. The lessons learned in the Great Depression, and forgotten temporarily by borrowers and lenders alike during the oil and real estate boom of the 1970s and early 1980s, were brought home forcefully to Texans through a series of institutional failures that beggars description. An FDIC publication does as well as any:

In 1980 the phrase "the Texas economy" evoked images of surging oil prices and boundless possibilities; by 1990 those images had been replaced by the reality of vacant office buildings and bankruptcy court. In the interim, nine of the ten largest Texas banking organizations were recapitalized with FDIC or other outside assistance, 425 Texas banks failed or were assisted by the FDIC, and the FDIC incurred insurance losses of nearly $11 billion in Texas. It is perhaps only a slight exaggeration to say that "[n]o other area in the world has experienced anything like the financial holocaust visited upon Texas." On the bright side, financial analysts now proclaim that "[n]o industry has undergone a more dramatic turnaround than Texas banking." In 1990, Texas banks earned the first overall yearly profit in five years.

477. A Letter From the Editor, 3 FDIC Banking Rev. i (Winter 1990).
480. The discussion focuses on banks because thrifts are no longer a significant portion of the Texas lending picture. See, e.g., Danielson, supra note 476, at 11, 17 (stating that as of March 31, 1994, the savings and loans' share of Texas deposits was only about 13% and falling). Those thrifts that remain also enjoy substantial profits. See Exec Under Cloud, N.O. Times-Picayune, Dec. 13, 1994, at D1 (reporting third-quarter earnings for savings and loans nationwide of $1.52 billion); S&L Profits Up Despite Rate Hikes, Hous. Post, Sept. 10, 1994, at C3 (reporting second-quarter 1994 profits for Texas-based thrifts of $97 million, down from $158 million during the same period in 1993).
December 1994 figures show record profits for banks nationwide\(^{482}\) and healthy profits for Texas banks as well.\(^{483}\) Between 1988 and 1992, the percentage of bank assets held by "healthy" banks in Texas rose from 38 to 81 percent.\(^{484}\) Perhaps even more telling, there were no Texas bank failures during first three quarters of 1994.\(^{485}\)

One should, however, be cautious about painting too rosy a picture. A substantial portion of the favorable profit picture comes not from lending activity, but from investments,\(^{486}\) currently preferred by many banks over the risks of the lending market.\(^{487}\) Moreover, for banks that are making new loans, comparatively low risk consumer loans seem to be preferred over business loans.\(^{488}\)

Since the Texas DTPA has not generally been applied to lenders in the past, judicial interpretations of the statute bear little or none of the blame for the industry collapse of the late 1980s.\(^{489}\) In at least two respects, however, the recent history of Texas banking has some general implications for the wisdom of applying the DTPA to lenders. First, since "experts predict the Texas lending market will stay jittery for years,"\(^{490}\) anything that tends to increase bankers' "jitters" might be expected to decrease Texas lending and harm the Texas economy. Second, for the foreseeable future, Texas and federal regulators undoubtedly will be examining Texas lending practices more closely and with a more jaundiced eye than in the past, particularly since the FDIC apparently believes that...

\(^{482}\) In the News, Hous. Post, Dec. 16, 1994, at D2 (reporting the FDIC's announcement that the earnings of U.S. banks had reached an all-time high of $11.8 billion in the third quarter, and profits were headed toward another record for the year).

\(^{483}\) Loan Competition Pares Profits for Texas Banks, Dallas Morning News, Dec. 16, 1994, at 1D. "To date this year, Texas banks have earned $1.47 billion, down from $1.9 billion through the same period a year earlier... and banks charged off $2.4 billion in loans in the third quarter, the smallest level since the first quarter of 1985." Id.

\(^{484}\) Clair & Sigalla, supra note 479, at 47.

\(^{485}\) Terrence O'Hara, Small Texas Banks Outshine Big Rivals as State Rebounds, Am. Banker, Sept. 30, 1994, at 6 (citing this fact as "perhaps the clearest sign of the new stability" in the Texas banking industry).

\(^{486}\) See, e.g., Robert B. Cox, Profits Sparkle at Small Banks in Texas, Am. Banker, Mar. 30, 1993, at 6 (stating that "[m]any Texas banks, confronted with bone-dry loan demand, had loaded up on bonds—and the value of those investments soared as rates plunged").

\(^{487}\) As two commentators recently explained the situation:

Faced with problems of asset quality and a weak regional economy, banks chose investing in securities over granting loans. Even after the Texas economy began its recovery in 1987, the banks continued this pattern of securities expansion and lending contraction. The securities holdings of Texas banks increased at more than a 10% annual rate for every year from 1988 to 1991; lending contracted in each of these years.

Clair & Sigalla, supra note 479, at 48.


\(^{489}\) A possible exception might be the LeMaire decision against MBank, wherein the bank failed while a $69 million lender liability decision based in part on the DTPA was on rehearing in the Houston Court of Appeals (Fourteenth District). See supra note 9.

fewer bank examinations during the mid-1980s contributed, in some measure, to the severity of the Texas crisis.\textsuperscript{491}

Beyond the obvious purpose of assuring stable and sound financial institutions, increased regulatory scrutiny has both good and bad effects. On the negative side, bankers\textsuperscript{492} and borrowers\textsuperscript{493} alike complain that increased regulation has decreased loan availability. On the positive side, since one purpose of bank examinations is "to investigate whether the bank is abiding by a variety of measures designed to protect consumers, such as truth-in-lending requirements, civil rights laws, and community reinvestment regulations,"\textsuperscript{494} Texas lenders undoubtedly are paying more attention than ever before to proper compliance with consumer law. This makes the additional threat of DTPA liability less useful today than it may have been in the past. The pervasive scope of federal and state regulation of consumer lending practices, however, has some additional implications, discussed in the subsections that follow.

2. The Regulatory Environment

Consumer lending usually is done on a volume basis. Each home or auto loan produces a very small profit for a financial institution. In consequence, standard forms and loan "packages" are the norm and individually negotiated deals a rarity. This fact has been criticized by some as showing an imbalance of bargaining power.\textsuperscript{495} More realistically, how-

\begin{itemize}
\item \textsuperscript{492} See, e.g., \textit{Bankers Believe Overregulations Cause Credit Crunch}, TEXAS BANKING, June 1991, at 24 (reporting the conclusion of Texas Bankers Association president Robert Harris that "tougher regulatory scrutiny" is a principal reason for the Texas credit crunch); \textit{Local Bankers Wiser, Healthier as Financial Industry Rebounds}, HOUS. BUS. J., Sept. 26, 1992, at 511 (quoting Walter Johnson, president of Southwest Bank of Texas: "The biggest challenge we face today is government regulations. Federal regulators are trying to kill the banks. Consumer banking laws passed in December of 1991 are very onerous, time-consuming, expensive and counter-productive."); see also Klinkerman, supra note 490, at 1 (stating that "[a] tightened regulatory environment has spooked banks into ever-more cautious lending practices").
\item \textsuperscript{493} Beverly L. Hadaway, \textit{The Texas Economy: Financing Availability}, TEX. BUS. REV., June 1991, at 2 (reporting from a survey that business borrowers blames "overly zealous regulators" for difficulty in securing loans).
\item \textsuperscript{494} O'Keefe, supra note 491, at 10.
\item \textsuperscript{495} For example, in a case involving the specificity required for waiver of notice of acceleration, a concurring opinion originally drafted by Justice Franklin Spears, but issued after his retirement by Justice Oscar Mauzy, argued that all such clauses should be held void as a matter of public policy:
\begin{quote}
The maker's rights to demand for payment, notice of intent to accelerate and notice of acceleration are valuable rights that this court should protect from skillful drafters who routinely insert waivers of these rights into pre-printed forms. If we waited for the lenders of this world to provide for these rights in their forms, or for borrowers to achieve the bargaining power to negotiate these terms, these equitable rights simply would not exist. The court's opinion ignores reality. Borrowers do not stand in an equal bargaining position with their lenders. In pretending that they do, the court abdicates its traditional function as guardian of these equitable rights.
\end{quote}
\end{itemize}

\textit{Shumway v. Horizon Credit Corp.}, 801 S.W.2d 890, 896 (Tex. 1991) (Mauzy, J., concurring).
ever, both lenders and borrowers profit by the economies of scale that can result from standardized consumer loan packages.

The fact that most consumer loans fall into a small number of standard formats with relatively standard terms also makes these transactions particularly amenable to government regulation. Over the past two decades, an extensive array of state and federal regulations has developed to protect the interests of consumers in small, and even some large, loan transactions. These regulations span the entire life cycle of a loan: from advertising, through the loan application, through the minutiae of loan documentation, to default and foreclosure. In the aggregate, consumer borrowers already enjoy an umbrella of protection that even the most vigorous individual enforcement of the DTPA could not hope to match.

Federal law sets out many disclosure requirements for consumer loans. The federal Truth in Lending and Fair Credit Billing Acts\(^496\) and the Competitive Equality Banking Act of 1987,\(^497\) all implemented by the Federal Reserve Board through "Reg Z,"\(^498\) set out many requirements related to credit advertising.\(^499\) Federal law imposes significant additional disclosure requirements for purchase money home loans. Under the Real Estate Settlement Procedures Act (RESPA)\(^500\) and resulting HUD regulations,\(^501\) specific disclosures, together with good faith estimates of closing costs, must be provided to a loan applicant within three business days.\(^502\) RESPA also prohibits a number of questionable lender activities, including kickbacks or unearned fees, excessive escrows, and tie-ins with title insurers.\(^503\) The Flood Disaster Protection Act\(^504\) imposes yet another layer of special disclosure requirements for lenders financing homes in flood hazard areas.

Lending institutions also are restricted in the reasons for which consumer credit legitimately may be denied. The Equal Credit Opportunity Act,\(^505\) implemented by the Federal Reserve Board through "Reg B,"\(^506\)

---


\(^{499}\) 12 C.F.R. §§ 226.4, 226.16 (1993). Reg Z's stated purpose is to "promote the informed use of consumer credit by requiring disclosures about its terms and cost." 12 C.F.R. § 226.1(b) (1993). To accomplish this purpose, lenders must provide detailed information for loan transactions in which the amount of the loan is not greater than $25,000 or is secured by a lien on the borrower's home. 15 U.S.C. § 1603(3) (1982 & Supp. 1994). For "open end" credit transactions, such as credit card debts and lines of credit, federal law requires an initial written disclosure of the finance charge and other charges, a statement of the consumer's billing rights and responsibilities, and a disclosure of security interests in the debtor's property that will be required. 12 C.F.R. § 226.5 (1993). "Closed end" credit transactions, such as the typical installment credit sale, require a similar disclosure of as many as eighteen categories of required information. 12 C.F.R. § 226.17 (1993).


prohibits lenders from discriminating in any aspect of a credit transaction. The Federal Trade Commission also exercises a great deal of control over some aspects of lending, by directly or indirectly prohibiting "false or deceptive" lending practices and, by abrogating the "holder in due course" doctrine for certain consumer transactions, thereby making lenders partly responsible for the consequences of sellers' misconduct. The Federal Reserve Board has extended these requirements to banks through amendments to Reg AA. The Bank Tying Act prohibits the conditioning of credit on the purchase of bank services or requirements that loan customers not do business with the bank's competitors. The Community Reinvestment Act addresses the practice of "redlining" by encouraging established lending institutions to extend credit to low-income neighborhoods, decreasing the opportunities available to the unscrupulous. In addition, the Fair Credit Reporting Act, while not specifically regulating lenders, protects potential borrowers from inaccurate or obsolete credit information, thereby providing substantial remedies for consumers who are denied credit based on false information.

Texas law supplements and significantly expands upon federal requirements. The Texas Consumer Credit Code contains detailed regulations and required disclosures for certain small loans, installment loans and sales, revolving loans and secondary mortgage loans, as well as mobile home and auto loans. Home solicitations also receive special treat-

507. This includes information requirements, investigation, procedures, standards of creditworthiness, terms of credit, revocation or termination of credit and collection procedures. See 12 C.F.R. § 202.4 (1987).

