Chapter 1.
Deceptive Trade Practices Act

A. Introduction

Prior to 1973, consumer law in Texas was generally governed by the legal and practical attitude embodied in the maxim "caveat emptor," buyer beware. For the most part, consumers were left to rely on their own wits when it came to protecting themselves against misrepresentation and deception. The available remedies—fraud, misrepresentation, breach of contract, deceit and warranty—all had limited applicability and were difficult to establish. Even in those cases where legal redress existed, attorneys were hesitant to handle consumer cases because of the small amount of money involved, and the inability to recover attorneys' fees.

The most common cause of action available to consumers who were misled or deceived was one based on fraud. In *Wilson v. Jones*, 45 S.W.2d 572 (Tex. App. 1932), the court discussed the essential elements of fraud:

The authorities announce the general rule that to constitute actionable fraud it must appear: (1) That a material representation was made; (2) that it was false; (3) that when the speaker made it he knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by the party; (5) that the party acted in reliance upon it; and (6) that he thereby suffered injury. The gist of an action based upon fraud is found in the fraud of defendant and damage to plaintiff. Each of these elements must be established with a reasonable degree of certainty and the absence of any one of them will prevent a recovery.

The law rests upon the basic rule which requires good faith in every business transaction and does not allow a party intentionally to deceive another by false representations or concealments and, if he does so, it will require him to make such representations good. However, the general rule does not make one party responsible for every unauthorized, erroneous, or false representation made to the other, although it may have been injurious. The ground of the action or misrepresentation is fraud and damage; both must concur to constitute actionable fraud; and when both concur the action will lie.

Where a relation of trust and confidence obtains between the parties, there is a duty to disclose all material facts, and failure to do so constitutes fraud. No general rule can be stated by which a relation of trust and confidence can be known. Each case furnishes its own standard. The rule applies whenever confidence is actually reposed by one party to the knowledge of the other. Of course, where the relations are not confidential and the parties deal at arm's length, there is no duty of disclosure and silence is not fraud; and if the facts are equally within the means and knowledge of both parties, or peculiarly within the knowledge of one party and of such a nature that the other has no right to expect information, an action for deceit will not lie.

However, the rule is established that if one of the parties to a transaction volunteers to convey information which may influence the other, he is bound to tell the whole truth and a fraudulent misrepresentation of a material fact will render him liable. This is especially true if the fact concealed is peculiarly within the knowledge of one party and of such a nature that the deceived party is justified in assuming its non-existence. There is a duty of disclosure and a deliberate suppression of such facts is fraud.

What must a consumer prove to establish fraud? When does a party have an obligation to disclose information? Would you represent a consumer who was deceived into purchasing a defective product that cost $900?

In 1973, the Texas Legislature changed this. With the enactment of a legislative reform package, "caveat emptor" was replaced with "*caveat venditor*," seller beware. The most significant of these statutes was the Deceptive Trade Practices and Consumer Protection Act (hereinafter "DTPA"). In a 1977 law review article, then-Attorney General John L. Hill discussed how the DTPA changed Texas law.

Introduction, Consumer Protection Symposium

8 St. Mary's L. J. 609 (1977)

John Hill

I was very pleased to be asked to write the introduction to this issue of the Journal, since what now has become known as consumer law has been an area of personal interest and concern to me both as a trial lawyer in private practice and as attorney general.

My private practice was primarily what is commonly referred to as a "plaintiff's practice"—that is, I represented persons injured by another's conduct in suits for damages. While most of my cases dealt with claims of personal injury, I was frequently asked, either by clients whom I was already representing in a personal injury action or by persons seeking legal assistance from me for the first time, to help them in what would now be called a "consumer case." The actual facts of each of these cases are not important here. What is important, however, is that each had a common characteristic—the amount in controversy was generally very small, normally not more than two hundred dollars. These losses were simply too small to justify the costs of litigation. Although the common law of fraud permitted an award of "exemplary damages" over and above actual damages, most cases did not involve the element of intentional deception that had to be shown before exemplary damages could be awarded. Furthermore, if exemplary damages were found not to be "reasonable" in relation to the plaintiff's actual damages, the judge would order remittitur of the "excessive" amount to the defendant.

The imbalance between litigation costs and potential recovery was not the only factor that made common law remedies ineffective. First, an action for fraud required rigorous proof: a material misrepresentation of fact upon which the plaintiff reasonably relied to his detriment. A plaintiff could stumble over any one of these proof hurdles and be denied relief. Further, as noted above, proof of "intent to deceive" was required for an award of exemplary damages. Proving up a state of mind—even with strong direct evidence—is painfully difficult. Finally, the defense of "puffing" or "dealer talk" which, in the words of Dean Prosser, allowed a salesman "to lie his head off, so long as he [said] nothing specific," constituted a major hurdle to success.

