> find any indication that the legislature intended to restrict its application by any other similar privity requirement. . . .
>
> This court further stated:
>
> The Act is designed to protect consumers from any deceptive trade practice made in connection with the purchase or lease of any goods or services. . . . To this end, we must give the Act, under the rule of liberal construction, its most comprehensive application possible without doing any violence to its terms. . . .

Keeping these principles in mind, we turn to an examination of the instant cause. The DTPA defines "consumer" as "an individual . . . who seeks or acquires by purchase or lease, any goods or services. . . ."

The court of appeals gave two reasons why Kennedy did not qualify as a consumer. First, it was suggested that Kennedy did not "seek or acquire" the policy benefits. . . . While Kennedy did not "seek" the benefits (since the new policy was negotiated by the hospital district's Board of Managers without his input), he most assuredly did "acquire" those benefits when he was covered by the policy's provisions.

The second rationale advanced by the court of appeals is that Kennedy did not "purchase" the policy from Sale, because he paid no consideration to Sale. While the Act's definition of "consumer" includes one who "acquires by purchase or lease," it does not necessarily follow from that language that the consumer must himself be the one who purchases or leases. For example, it could reasonably be said that Kennedy did "acquire" the policy benefits "by purchase," albeit a purchase consummated for his benefit by the hospital district's Board of Managers.

To accept the construction favored by Sale, that only direct purchasers can be consumers, would be to read additional or different language into the DTPA, in contravention of the Act's mandate of liberal construction. The legislature could easily have drafted such a restriction into the definition of "consumer," for example, by use of the words "purchaser or lessee," but did not do so. As this court stated in Cameron: [W]e believe every word excluded from a statute must . . . be presumed to have been excluded for a reason. Only when it is necessary to give effect to the clear legislative intent can we insert additional words or requirements into a statutory provision. . . .

We therefore hold that, under the facts of this case, Francis Kennedy was a consumer and thus entitled to maintain a cause of action under the DTPA. As this court recently stated in *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 707 (Tex. 1983):

Privity between the plaintiff and defendant is not a consideration in deciding the plaintiff's status as a consumer under the DTPA. . . . A plaintiff establishes his standing as a consumer in terms of his relationship to a transaction, not by a contractual relationship with the defendant. The only requirement is that the goods or services sought or acquired by the consumer form the basis of his complaint.

For the foregoing reasons, we reverse the judgment of the court of appeals and affirm the judgment of the trial court. . . .

Comment

As noted above, a consumer must not only "seek or acquire" "goods or services," he must do so by "purchase or lease." Although the term "purchase" is not defined in the Act, it should be read liberally to include any transfer of goods or services in exchange for "consideration." Consideration should be broadly defined to include any bargained-for exchange, and is not limited to transactions in which goods or services are exchanged for money. Although the Act probably does not apply to the exchange of a "gift," some "gifts" may in fact have been purchased. For example:

Consumer receives an offer in the mail from Company offering a "free TV" if Consumer attends a sales presentation. There is no requirement that Consumer purchase anything. He simply must attend the hour-long sales presentation. Company is in the business of selling time-share units. Consumer arrives, hears the presentation and is given a toy TV. Does Consumer qualify under the DTPA? Was there consideration?

In order to qualify under the DTPA, it must be established that Consumer purchased, or sought to purchase, either the TV or the time-share interest. It could first be argued that the purpose of the presentation was the sale of land and that Consumer's purpose was to make such a purchase. Therefore, the argument would continue; Consumer sought to acquire goods, which includes realty. This argument may be defective, however, because Consumer will probably testify that he did not intend to purchase the land, and did not go to the presentation seeking to purchase the land. There is, however, a second claim. Consumer in this case has "purchased" the TV. Purchase simply requires consideration. In contract terms, there must be a "bargained-for exchange." In this case, Consumer has agreed to attend and sit through a presentation in exchange for the TV. Unlike a gift, which is given in exchange for nothing, in this instance there was a quid pro quo. The requirement that Consumer sit through a presentation was a condition to receipt of the TV. In fact, once Consumer satisfied the condition, a contract was probably formed. Once a contract exists, the requirement of a purchase clearly is met.

It should also be emphasized that the Act's requirement of "purchase" does not require that the "consumer" actually transfer the consideration. In *Kennedy v. Sale*, the Supreme Court held that there is no requirement that the consumer himself be the one who pays for the purchase or lease; payment may be made by another, so long as the "consumer" is the one who acquired the goods through the purchase. Consider the following:

Father and Son went to the store to purchase a baseball bat for Son. Son selected one, and Father paid for it. During a game, the bat split. It was discovered that the bat was defective. Does Son have a DTPA cause of action based on breach of the warranty of merchantability?

The fact that Father "paid" for the goods should not matter under the rationale of *Kennedy*. Son "acquired" the goods by "purchase."

WELLBORN
v.
SEARS, ROEBUCK & CO.
970 F.2d 1420 (5th Cir. 1992)

Garza, Judge.