Under this legislation, as implemented, lenders cannot legitimately consider race, color, religion, national origin, sex, marital status, age, receipt of public assistance, or good faith exercise of rights under the federal Consumer Credit Protection Act as factors in denying credit. 12 C.F.R. § 202.2(2) (1987). The ECOA and Reg B require lenders to follow detailed procedures in processing applications for credit. Lenders cannot request certain information in a credit application, must take action on an application within 30 days from the time it is complete, and must provide applicants with timely notice of action. 12 C.F.R. § 202.5-202.9 (1987). Enforcement "teeth" include individual and class actions for actual and punitive damages, costs and attorney's fees in many cases. 12 C.F.R. § 202.14 (1987).

508. The general framework of these regulations has already been described. See supra notes 462-74 and accompanying text; see also Reg AA, 12 C.F.R. pt. 227 (1993).

509. See supra notes 222-25 and accompanying text.

510. See generally Chamness & Zalenski, supra note 465.


513. This term comes from the practice among some lenders of drawing a red line on a map around those neighborhoods judged to be poor credit risks. See Gene A. Marsh, Lender Liability for Consumer Fraud Practices of Retail Dealers and Home Improvement Contractors, 45 ALA. L. REV. 1, 15 (1993).


515. These remedies include actual damages and attorney's fees for negligent noncompliance, plus punitive damages upon proof of willful violations. 15 U.S.C. § 1681n-o (1988).

516. TEX. REV. CIV. STAT. ANN. art. 5069-3.01 (Vernon 1987) (limiting application of Chapter 3 of the Consumer Credit Code to loans of $2500 or less); §§ 4.01-.04 (Vernon 1987 and Supp. 1994) (installment loans); §§ 6.01-.11 (installment sales); §§ 15.01-.11 (re-
The Texas Consumer Credit Code provides a variety of remedies for violations, including cease and desist orders, injunctions, civil penalties, and consumer class actions. Finally, an entire chapter of the Credit Code, passed at the same legislative session as the DTPA, is devoted to abuses in debt collection practices. Similar legislation, the Fair Debt Collection Practices Act, has been enacted at the federal level, although the federal statute does not apply to creditors collecting their own debts. Both laws are aimed at abusive and harassing debt collection practices, including fraudulent or deceptive representations by collection agents.

This array of protective legislation in the area of consumer loans bewilders many lenders and daunts even those attorneys who specialize in financial institution law. Testifying at interim hearings, the former chair of the Texas state bar's consumer law section described the job of keeping up with regulatory requirements as "a never-ending task," concluding that "we have reached in my view a saturation point in the proliferation of consumer laws and regulations at the state and federal level." This view is supported by a 1991 survey of Texas bankers: 64 percent of the bankers surveyed believe that there is a "credit crunch" in Texas and 93 percent of those who believe there is a credit crunch attribute the problem to excessive government regulation. Some credibility is added to bankers' claims by Treasury Secretary Lloyd Bentsen's recent warning that "failure to streamline the hodgepodge system of federal banking regulation risks another financial crisis." Leaving the wisdom of extensive regulation of lending practices to one side, it seems clear that consumers enjoy a significant degree of statutory protection in this area, even without adding the DTPA's provisions to the top of the heap. In light of the fact that the Texas Legislature deliberately excluded the business of lending from the DTPA in 1973, and that many statutory restrictions on consumer lending have been enacted since that time, there would seem even less reason now for courts to extend the DTPA to lending transactions than there was at the time of the Riverside decision.

517. TEX. REV. CIV. STAT. ANN. art. 5069-13.01-.07 (Vernon 1987).
518. TEX. REV. CIV. STAT. ANN. art. 5069-2.03(7) (Vernon 1987 & Supp. 1994) (cease and desist orders, injunctions); 8.05 (Vernon 1987) (civil penalties); 8.04(b) (consumer class actions).
524. Bankers Believe Overregulations Cause Credit Crunch, 80 TEX. BANKING 24 (June 1991).
525. Bentsen Says Banks May Face New Crisis, HOUS. CHRON., Mar. 2, 1994, at 3B.
3. The Possibility of Preemption

The pervasiveness of federal regulation of consumer loans leads naturally to the question of whether an attempt by Texas courts or the legislature to apply the DTPA to lending transactions could run afoul of the preemption doctrine. The answer is relatively clear: As a general matter, federal law would not preempt state action. A caveat to that answer, however—that application of the DTPA to certain classes of loans may be preempted—makes a brief examination of the question useful.

In general, a state statute can be preempted in one of three ways: Congress can expressly preempt state law; Congress can implicitly preempt state law through a comprehensive scheme of regulation; or an actual conflict between state and federal law can make compliance with both sets of laws difficult or impossible. There is a presumption against federal preemption of state law. As a practical matter, to a Texas state court, this presumption may be strengthened by the Texas Supreme Court's recognition that the DTPA stems from "a deeply rooted state interest."

The possibility that Congress has occupied the entire field of regulation of consumer lending is easily dismissed, so far as banks are concerned. Congress can preempt a particular field of law through explicit statutory language or through a comprehensive scheme of regulation so pervasive as to justify a logical inference that Congress left no room for additional state action. No specific language in the federal laws governing con-

---


528. Brown v. American Transfer and Storage Co., 601 S.W.2d 931, 938 (Tex. 1980); see also BRAGG, ET AL., supra note 94, at 52, § 2.05. This deference to state interests is, of course, far from complete. "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." Free v. Bland, 369 U.S. 663, 666 (1962); see also Ridgway v. Ridgway, 454 U.S. 46, 54-55 (1981) (holding Maine law did not preempt life insurance beneficiary).

529. The general preemption argument may have some validity when applied to a federally chartered savings and loan. In contrast to banks, federally chartered thrifts are subject to a comprehensive scheme of federal regulation that has been described as "covering all aspects of every federal savings and loan association from its cradle to its corporate grave." Meyers v. Beverly Hills Fed. Sav. & Loan Ass'n, 499 F.2d 1145, 1147 (9th Cir. 1974) (citing People v. Coast Fed. Sav. & Loan Ass'n, 98 F. Supp. 311 (S.D. Cal. 1951)). Federal regulations governing thrifts certainly give the impression that the regulatory scheme preempts the field, referring to the "plenary and exclusive authority of the [Federal Home Loan Bank] Board to regulate all aspects of the operations of Federal associations," and stating that "[t]his exercise of the Board's authority is preemptive of any state law purporting to address the subject of the operations of a federal association." 12 C.F.R. § 545.2 (1989). One Washington court, in fact, deciding whether that state's deceptive trade practices act applied to a federally chartered savings and loan, has found preemption. Tokarz v. Frontier Fed. Sav. & Loan Ass'n, 656 P.2d 1089, 1095 (Wash. Ct. App. 1985). A similar argument, however, has failed in Massachusetts. Morse v. Mutual Fed. Sav. & Loan Ass'n of Whitman, 536 F. Supp. 1271 (D. Mass. 1982).

sumer lending expresses an intent to exclude state action.\textsuperscript{531} Nor does the history of federal regulation of banking suggest any general preemption of the field by implication.\textsuperscript{532} Accordingly, those who suggest that the law governing nationally chartered banks generally preempts state deceptive trade practice statutes can expect to have a difficult time of it.\textsuperscript{533}

The final type of preemption argument, that specific federal regulations may preempt specific applications of the Texas DTPA, is an entirely different matter. In the field of lending, specific preemption arguments have succeeded in displacing such venerable and deeply-seated restrictions on Texas lending as the usury\textsuperscript{534} and homestead\textsuperscript{535} laws. The Texas DTPA already has been held to be preempted in specific situations by the Federal Arbitration Act\textsuperscript{536} and by the Employee Retirement Income Security Act of 1974 (ERISA).\textsuperscript{537} It is easy to envision many other situations in which specific preemption challenges might be leveled against the

\begin{itemize}
\item \textsuperscript{531} Accord Bragg, supra note 94, at 50.
\item \textsuperscript{532} The point was clearly articulated by the Third Circuit: Whatever may be the history of federal-state relations in other fields, regulation of banking has been one of dual control since the passage of the first National Bank Act of 1863. . . . In only a few instances has Congress explicitly preempted state regulations of national banks. More commonly, it has been left to the courts to delineate the proper boundaries of federal and state supervision. The judicial test has been a tolerant one. National State Bank v. Long, 630 F.2d 981, 985 (3d Cir. 1980).
\item \textsuperscript{533} The general preemption argument has not fared well in the courts. The Supreme Court of California, for example, dealing with a preemption question in dicta in a bank service charge case, observed that "although many federal statutes and regulations deal with the subject of unfair competition and deceptive practices, such statutes and regulations generally co-exist peacefully with state laws regulating the same activity." Perdue v. Crocker Nat'l Bank, 702 P.2d 503, 525 n.44 (1985), appeal dismissed, 475 U.S. 1001 (1986).
\item On the rare occasions that the subject has arisen to date in Texas, the general preemption argument has not been successful. The Riverside majority did not address the preemption question, possibly because any discussion of preemption would have been dicta. The four dissenting justices of the Texas Supreme Court, however, rejected an argument based on the division of regulatory responsibility between the FTC and the Federal Reserve Board, reasoning that "[t]he denial of authority to the [FTC] to regulate national banks concerning unfair or deceptive practices in no way precludes the Texas Legislature from setting up its own mechanism to regulate deceptive practices of national banks." Riverside, 603 S.W.2d at 179 (Campbell, J., dissenting). In broader terms, the dissenting justices concluded: "There is nothing in the Texas [DTPA] which interferes with the purposes of the creation of national banks or which would tend to impair or destroy their efficacy as federal agencies." Id. A somewhat similar preemption argument likewise has failed to impress a Texas appeals court. See Farmers and Merchants State Bank of Krum v. Ferguson, 605 S.W.2d 320, 325 (Tex. App.—Fort Worth 1980), modified on other grounds, 617 S.W.2d 918 (Tex. 1981). All in all, the argument that federal regulation generally preempts application of the Texas DTPA to lenders is unlikely to be successful.
\item Seiter v. Veytia, 756 S.W.2d 303 (Tex. 1988).
\item Briercroft Serv. Corp. v. De los Santos, 776 S.W.2d 198 (Tex. App.—San Antonio 1988, writ denied); Gutierrez v. Gulf Coast Builders, 739 S.W.2d 371 (Tex. App.—Corpus Christi 1987, writ denied).
\item Giles v. TI Employees Pension Plan, 715 S.W.2d 58, 59 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (rejecting a DTPA challenge to a pension plan provision).
\end{itemize}
Texas DTPA should the statute be applied by courts to lending transactions. For example, a lender making all disclosures required by Reg Z\(^538\) would have a persuasive argument against a borrower claiming to have been deceived by the lender's failure to make further disclosures. A lender denying credit for reasons not prohibited by the Equal Credit Opportunity Act could make similar claims,\(^539\) and so forth.

In one very significant area of potential lender liability under the DTPA, namely, the "inextricably intertwined" doctrine, the Texas Supreme Court already has dealt with some cases. Two cases, which have been discussed earlier,\(^540\) presented a potential conflict between the DTPA and federal law. These cases involved claims that a lender should be found to be "inextricably intertwined" with a consumer transaction, and thus liable under the DTPA, when the lender was an assignee of consumer paper containing a required FTC disclosure that preserves consumer defenses while limiting lender liability to amounts paid under the contract.\(^541\) In none of these cases did the Texas Supreme Court explicitly discuss the possibility of preemption.\(^542\) On the other hand, in each case, the Texas Supreme Court favored the FTC rule, not the DTPA, in reaching a result. In the process, as will be discussed shortly, the "inextricably intertwined" rule may have been restricted to the point of triviality.\(^543\) Thus, in at least one area,\(^544\) federal regulation already may be influencing the development of Texas judicial doctrine on the potential interface between lending transactions and the DTPA.