Contract law was no better, since by artful construction of printed contract clauses the seller could so limit the buyer's remedies as to rule out effective court action. The only stopgap for this practice was the doctrine of unconscionability, which permitted a court to void a patently unreasonable contract clause. Unfortunately, the doctrine of unconscionability was available only as a defense and not as an affirmative cause of action. Few consumer debtors would risk defending an action in the hope that their contracts would be declared "unconscionable," and again, the costs of asserting the defense made it all but illusory.

Because of these two problems—proof requirements and litigation costs—I was forced to turn down many cases even though they were meritorious. Turning down these cases was made even more difficult for me since there was virtually no place to send these aggrieved consumers for help. The Federal Trade Commission, until recently, could initially issue only an administrative cease and desist order and then only after a lengthy administrative hearing and possible appeal. Furthermore, the Commission was, and still is, generally interested in bringing legal or administrative action where there are numerous consumers affected by the allegedly unlawful practice. Many one-time consumer abuses do not reach this threshold.

State enforcement machinery was likewise inadequate. The first "deceptive trade practices act" was passed in 1967 as part of legislation dealing principally with consumer credit. Thirteen specific acts or practices were declared unlawful, and the Consumer Credit Commissioner was authorized to request the attorney general to seek injunctions. The statute also provided for civil penalties of one thousand dollars per violation but only for violation of an injunction. A broad exemption provision immunized any "actions or transactions permitted under laws administered by a public official acting under statutory authority of this state or the United States." No provision for, or mention of, private remedies was made.

This legislation was amended in 1969 in several significant ways. First, a general prohibition of all "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade and commerce" was added to the thirteen specifically prohibited practices, and Texas courts were directed to Federal Trade Commission and federal court interpretations of Section 5(a)(1) of the Federal Trade Commission Act for guidance in construing the general prohibition. Second, prelitigation investigative powers and the authority to accept an "assurance of voluntary compliance" without filing suit were given to the Consumer Credit Commissioner and penalties were increased to ten thousand dollars for each violation of an injunction. What seemed like a great step forward in strengthening enforcement was more than offset by the addition of three more exemptions to the already broad exclusion provided in 1967. Now immunized from prosecution was the insurance industry; advertising media, absent a showing that the intent or purpose of the advertiser was known by the advertising medium's owner or personnel; and any conduct that was subject to and compliant with the regulations and status administered by the FTC. Like the 1967 legislation, the 1969 amendments failed to extend a private remedy to those victimized by deceptive practices; instead, it was expressly provided that "[n]othing in this chapter either charges or diminishes the rights of parties in private litigation."

Therefore, when I became Attorney General in January 1973, I realized that my first major task was to improve Texas law to better protect the consumer. Needed was both strengthened public enforcement tools and the creation of an effective private remedy. With the drafting assistance of now-Senator Lloyd Doggett, who was then President of the Texas Consumer Association, the hard legislative work of the bill's able sponsors, Senators Oscar Mauzy and A. R. "Babe" Schwartz in the Senate and then-House member, now Senator, Carl Parker in the House, and with the support of such diverse organizations as the Texas Retail Federation, the Texas AFL-CIO, and the Texas Junior Bar, we devised and passed the Texas Deceptive Trade Practices—Consumer Protection Act of 1973 (DTPA). It became law on May 21, 1973.

The DTPA represented a marked departure from past law. Substantively, much of the old law was kept intact. The general prohibition against "false, misleading, or deceptive acts or practices" and the reference to FTC rules and regulations were retained. Most of the old list of specifically prohibited practices was reenacted, but nine new items were added, bringing the number of prohibitions on the new "laundry list" to twenty. Importantly, three of the four exemptions were abolished, leaving only the media with a limited immunity.

The DTPA's most significant contribution, however, was in the area of remedies. The Consumer Protection Division of the Attorney General's Office, rather than the Consumer Credit Commissioner, was given primary authority to enforce the Act and could now seek, not only an injunction, but also civil penalties from two thousand dollars per violation up to a maximum of ten thousand dollars in the original enforcement action against the defendant. Additionally, the Consumer Protection Division was given the power to seek restitution or actual damages on behalf of identifiable persons injured by the wrongful conduct of the defendant. Most importantly, the legislature, recognizing the inadequacies of common law remedies, provided a private cause of action for treble damages, court costs, and attorneys' fees for any consumer "adversely affected" by a deceptive trade practice, a breach of an express or implied warranty, any "unconscionable action or course of action," or by any violation of article 21.21 of the Insurance Code.

By extending to the consumer the same cause of action for deceptive practices formerly available only to the attorney general, the DTPA substantially lightened the burden of proof required of the consumer in common law actions for fraud. The FTC interpretations of the Federal Trade Commission Act, which Texas courts were instructed by the DTPA to follow, had already abandoned the requirement of "intent to deceive" and "reliance." Representations and advertisements are unlawful regardless of the intent of the seller if they have the "capacity" or "tendency" to deceive; actual deception is not required. Moreover, conduct has the capacity to deceive even if the reasonable or intelligent buyer would not have been misled. If the conduct could mislead the "ignorant, the unthinking and the credulous," it violates the law. Thus, the defense of "puffing" was substantially curtailed. Similarly, the "materiality" of the misrepresentation, while recognized as a factor by the FTC, is of no real consequence. Significantly, any waiver of the remedies in the DTPA was declared "void and unenforceable." While extending a new cause of action to the consumer, the DTPA did not seek to repeal the consumer's right to bring a common law fraud action. Section 17.43 provided quite clearly that the DTPA's provisions are not "exclusive" and its remedies "are in addition to any other procedures or remedies provided for in any other law."