This diversity case is a products liability action involving an automatic garage door opener manufactured by the Chamberlain Group, Inc. (Chamberlain) and distributed by Sears, Roebuck & Co. (Sears). Marilyn Wellborn (Wellborn) brought this action against Sears and Chamberlain after her son was killed as a result of the garage door opener malfunctioning. We affirm in part and certify the question—Does a decedent's cause of action under the Texas Deceptive Trade Practices—Consumer Protection Act survive under the Texas Survival Statute—to the Texas Supreme Court.

I

In late 1986, Wellborn bought a Chamberlain automatic garage door opener from Sears. Wellborn's friend, Jerome Smith (Smith), installed it in Wellborn's garage in April or May of 1987. While installing the opener, Wellborn and Smith studied the owners' manual, and then they performed the test outlined in that manual. Testing the garage door opener, however, Wellborn and Smith used a "two by four" instead of the one-inch obstacle described in the owners' manual. Moreover, subsequent to installing the opener in 1987, Wellborn did not perform the annual test to determine whether any further adjustments to the opener were necessary.

Wellborn often worked the night shift and, on those evenings, she left her fourteen-year-old son, Bobby, at home without supervision. During the evening of November 2, 1988, Wellborn telephoned Bobby at home but he did not answer. She then telephoned Smith and, at her request, Smith went to the Wellborns' home. There, Smith found Bobby pinned underneath the garage door with his skateboard next to his feet. Smith activated the automatic garage door opener, and the garage door rose.

Investigating officers subsequently arrived at the Wellborns' and tested the garage door and the opener: They placed their hands under the door about two feet from the ground, and found that the garage door worked properly. When the officers tested the garage door in the same manner from about eight inches, however, the garage door did not reverse. An expert later determined that the garage door did not reverse because of faulty installation. The force adjustments had been set to maximum and the length of the door arm was too short.

In November of 1989, Wellborn brought this suit against Sears and Chamberlain. At trial, the parties offered evidence as to how the accident occurred. Wellborn testified that Bobby was aware of the dangers of getting beneath garage doors and that Bobby knew that the garage door opener was a piece of machinery designed to raise and lower the garage door. One of the Wellborns' older neighbors testified that she had observed Bobby playing a "game" where he raced under the closing garage door. The investigating officer and another expert agreed that the accident's probable cause was Bobby's attempt to race the closing door on his skateboard. The defendants' experts testified that the blunt trauma to Bobby's forehead probably meant that Bobby hit his forehead on the concrete driveway and was knocked unconscious and that the garage door then struck Bobby's back, which restricted his ability to breathe. According to Wellborn's experts, Bobby struggled to free himself, and remained conscious for a minimum of three to five minutes—possibly as long as several hours. Bobby eventually lost consciousness and died.

* * * *

C

The defendants contend that, because Bobby neither sought nor acquired the garage door opener for purchase or lease, Bobby does not meet the DTPA's definition of "consumer." Instead, the defendants argue, Bobby was a "mere incidental user of the garage door opener—he was not even licensed to drive [and therefore] he could not use the garage door opener for its primary purpose." We disagree.

The DTPA provides that a consumer is entitled to recover both actual and additional damages plus attorney fees. A "consumer" is defined as one "who seeks or acquires by purchase or lease . . . any goods or services. . . ." The Texas Supreme Court has liberally construed terms of the DTPA in order to effectuate the Act's comprehensive application.

Direct contractual privity between an individual and the defendant is not a consideration in determining an individual's status as a consumer under the DTPA. Standing as a consumer is established in terms of the individual's "relationship to the transaction, not by a contractual relationship with the defendant."

Birchfield v. Texarkana Mem. Hosp., 747 S.W.2d 361, 368 (Tex. 1987). Thus, one may acquire goods or services that have been purchased by another for the plaintiff's benefit.

In *Kennedy*, the Texas Supreme Court expressly held that one need not have been a purchaser in order to qualify for consumer status under the DTPA. *Kennedy* held that an employee covered by group insurance purchased by his employer was a consumer in that he acquired the benefits of the services of the policy due to the coverage of the policy provisions, irrespective of the fact that he did not actually purchase the policy benefits from the agent. Subsequently, the Texas Supreme Court extended consumer status to a minor who, through the efforts of her parents, acquired goods and services from the defendants. *Birchfield* held that the minor acquired goods and services, "regardless of the fact that she obviously did not contract for them."

Although Bobby did not enter into a contractual relationship with the defendants, he acquired the garage door opener and the benefits it provided. Wellborn did not purchase the garage door opener specifically for Bobby's benefit; nevertheless, Bobby lived with Wellborn and regularly used the garage door opener until the time of his death. Wellborn testified that one of the reasons that she bought the garage door opener was to provide additional security for Bobby on the nights that Bobby was home by himself. Indeed, Wellborn had instructed Bobby to lock the house up at night. Because Bobby acquired the garage door opener when it was purchased for his benefit, installed in his home, and used by him, we hold that, under the facts of this case, Bobby is a consumer.