B. SOME CONSEQUENCES OF APPLYING THE DTPA TO LENDING TRANSACTIONS

It is difficult to assess the impact of the DTPA on the Texas economy. The statute, appropriately described as "a grand experiment,"\(^545\) has now been an important part of the Texas business scene for over two decades. Yet little attention has been given to the purpose of this experiment, much less the collection of hard data on the results. In consequence, "we

\(^538\) See supra notes 496-99 and accompanying text.
\(^539\) See supra notes 505-07 and accompanying text.
\(^540\) See supra notes 216-27 and accompanying text.
\(^541\) See Perez v. Briercroft Serv. Corp., 809 S.W.2d 216 (Tex. 1991); Home Sav. Ass’n v. Guerra, 733 S.W.2d 134 (Tex. 1987); Kish v. Van Note, 692 S.W.2d 463 (Tex. 1985); see also Resolution Trust Corp. v. Cook, 840 S.W.2d 42 (Tex. App.—Amarillo 1992, writ denied).
\(^542\) At least one commentator suggests that the FTC rule was not intended to preempt state remedies. See Marsh, supra note 513, at 51 (stating that "the decisions to date dealing with the FTC Rule where debtors are using it affirmatively, as well as the guidance coming from the FTC staff in the mid-1970s, suggest no such limited liability was intended if the plaintiff’s theory was based on independent state law grounds and not on the FTC rule").
\(^543\) See infra notes 615-16 and accompanying text.
\(^544\) Conversely, the Corpus Christi Court of Appeals held in a recent case that the Federal Ship Mortgage Act does not preclude a DTPA action against a lender, when the borrower’s claims relate to the loan’s structure and events at closing. See Ocean Transport, Inc. v. Greycas, Inc., 878 S.W.2d 255, 272 (Tex. App.—Corpus Christi 1994, n.w.h.).
know little about the costs and benefits of the Texas DTPA. A further complication for any attempt to judge the DTPA's effect is a lack of any consensus on what the statute is intended to accomplish, extending even to disagreements between the drafters on the original intent of the statute. For these reasons, any discussion of the public policy implications of extending the DTPA to lending transactions necessarily is tentative and idiosyncratic.

Nonetheless, some reasonable guesses can be made. The subsections that follow describe the likelihood that extending the DTPA to lending transactions will favor sophisticated consumers disproportionately, decrease credit availability and frustrate efforts to monitor the soundness of banking institutions, while solving no problems that could not be handled better by state agencies.

1. Perverting Public Policy: The DTPA as the Exclusive Tool of the Rich

While the intent of the Texas Legislature to exclude loans from the DTPA's ambit is clear, and has been documented in some detail, the original reason for the exclusion is not so clear. Comments made during discussion on the original bill, however, suggest that the Texas Legislature may have felt that lenders already were subject to sufficient regulation to protect consumers. Whatever may have been the legislature's original intent, the regulatory explosion that has occurred during the past two decades makes the wisdom of applying the DTPA to loans extremely questionable today. Condensed to one sentence, development of a judicial doctrine that makes lenders liable under the DTPA primarily will favor large business litigants, not small consumers.

The DTPA has never by its terms been limited solely to small consumers. The original draft of the DTPA contained a definition of "consumer" that would have restricted a private cause of action to "an individual who seeks or acquires by purchase or lease, any goods or services for personal, family, or household use." The restriction to purchases of goods for "personal, family, or household use" dropped out of the bill that was en-

547. See, e.g., Lynn, supra note 545, at 868.
548. See supra notes 266-304 and accompanying text.
549. As discussed earlier, one senator mentioned during floor debate that "small loans, regulatory, they are the ones that are out of this bill." See supra text accompanying note 301. During committee debates, Rep. Temple indicated that he was aware of the extensive regulatory system governing banks, commenting: "Now, I don't know how many different agencies regulate the banking industry, but right offhand, I can think of state bank, for example, is very closely regulated by the FDIC, the Department of Banking of the State of Texas, it comes under the Commercial Code, I believe." See supra note 301.
acted;\textsuperscript{551} a later amendment removed the requirement that "services" must be "for other than commercial or business use."\textsuperscript{552}

Nonetheless, in light of the overall history of the DTPA, it seems fair to say that the "primary aim" of the statute was to protect small consumers.\textsuperscript{553} One of the statute's drafters, in the foreword to a co-authored treatise on the subject, explained that before the DTPA's enactment many consumer complaints "involved only small amounts of money which a lawyer could not economically pursue."\textsuperscript{554} Much of the structure of the DTPA reinforces the conclusion that its primary focus is the protection of individuals against the excesses of the marketplace.\textsuperscript{555} The trebling of damages in general,\textsuperscript{556} and the mandatory trebling of damages under $1000,\textsuperscript{557} obviously is designed to encourage small claims.\textsuperscript{558} The provision for attorneys fees to any successful litigant\textsuperscript{559} accomplishes much the same result.

Since the DTPA was drafted with small consumers primarily in mind,\textsuperscript{560} and since there evidently was little conscious attention given to

\begin{thebibliography}{99}

\bibitem{101} Id. § 17.45(2), amended by Act of May 10, 1977, 65th Leg., R.S., ch. 216, § 1, 1977 Tex. Gen. Laws 600, 600; see also Wells, supra note 463, at 543-44 (criticizing 1977 amendment as being undertaken by the legislature with "virtually no discussion or investigation to determine whether such entities actually require the easier burden of proof and treble damage incentive to sue.").
\bibitem{102} Interim Hearings Before the Joint Comm. on Deceptive Trade Practices Act, 9 (Aug. 12, 1988) (testimony of Karen Neeley) (transcript available from Senate Staff Services Office).
\bibitem{103} Bragg, supra note 94, at v (introduction to the first edition).
\bibitem{105} Former Attorney General John Hill, in whose office the DTPA originated, explained that the treble damage provisions in the DTPA were designed to give consumers effective remedies in cases commonly considered too small to warrant the expense of litigation. See Hill, supra note 296, at 614. He described his personal reasons for sponsoring the DTPA as follows:

Prior to being elected to the Office of Attorney General of Texas, I was concerned about the state of the law in the consumer area, since, in many instances, justice was not being afforded our citizens purely because of the economic imbalance between the costs of litigation and the generally small amounts in controversy. While in private practice, I saw many types of injuries and damage that could befall a consumer which simply could not be redressed in the courts due to the economic reality of spending more money on court costs and attorney's fees than could ultimately be recovered from the defendant wrongdoer.

\bibitem{107} See, e.g., Pennington v. Singleton, 606 S.W.2d 682, 690 (Tex. 1980); McCarthy, supra note 463, at 892-93.
\bibitem{109} The utility of the DTPA as a remedy even for small consumers is not an issue that the author proposes to tackle. In general, however, deceptive trade practice statutes may well not have as beneficial an effect as might be hoped. In an address at the University of Houston, Professor Stewart Macauley of the University of Wisconsin observed: "Appellate cases suggest . . . that middle class and rich consumers are the usual beneficiaries of

\end{thebibliography}
it is not surprising that the fairness and utility of applying the DTPA in "commercial" or business-versus-business settings has become the subject of considerable debate. This debate is far from theoretical. Some hard evidence, both anecdotal and empirical, supports the conclusion that the DTPA is being used frequently by large commercial plaintiffs. To pick but a few examples, reported litigation includes purchasers of used dump trucks and complex computer software, already discussed, as well as a Saudi Arabian bulk buyer of soft drinks.

Those who advocate use of the DTPA as a weapon for sophisticated litigants suggest that businesses should have the same rights as individuals, and that the availability of DTPA remedies to business consumers is "a form of consumer protection, one step removed." Detractors claim that the DTPA's provisions are fundamentally unfair when applied in a commercial setting. The DTPA generally favors plaintiffs, a feature that has been criticized as unnecessary, in view of the relatively greater

these [deceptive trade practice] statutes. The poor consumer seems protected only marginally." Macaulay, supra note 546, at 586.

561. As one commentator has observed, "it has never been clear why the commercial consumer needed the protection of the DTPA." Harrison, supra note 555, at 882. Nor does the legislative history of the DTPA or its amendments provide any real insight. Accord Bragg, supra note 40, at 8 (1976) (referring to 1975 amendments); Wells, supra note 463, at 527 (referring both to original enactment and 1977 amendments).

562. Two attorneys with one of Texas's more prominent commercial litigation firms have written an article extolling the DTPA's "future utility in assisting a litigator's business and commercial clients," and assessing the legislation as providing "some fairly powerful ammunition to commercial victims of misrepresentations and other unfair practices." Rowland & Wilson, supra note 2, at 28.

563. A study of the DTPA's use in Harris County (Houston) supports the conclusion that the DTPA is having a significant effect on litigation far removed from the typical "consumer" complaint. The data indicates that, while small claims still constitute the bulk of DTPA litigation, litigation between businesses now accounts for more than one-quarter of all DTPA suits. Nancy F. Atlas, et al., DTPA in the Courts: Two Empirical Studies and A Proposal For Change, 21 St. Mary's L.J. 609, 611 (1990).

564. See Knight v. International Harvester Credit Corp., 627 S.W.2d 382 (Tex. 1982) (dump truck) and Qantel Business Sys., Inc. v. Custom Controls Co., 761 S.W.2d 302 (Tex. 1988) (computer software). The cases have been discussed in some detail earlier in this article. See supra text accompanying notes 147-68 and notes 232-36.


566. Bragg, supra note 40, at 8.

567. The point was made well in one empirical study:

The value and utility of the DTPA's special protections for the plaintiff may be debated in these large recoveries. The amount at issue itself plus traditional contract, warranty, and tort theories provide adequate bases for instituting the litigation and for attorneys undertaking representation; there is no real need for the additional incentives of the DTPA. Where defendant in such cases acted maliciously, grossly negligent or recklessly, damage enhancement as a form of punishment is available under traditional exemplary or punitive damages standards. Otherwise, recovery of actual, foreseeable damages on traditional, more balanced theories should be sufficient.

Atlas, supra note 563, at 647.

568. A statistical analysis of Harris County (Houston) district court verdicts shows that DTPA actions strongly favor plaintiffs: Plaintiffs win DTPA suits more often than any type of suit other than workers' compensation claims. Id. at 638.
The DTPA also has been criticized as being contrary to most commercial law as it tends "to discourage litigation and encourage settlement." The large sums of money typically involved in business litigation make it unlikely that the treble damage provisions of the DTPA are really required to encourage legitimate litigation. Moreover, in an ironic twist, the cost of business-versus-business litigation ultimately will be borne by the "real" consumer, the end user of the product, resulting in "an unjustifiable hardship on the individual consumer through much higher prices."

In addition to specific questions about the utility of the DTPA in commercial settings, a growing body of literature has raised questions about the economic benefits of lender liability suits in general. One theoretical piece, for example, states that suits for breach of contract, lenders' concern for reputation and the ready availability of alternative sources of credit all argue against any great abuses of lenders' power. Damages should be limited to the cost of securing alternative credit, it is suggested, since any greater amount creates "perverse incentives" for debtor misbehavior as well as increasing the cost of credit.

What makes these concerns about use of the DTPA by sophisticated consumers unique, when considered in the lending context, is the fact that small consumers—those who, in the language of the original draft of the DTPA, use loan money to purchase "goods or services for personal, family, or household use"—would to a very large extent be excluded from whatever benefits the DTPA otherwise might offer them vis-a-vis their lenders. Consumer lending, commonly defined by statute or regulation as loans intended for "personal, family, or household purposes," is regulated pervasively at both the state and federal level. Individual consumers, to a much greater extent than businesses, therefore would find

---

569. Harrison, supra note 555, at 911; Wells, supra note 463, at 527.
570. Harrison, supra note 555, at 912-13. The author also criticizes the DTPA's settlement provisions as encouraging excessive demands and discouraging settlement offers. Id. at 913 n.208.
571. Id. at 882.
572. Id. at 921.
574. Fischel, supra note 573, at 138 (noting while these three factors "weaken the incentive for a lender to behave opportunistically, they do not eliminate it altogether").
575. Id. at 148, 151.
576. See supra note 550 and accompanying text.
577. See, e.g., 12 C.F.R. § 202.2(h) (1993) (Reg B; defining "consumer credit" as "credit extended to a natural person primarily for personal, family, or household purposes"); 12 C.F.R. § 226.2(a)(12) (Reg Z; same).
578. See supra notes 495-525 and accompanying text.
their DTPA lending complaints preempted by federal statute or regulation.  