Having overcome the first hurdle to effective private redress for consumer deception—the burden of proof, the new DTPA addressed the second hurdle—the disincentive to litigate arising from the imbalance between the high cost and practical difficulties of litigation and the small "actual" damages characteristic of most consumer claims. The obvious answer was to provide for an award of multiple damages, in addition to court costs and attorneys' fees, to the consumer who prevails in a lawsuit so that the consumer would be encouraged to seek private resolution of his grievance. A new mechanism was required to accomplish this purpose. As noted, exemplary damages would not suffice since the plaintiff could never be sure that the trier of fact would ultimately find the requisite degree of culpability on the defendant's part or of the amount of exemplary damages he would ultimately be awarded, as that decision is left to the jury to be decided in light of the particular facts of the case at hand. To remove this uncertainty the legislature created the automatic trebling mechanism of Section 17.50(b)(1). Now the consumer would be assured from the outset that if he proved a cause of action under Section 17.50(a), he would receive three times his actual damages.

All of the features of common law fraud that had stood in the way of effective private consumer redress were now gone. The enforcement mechanisms of the DTPA truly fulfilled the legislative purposes of "protect[ing] consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty" and "provid[ing] efficient and economical procedures to secure such protection." The injured consumer—armed with a certain, multiple damage remedy—could now protect himself, thus lessening the demand for public enforcement actions for restitution and damages. . . .

Note

Since its enactment in 1973, the DTPA has been amended in nearly every session of the legislature. The question of which version of the Act applies is often of serious consequence. For example, the remedies available and the scope of the Act have been substantially changed over the years. There is no set answer to which version of the Act applies to a given fact situation. This is because the bills enacting the various reforms take different approaches with respect to applicability. For example, early amendments were silent as to applicability. In those cases, the courts applied the law in existence at the time the violation of the Act occurred, regardless of the date of the sale, when the consumer discovered the violation, or when the law suit was filed. *See*, *e.g.*, *Woods v. Littleton*, 554 S.W.2d 662 (Tex. 1977). Many of the latter amendments, however, expressly provide that they apply to any action filed after a certain date, regardless of when the violation of the Act occurred. *See*, *e.g.*, 1989 amendments, ch. 380 § 6, 1989 Tex. Gen. Laws 1490,

1493. In 1995, the most significant changes in the Act were enacted into law. These amendments, "the 1995 amendments," apply to all DTPA cases filed after September 1, 1996.

The discussion in the text is designed to provide a complete understanding of the DTPA from both a historical and a contemporary perspective. Thus, cases decided under earlier versions of the Act have been included. This has been done for two reasons. First, many cases are still being litigated, and will be for many years, under earlier versions of the Act. Second, and perhaps more importantly, a complete understanding of the present versions of the Act necessitates an understanding of what came before it. In all cases. however, the discussion terminates with a review of the most current version of the Act.

As discussed above, the DTPA is designed to prevent fraud, deception and misrepresentation in the marketplace. To fully protect the consumer, the Act is generally over-inclusive, rather than restrictive, when defining terms or offering protections. Thus, this "consumer protection" statute covers many disputes not normally included within the common understanding of that term. Consider the present definition of consumer in Section 17.45(4):

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

Most sales and leases in Texas involve consumers as that term is now defined.

But equally important to the breadth of the Act are the remedies available to a successful plaintiff. By allowing treble damages and attorneys' fees, the Act provides an incentive for attorneys to handle cases which otherwise would have been economically unfeasible.

Before considering the specifics of this law, however, and the methods in which it may be applied, one point must be emphasized. The DTPA is really several laws in one. Section 17.50(a) permits a consumer to maintain an action under four different circumstances. First, the Act permits lawsuits to be brought under its remedial provisions for violations of its list of prohibited practices, usually called the "laundry list." Second, the Act permits a consumer to bring an action under its remedial provisions for any practice that is "unconscionable," even if the practice is not prohibited by the specific provisions of the Act. Third, the Act permits any breach of warranty to be brought under its remedial provisions. And, finally, the Act permits any violation of Chapter 541 of the Insurance Code to be brought under its remedial provisions. In other words, the DTPA is both a separate cause of action and a vehicle through which to bring other claims.

B. Proper Party Plaintiff—Consumer

In order to maintain a successful lawsuit under the DTPA, a plaintiff must show three things: first, that he or she is a "consumer" as that term is defined in the Act; second, that the defendant has committed one of the actions specified in Section 17.50(a) (1), (2), (3), or (4); finally, that the defendant's action was a "producing cause" of the consumer's damages.