* * * *

III

For the foregoing reasons, we AFFIRM the district court's judgment in its entirety except that we CERTIFY the following question to the Texas Supreme Court—Does a decedent's cause of action under the Texas Deceptive Trade Practices—Consumer Protection Act survive under the Texas Survival Statute?

Questions

1. How does the court define the word "acquire"? When is a third-party beneficiary a "consumer"? In *Service Corp. Int'l. v. Aragon*, 268 S.W.3d 112 (Tex. App.—Eastland 2008), the court noted:

> Only a "consumer" has standing to sue under the DTPA. The DTPA defines consumer as one "who seeks or acquires by purchase or lease, any goods or services." A plaintiff need not establish privity of contract to be a consumer. Instead, a plaintiff's standing as a consumer is established by her relationship to the transaction. A third-party beneficiary may qualify as a consumer as long as the transaction was specifically required by or intended to benefit the third party and the good or service was rendered to benefit the third party.
>
> When determining whether a third-party beneficiary qualifies as a consumer, courts have considered whether the third party was the primary intended beneficiary or if it derived only an incidental benefit. For example, in *Kennedy v. Sale*, 689 S.W.2d 890, 892 (Tex. 1985), employees were the primary intended beneficiary of an insurance policy purchased by their employer and, therefore, were consumers. Conversely, in *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 408 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.) (will beneficiaries injured by estate counsel's legal malpractice), and *Brandon v. American Sterilizer Co.*, 880 S.W.2d 488, 492 (Tex. App.—Austin 1994, no writ) (hospital employee injured by defectively repaired gas sterilizer), the third parties were only incidental beneficiaries and, therefore, were not consumers.
>
> No Texas decision directly addresses who the intended beneficiaries are when a cemetery plot or funeral services are purchased, but Texas courts have allowed immediate family members to bring

common-law actions for mishandling a corpse. In this case, a son contracted with the defendant to take his mother's body from a hospital to the defendant's place of business and to maintain the body in suitable condition for decent burial. The defendant took possession of the decedent's body but allowed it to decompose. The jury awarded mental anguish damages to each of the decedent's four children. The court suggested a remittitur but affirmed their right to recover. Thus, even though only one of the decedent's children dealt with the defendant, because each was allowed to recover, the defendant's duty ran to all four. If a company taking possession of a body has a duty to the decedent's children, it is reasonable to conclude as the trial court did that SCI's interment services were intended for the benefit of Obie's immediate family and that each was a consumer.

2. Suppose that an employee is injured on the job due to a defective tool. Is the employee a DTPA consumer? Has she acquired the tool? What about a tenant who has a new roof installed by the landlord? What additional information would you want?

Problem

Read the following opinion. Write a dissenting opinion.

EXXON CORPORATION
v.
DUNN
581 S.W.2d 500 (Tex. Civ. App.—Dallas 1979, no writ

Robertson, Justice.

The primary question on this appeal is whether appellee Marvin Dunn is a consumer as defined by the Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COMM. CODE ANN. § 17.45(4) (Vernon Supp. 1978). Appellee sued appellant Exxon Corporation under Section 17.50(b) of the Deceptive Trade Practices-Consumer Protection Act for failing to repair an automobile air conditioner. Appellee was not charged and did not pay for any goods and services in connection with the repair. Trial was to the court, and judgment was rendered for appellee. We hold, however, that appellee is not a consumer as defined by the statute and, therefore, we reverse and render.

Appellee took his five-year-old automobile to an Exxon car-care center to have it filled with gasoline and to have the battery recharged. When he later returned to pick up his car and to pay for the services, he found that the car had overheated. The next day he noticed that the air conditioning unit was not working properly. He returned the car to Exxon who attempted several times to repair the air conditioning unit. Appellee did not pay Exxon, nor was he charged for any of the repairs or attempts to repair the unit.

TEX. BUS. & COMM. CODE ANN. § 17.50(b) confers a cause of action upon a consumer who has been adversely affected by the violation of deceptive acts or practices. The cause of action conferred by Section 17.50(b) is restricted to the class of claimants defined as "consumers" within the meaning of Section 17.45(4). . . . Section 17.45(4) defines a consumer as: "[A]n individual, partnership, corporation or governmental entity who seeks or acquires by purchase or lease, any goods or services." Since Dunn did not "purchase or lease" the repairs, he is not a consumer within the definition of Section 17.45(4). . . .

In *Russell* the defendant insurance company provided the insured with a rental car and the insured understood that he would have the use of this auto until his car could be replaced. Thereafter the rental car