Small consumers, but not business consumers, would find their remedies severely limited when their credit agreements are acquired by lenders in the due course of business; the Texas Supreme Court already has ruled to this effect. The extension of the DTPA to lending transactions, then, would have the practical effect of creating a weapon that would be used disproportionately by those who were not the principal concern of the DTPA's drafters. This effect hardly seems a worthwhile social goal.

2. Killing the Goose: Impact on Credit Availability and Terms

Another likely effect of extending the DTPA to Texas lenders is the loss of credit, or credit availability only at higher rates. Lending is a business. To an increasing extent, particularly in Texas, lending also is becoming an interstate business. The banking debacle of the late 1980s wreaked havoc on Texas-owned banks. Of the top ten independent banks in Texas a decade ago, only one survives; about half of the total bank market now is controlled by out-of-state banks. The new multistate flavor of Texas banking will be accentuated in the near future. Congressional passage of the Interstate Banking Efficiency Act in December 1994 will permit interstate branching and consolidation, effective June 1, 1997.

Texas lawmakers already are concerned that one effect of out-of-state control of Texas banks will be a loss of lending capital. A special committee of the Texas Legislature recently has criticized the lending practices of the larger banks, recommending that Texas should opt out of the federal interstate branching act. Rep. Kim Brimer, co-chair of the House Special Committee on Small Business Access to Capital, stated in a December 6, 1994 press release that “all banks owe reinvestment to the community and they are NOT responding to the call.” Representative Brimer went on to characterize the larger banks as “sump pumps, taking boat and car and home improvement loans, but not taking a chance on small businesses that create jobs and valuable services.” The state’s five largest banks, according to the committee report, have more than one-half of all loan assets, but make only one-third of small business loans and eight percent of agricultural loans.

579. See supra notes 495-544 and accompanying text.
580. See supra notes 216-27 and notes 540-44 and accompanying text.
583. Texas Legislative Committee Urges Opting Out of Interstate Branching, 63 BNA'S BANKING REP. 874 (1994).
584. Id.
585. Id.
Without debating the factual merits of the credit flight complaints in any detail, it is reasonable to expect that application of the DTPA to lenders would have a negative impact on the availability of credit. After the widely-criticized result in the Texaco-Pennzoil litigation, the *Wall Street Journal* opined that "[a] state that increases the cost of doing business by institutionalizing legal uncertainty is a state in danger of losing business." If the Texas court system is perceived by businesses as the biggest barrier to investment in Texas, as one widely-cited study claims, then it is a small stretch to conclude that lenders could be influenced by judicial developments making it more difficult to lend in Texas than it is in other states.

It probably is not possible to predict the precise effect that judicial decisions subjecting lenders to DTPA liability would have on credit availability in Texas. In the aggregate, other legal and business considerations might swamp the effect of the DTPA. Moreover, since several other states have applied their deceptive trade practice statutes to lenders, Texans would not be placed at a unique disadvantage in the interstate lending market, though the Texas DTPA is likely to be perceived as more of a threat than most. Nonetheless, some negative effect is likely. The combined effects of the banking collapse of the 1980s and the rise of lender liability suits surely have made financial institutions sensitive to litigation-associated risks of lending. That risk undoubtedly will be dealt with in some way, whether by not making loans at all, by making loans in more congenial jurisdictions, or by increasing the price of credit. In any event, Texas consumers ultimately would underwrite the costs of DTPA litigation and judgments.

587. See id. (reporting the result of a study at SMU's Center for Enterprising, that "Texas's civil justice system [is] the biggest barrier to attracting business to the state").
588. See generally supra notes 432-61 and accompanying text.
589. As stated earlier in this article, Texas generates about half of all reported DTPA litigation. See Dunbar, supra note 6; see also J.R. Franke & D.A. Ballam, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?*, 32 SANTA CLARA L. REV. 347, 358 (1992) (describing Texas as one of the states that have been "among the most active" in applying consumer protection statutes to "fringe cases").
590. See, e.g., Ebke & Griffin, supra note 573, at 812 (suggesting that a possible response to the uncertainties of lender liability litigation might be a refusal to lend).
591. See, e.g., Meer, supra note 573, at 556 n.136 and 556 (stating that "lenders may move from states applying good faith standards to express lending terms" and "[r]elaxed interstate banking restrictions could . . . serve to make substantial separation of borrowers and lenders a reality").
592. See, e.g., RICHARD A. POSNER, AN ECONOMIC ANALYSIS OF THE LAW 395-96 (4th ed. 1992) (stating that the interest rate on a loan reflects the risk at the time the loan is made); Bruce G. Stevenson & Michael W. Fadil, *Why Lending Crises Occur So Frequently*, J. COMM. LENDING, Nov. 1994, at 43 (stating that "[r]isk-adjusted pricing must become the norm for commercial lending"); Fischel, supra note 573, at 135-36 ("Lenders anticipate the various forms of debtor misbehavior and factor them into their decisions of whether and on what terms to lend. The greater the amount of anticipated debtor misconduct, the greater the compensation (i.e., the higher interest rate) that a lender will demand."); Borders, supra note 573, at 751 (stating that "[l]enders must increase their interest rates to cover the increased risks they must bear").
3. No Way to Run a Business: Impact on Regulation and Banking Practices

Application of the DTPA to lenders would implicate public policy concerns in another way that might not at first blush be apparent. Bankers and bank regulators rely to a great extent on loan paper to set out the extent of a bank’s liability. The parol evidence rule, however, generally does not apply to DTPA claims. Thus, assuming that the DTPA were applied to loans, a lender can be held liable for representations not reflected in, or even contrary to, the language of the loan documents. However, a judicial doctrine that holds lenders liable for promises that are contrary to the express language of loan documents could create great difficulty for bank examiners who try to assess the stability and soundness of lending institutions, as well as for loan officers who may take over a file after a previous loan officer quits or retires. Moreover, the post facto case-by-case nature of DTPA litigation makes it a tool particularly ill-suited to the purpose of curbing lender misconduct.

The interaction between parol evidence and the DTPA is somewhat more complex than just stated. Application of the DTPA to lenders would not always give an unscrupulous borrower carte blanche to invent oral commitments contrary to a loan’s express terms. While the parol evidence rule does not apply to DTPA claims, the statute of frauds is a defense. Thus, DTPA claims based on loans secured by real estate, or that cannot be performed within a year (such as multi-year line of credit or revolving loans) would still be restricted to the written terms of an integrated loan agreement. Perhaps most important, 1989 legislation excludes evidence of oral agreements for certain loans in excess of $500,000 when required disclosures are made. Moreover, although the law on the subject is “muddled” at best, a borrower could not avoid the statute of frauds simply by recasting a claim for breach of contract as one for fraud or misrepresentation.


597. Southwestern Bell Tel. Co. v. DeLanney, 809 S.W.2d 493, 495 (Gonzales, J., concurring); see also Clisham Mgt., Inc. v. American Steel Bldg. Co., Inc., 792 F. Supp. 150, 155 (D. Conn. 1992) (noting also that “Texas law is unclear as to whether the ... statute of frauds requirements of a contract claim apply in a DTPA action predicated on breach of warranty”).

598. See, e.g., Wade v. State Nat’l Bank, 379 S.W.2d 717, 720 (Tex. Civ. App.—El Paso 1964, writ ref’d n.r.e.) (“We fail to see how there could be any recovery for fraud involving the breach of an unenforceable contract. To hold otherwise would be to create an anom-
is independent of the contract, however, a matter that is subject to case-
by-case interpretation, the statute of frauds would not bar the admission
of parol evidence.\textsuperscript{599}

Federal regulators are severely hampered in carrying out their duty of
assessing the safety and soundness of financial institutions when signif-
ificant lending commitments are not reflected in the loan documents. To
some extent, the FDIC, acting as receiver for a failed bank, is protected
by the \textit{D'Oench, Duhme}\textsuperscript{600} doctrine, which bars the use of unrecorded
agreements between the borrower and the lender as a basis for claims or
defenses against the FDIC.\textsuperscript{601} The purpose of this seemingly harsh doc-
trine\textsuperscript{602} is made clear in many decisions. "Unwritten representations . . .
would naturally mislead an outside examiner, simply because they were
unwritten."\textsuperscript{603} Thus, borrowers who have unrecorded deals with their
lenders are participating in a "‘scheme or arrangement’ by which bank-
ing authorities are likely to be misled."\textsuperscript{604} The public interest, particu-
larly seen against the backdrop of the massive Texas bank failures of the
past decade, is clear: "Unrecorded agreements—those rooted in the
loose soil of casual transactions as much as those that spring from the
malodorous loam of outright fraud—are a threat to the ecology of the
banking system that we can ill-afford."\textsuperscript{605}

A judicial doctrine that permits DTPA actions to be asserted against
lenders would result in the creation of liabilities that could not be judged
from the face of loan documents. An examiner reviewing a bank’s files
could not know whether the collateral, guaranty agreements and loan
provisions were "real," or whether there was some side deal with the bor-
rower that defaults would be ignored, that collateral and guaranties were
"just formalities," or "what-have-you." While these side deals could not
be enforced against the receiver of a failed bank, the principal purpose of

\textsuperscript{599} McClure \textit{v.} Duggan, 674 F. Supp. 211, 224 (N.D. Tex. 1987) (permitting DTPA
action to proceed when the claim is based on "a factual misrepresentation independent of
the alleged unenforceable agreement"); Sibley \textit{v.} Southland Life Ins. Co., 36 S.W.2d 145,
146 (Tex. 1931) (holding claim for fraud in the inducement of a land contract not barred by
statute of frauds); Streller \textit{v.} Hecht, 859 S.W.2d 114, 116 (Tex. App.—Houston [14th Dist.]
1993, writ denied) (holding claim for fraud in the inducement of a guaranty not barred by
statute of frauds).

\textsuperscript{600} See \textit{D'Oench, Duhme} \textit{v.} FDIC, 315 U.S. 447 (1942).

\textsuperscript{601} See Bowen \textit{v.} FDIC, 915 F.2d 1013, 1015-16 (5th Cir. 1990).

\textsuperscript{602} The attitude of many plaintiffs' lawyers toward \textit{D'Oench, Duhme}, is typified by the
seminar speaker who justified its inclusion in a speech on the DTPA by stating that "much
lender liability is within the ambit of the DTPA except for the unjust creation and applica-
tion of the D'Oenche [sic], Duhme Doctrine and its statutory progeny." Walter P. Wolf-
ram, \textit{A Strategic Grasp of the DTPA}, in \textit{SOUTH TEXAS COLLEGE OF LAW, ADVANCED

\textsuperscript{603} Kilpatrick \textit{v.} Riddle, 907 F.2d 1523, 1527 (5th Cir. 1990), \textit{cert. denied}, 498 U.S. 1083

\textsuperscript{604} Bowen, 915 F.2d at 1015 (quoting Beighley \textit{v.} FDIC, 868 F.2d 776, 784 (5th Cir.
1989)).

\textsuperscript{605} \textit{Id.} at 1017.
regulatory inspections is to insure that lending institutions are engaging in sound lending practices, so that they do not fail.

While much of this concern still is theoretical, because the DTPA has not yet been applied to lenders in many cases, reported decisions give some hint of the potential conflict between the DTPA and sound regulatory practices. In *Riverside* itself, for example, the borrower's basic claim was that the bank should have been forced to make a loan because the Riverside loan officer and the borrower connived to falsify a loan application, a felony under federal law. In *Security Bank v. Dalton*, a Fort Worth appellate court decision in which the DTPA was applied to a lender, at least one of the loans that the borrowers contended the bank wrongly refused to extend, apparently was in excess of the bank's legal lending limit. In both these cases, the DTPA cause of action was based on an attempt to force the bank to violate federal law.