1. Introduction

The term "consumer" is defined by Section 17.45 (4) as:

> [A]n individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of $25 million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more.

Under this definition, to be a consumer the plaintiff must "seek or acquire" by "purchase or lease" any "goods or services." The only class of entities excluded from the Act are business consumers with assets of $25 million or more.

To be a consumer you must "seek or acquire," by "purchase or lease," "goods or services." Does this mean that an actual sale must take place? Does the Act protect the consumer who is simply shopping around?

Consider the following:

Carey Consumer recently saw an advertisement in a local paper for a fitness club. Being slightly out of shape (Carey was 5'4" and weighed 150 pounds), Carey went to the club. The ad represented: "We have the safest and most effective equipment on the market." When Carey arrived, she was assigned to a "fitness consultant" who set her up on one of the machines to see what her "fitness level" was. This was a "free" test that all prospective members were given before any agreement was entered into. Because Carey's "fitness level" was basically zero, she injured herself when the machine hit her in the head. It turned out that the machines were not safe for beginners to use. Is Carey a consumer under the DTPA? (*See Williams v. Hills Fitness Center, Inc.*, 705 S.W.2d 189 (Tex. App.—Texarkana 1985)).

2. Seek or Acquire

MARTIN
v.
LOU POLIQUIN ENTERPRISES, INC.
696 S.W.2d 180 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.

OPINION ON MOTION FOR REHEARING

Draughn, Justice.

Following the panel opinion previously rendered in this case, both appellant and appellee filed motions for rehearing before the full court. We withdraw the previous panel opinion and substitute the following.

This case presents three major issues. Of primary concern is (1) the definition of the term "consumer" under the Texas Deceptive Trade Practices—Consumer Protection Act (DTPA), a definition that determines who may initiate a private cause of action under the DTPA. Our review of this first issue regarding consumer status calls into question a panel decision of this court rendered four years ago, wherein this court held that one must transfer valuable consideration to be a consumer under the DTPA. *Bancroft v. Southwestern Bell Telephone Co.*, 616 S.W.2d 335 (Tex. App.—Houston [14th Dist.] 1981, no writ). Also at issue are (2) whether a party may limit its DTPA liability by contract and (3) whether the evidence is sufficient to support the trial court's award for lost profits.

Lou Poliquin, president of the appellee modeling school, sought to place an advertisement in the 1980 Houston Yellow Pages through the services of The Glenn Martin Agency, a national advertising firm specializing in the placement of such ads. When the ad failed to appear in the Houston directory, Lou Poliquin Enterprises sued Glenn Martin under the DTPA. The trial court awarded Lou Poliquin Enterprises actual damages of $30,000 in lost profits, $5,965 in attorneys' fees, and $2,000 under DTPA § 17.50(b)(1). Glenn Martin presents eleven points of error raising the three issues listed above. We now hold that valuable consideration is not a prerequisite for DTPA consumer status, we overrule our contrary holding in *Bancroft*, and we affirm the trial court's judgment in favor of Lou Poliquin Enterprises.

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CONSUMER STATUS ISSUE

Appellant Glenn Martin alleges in his first two points of error that the Barbizon School of Modeling may not recover under the DTPA because there is no evidence or insufficient evidence that the school is a consumer as required by the act. We disagree. It is well settled that an individual must be a consumer to initiate a private cause of action under DTPA § 17.50(a). A consumer is defined in DTPA § 17.45(4) as one "who seeks or acquires by purchase or lease, any goods or services. . . ." However, the critical question confronting us is whether a person who merely seeks to purchase goods or services may be a consumer if he has not actually transferred valuable consideration for the object of his search. The specific answer to this question has to date been clouded with uncertainty. We are now presented squarely with this issue, because in the present case, Mr. Poliquin executed a contract with the advertising agency but had not paid for the services. Relying on earlier case law rationale, Glenn Martin claims the Barbizon School is not a consumer under the DTPA because Mr. Poliquin did not transfer valuable consideration for the services sought.

As primary support for his position, Martin cites *Bancroft v. Southwestern Bell Telephone Co.*, 616 S.W.2d 335 (Tex. App.—Houston [14th Dist.] 1981, no writ). The facts in *Bancroft* are remarkably similar to the case at bar, and that opinion states that one must transfer valuable consideration to qualify as a DTPA consumer. . . . However, *Bancroft* was decided in 1981. Recent developments in this area of the law indicate that we should re-evaluate our position to determine whether *Bancroft's* rationale still applies.

In 1981 the Texas Supreme Court stated that the DTPA must be liberally construed to carry out the legislative intent of consumer protection. . . . In the years following *Cameron*, most of the cases interpreting the DTPA definition of "consumer" arose from situations where a payment changed hands at some point in the transaction, although the purchase or lease may not have been entirely consummated. There are very few cases in which no payment occurred at any point, thus placing the issue of the necessity of valuable consideration squarely before an appellate court. . . .