was canceled, and the insured sued the insurance company under the Deceptive Trade Practices-Consumer Protection Act. The court held that the insureds were not consumers under the statute because they had not purchased or leased the car themselves. The defendant lender in Thompson wrote a letter to the plaintiff borrowers stating that the lender would not foreclose a deed of trust lien against the borrowers' home while borrowers tried to sell the home and while they kept their payments up to not more than two payments behind. Subsequently, the lender posted the property for foreclosure and the borrowers filed suit under the Deceptive Trade Practices–Consumer Protection Act. In holding that the borrowers were not consumers under the act, the court stated that the borrowers had not purchased services from the lender, but had purchased the use of money with their note and deed of trust. Since the undisputed evidence in this case shows that appellee did not pay for and was not charged for any goods or services by Exxon in the repair of his air conditioning unit, he is not a consumer under the act. Appellee argues that the damage to his air conditioning unit resulted from the manner in which the battery was charged and cites *Boman v. Woodmansee*, 554 S.W.2d 33 (Tex. Civ. App.—Austin 1977, no writ) for the proposition that recovery for such damage is actionable under the Deceptive Trade Practices Act. In *Boman* the jury found that a construction company failed to install a swimming pool in a good and workmanlike manner and that this failure was a producing cause of plaintiff's damage. In this case, appellee has not elicited evidence of how the battery was charged and thus failed to establish that the charge was not accomplished in a skillful and workmanlike manner. Therefore, *Boman* is not controlling in this case.

Reversed and rendered.

Notes & Questions

1. As the court notes in *Kennedy*, the consumer does not have to be the one who pays for the goods or services. The Texas Supreme Court considered whether a hospitalized infant, whose bills were paid by the parents, was a consumer for purposes of the DTPA. In *Birchfield v. Texarkana Memorial Hospital*, 747 S.W.2d 361 (Tex. 1987), the court held:

> Equally unpersuasive is Wadley's (the hospital) contention that Kellie Birchfield was not a consumer within the meaning of the D.T.P.A. A plaintiff establishes her standing as a consumer in terms of her relationship to a transaction, not by a contractual relationship with the defendant. Wadley sold its goods and services and Kellie Birchfield "acquired" them, regardless of the fact that she obviously did not contract for them.

2. Should there be a "purchase" any time there is consideration, that is a bargained-for-exchange? If the contract definition is used to determine when consideration exists, many "free" offers should be viewed as purchases. *See*, *e.g.*, *Jennings v. Radio Station KSCS*, 708 S.W.2d 60 (Tex. App.—Fort Worth 1986) ("free" offer of $25,000 if station failed to play three songs in a row may be a contract); *First Texas Savings Ass'n v. Jergins*, 705 S.W.2d 390 (Tex. App.—Fort Worth 1986) ($5,000 "Scoreboard Challenge" contest resulted in a contract).

3. Can a user or borrower be a consumer? Assume that John purchases a car and lets his friend Sally borrow it. Can Sally sue for breach of the warranty of merchantability under the DTPA? Is Sally a consumer? Would it matter if Sally is a relative of John's? What if Sally went with John to purchase the car and was looking to buy one herself? What if she borrowed the car often? *See Kitchener v. T.C. Trailers, Inc.*, 715 F. Supp. 798 (S.D. Texas 1988) (borrower is not DTPA consumer); *Rodriguez v. Ed Hicks Imports*, 767 S.W.2d 187 (Tex. App.—Corpus Christi 1989) (passenger not consumer).

4. Juanita was considering an abortion. She saw an ad in the paper for "free abortion counseling." Juanita made an appointment to meet with the counselors at the "Abortion Referral and Counseling

Services, Inc." In fact, the agency is a pro-life organization that forced Juanita to sit through a slide show and video presentation that was anti-abortion. Juanita was very upset by the presentation and wants to sue to enjoin what she feels is a deceptive practice. Is Juanita a DTPA consumer? *See Mother & Unborn Baby Care of North Texas, Inc. v. State*, 749 S.W.2d 533 (Tex. App.—Fort Worth 1988).

5. Can the purchaser's fiancé be a consumer? In *Chamrad v. Volvo Cars of North America*, 145 F.3d 671, 673 (5th Cir. 1998), the court distinguished *Wellborn* stating:

> In this case, unlike in *Arthur Andersen* and *Wellborn*, there is no evidence to support the proposition that O'Connor, in seeking to acquire or purchase a good or service, bought the vehicle with the intent to benefit Chamrad. Neither at the time of the purchase nor the accident were Chamrad and O'Connor married. At all relevant times Chamrad owned his own vehicle. The Volvo belonged to O'Connor and was for her use. Finally, the record reflects that over approximately a five-year period Chamrad drove the vehicle on only one occasion, the night of the accident.

What must you show to establish that a fiancé is a consumer?

Problem

Janie recently stopped in her local gas station to fill her car up with gas. She chose self-service so that she would pay less. After she started pumping the gas, the station manager came out and said, "would you like your oil checked?" She said, "sure, why not." He opened the hood, fumbled around and told her everything was fine. She finished pumping the gas and drove off. Unfortunately, the manager didn't shut the hood correctly and it blew up in the wind and went through the windshield causing Janie to crash. Is Janie a consumer under the DTPA? Would it matter if it were a full-service purchase? Should it?

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4. Goods or Services

Once you have established that your client has sought or acquired by purchase or lease, there is still the matter of what was sought or acquired. Under the Act only "goods" or "services" will satisfy the definition of consumer.

Goods are defined by Section 17.45 (1) as: "tangible chattels or real property purchased or leased for use." Services are defined by subsection (2) to mean: "work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods."