Admittedly, keeping the DTPA out of the arsenal of legal actions available to individual borrowers would not be a panacea. Other legal doctrines (such as fraud and negligent misrepresentation) are available to borrowers under current law, and could create much the same problems in cases to which they apply. This situation would hardly justify a judicial decision to make things worse by adding the DTPA to the mix; particularly at a time when the Texas Legislature seems anxious to restrict the circumstances under which unrecorded agreements can be used to vary lender's obligations. Conversely, if the DTPA truly were needed to curb lender abuses, a decision not to permit individual actions would not affect the Texas Attorney General's arguable power to proceed under its provisions. This result would be preferable to individual actions because the DTPA could be used prospectively on an industry-wide basis, rather than afterwards through the happenstance of litigation.

606. The bank's application for writ of error in *Riverside* makes this point clear, arguing that "[i]n the wake of the collapse of the Sharpstown State Bank and a number of smaller Texas banks in recent years, of which this Court can and should take judicial notice, it is particularly incongruous for the Court of Civil Appeals to hold that Riverside should be penalized under the Deceptive Trade Practices—Consumer Protection Act, because one of its officers prevented it from making a loan predicated on a false loan application." Application for Writ of Error at 6 n.4, Riverside Nat'l Bank v. Lewis, 603 S.W.2d 169 (Tex. 1980) (No. 8046).


609. See, e.g., Custom Leasing, Inc. v. Texas Bank & Trust Co. of Dallas, 516 S.W.2d 138 (Tex. 1974) (promise to do future act without intention of performing is actionable); Mumphord v. First Victoria Nat'l Bank, 605 S.W.2d 701 (Tex. Civ. App.—Corpus Christi 1980, no writ) (same).


611. See supra note 596 and accompanying text; see also Gall & Bowen, supra note 11, at O-11 (characterizing this legislation as "an effort to stem the flow of litigation over loan commitments").

612. The role of the Attorney General’s office has been treated briefly earlier in this article. See supra notes 472-75 and accompanying text.
V. DRAWING THE BOUNDARIES BETWEEN THE DTPA AND LOANS

Earlier in this article, the development of three different lines of judicial assault on the Riverside rule—"collateral services," the "inextricably intertwined" doctrine and the "financial intermediation" theory—was traced. Each approach is based upon a possible "exception" left open in Riverside; each approach has the potential for reducing the Riverside rule to triviality. In each situation, however, the Texas Supreme Court has not yet spoken on the most important questions. Accordingly, there still is room for some realistic line-drawing. The final section of the article will re-examine the exceptions to Riverside to determine whether there is any graceful way out of the current state of disorder.

A. DISENTANGLING THE "INEXTRICABLY INTERTWINED" DOCTRINE

As described earlier, most restrictions on the Riverside doctrine occurred in cases creating an exception to Riverside's general rule of non-liability when a lender is "inextricably intertwined" in a consumer transaction. These decisions—primarily Knight, Flenniken, and La Sara Grain—also generated what some now view as a "special test," sometimes termed the "borrower's objective" test, for consumer standing in lending cases. If there is no such "special test" in the lending context—and this writer suggests that there is none, and should be none—then most potential plaintiffs will not qualify as DTPA consumers vis-a-vis their lenders. In the first subsection, it will be demonstrated that there is no legal basis for such a separate test; and in the second, that the unthinking development of such a test by intermediate courts leads to nonsensical legal consequences.

1. The Possibility of Restricting the "Borrower's Objective" Test

The Texas Supreme Court has set out a two-pronged general test to qualify a person as a DTPA "consumer." First, the person must seek or acquire goods or services by purchase or lease. Second, "the goods or services purchased or leased must form the basis of the complaint." The first element of this test is statutory; the second involves an element of judicial interpretation. Nonetheless, both aspects of the basic

---

613. See supra notes 109-264 and accompanying text.
614. See supra notes 58-108 and accompanying text.
615. See supra notes 143-251 and accompanying text.
616. Reese, supra note 21, at 614.
618. Id. (emphasis added).
620. See Larry D. Carlson, The DTPA in Litigation With Financial Institutions, in Univ. of Hous. L. Found., DTPA, Consumer & Ins. L. Inst., at Q-15 (stating that "[t]he Act imposes no such requirement").

The validity of the second prong seems to have been confirmed by implication in recent statutory amendments. In 1989, the Texas Legislature amended the DTPA to make the recoverability of damages conform to other aspects of "tort reform." One amendment
test are deeply ingrained in Texas DTPA jurisprudence. By contrast, a respectable number of courts and commentators read the Texas Supreme Court's DTPA decisions as modifying the second prong of this restricted recovery in accordance with Chapters 33 and 41 of the Texas Civil Practices and Remedies Code (dealing with comparative responsibility and punitive damages) for "damage to property other than the goods acquired by the purchase or lease that is involved in the consumer's action or claim." Tex. Bus. & Com. Code Ann. § 17.50(b)(1)(A)(iii) (Vernon Supp. 1995). Thus, like the Texas Supreme Court, the legislature seems to consider a problem with a particular good to be at the center of a DTPA claim.

621. See, e.g., Chastain v. Koonce, 700 S.W.2d 579, 581 (Tex. 1985) (citing Cameron with approval); Carlson, supra note 620, at Q-15 (noting that Cameron "remains good law today").

622. At least five courts of appeals—Corpus Christi, Dallas, Fort Worth, Texarkana, and Tyler—appear to have adopted some version of the "borrower's objective" test. See Megason v. Red River Employees Fed. Credit Union, 868 S.W.2d 871, 873 (Tex. App.—Texarkana 1993, no writ) (citing La Sara Grain and the borrower's objective test, and holding that a complaint about the sale price at foreclosure "relates directly to the good sought and brings [the borrower's] counterclaim within the provisions of the DTPA"); FDIC v. F & A Equip. Leasing, 854 S.W.2d 681, 690 (Tex. App.—Dallas 1993, no writ) (citing La Sara Grain and holding that the plaintiffs were consumers "because they used the loan money to purchase goods"); Griffith v. Porter, 817 S.W.2d 131, 134 (Tex. App.—Tyler 1991, no writ) (citing La Sara Grain and stating that "[a] borrower can qualify as a consumer as long as his purpose in the transaction is to acquire goods or services"); Security Bank v. Dalton, 803 S.W.2d 443, 453 (Tex. App.—Fort Worth 1991, writ denied) (citing La Sara Grain and holding that a lender's actions were actionable under the DTPA because "the . . . loans were clearly taken in connection with the purchase of the sale of a good or service and thus qualify [the borrowers] as consumers"); First Tex. Sav. Ass'n v. Stiff Properties, 685 S.W.2d 703, 705 (Tex. App.—Corpus Christi 1984, no writ) (citing La Sara Grain, decided while the appeal was pending, and holding that all persons who perform unconscionable acts "in the context of a transaction in goods or services" are liable).

Still other courts of appeals—including Austin and El Paso—appear to be leaning toward the "borrower's objective" reasoning, though not holding a lender liable, under the facts. See Henderson v. Texas Commerce Bank—Midland, N.A., 837 S.W.2d 778, 782 (Tex. App.—El Paso 1992, writ denied) (not citing the borrower's objective test, but emphasizing that there was no evidence that the loan was sought for any other purpose than refinancing existing bank debt); Affiliated Capital Corp. v. Commercial Fed. Bank, 834 S.W.2d 521, 529 (Tex. App.—Austin 1992, no writ) (not citing the borrower's objective test, but apparently viewing as important the fact that the borrower "did not contract to buy property, materials, or an apartment complex from the Bank; rather, the Venture contracted to borrow money from the Bank using the completed project as security for the loan").

One Amarillo decision, Irizarry v. Amarillo Pantex Fed. Credit Union, 695 S.W.2d 91 (Tex. App.—Amarillo 1985, no writ), is more problematic. The plaintiff bought an auto, financing the purchase through the credit union. After he became disabled, he sued the credit union, complaining that the credit union had misrepresented the extent of its insurance coverage. The Amarillo Court of Appeals, relying upon La Sara Grain, classified the borrower as a consumer, apparently because the purpose of the loan was to purchase a car. Id. at 92. This decision has been cited by other courts as support for the "borrower's objective" test. On the facts, however, it would appear that lender liability could have been justified on the ground that the disability insurance was a collateral service. See supra note 122 and accompanying text.

623. See, e.g., Alderman & Rosenthal, supra note 7, at 501 (stating that "whenever the underlying basis of the transaction is the purchase of goods or services, the collateral lending of money should be subject to the DTPA"); Sam Kelley, Some Recent Court Decisions Relating to Art. 5069, V.T.C.S. and the Texas Deceptive Trade Practices Act, in Tex. Ass'n of Bank Couns., Ninth Annual Convention 14 (1985) (observing that "it seems clear that the courts are going to apply the DTPA to loans of money if the proceeds are to be used to purchase goods or services"); McCormick, supra note 253, at 727 (stating that "[a] customer's intent to purchase or lease a good may be enough to qualify him or her as a consumer under the DTPA"); J. Scott Sheehan, Applicability of the Texas Deceptive Trade Practices—Consumer Protection Act to Banking and Real Estate Transactions, in Tex.
basic test to permit DTPA standing in a lending context if the borrower's *objective in obtaining a loan* is the purchase or lease of goods or services. Even within this latter group, there may be a further split. While some sort of "tie-in" relationship between lender and seller still is required under one version of the "borrower's objective" test, another view is that proof of some sort of tie-in between the lender and the seller "is not an essential element for consumer status, but is merely evidentiary on the question of joint liability." In most lender cases, the version of the test used will be dispositive.

Applying the standard "basis of the complaint" approach, some courts and commentators have concluded that a lender cannot be liable under the DTPA unless the borrower has some complaint about the goods or services that were purchased with the loan proceeds. Using the "borrower's objective" approach, other courts and commentators take the position that a lender is liable under the DTPA for its misdeeds whenever the borrower used, or intended to use, loan proceeds for the purchase or lease of goods or services—even if the borrower has no complaint about those goods and services. This conflict forms the basis of the Texas circuit split described at the beginning of this article.

Under principles of adherence to precedent, intermediate state courts are bound to respect the latest authoritative decision from the state supreme court. Under the *Erie* doctrine, federal courts likewise are bound on state law issues, unless convinced that the state common law principle in issue is on the brink of change. While the Texas Supreme

---


625. Megason, 868 S.W.2d at 873.


627. See, e.g., Walker v. FDIC, 970 F.2d 114, 123 (5th Cir. 1992) (ruling that, though the plaintiffs intended to use loan proceeds for the construction of a hotel, "they allege no complaint pertaining to the Homotel itself"); Central Texas Hardware, Inc. v. First City, Texas—Bryan, N.A., 810 S.W.2d 234, 237 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (holding a lender was not liable for its actions under the DTPA because the plaintiff did not complain about the inventory items it intended to purchase with the loan). The Fourteenth Court of Appeals may be retreating from this position. In Baskin v. Mortgage & Trust, Inc., 837 S.W.2d 743, 748 (Tex. App.—Houston [14th Dist.] 1992, writ denied) the court stated that a lender is not liable under the DTPA "[u]nless the lender has some connection with the actual sales transaction or has committed a deceptive act related to financing the transaction."