The Texas Supreme Court recently indicated that a person's "objective" is of paramount importance in determining DTPA consumer status. . . . An important factor in qualifying as a DTPA consumer, then, is whether a person intended to purchase or lease the goods or services in question, or more succinctly, whether that person's objective was to purchase or lease. The *La Sara* opinion makes no reference to valuable consideration as a requirement for consumer status. Although the necessity of valuable consideration was not squarely before the Supreme Court under the circumstances of that case, we believe *La Sara* illustrates to some degree the current trend of the Supreme Court's reasoning with respect to this issue.

Our examination of the statute as a whole supports the conclusion that DTPA consumer status is not dependent upon the transfer of valuable consideration. For example, in § 17.46(b)(10), the statute lists the practice of "advertising goods or services with intent not to supply a reasonable expectable public demand . . ." as a deceptive trade practice actionable by a consumer. *See* DTPA § 17.50(a)(1). Section 17.46(b)(10) was designed to prevent "bait and switch" advertising where the seller attracts customers

through the advertisement of inexpensive products the seller intends to sell only in nominal amounts. Customers responding to this advertisement are immediately diverted to more expensive products. . . . When a consumer encounters this practice, must he actually buy the more expensive product or at least tender a down payment on a product he does not want before he may sue the seller for a deceptive trade practice? We think not. Under these circumstances, valuable consideration would not typically change hands. Therefore, to be eligible to bring a DTPA claim based on § 17.46(b)(10), the prospective purchaser must at least have approached the seller with the objective of purchasing the advertised inexpensive product. He must at least have sought in good faith to purchase.

In reviewing the § 17.46(b) laundry list of deceptive practices, we can conceive of numerous situations wherein an individual would execute a purchase contract but would not actually follow through with payment because of the subsequent discovery of a deceptive trade practice. This individual could suffer substantial damages in justifiable reliance upon the contract he had executed in good faith with the seller. We believe the DTPA was designed to protect consumers confronted with precisely this type of problem. If that consumer can prove his damages with reasonable certainty, he may recover pursuant to the DTPA.

We now have three factors before us in deciding whether *Bancroft* should control our decision in the instant case: (1) the legislature and the Supreme Court have specifically acknowledged that the DTPA should be liberally construed to protect the public; (2) a reading of the statute as a whole indicates the legislature contemplated actionable practices wherein a transfer of valuable consideration would not always take place; and (3) the Supreme Court recently stated that a person's "objective" is critical in determining consumer status. In view of these factors, we overrule *Bancroft* and hold that the transfer of valuable consideration is not a prerequisite to consumer status under the DTPA. While it is true that the Supreme Court has never specifically stated that valuable consideration is not a requirement for DTPA consumer status, we believe our interpretation to this effect not only comports with the trend exhibited in recent Supreme Court decisions, but also promotes the intent of the statute to protect the public.

If valuable consideration is not a prerequisite, what then is required to achieve consumer status? A DTPA consumer is one who in good faith initiates the purchasing process. An individual initiates the purchasing process when he (1) presents himself to the seller as a willing buyer with the subjective intent or specific "objective" of purchasing, and (2) possesses at least some credible indicia of the capacity to consummate the transaction. If a defendant seller in a DTPA action challenges the plaintiff buyer's status as a consumer, the buyer must be prepared to offer proof of (1) a good-faith intention to purchase and (2) the capacity to purchase the goods or services in question. The seller may attempt to rebut the buyer's claim of consumer status by offering proof that the buyer entered into the transaction without a true intention to purchase or without the capacity to consummate the deal. If such a challenge is levied, the trier of fact must, as always, review the evidence and decide whether the buyer is a DTPA consumer, taking into account the legislature's intent that the DTPA be liberally construed to protect the public against deceptive trade practices.

In the case at bar, Mr. Poliquin's "objective" was to purchase services from The Glenn Martin Agency. In fact, the parties specifically acknowledged that objective by executing a written contract for this purpose. Additionally, the modeling school had operated for several years, and the local Southwestern Bell sales representative offered to place another ad for Mr. Poliquin, indicating that Mr. Poliquin had paid for previous ads and likely possessed the capacity to pay for future ones. We overrule Mr. Martin's first and second points of error because we find sufficient evidence that the Barbizon School of Modeling intended to

purchase, took action to purchase, and possessed the capacity to purchase the Yellow Pages ad. The school therefore achieved DTPA consumer status even though it did not actually pay for the ad.[1]

Glenn Martin warns that our elimination of valuable consideration from DTPA consumer status will precipitate a flood of frivolous DTPA claims. We are not impressed by this argument, because at least three factors militate against this result. First, our two-pronged test for consumer status requiring the objective of purchasing and the capacity to purchase narrows the field of potential claimants. Second, the DTPA itself requires that a claimant suffer damages, and such damages must be alleged in good faith in the claimant's original petition and subsequently proven by a preponderance of the evidence. Finally, DTPA § 17.50(c) provides a mandatory award of attorney's fees to a defendant if the court finds the suit groundless, brought in bad faith, or brought for the purpose of harassment. A defendant may review these three factors and employ numerous pretrial and trial procedures to challenge a plaintiff suspected of bringing a frivolous DTPA claim.