In most cases, whether something is a good or a service does not present a very difficult question. There are some transactions, however, where the subject matter is not clearly defined, or, where there are several different aspects to what appears to be a single transaction. For example, in *Woods v. Littleton*, 554 S.W.2d 662 (Tex. 1977), decided before the definition of goods included real estate, the purchaser bought a house and plumbing services. Although the purchaser was not a "consumer" with respect to the house, he satisfied the DTPA standing requirement because he purchased the services. Thus it is clear that a transaction may involve both non-DTPA and DTPA claims. With this in mind, analyze the following:

[On June 24, 1987, the Texas Supreme Court issued an opinion in *E.F. Hutton & Co. v. Youngblood*, dealing with the relationship between the DTPA and the sale of securities. On November 10, the court withdrew that opinion, and substituted a new one that failed to discuss the DTPA issue. 741 S.W.2d 363 (Tex. 1987). The following is the opinion of the court that was withdrawn. Would you have concurred or dissented?]

E. F. HUTTON & CO.
v.
YOUNGBLOOD
Supreme Court of Texas, 1987
No. C-5526

CAMPBELL, JUSTICE.

Our primary question is whether the Texas Deceptive Trade Practices Act applies to the sale of securities by stock brokerage houses. John D. Youngblood and his wife, after receiving erroneous tax and investment advice, sued E. F. Hutton & Company, Inc., under the Texas Securities Act (TSA), TEX. REV. CIV. STAT. ANN. art. 581-1, et seq. (1986), the Deceptive Trade Practices Act (DTPA), TEX. BUS. & COMM. CODE § 17.41, et seq. (Vernon Supp. 1986), other statutes, and the common law. The trial court rendered judgment for the Youngbloods under the DTPA, and the court of appeals affirmed. . . . We hold the strict liability provision of the DTPA is incompatible with the due diligence defense allowed by the Texas Securities Act, and both cannot apply to the sale of securities. Therefore, following the rule of statutory construction that between two inconsistent statutes covering the same subject the more specific prevails, we conclude the DTPA does not apply to the sale of securities. Accordingly, we reverse the judgment of the court of appeals and remand this cause to that court for consideration of the defendant's liability under theories other than the DTPA.

John Youngblood participated in an employees' savings plan whereby he allocated a part of each paycheck to a retirement fund and, in return, his employer contributed an additional sum. The company's contributions to the plan are not taxed to the employee when made, only when withdrawn. The employee contributions come from salary, which has already been taxed and are not taxed when withdrawn. In October 1982, Youngblood sought the advice of Hutton and the Internal Revenue Service about withdrawing money from the pension fund. The Internal Revenue Service advised the withdrawal would trigger tax liability. Hutton advised that withdrawal of the employer's contributions from the fund and investment in Hutton's Bond and Income Series would be a tax free rollover. Hutton later discovered that the withdrawal was taxable; Youngblood incurred tax liability and this suit followed. Judgment was awarded under the DTPA although the jury's responses to special issues indicated liability may also be maintained under the TSA, or under common law negligence—with Hutton 60 percent negligent and Youngblood 40 percent negligent.

Whether the DTPA applies to securities transactions is a case of first impression for this court. One court of appeals has considered this issue. . . . However, that case was disposed of by holding that the purchaser was not a "consumer" under the DTPA because securities were not goods. . . . Youngblood has alleged that he has purchased a "service," as opposed to a "good," i.e., investment advice provided by a full service brokerage house. Hutton claims they do not provide a service within the meaning of the DTPA. Hutton also raises no evidence points. However, we need not address those issues because we hold the DTPA does not apply to the instant transaction.

The DTPA's defenses are specified in TEX. BUS. & COMM. CODE ANN. Secs. 17.50A(d), 17.50B (Vernon Pamph. Supp. 1986). There are no common law defenses other than those provided by the Act. . . . To fulfill the legislative mandate that the Act shall be liberally construed and applied to promote its underlying purposes, § 17.44, we have held: "Regardless of the reason, when a good does not have the characteristics it is represented to have . . . the injury to the consumer is the same. There is no justification for excluding some misrepresentations and including others on the basis of the reason for their falsity. . . ."

The holding in *Pennington* is in stark contrast to the due diligence defense allowed under the TSA wherein a person is not liable for inaccurate or incomplete information given to a client if the person proves

he or she did not know and could not have reasonably known of the inaccuracy or incompleteness of the information. . . .

At least eight other jurisdictions have concluded that securities transactions are not under the umbrella of their unfair trade practices acts. Only Arizona has reached an opposite conclusion. . . .

No other state's unfair trade practices act exactly mirrors ours; therefore, each case is distinguishable. We do note, however, that in Arizona the court inferred specific legislative guidance in concluding that their unfair trade practices act applies to securities transactions. In the *Pickrell* case, the Arizona court observed that the legislature added a savings clause to its consumer fraud act in reaction to an appellate court holding that the act was inapplicable to securities transactions. . . .