628. See supra notes 622-23.

629. See supra notes 28-33 and accompanying text.

630. See, e.g., Robertson & Paulsen, supra note 115, at 46-47.

631. In this view, Walker v. FDIC, 970 F.2d 114, (5th Cir. 1992), is rightly decided. As mentioned at the beginning of this article, see supra notes 32-33 and accompanying text, the Fifth Circuit noted that "[t]he Texas courts of appeal are obviously split on this issue," but declined to apply the "borrower's objective" test on the basis that "Riverside has yet to be expressly overruled." Id. at 123 n.16.
Court's decisions are not altogether free from conflict, the better reading of the cases is that the "basis of the complaint" test, not the "borrower's objective" test, still is the true test of DTPA standing, whether in the lending context or elsewhere. Decisions adopting the "borrower's objective" test therefore can be criticized as unreasonably anticipating a shift in the Texas Supreme Court's interpretation of the DTPA rather than applying the law as it exists.632

A brief review of the relevant Texas Supreme Court decisions, already discussed in some detail,633 is a useful reminder of the fact that the "borrower's objective" test occurs only in Texas Supreme Court dicta that is arguably questionable. Virtually all courts and commentators invoking the "borrower's objective" test rely on language found in the Texas Supreme Court's decision in La Sara Grain.634 While the language is clear,635 the context is highly questionable. First, the La Sara Grain language is collateral since the lender was found not liable under the facts,636 and the opinion focused primarily on another issue.637 Second, while the La Sara Grain language purports to summarize the holdings of Knight and Flenniken,638 both of those decisions easily pass muster under the more restrictive "basis of the complaint" test. The Flenniken borrowers complained that the bank paid a contractor who failed to complete their house; the Knight borrower complained of a DTPA-violating waiver provision inserted in a sales contract drafted by, and immediately assigned to, the lender.639 Finally, it probably is not coincidental that the broad La Sara Grain dicta was written by Justice Franklin Spears, who indicated in his dissent in Ogden v. Dickinson State Bank—issued only a few months before La Sara Grain—that he had a much more expansive view of Flenniken than did the majority of the court.640

Finally, as already highlighted, if one ignores commentary and glosses on the case law from intermediate courts, any recent trend in Texas
LENDERS AND THE DTPA

Supreme Court DTPA opinions is away from lender liability in DTPA cases, both in result and in language. Viewed from the perspective of supreme court decisions alone, as any such decision ought to be viewed, the 1983 Flenniken decision may have been the high point in lender liability holdings, and the 1985 La Sara Grain opinion the high point in dicta, not as way stations on some inexorable road that will end with dissolution of the Riverside rule.

A requirement that borrowers must meet the same “basis of the complaint” test that any other potential consumer would meet—that is, that the borrower must have some complaint relating to the quality of the goods or services purchased with the loan proceeds—would in itself eliminate the majority of DTPA claims brought against lenders on an “inextricably intertwined” theory. Application of yet another requirement, set out by the Texas Supreme Court in the specific context of the “inextricably intertwined” line of cases, would eliminate most of the rest.

In Qantel, already discussed in detail, the Texas Supreme Court ruled that “‘[i]nextricably intertwined’ is not an additional theory of vicarious liability under the DTPA.” The DTPA defendant is held responsible only for its own conduct or under some recognized theory of derivative liability. One surely can envision a situation in which a borrower stops making loan payments because of complaints about the quality of the goods or services purchased with the loan proceeds, then sues the lender because of some misdeed in the process of foreclosure. Simultaneous application of the Cameron “basis of the complaint” test and the Qantel “no vicarious liability” requirement should eliminate even such lender suits, because the “basis of the complaint” against the lender would be the foreclosure, not the defective goods or services.

The observation that strict and simultaneous application of the Cameron and Qantel requirements would eliminate most lender suits brought on “inextricably intertwined” DTPA grounds is not original with the author, although the limitation does not yet appear to have been

641. See supra notes 248-50 and accompanying text.
642. See supra notes 232-36 and accompanying text.
643. Qantel, 761 S.W.2d at 305.
644. Thus, as the Austin Court of Appeals properly held in Wynn v. Kensington Mortgage & Fin. Corp., 697 S.W.2d 47, 49-50 (Tex. App.—Austin 1985, no writ), a lender cannot be held liable for excessive levels of formaldehyde in a mobile home simply for acting as the lender.
645. One might still envision suits on grounds much like those present in Knight, when the lender committed a violation of the DTPA during the original sale, or in a seller-financing arrangement such as the Texas Supreme Court might have found to exist under facts similar to Kinerd. See also Griffith v. Porter, 817 S.W.2d 131 (Tex. App.—Tyler 1991, no writ) (seller financing).
646. See, e.g., Carlson, supra note 620, at Q-16.

[The interplay between Cameron and Qantel in these type[s] of cases places the consumer in a quandary. If the consumer focuses his complaint on the good or service purchases, he satisfies the Cameron requirement, but risks failing to establish liability on the part of the lender under Qantel. On the other hand, if the consumer focuses his complaint on deceptive acts of the lender, he risks running afoul of Cameron.]
recognized by the courts. To reiterate, contrary to the oft-quoted dicta in *La Sara Grain* that *Riverside* has been "twice limited... to its facts," the truth of the matter might be that in decisions over the past decade it is the "inextricably intertwined" language of *Knight*, not *Riverside*, that has been limited to its facts. This reading of the case law also would explain the Texas Supreme Court's apparent lack of enthusiasm for the "inextricably intertwined" doctrine in its last decision using those words. By eliminating the "special test" of lender liability under the DTPA, the DTPA's coverage would be kept at something approximating the limits originally intended by the legislature. Moreover, a decision to set some strict limits on use of the "inextricably intertwined" test would avoid the need for making the bizarre distinctions that now are developing in the case law.

2. The Wisdom of Restricting the "Borrower's Objective" Test

Those who would push the "inextricably intertwined" doctrine to its limit suggest that one need only to look at the purpose of the loan to determine potential DTPA liability for lender misconduct: If loan proceeds are used to purchase goods or services, then the lender is potentially liable. Conversely, if the purpose of securing a loan is not the purchase of specific goods or services, but the refinancing of an existing loan or the establishment of a general line of credit, then there is no DTPA liability for the lender's bad acts.

If this were the true distinction between *Knight*, *Flenniken* and *Riverside*—that the *Knight* and *Flenniken* borrowers bought a dump truck or a home, while the *Riverside* borrower merely refinanced a Cadillac, then it is a strange and delicate distinction indeed. In *Riverside*, after all, the borrower defaulted in the very first payment on his consumer loan. While *Riverside* Bank was indeed "refinancing" the loan, the loan was for

Another commentator has stated that under the restrictive version of the test, only the small minority [sic] of borrowers who have actually acquired goods and know of a defect in the goods will be able to assert DTPA claims. In addition, the borrowers who have valid DTPA claims based on defective or deficient goods will not be able to assert the claim against the lender unless the lender personally violated the DTPA.

*Id.*; Reese, *supra* note 21, at 613.

647. 673 S.W.2d at 566.

648. The last decision from the Texas Supreme Court to use the words "inextricably intertwined" in the context of a DTPA action was *Qantel*, 761 S.W.2d at 305. The decision noted that the phrase "finds its recent origins in connection with the DTPA in *Knight*," and explained that decision in some detail, but did not mention either *Flenniken* or *La Sara Grain*. *Id.* As already discussed, the holding in *Qantel* was that "inextricably intertwined" is not an additional ground of DTPA liability.

649. A student article, arguing for expansion of the "borrower's objective" test, candidly (though perhaps unintentionally) assessed the history of the "inextricably intertwined" doctrine as an intrusion on the legislature's prerogative, stating that "[t]he Texas Supreme Court has attempted to correct the legislature's exclusion by making a special test for determining the consumer status of a borrower." Reese, *supra* note 21, at 614 (emphasis added). To reiterate, however, this encroachment on the legislature's domain has occurred only in dicta at the Texas Supreme Court level.
the purchase of a consumer good, the loan amount represented the entire purchase price of that good, and Riverside Bank knew these facts. It is difficult to imagine any sound legislative policy that would seek to punish the misconduct of Riverside's loan officer whenever he made false statements in the course of financing the purchase of an auto, but would not punish that officer for making precisely the same false statements while refinancing a car sale. It is equally difficult to imagine a sound policy that would punish lender misrepresentations when a loan is sought for the purpose of buying a specific good, but not when a line of credit is sought—even though the purpose of securing the line of credit may be the purchase of many such goods over time. One would, after all, suppose that a line of credit generally is sought for the purpose of buying something. Yet these are precisely the kinds of highly artificial distinctions Texas courts now appear to be making while trying to thread their way through the "inextricably intertwined" maze.

A recent case, First State Bank of Canadian, Texas v. McMordie, makes evident one aspect of the intrinsic arbitrariness of the "borrower's purpose" test. McMordie, a rancher, sued the bank on DTPA grounds for breach of an oral commitment to make a loan. The purpose of the loan, according to McMordie, was twofold: to refinance a preexisting debt for cattle purchases at another bank and to obtain a million dollar line of credit for new cattle purchases. The Amarillo Court of Appeals held that McMordie did not qualify as a DTPA consumer because the record was "devoid of any objective manifestation that McMordie sought or acquired, by purchase or lease, cattle which form the basis of his complaint." Assuming that the borrower did provide proper evidence that he sought to use the line of credit proceeds to buy cattle, one might then need to prorate the damages: The lender would be liable for its conduct to the extent of the percentage of the expected loan that would have gone toward the purchase of new cattle, but not for that percentage of the expected loan that was earmarked for payment of preexisting debt, even

---

650. Riverside, 603 S.W.2d at 171.
651. Following Riverside strictly, at least a couple of appellate courts recently have declined to hold refinancing arrangements subject to the DTPA. See Henderson, 837 S.W.2d at 782 (observing that "[t]here is no evidence that Henderson sought to do anything other than borrow money from TCB to refinance his debts at InterFirst"); First State Bank of Canadian, Texas, 861 S.W.2d 284, 286 (Tex. App.—Amarillo 1993, no writ) (noting that one purpose of the plaintiff's loan was "to refinance his debt"). Likewise, courts hold that a line of credit loan is not enough to trigger DTPA liability. See, e.g., First Interstate Bank of Bedford v. Bland, 810 S.W.2d 277, 289 (Tex. App.—Fort Worth 1991, no writ); Bank of El Paso v. T.O. Stanley Boot Co., Inc., 809 S.W.2d 279, 289 (Tex. App.—El Paso 1991), aff'd in part, rev'd in part, 847 S.W.2d 218 (Tex. 1992); see also Roberts v. Burkett, 802 S.W.2d 42, 47 (Tex. App.—Corpus Christi 1990, no writ) (noting that "[t]he loan transaction did not involve a good or service and [the plaintiff's] purpose was only to borrow money"); Sheehan, supra note 623, at 23-24 ("There seems to be a trend to distinguish purchase money loans and indirect dealer paper from the mere loan of money. Certain type[s] of bank lending may therefore face the full brunt of the [DTPA].").
652. 861 S.W.2d 284 (Tex. App.—Amarillo 1993, no writ).
653. Id. at 286.
654. Id.
though the purpose of that debt was also cattle purchases. One might envision other approaches than prorating to dealing with such multipurpose loans, but the inherent foolishness of the entire enterprise ought to be self-evident.

*Security Bank v. Dalton,* a Fort Worth decision that is perhaps the best known of the recent “borrower's objective” cases, illustrates other difficult questions that might arise in trying to make sense out of the test. Security Bank, successor in interest to Flower Mound Bank, was found liable under the DTPA for refusing to renew loans. In holding that the bank was liable under the borrower’s objective test, the Fort Worth Court of Appeals emphasized that the original loan proceeds were used for the purpose of building a funeral home and that “Flower Mound Bank knew of this purpose when the loan was made, and the records obtained by Security Bank when it purchased Flower Mound's assets so indicated this purpose.”

Suppose, however, that the original lender did not know that the borrower’s purpose was the purchase of goods and services. The borrower, we may assume, had sufficient collateral to cover any possible default and valued his or her privacy enough to refuse to divulge the loan’s purpose. Would the bank still be liable under the DTPA for its misdeeds? The Fort Worth court seemed to assume that it would not. Yet DTPA doctrine teaches that the transaction is to be looked at from the consumer’s point of view, and the very phrasing of the “borrower’s objective” test tends to reinforce this view. It might be, then, that a lender could commit a DTPA violation without ever knowing that it was involved in a DTPA transaction.