* * * *

Because we find no reversible error, we affirm the trial court's judgment.

Ellis, Justice, concurring.

I concur with the Court in affirming the trial court's judgment. I agree with the court that the transfer of valuable consideration is not a prerequisite to consumer status under the DTPA.

The majority in its opinion sets up a two-pronged test to determine consumer status. They state that a DTPA consumer is one who in good faith initiates the purchasing process. They go on to state that an individual initiates the purchasing process when he: "(1) presents himself to the seller as a willing buyer with the subjective intent or specific 'objective' of purchasing, and (2) possesses at least some credible indicia of the capacity to consummate the transaction."

They suggest that if a defendant-seller in a DTPA action challenges the plaintiff-buyer's status as a consumer, the buyer must be prepared to offer proof of (1) a good-faith intention to purchase and (2) the capacity to purchase the goods or services in question. I agree that the plaintiff-buyer in a DTPA action should show a good-faith intention to purchase the goods or services but I do not agree that he must show proof of his capacity to purchase the goods or services. I do not think that this restriction should be placed on the achievement of consumer status because many DTPA violations occur prior to the consumer's knowledge of the cost or his capacity to finance the cost of the goods or services.

[1] Although we interpret DTPA consumer status as not requiring valuable consideration, we note that valuable consideration supported the valid contract executed by Glenn Martin and the Barbizon School. Valuable consideration need not be pecuniary consideration. City of Crystal City v. Crystal City Country Club, 486 S.W.2d 887, 888 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.). Valuable consideration may exist in the form of a right, interest, profit, or benefit to one party or a forbearance, loss, responsibility, or detriment to the other party. Champlin Petroleum Co. v. Pruitt, 539 S.W.2d 356, 361 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.); Garcia v. Villarreal, 478 S.W.2d 830, 832 (Tex. Civ. App.—Corpus Christi 1971, no writ); Sanders v. Republic National Bank of Dallas, 389 S.W.2d 551, 555 (Tex. Civ. App.—Tyler 1965, no writ). Therefore, should the Texas Supreme Court subsequently determine that valuable consideration is necessary under the DTPA, the Barbizon School would still qualify as a consumer because valuable consideration supported the parties' contract.

Notes & Questions

1.How does the court define "consumer"? Do you agree with the majority or concurring opinions' analysis of the "capacity to purchase" requirement? Should there be a purchase anytime there is consideration? Was there consideration in Martin?

2.Suppose that a person contracted to buy a house, and then failed to qualify for the loan. Would he or she be a "consumer"? Should he or she be a consumer? It does not appear that any subsequent decisions have require the consumer have the "capacity" to purchase.

3.Assume that a car dealer made a mistake and advertised a used car for $1,850 instead of $18,500. Does a consumer have a DTPA claim against the car dealer if he refuses to sell the car as advertised? Does it matter if the consumer knows the car usually sells for $18,500? Before you answer, consider the following opinion.

HOLEMAN
v.
LANDMARK CHEVROLET CORPORATION
989 S.W.2d 395 (Tex. App.—Houston [14th Dist.] 1999, pet. denied

Anderson, Justice

Landmark Chevrolet ran an advertisement on a radio station that, among other things, stated all offers would be accepted and that new trucks would be sacrificed, "regardless of loss." Appellants went to Landmark Chevrolet and made offers to purchase vehicles for amounts ranging from $50.00-200.00. Landmark refused these offers. Landmark subsequently ran a corrected advertisement, deleting the "all offers will be accepted" language. Landmark also ran a retraction of the original ad. In October 1991, appellants filed this lawsuit.

Several years later, Bill Heard Chevrolet ran a radio advertisement that included language, "[e]very deal will be accepted regardless of profit or loss." Appellant Brandt went to Bill Heard Chevrolet and handed the new car salesman, Al Cruz, a written "offer" to buy eight different vehicles for $100.00 each. The offer was refused. Bill Heard subsequently ran a retraction of the advertisement stating, "The sentence 'all offers would be accepted, regardless of profit or loss' should have read 'all reasonable offers will be accepted regardless of profit or loss'." Bill Heard was subsequently added as a defendant to the Landmark suit.

The case proceeded to trial on DTPA claims. The jury found no DTPA violations by Landmark as to appellants, Chessire, Gemza, and Frankhouser. The jury did find violation as to appellants Holeman, Wilke, Yates, and Bradt, and awarded damages. The jury, however, found that none of the plaintiffs were "consumers" under the DTPA. Accordingly, the trial court entered a take nothing judgment in favor of appellees.

In points of error one, two, and four, appellants challenge the trial court's submission of the jury question regarding appellants' status as consumers and the trial court's failure to hold, as a matter of law, that appellants were consumers. Appellants contend the determination of whether a plaintiff is a consumer under the DTPA is a question of law for the trial court and not a question of fact for the jury.