We do not infer a similar legislative mandate. The comment to the amendment creating the due diligence defense indicates the legislature sought to provide a heavier burden for a plaintiff suing a brokerage firm than for one who brings suit under the DTPA. According to the comment:

> [T]he old Texas law was interpreted by one court to deny such a (due diligence) defense. This not only placed an unfair liability on a person who made all reasonable efforts to give complete and accurate information; it deprived him of an incentive to be careful, which the reasonable care defense provides. By the new law, a dealer, for example, who makes all reasonable efforts to give complete and accurate information about a company whose securities he sells to a customer, is not liable to the customer if there is information the dealer fails to get, or gets in an inaccurate form. . . .

This amendment was passed four years after the enactment of the DTPA. If the legislature intended the DTPA to apply to securities transactions, this amendment was superfluous. Because the legislature is never presumed to do a useless act, we cannot infer, as the Arizona court did, that the legislature intended for the DTPA to apply to securities transactions. . . .

In conclusion, we hold the DTPA and the TSA are fundamentally inconsistent. Therefore, we apply the rule of construction that if statutes in pari materia may not be harmonized, the more specific applies over the more general. Accordingly, we reverse the judgment of the court of appeals insofar as liability was found under the DTPA, and remand to that court for consideration of liability under the TSA or the common law.

Notes & Questions

1. Consider the following comment written after the withdrawn opinion:

> The court's conclusion that the DTPA does not apply when application would be inconsistent with the TSA is probably a correct application of these two laws, and general statutory interpretation. The court ignores, however, another basic tenet of statutory construction: that statutes should, whenever possible, be interpreted in a manner whereby they can both be applied consistently. In the instant case, a recognition that this transaction involved the rendering of a service, rather than the sale of securities, would permit application of the DTPA without resulting inconsistencies. Youngblood went to E. F. Hutton, a "Full Service Broker," and asked for and received investment and tax advice. It was this advice that forms the basis of their complaint, not the resulting sale of a security. The court's broad sweep of preemption authorizes anyone who deals in stocks and bonds to misrepresent the nature of their corollary services, subject to only negligence liability. Clearly, if an accountant or attorney had given the same advice to the Youngbloods, DTPA liability would lie. In future cases the court should pay careful attention to the transaction in question and ask:

> Was this the sale of securities or the rendering of an independent service? Only in the former should the DTPA be deemed incompatible and inapplicable.

12 CAVEAT VENDOR at 94 (1987).

2. What if Youngblood had consulted a CPA about the taxability of the rollover and then went to the stockbroker on that advice? Could the CPA be liable under the DTPA? If yes, should there be a difference just because the stockbroker also sold the stock? *See Marshall v. Quinn-L Equities, Inc.*, 704 F. Supp. 1384 (N.D. Texas 1988) (investor who purchased limited partnership interest may be consumer with respect to related services provided by attorney).

3. Billy Bob recently agreed to purchase a participating working interest in certain oil and gas leases from Olsen, financing to be made by Bank. After default, Bank attempted to foreclose and Billy Bob filed a claim under the DTPA against both Bank and Olsen. Is this transaction governed by the DTPA? Is oil and gas a good? Is it under the UCC? *MBank Fort Worth v. Trans-Meridian, Inc.*, 625 F. Supp. 1274 (N.D. Tex. 1985).

4. What about a partnership interest? Is that a "good" or "service"? Would the sale of a limited partnership be a transaction covered by the DTPA?

HENNESSEY
v.
SKINNER
698 S.W.2d 382 (Tex. App.—Houston [14th Dist.] 1985, no writ

Brown, Chief Justice.

* * * *

The question raised by this appeal is whether a purchase of cattle made to enter into a commercial ranching partnership with the seller is a purchase of goods "for use" covered by the DTPA. That cattle in general are goods covered by the DTPA is not in dispute. . . . However, our holding in *Rotello v. Ring Around Products*, 614 S.W.2d 455 (Tex. App.—Houston [14th Dist.] 1981) may have created the impression that only goods which are used up or lose their identity upon being put to use can form the basis of a DTPA action. . . . We wish to correct that impression here. Since the ordinary meaning of "for use" includes use as breeding stock, Squanto and the cattle would qualify as goods "for use" even under Rotello's overall common-sense standard. But the recent case of *Big H Auto Auction, Inc. v. Saenz Motors*, 665 S.W.2d 756 (Tex. 1984), in treating a pre-1983 transaction such as ours, specifically held that the "for use" concept includes purchases purely for resale as well. *Rotello's* extinction "requirement" is therefore obsolete.

Big H Auto teaches that goods are goods "for use" "for whatever use was intended to be made of the (goods). . . ." *Big H Auto* prohibits any limitation of the "for use" concept, stating that such limitation "would be contrary to the statutory mandate of § 17.44 on construction and application of the Act. . . ." We therefore hold that the purchase of cattle for commercial cattle raising purposes generally is a purchase of goods "for use" covered by the DTPA.