The Fort Worth Court of Appeals also grappled with the question of assignment of loans with unsatisfying results. Security Bank was not the original lender; it acquired the assets of Flower Mound Bank when that bank failed and its assets were sold by the FDIC. Since the original loans were for the purchase of goods or services, the Fort Worth court seems to have reasoned, Security Bank acquired a “consumer” loan with concomitant risks of liability. Leaving unique questions involving bank failure and FDIC powers to one side, there is more than one way in which a lender could step into the shoes of another. The second lender can take an assignment of the first loan and security agreement, or the second lender can advance funds to pay off the first loan, taking a lien through a new security agreement on the goods purchased with the first loan. From the lender’s point of view, the principal difference is that, if more than one creditor has a security interest in the goods, the second lender has

---

655. 803 S.W.2d 443 (Tex. App.—Fort Worth 1991, writ denied).
656. Security Bank v. Dalton was singled out by the Fifth Circuit in Walker v. FDIC as an example of the circuit split in Texas intermediate courts on the “borrower’s objective” question. *Walker,* 970 F.2d at 123 n.16. This decision also was cited by the Montana Supreme Court in its decision not to follow *Riverside* as an exemplar for Montana law. See *Baird v. Norwest Bank,* 843 P.2d 327, 334 (Mont. 1992).
658. *Id.* at 445.
LENDERS AND THE DTPA

better assurance of a favorable lien position with an assignment. For this reason, the second approach usually is seen in refinancing transactions in which security of lien position is not in question. From a DTPA standpoint, the second approach would have great advantages. The lender who simply advances funds to pay off the first loan, secured with the goods purchased through the first loan, should not be liable for lending misconduct under the DTPA; the lender who takes an assignment, under the Fort Worth court's apparent analysis, would be liable for the same misconduct.

In several respects, then, under the "borrower's objective" test, the extent of a lender's liability would depend primarily on the happenstance of the structuring of the transaction, not on the quality of the lender's behavior. Initial financing is treated differently than refinancing, general lines of credit and (perhaps) loans without a stated purpose differently than loans for targeted purposes, and assignments differently than new paper. This "Alice in Wonderland" series of distinctions would not make any sense to a lender; such distinctions make even less sense if the DTPA really was intended by the legislature to be a tool to correct lender misconduct. The value of a restrictive reading of the "inextricably intertwined" doctrine, through applying more general tests of DTPA standing to lending transactions, is that no such distinctions need develop. A lender would be liable under contract and banking law for its actions as a lender and liable under the DTPA if it chooses to step across the line into active involvement in a consumer transaction that goes bad.

B. COLLATERAL AND NOT-SO-COLLATERAL SERVICES

Another major area of judicial encroachment on the Riverside exemption of lenders from DTPA liability is the "collateral services" doctrine. While recognizing that lending transactions as such are not subject to DTPA liability, courts characterize certain actions by lenders as collateral to the loan transaction, and thus actionable. The fairness of some sort of a collateral services doctrine is clear. Financial institutions do many other things than lend money. It would not be reasonable to exempt a lender from DTPA responsibility for actions that would subject a non-lender to identical liability under identical circumstances. For example, the purchase of insurance has been held to be a DTPA "service;" violations of the Texas Insurance Code even are incorporated in the act as

---


660. In refinancing auto purchases, for example, lien position would not be critical because the certificate of title would be held by the first creditor and transferred to the second. The second lender, therefore, might wish to structure the deal as a new transaction, perhaps because the lender prefers its own forms to those of the first lender.

Some recent DTPA decisions push the “collateral services” argument much further, though. In *Herndon v. First National Bank of Tulia*, 663 for example, the Amarillo Court of Appeals determined (on its third try664) that a farmer stated a DTPA claim against a lender on a collateral services theory through pleadings that recited, in relevant part:

The financial services purchased from the bank included but are not limited to lending money to purchase [feed, seed, fertilizer, fuel, herbicides, pesticides, machinery, equipment, etc.], financial advice on where and when to obtain financing, or abstain from borrowing, and how to structure the various financial arrangements of the Jerry Herndon farming operation.665

Herndon’s pleading somewhat inartfully combines two questions left open in *Riverside*: whether financial services necessarily exist in the lending of money and—in the second half of the paragraph—whether discussions that commonly take place between a borrower and a lender in the process of making a loan are “collateral” services. The Amarillo court evidently relied on Herndon’s latter claims, that lenders perform for borrowers the “collateral services” of advising those borrowers on how and where to get the best loan, whether to borrow, and how to arrange the transaction.666 Such claims, however, would arise to some extent in almost every loan. If the Amarillo court’s decision in *Herndon* is correct,667 then expansion of the collateral services doctrine indeed has swallowed up the *Riverside* rule.

The question, then, is where one draws the line. To the extent that *Herndon* and other decisions668 are read for the conclusion that the mere making or handling of a loan is a “collateral service” within the meaning of the *Riverside* exception, they simply are wrong. The *Riverside* court made a careful distinction between whether the loan of money could it-

---

663. 802 S.W.2d 396 (Tex. App.—Amarillo 1991, writ denied).
664. The first decision was for the borrower, the second for the lender. Both were superseded by the third, final opinion. *Id.* at 397.
665. *Id.* at 398.
666. In explaining its decision, the Amarillo panel quoted from the latter half of the pleading paragraph reproduced in text. *Id.* at 399.
667. The Texas Supreme Court’s decision to issue a “writ denied” in the *Herndon* case says little about the decision’s correctness. Assuming that a “writ denied” designation has any real meaning, Herndon’s pleadings were so vague that he *might* have pleaded at least one collateral service under a more limited view of the case. Herndon, for example, contended that he “purchased the financial services of the bank for the . . . application of various inputs to crop and livestock production.” *Id.* at 398. What this means is not known to the writer, but it *might* be a pleading of a collateral service sufficient to withstand dismissal of a cause of action.
668. See, e.g., *Baskin v. Mortgage & Trust, Inc.*, 837 S.W.2d 743, 748 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (apparently stating in dicta that the “servicing” of a mortgage loan is a “collateral service” actionable under the DTPA).
self be considered a service, and whether "collateral" services could be actionable. Moreover, in view of the legislature's intent to exclude lending from the DTPA, stretching the Riverside exemption to this extreme would be a gross usurpation of the legislative function. A more reasonable, though restrictive, collateral services doctrine could be derived from the Texas Supreme Court's basic two-pronged test for consumer status, just as has been demonstrated with the "inextricably intertwined" doctrine. To reiterate, a person must seek or acquire goods or services by purchase or lease. Those goods or services then must form "the basis of the complaint." So far as the "inextricably intertwined" doctrine goes, the "basis of the complaint" test is the main sticking point. With the "collateral services" doctrine, however, adaptation of the first prong of the Texas Supreme Court's two-pronged test—in particular, the question of whether services are acquired by "purchase or lease"—is the most controversial aspect.

It is difficult for a typical borrower to prove, so far as many services claimed as "collateral" to loan transactions are concerned, that those services are acquired "by purchase or lease." One approach taken by borrowers, and some courts, is to argue that the interest rate for a loan necessarily includes not only the cost of borrowing money, but the cost of services necessarily involved in making and "servicing" that loan. However, as the Fifth Circuit has recognized, this interpretation would undermine the legislature's exclusion of intangibles from the DTPA's ambit. Moreover, it would equate a loan functionally with a "purchase" or "lease," a result that is excluded by common-sense rules of statutory construction already discussed in some detail earlier in this article.

The requirement that a service be "purchased or leased," read literally, should require a showing that the borrower paid for, or at least intended

---

669. Riverside, 603 S.W.2d at 175.
670. See supra notes 266-304 and accompanying text.
671. See supra notes 617-21 and accompanying text.
672. See, e.g., Fortner v. Fannin Bank in Windom, 634 S.W.2d 74, 76-77 (Tex. App.—Austin 1982, no writ) (approving the argument that payment of interest on a loan "purchased" the bank's services in filing car title); but see Offerman, supra note 121 (criticizing this reasoning). The Fortner court's reasoning is in marked contrast to that of the court in Thompson v. First Austin Co., 572 S.W.2d 80, 82 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.), which went to some pains to explain that the payment of interest is not sufficient consideration for forbearance in foreclosure, and that such "services" are primarily for the benefit of the lender). The Fortner court evidently failed to consider Thompson. Accord Offerman, supra note 121, at 881. The Thompson decision is discussed in some detail supra at notes 111-18 and accompanying text.
673. See FDIC v. Munn, 804 F.2d 860, 863-64 (5th Cir. 1986). [A]ll transactions involve human service to some extent, the cost of which is included in the price of the transaction. Arguably, then, all services in any transaction are purchased 'services' under the DTPA. Under this approach, any service involved in a stock purchase or loan transaction would give rise to DTPA consumer status even though the actual stock purchase or loan could not, thereby undermining the legislature's exclusion of sales of intangible chattels from the DTPA.
674. See supra notes 370-430 and accompanying text.
to pay for, the service in question, separate and apart from the interest paid on the loan, which by statute is compensation paid for the “use . . . of money.”\textsuperscript{675} Indeed, some of the decisions make this distinction.\textsuperscript{676} In \textit{Central Texas Hardware}.\textsuperscript{677} for example, the court declined to find DTPA liability based upon services involved in making the loan because the services in question “were merely ancillary to the processing of the loan application itself” and “no fee was charged.”\textsuperscript{678}

Many services provided by financial institutions carry separate charges\textsuperscript{679} or involve consideration other than the payment of interest on a loan.\textsuperscript{680} complaints related to any of these services should not be barred simply because the institution also is acting as a lender.\textsuperscript{681} Conversely, those “services” which are simply part of the loan package, and for which no separate charge is made, should not be considered to be “collateral” services. This requirement would, in the writer’s estimation, exclude a number of services held to be “collateral” by some intermediate courts.\textsuperscript{682} The risk that lenders would attempt to insulate themselves from DTPA liability by including distinct and separate service charges

\begin{footnotes}
\footnote{675. TEx. REV. CIV. STAT. ANN. art. 5069-1.01(a) (Vernon 1987).}
\footnote{676. See, e.g., Roberts v. Burkett, 802 S.W.2d 42, 47 (Tex. App.—Corpus Christi 1990, no writ) (DTPA liability for legal services provided in connection with a loan transaction rejected in part because “[t]he key element missing here is actual purchase or an agreement that [the borrower] would purchase legal services”). \textit{But see}, e.g., Irizarry v. Amarillo Pantex Federal Credit Union, 695 S.W.2d 91, 93 (Tex. App.—Amarillo 1985, no writ) (rejecting the argument that “Irizarry cannot be a consumer because he paid no consideration for the insurance,” though basing DTPA liability primarily on an erroneous understanding of the inextricably intertwined doctrine).

\footnote{677. 810 S.W.2d 234 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

\footnote{678. \textit{Id.} at 237.

\footnote{679. One list of such charges includes check processing fees, monthly service charges, activity fees, commissions on securities transactions, and escrow fees. Neeley, \textit{supra} note 131, at G-15.

\footnote{680. The writer does not argue, for example, that “free” checking really is free. The institution received consideration for its services in the form of the opportunity to use the funds on deposit until called for by the depositor. \textit{See} FDIC v. Munn, 804 F.2d 860, 865 (5th Cir. 1986) (characterizing the CD “hold” services in \textit{Ritenour} as “financed . . . through revenue from [the bank’s] accounts”).

\footnote{681. \textit{Accord} Richard M. Alderman, \textit{Innovative Uses of the Deceptive Trade Practices Act}, 18 TEX. TECH L. REV. 45, 53-54 (1987) (“[I]t is difficult to see how anyone, a bank or other entity, can argue that it did not perform a service if it imposed a ‘service charge.’ Therefore, any banking service accompanied by a fee clearly falls within the scope of the DTPA.”); Neeley, \textit{supra} note 131, at G-15 (“Counsel’s case will be significantly strengthened if the financial institution charges a service charge for the services which form the basis of his client’s cause of action. Such service charges furnish documentary proof that the service was purchased.”).