* * * *

To seek recovery under the DTPA, a party must be a "consumer" as defined in section 17.45(4). Under this section, a "consumer" is "an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services. . . ." TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987). Case law has determined that a DTPA consumer is one who in good faith initiates the purchasing process. *Martin v. Lou Poliquin Enterprises, Inc.*, 696 S.W.2d 180, 184 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.). An individual initiates the purchasing process when he (1) presents himself to the seller as a willing buyer with the subjective intent or specific "objective" of purchasing, and (2) possesses at least some credible indicia of the capacity to consummate the transaction.

Appellants argue there is no requirement in the Act that the consumer have sought in good faith to purchase. As support for their argument, appellants offer the example of involuntary consumer status conferred upon persons whose cars have been towed. *See Allied Towing Service v. Mitchell*, 833 S.W.2d 577 (Tex. App.—Austin 1992, no writ) (party whose car was towed involuntarily acquired services and qualified party as "consumer" under the DTPA). Although the car owner in Allied Towing did not seek to acquire towing, the court held that the car owner did seek entertainment from an establishment that provided free parking and that there was a sufficient connection between the parking and towing service. The exception for an involuntary consumer is in keeping with the legislative intent that the DTPA be given liberal construction in favor of consumers. Furthermore, the consumer did pay for the towing services.

Where there is no actual purchase, a defendant seller may challenge the plaintiff buyer's status as a consumer. If the seller raises such a challenge, the buyer must be prepared to offer proof of: (1) a good-faith intention to purchase and (2) the capacity to purchase the goods or services in question. The seller may attempt to rebut the buyer's claim of consumer status. If the seller offers proof that the buyer entered into the transaction without a true intention to purchase or without the capacity to consummate the transaction, the trier of fact must decide whether the buyer is a consumer, taking into account the legislature's intent that the DTPA be liberally construed to protect the public from deceptive trade practices. Because appellants did not actually purchase any vehicles, we believe appellees could challenge appellants' status as consumers on the ground that appellants did not have a good faith intention to purchase.

Appellees challenged appellants good faith intention to purchase and, in response, appellants testified to their good faith intention to purchase vehicles and their capacity to purchase. This raised fact questions for the jury to resolve. Accordingly, we find no abuse of discretion by the trial court in submitting this disputed fact issue to the jury.

In points of error nine and eleven, appellants challenge the factual sufficiency of the evidence supporting the jury's finding that none of the plaintiffs were consumers. Appellants contend there is no evidence controverting the plaintiffs testimony that they heard the advertisement and, acting in good faith, went to Landmark Chevrolet and Bill Heard Chevrolet to buy vehicles. Appellees, however, insist the evidence establishes that none of the appellants had a good faith intention to consummate a transaction and therefore, the jury finding must be upheld.

When a defendant challenges a plaintiff's status as a consumer, the plaintiff must be prepared to offer proof of: (1) a good-faith intention to purchase and (2) the capacity to purchase the goods or services in question. No case law defines "good faith" in connection with the intention to purchase goods or services. In submitting the issue of consumer status to the jury, the trial court included a definition of consumer as "one who attempts to acquire goods from another in good faith and with the capacity to consummate the transaction." The jury was not instructed on the definition of "good faith." Appellants argue they had a good faith intention to purchase because they actually intended to buy vehicles for the prices offered.

In *Martin*, a panel of this court discussed the prerequisites for achieving consumer status under the DTPA when valuable consideration has not changed hands. After describing the legislative intention that

the DTPA be given liberal construction in favor of consumers, the court observed that this intent was served by conferring consumer status on parties who in good faith initiated the purchasing process. The court held that the transfer of valuable consideration is not a prerequisite to consumer status under the DTPA. A party initiates the purchasing process when he "(1) presents himself to the seller as a willing buyer with the subjective intent or specific 'objective' of purchasing, and (2) possesses at least some credible indicia of the capacity to consummate the transaction." (emphasis omitted). Although this describes when the purchasing process is initiated, it does not define good faith.

The Texas Business and Commerce Code defines good faith as "honesty in fact in the conduct or transaction concerned." TEX. BUS. & COM. CODE ANN. § 1.201(19) (Vernon 1994). The Texas Supreme Court has held that the test for good faith is the actual belief of the party and not the reasonableness of that belief.

All appellants testified they made offers with the intent to purchase and that they believed the dealerships' advertisements meant that their offers would be accepted, regardless of the price offered. Several appellants conceded they knew their offers might not be accepted, but they believed the language in the advertisement required the dealers to accept any offer.

Appellees, however, claim appellants did not have a good faith intention to purchase because all of the appellants were acquainted with, or had a connection to, appellant Bradt (who is an attorney), they all made unreasonably low offers, they did not check whether the advertisements were in error, no other persons made such low offers, and one appellant was considering a DTPA lawsuit before making his offer.