Appellee contends that a percentage interest in a herd of cattle has no physical attributes and therefore is intangible. Thus he argues that Hennessey did not purchase goods, since goods must be "tangible chattels or real property." This contention has little merit. As appellant pointed out at oral argument, the plaintiff

consumers in *Rotello* who purchased soybean seed for cultivation did not make separate purchases of each individual seed they bought. They purchased an amount of seed, just as Hennessey purchased a number of cattle. Both the purchase of the percentage of the herd of 63 cattle and the purchase of the ten percent interest in Squanto are both recorded in bills of sales as would any purchase of individual cattle. Indeed, stating a purchase of cattle in terms of a percentage of a herd instead of individual cattle is one way of preventing confusion and possible strife in a relationship with the seller/partner since the purchaser's share in a herd will remain constant. The purchase of a percentage of a herd of cattle is a purchase of cattle and therefore of goods.

Appellee further contends that Hennessey intended in the course of the 1982 transactions with Skinner to purchase an intangible partnership interest and therefore cannot invoke the provisions of the DTPA. This argument is without merit. Hennessey received bills of sale purporting to transfer title to his interest in the herd and in the lease. These things are not a partnership interest. Purchase of the cattle and of a portion of the grass lease enabled Hennessey to become a partner with Skinner, but the encumbered cattle "form(ed) the basis of the complaint, . . ."

Further, even if the amounts paid to Skinner are viewed as purchasing a combination of tangible goods and of an intangible partnership interest, the DTPA was clearly intended to cover mixed purchases of goods or services on the one hand and non-DTPA items on the other. "[I]t cannot be said that (plaintiffs) are to be excluded from the category of "consumers" and denied the protection of the Act afforded "consumers" merely because the sale included real estate as well as "services." [A]ppellant's first two points of error are sustained.

* * * *

Modified and Affirmed.

Notes & Questions

1. Is the purchase of a lottery ticket the purchase of a good or a service? Does the seller of the ticket get paid for performing a service? Consider the following excerpt from *Kinnard v. Circle K Stores, Inc.*, 966 S.W.2d 613 (Tex. App.—San Antonio 1998):

> Rebecca Kinnard bought tickets for the January 2, 1993 Lotto Texas drawing at a San Antonio Circle K store. Ms. Kinnard stated in her deposition that she did not double-check her tickets at the time because there was a long line of customers behind her. The Kinnards contend one of the playslips Ms. Kinnard handed to the clerk that night contained the winning combination of six numbers; they also contend that the clerk who processed her playslips was not a store employee. In any case, this combination did not register with the Lottery Commission computer and the Kinnards were not winners; what did register with the Commission was a duplicate number, processed at that store, roughly at the time the Kinnards would have played. It thus appears that one of the playslips was processed twice.
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> * * * *
>
> THE DTPA CAUSE OF ACTION
>
> The Kinnards next argue that it was error to grant summary judgment on their claims under the Texas Deceptive Trade Practices Act, and that these claims deserve a jury hearing. Circle K contends that this transaction does not qualify as provision of a "service" for purposes of the DTPA. We agree with Circle K.

To avail themselves of the DTPA, the Kinnards must first show they were "consumers." This means they must show that they "sought to acquire, by lease or purchase, any goods or services." We believe the Kinnards do not qualify as "consumers" for purposes of this transaction because a lottery ticket is a right to participate in the drawing held twice a week. As such, it is an intangible, and therefore neither a good nor a service. *See Hand v. Dean Witter Reynolds Inc.*, 889 S.W.2d 483 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

In *Hand*, the plaintiff sued her broker and his company in negligence and under the DTPA because they did not execute desired options contracts in the oil spot market. The trial court granted summary judgment. In addressing her DTPA claim, the court first determined that a transaction involving an intangible, such as a futures contract, does not involve a "good" or "service" within the meaning of the statute, although some service inevitably accompanies the transaction. It then found that in transactions in which the sole object of the transaction is the purchase of an intangible, Texas law does not grant consumer status: "Thus, when a transaction's central objective is the acquisition of an intangible, Texas law requires that the collateral service be an important objective of the transaction and not merely incidental to the performance of a transaction excluded under the DTPA." Investment advice would be an example of such a collateral service.

In our case, we find that the object of the transaction was a chance to participate in the Texas Lotto drawing for that date; Circle K's participation in that process was merely incidental to the transaction. Therefore, the Kinnards do not qualify as "consumers" under the DTPA and summary judgment was proper. The Kinnards' third point of error is overruled.

2. Could the consumer have argued that the "object" of her transaction with Circle K was the purchase of the services of its employees? What if the consumer went specifically to this store because there had been a large number of winners and the clerk was believed to be a "lucky seller"?

3. Think about the last time you entered into your bank. Were you a "consumer" for purposes of the DTPA? What does a bank do? Does it sell or lease goods or services? What is a "full service bank"?

RIVERSIDE NATIONAL BANK
v.
LEWIS
603 S.W.2d 169 (Tex. 1980)

GREENHILL, CHIEF JUSTICE.