\footnote{682. By way of example, this would include the financial advice in \textit{Herndon}. \textit{See supra} notes 663-67 and accompanying text. As another example, in FDIC v. F & A Equipment Leasing, 854 S.W.2d 681 (Tex. App.—Dallas 1993, no writ), the Dallas Court of Appeals issued a very confused ruling, finding consumer standing on a version of the “inextricably intertwined” or “borrower’s objective” approach, then concluding that “any services provided in connection with adding [another party] to the notes and transferring the collateral from F & A to [other party] were necessarily provided in connection with the original loans in which F & A were consumers.” \textit{Id.} at 690-91. To the extent that the decision intended to draw on the “collateral services” approach, it would be wrong under the author’s suggested approach. To the extent that consumer status was found on a “borrower’s objective” theory, the quoted language would not be necessary.}
under the rubric of "interest" is minimal. "Fee income" is a principal source of profit for lending institutions at the present time;\textsuperscript{683} moreover, an attempt to combine charges for separate bank services under the "loan" umbrella would risk running afoul of the Bank Tying Act\textsuperscript{684} at the very least.

Even a "separate fee" test would have to be applied very carefully. Take the example of cases involving loan brokers, claimed by at least one set of commentators as being in conflict with the Riverside rule.\textsuperscript{685} In at least two cases,\textsuperscript{686} loan brokers have been held liable under the DTPA for failing to produce a loan as promised. In each case, the court emphasized that fees were paid to the brokers\textsuperscript{687} and in each case the court distinguished Riverside on the basis of the collateral services doctrine.\textsuperscript{688} Interestingly enough, loan brokering transaction like this would be actionable under the DTPA by virtue of the 1987 Credit Services Organizations Act.\textsuperscript{689} These activities, however, would not be actionable under the DTPA if engaged in by a "traditional" lender—that is, a regulated lender, FDIC or FSLIC-insured bank or thrift, or credit union.\textsuperscript{690}

Other aspects of the basic DTPA tests also would cause problems for some of the more fanciful extensions of the "collateral services" doctrine. For example, the services still must form the basis of the complaint. If the bank's wrongful actions are not tied to the purchased services, then the borrower should not be a DTPA consumer.\textsuperscript{691} In addition, the DTPA's requirement that the consumer "seek" the services has been construed as a requirement that the services have been an objective of the bor-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{683} See, e.g., Banking: CFA Says Consumers Losing Millions in Interest Income at Commercial Banks, DAILY REP. FOR EXECS., May 4, 1984, at A84 (quoting Steve Brobect, executive director of the Consumer Federation of America, that "[t]here is widespread consensus within and outside the [banking] industry that the principal reason for these large profits are the great spread between cost of funds and loan rates, and the rise in fee income"); Pamela Yip, Texas Commerce Prospering: First-Quarter Profits Surge 76 Percent, HOUS. CHRON., Apr. 20, 1994, at B1 (reporting that fee income at Texas Commerce "rose 14 percent to $106 million" and that "[i]ncome from trust services increased 46 percent, and deposit service charges were up 12 percent").
\item \textsuperscript{684} See supra note 511 and accompanying text.
\item \textsuperscript{685} See Krahmer, supra note 14, at 36-37.
\item \textsuperscript{686} Merchantile Mortgage Co. v. University Homes, Inc., 663 S.W.2d 45 (Tex. App.—Houston [14th Dist.] 1983, no writ); Lubbock Mortgage & Inv. Co. v. Thomas, 626 S.W.2d 611 (Tex. App.—El Paso 1981, no writ).
\item \textsuperscript{687} Merchantile Mortgage, 663 S.W.2d at 47 ("stand-by fees" totaling $6,200); Lubbock Mortgage, 626 S.W.2d at 612 ("loan fees" totaling at least $3,500).
\item \textsuperscript{688} Merchantile Mortgage, 663 S.W.2d at 47-48 (adopting the Lubbock Mortgage reasoning); Lubbock Mortgage, 626 S.W.2d at 613 (noting that the Riverside court "refused to pass upon the issue of whether a bank's misrepresentation concerning its collateral activities incidental to obtaining a loan could constitute a deceptive act").
\item \textsuperscript{689} See supra notes 345-69 and accompanying text.
\item \textsuperscript{690} See supra note 359 and accompanying text.
\item \textsuperscript{691} Thus, in Resolution Trust Corp. v. Westridge Court Joint Venture, 815 S.W.2d 327 (Tex. App.—Houston [1st Dist.] 1991, writ denied), the court properly passed over the question of whether services typically associated with a real estate loan (payment and collection of ad valorem taxes, maintenance of insurance, and so forth) qualified the borrowers as DTPA consumers, because they "failed to complain of any violation of the DTPA emanating from the acquisition of the project or the financing of the project." Id. at 332.
\end{itemize}
\end{footnotesize}
rower,692 or for the primary benefit of the borrower.693 “Services” that are for the primary benefit of the lender, but which have been argued as actionable under the DTPA, such as encouraging a borrower to pay a third party’s debt694 or foreclosing on collateral,695 surely are not “sought or acquired” by borrowers in any rational sense of those words. Any sane borrower would rather not receive the benefit of such services. In short, careful application of standard DTPA requirements, combined with a requirement that the “services” at issue be accompanied by a charge to the consumer, other than interest on the loan, would do much to create some reasonable limits on the “collateral services” doctrine.

C. LENDING AS A SERVICE

The final “exception” left open in Riverside, that “services existed in the lending of money, . . . and were necessarily a part of the interest rate or purchase price of the loan,”696 while potentially the most dangerous to lenders, is also the objection most easily answered—though not for the reason given by the Riverside court. The Texas Supreme Court criticized this financial intermediation argument as “merely hypothetical” since no evidence in support of the theory had been presented at trial.697 As Professor Krahmer has ably pointed out, and as has already been discussed,698 the business of lending could quite reasonably be viewed as a series of interrelated services. However, even if evidence that the financial intermediation theory reflects actual banking practice were presented in some future trial, such evidence ultimately would prove to be of little consequence. The question is not whether lending could in some ways be

692. See, e.g., FDIC v. Munn, 804 F.2d at 865 (stating that the “key principle” for determining consumer status is whether the goods or services are “an objective of the transaction,” rather than “merely incidental to it”); Texas Cookie Co. v. Hendricks & Peralta, Inc., 747 S.W.2d 873, 877 (Tex. App.—Corpus Christi 1988, writ denied) (finding DTPA consumer in a franchise purchase since the collateral services in question “were clearly an objective of the transaction and not merely incidental to it”).

693. To a certain extent, actions taken by the bank for its own benefit also could be said to be “services” to the borrower. See, e.g., Fortner, 634 S.W.2d at 76 (going to great lengths to explain how filing of car title by bank was a “service” to the borrower); see also Offerman, supra note 121, at 883 (commenting that “[m]any activities which are normally performed by a lender for its own benefit also indirectly benefit the borrower”).

694. In Schmueser v. Burk Burnett Bank, 937 F.2d 1025 (5th Cir. 1991), for example, the Fifth Circuit declined to find that the “services” provided to a third party by a bank which encouraged a borrower to pay a third party’s note (so that the bank would not be called on to perform on a letter of credit in favor of the third party) were not actionable under the DTPA. The claimed services “were, at best, gratuitous or merely self-serving, and undertaken only in an attempt to avoid [the bank’s] own liability on the letter of credit.” Id. at 1029.

695. At least two decisions have held that a borrower could not complain of grossly inadequate price at foreclosure sale, since a borrower is in the condition of a seller, not a buyer. See Federal Sav. & Loan Ins. v. Kralj, 968 F.2d 500, 507-08 (5th Cir. 1992); Resolution Trust, 815 S.W.2d at 332.

696. Riverside, 603 S.W.2d at 175.

697. Id.

698. See supra notes 252-64 and accompanying text.
described as a service, but whether lending is, under settled principles of statutory construction, encompassed within the DTPA.

The financial intermediation theory ultimately fails not because of any failure in Professor Krahmer's banking theory, which is in the main unexceptional, but because the language and legislative intent of the DTPA and subsequent statutes exclude such an interpretation. To reiterate, the legislative history of the DTPA indicates that the business of lending was intentionally excluded. A subsequent amendment of the DTPA, adding the words "loans, or extensions of credit" to the "goods or services" language dealt with in Riverside, is persuasive evidence that the Texas Legislature has used the word "services" in the DTPA more restrictively than some banking law theorists might do in other contexts. Moreover, the requirement that any "services" be acquired by "purchase or lease," and the clear distinction drawn in law between purchases, leases, and loans, raises yet another hurdle against the financial intermediation approach.

The Credit Services Organizations Act, passed by the Texas Legislature after Professor Krahmer's article appeared in print, perhaps is the most persuasive argument against accepting the financial intermediation theory of DTPA liability. The "credit services" targeted in this statute are indistinguishable from some of the "financial intermediation" services discussed in Krahmer's work, and the statute imposes DTPA liability, yet traditional financial institutions are exempted from the Credit Services Organizations Act's provisions, an act that would be sheerest nonsense if the DTPA were meant to include financial intermediation as a service. In short, the financial intermediation approach to imposing DTPA liability on lenders is—to paraphrase biologist T.H. Huxley—a beautifully simple theory slain by a host of ugly facts.

VI. CONCLUSION

In a perfect world, the writing of this article would be neither necessary nor controversial. The question of whether lending activities, per se, are encompassed within the Texas DTPA is not one that is intrinsically difficult to answer. The legislative history is clear and grounded in sound considerations of public policy. The first Texas Supreme Court decision on the subject came to the correct conclusion, though the reasoning may leave something to be desired. Predictions of an inexorable drift in the law toward repudiating Riverside—translated into anti-lender rulings by a fair number of intermediate appellate courts—simply cannot be squared

---

699. See supra notes 266-304 and accompanying text.
700. See supra notes 310-20 and accompanying text.
701. See supra notes 370-430 and accompanying text.
703. See supra notes 345-69 and accompanying text.
704. See John Bartlett, Familiar Quotations 505 (16th ed. 1992) (Justin Kaplan, gen'l ed.) (quoting Thomas H. Huxley, in Biogenesis and Abiogenesis (1870), referring to "[t]he great tragedy of science—the slaying of a beautiful hypothesis by an ugly fact").
with the holdings or even with the language of the most recent Texas Supreme Court decisions on the subject.

Since the Texas Supreme Court has not yet spoken definitively on the subject, no great harm has been done—other than to those lending institutions that already have been held liable or settled suits based on a mistaken theory of the DTPA. The real question is how such a comparatively simple legal question, though one with very important consequences, can have degenerated into its current muddled state. While any answer to this question ultimately must be speculative, several factors may enter into the mix: an unnecessarily tentative decision in Riverside, persuasive dicta in later cases that obscured contrary holdings, uniformly critical academic reviews of Riverside, and perhaps even a touch of collective paranoia occasioned by the “lender liability crisis.”

The most important contributing factor to the wrong path the law has taken, however, is one not unique to Texas. A recent study of seven states characterized by expansive interpretations of consumer legislation has counseled:

In determining whether these broad interpretations of statutory coverage are indeed judicial expansions of the legislation or are applications consistent with legislative intent, the statutes themselves must be examined, especially legislative responses to developing jurisprudence in the form of subsequent amendments and with respect to available legislative history.

To date, no Texas court has ever followed this advice and simply consulted the legislative history of the DTPA or subsequent legislative action. The reason for this omission may be no more complicated than initial unfamiliarity with the tools for statutory construction, followed by the later general assumption that “someone must have checked.” Whatever the reason for this omission, it would be a sorry state of affairs if wholesale neglect by courts of the Texas Legislature’s demonstrable intent results, through inadvertence, in judicial activism of the worst sort. If this article does no more than focus one court’s attention on that sadly neglected aspect of the DTPA debate, it will have served a useful purpose.

705. The principal culprit on this ground is Justice Spears’s oft-quoted recapitulation of the post-Riverside decisions in La Sara Grain. See supra notes 211-15, notes 634-40 and accompanying text.
707. Franke & Ballam, supra note 389, at 361.