We now turn to the evidence relevant to appellants' subjective intention to purchase. Appellant John Wilke testified that he believed he heard the Landmark advertisement on July 16, 1991. At the time he made the offer on the vehicles, he was working at Bradt's law office. Wilke stated, however, that he did not discuss the ad or the offer with Bradt until after making the offer. Wilke conceded he did not call the dealership to see if the advertisement was a mistake. Wilke's testimony was inconsistent as to whether he thought Landmark would accept his offer. Nonetheless, Wilke responded in the affirmative when asked if he thought the offer would be accepted whether or not it was reasonable.

Appellant E.W. Chessire testified he knew Bradt, Wilke, and Holeman from the Masonic Lodge. Chessire believed he heard the Landmark advertisement on Saturday, July 20, 1991. He discussed the advertisement and visited Landmark with Larry Elkins, a neighbor of Chessire's. Chessire stated his belief that Landmark never intended to follow through on the advertisement. Chessire would have found the advertisement more credible if it had been a plan to give away vehicles.

Appellant Joe Gemza testified he had retained Bradt's services in the past. Gemza also knows appellant Dan Frankhouser, who is a vendor to Gemza's company. Gemza recalled hearing the Landmark advertisement on a Friday, but the letter offer he sent to Landmark is dated July 16 or 18 (which would have been either Tuesday or Thursday). Gemza stated he spoke to Bradt about the offer within 48 hours of making the offer. Gemza was "shocked" by the language in the ad, but he did not call the dealership to determine if the ad was in error.

Appellant Dan Frankhouser testified he knew Bradt and Gemza. Frankhouser testified he heard the Landmark advertisement on July 16, 1991, but that he thought Gemza was with him when he heard the advertisement. Gemza, however, had testified he heard the advertisement on a Friday, which would have been July 20, 1991, after the original advertisement had been retracted. Frankhouser spoke to Gemza about the ad and the two men went to Landmark together. They discussed how they would make offers under the terms and conditions specified in the advertisement. Frankhouser called Bradt after Landmark refused the offer. Frankhouser was shocked that "someone would say something as blatantly stupid as [the language in the advertisement] with no qualifications." Frankhouser did not attempt to determine if the advertisement

was in error. Finally, Frankhouser stated he honestly thought he could purchase vehicles, with a total value of $200,000.00, for $1,000.00.

Appellant Eugene Yates testified Bradt is his son-in-law. Yates spoke to Bradt after he heard the Landmark advertisement on July 16, 1991, and Yates visited Landmark with Bradt. The two men asked a salesman which vehicles were part of the advertised sale. The two then chose vehicles and wrote down descriptions and vehicle identification numbers. Bradt wrote a written offer for Yates. Yates claimed Bradt did this as a friend and not as Yates' attorney. Yates testified he did not believe the Landmark advertisement was limited to the trucks specifically mentioned, but he did not attempt to determine if the advertisement was incorrect.

Appellant Bradt testified he heard the Landmark advertisement on July 16, 1991, and he discussed the advertisement with his family and with Yates. He claimed he did not discuss the advertisement with any of the other appellants. Bradt admitted he knows all of the appellants. Bradt insisted that he relied on the advertisement language when he made his offer to purchase. He admitted he knew Landmark might not accept his offer and that he had mentioned the possibility of bringing a DTPA claim if the dealership did not live up to its advertisement.

James Franklin Johnson, a representative from Landmark Chevrolet testified that the advertisement ran from July 16, 1991 to approximately noon on July 18, 1991. Johnson testified that no other customers made offers as low as appellants'.

As to the Bill Heard advertisement, Bradt testified he heard the ad on January 26, 1994. Bradt thought this ad was deceptive because it said any deal would be accepted, "regardless of loss." Bradt made a written offer to purchase eight vehicles for $100 each, and he handed this offer to Al Cruz. Cruz said he could not accept that deal.

Sean Sullivan, the general sales manager at Bill Heard Chevrolet in 1994, testified that no one came to the dealership with an offer similar to Bradt's. Sullivan admitted the dealership keeps a log of all persons who visit the showroom, but that these logs were not produced because they are destroyed after fourteen days.

Despite appellants' testimony they intended to purchase vehicles for prices ranging from $50.00-100.00, the jury could have found the appellants were not acting in good faith by making such low offers, particularly in light of the fact that no other persons made such low offers. The jury also could have considered the appellants' link with Bradt as further indication that appellants may not have been acting independently with good faith. This is buttressed by the testimony that some appellants testified to hearing the advertisement after it had been pulled and the corrected advertisement was on the air. Because we find sufficient evidence supporting the jury's answers to jury questions four and eight (finding no consumer status for appellants as to Landmark or Bill Heard), we overrule points of error nine and eleven.

* * * *

We affirm the judgment of the trial court.

3. Purchase or Lease

To qualify as a consumer the party must seek or acquire by "purchase" or "lease" the goods or services. How are these terms defined? Article 2 of the U.C.C. provides that purchase "includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property." (U.C.C. § 1-201[32].) Is this the definition that should be used for the DTPA? Before you read the next case consider one more question: Does the consumer have to be the one who