This case primarily involves the question whether one who seeks a loan from a bank in order to refinance a car qualifies as a "consumer" under the Deceptive Trade Practices Act (DTPA). The trial court disallowed recovery under the DTPA, but the court of civil appeals reformed the judgment to hold the bank liable under the DTPA. 572 S.W.2d 553. Since we believe that Mr. Lewis was not a "consumer" in the instant transaction, we hold that the trial court correctly denied recovery under the DTPA. We also hold that under this record, Lewis is entitled to recover from Riverside Bank upon his cause of action for common law fraud. Further, we hold that there is some evidence to support recovery of exemplary damages for fraud. We remand the cause to the court of civil appeals to pass upon the sufficiency of the evidence as to exemplary damages.

The relevant facts are as follows: In February, 1975, Lewis purchased a new Cadillac El Dorado. Allied Bank provided almost $10,500.00 in financing. To secure the loan, Allied Bank took a security interest in

the car and kept a $6,000.00 certificate of deposit as security. Lewis failed to make the first payment due on April 10, and a check that he gave a few days later was returned for insufficient funds. After these occurrences, Mr. Little, Lewis' loan officer at Allied Bank, asked Lewis to move the loan to another bank.

After two unsuccessful attempts to refinance the loan, Lewis went to Riverside Bank on May 2. Arthur Carroll, a junior loan officer, helped Lewis complete a loan application, and told Lewis that the application would have to be approved by his superiors at the Bank. At that time, Carroll called the Allied Bank loan officer, Mr. Little, and told him that Lewis had applied for the loan at Riverside Bank.

On May 6, 1975, Carroll called Little once again. During this phone conversation, Carroll informed Little that the loan had been approved, and requested Little to have Allied Bank forward a draft, the title, and the certificate of deposit to Riverside Bank. After forwarding these items, there was no communication between Little and Carroll until May 14, 1975.

On May 14, Little called Carroll in order to determine why the draft had not been paid. Carroll told Little that the draft had been held up due to a senior loan officer's questions, but that it would be paid on the next day. On May 15, Little informed Carroll that he wanted the draft paid immediately, or returned. Carroll replied that the draft had been paid, and the cashier's check was in the mail. The next day, May 16, Carroll told Little that the draft would not be paid.

During the course of these communications between Little, at Allied Bank, and Carroll, at Riverside Bank, James Means, executive vice-president at Riverside National Bank, did some investigation of Lewis' loan application. Upon calling Allied Bank, Means discovered that Lewis' application misrepresented his net income and did not disclose the fact that he had already failed to make his first, and only, payment. Thus, on May 14, Means decided that Riverside would not make the loan to Lewis.

On May 15, however, Carroll called Lewis, told him that the loan had been approved, and asked him to come to the bank to sign the necessary papers. Lewis complied with the request, signing a promissory note in the amount of $12,871.80 on May 15. This note was kept by Riverside until the time of trial, although it was never sought to be collected. As previously stated, on May 15, Carroll was also representing to Allied Bank that the loan would be taken by Riverside Bank.

After being told on May 16 that Riverside would not take the loan, Allied Bank repossessed the car and sold it at auction. The sale failed to generate sufficient money to cover the full loan at Allied, and a deficiency of $3,177.50 was deducted from Lewis' certificate of deposit, with the balance being returned to him.

* * * *

RIVERSIDE'S LIABILITY UNDER THE DECEPTIVE TRADE PRACTICES ACT.

The alleged deceptive acts in this case occurred during May, 1975. Accordingly, the statutory provisions that govern this case are those that were in effect at the time that the alleged deceptive acts occurred. . . .

* * * *

The Act thus differentiates between the remedies available to correct violations of the Act. A "person" may have engaged in a deceptive act by presenting any misleading information concerning any item of value. See Sections 17.46(a), 17.45(6). Any person engaging in such deceptive practices may be subjected to a suit by the Consumer Protection Division of the Attorney General's Office, under Section 17.47. But, one who engages in deceptive acts may not be subjected to a private suit for damages under the Act unless the aggrieved party is a consumer. Section 17.50 expressly declares, in its caption: Relief for Consumers. Furthermore, Section 17.50 provides that a consumer may maintain a cause of action if aggrieved by

deceptive practices. The Legislature granted no such remedy by means of a private cause of action for any person; one must be a consumer.

It has been argued that any person ought to be permitted to sue if aggrieved by a deceptive act. This contention relies on the broad definition of "trade" and "commerce" and the liberal interpretation of the DTPA that is promoted by Section 17.44. We disagree with this position for two reasons. First, the scope of "trade" and "commerce" defines the acts that are illegal; it does not purport to say who may maintain a private cause of action. Rather, it is the definition of consumer that delineates the class of persons that may maintain a private cause of action. Second, the rule of liberal interpretation should not be applied in a manner that negates the statutory definition of the word "consumer." To ignore the Legislature's definition of "consumer," and permit any aggrieved person to maintain a private cause of action under the DTPA, ignores the well established presumption that legislative choice of words is such that every word has meaning. . . . To read the Act in such a manner that "trade" and "commerce" define the class of persons who are consumers would constitute a judicial deletion of Section 17.45(4), which defines consumer in terms of a purchaser of "goods" and "services," and not in connection with "trade" and "commerce." This we cannot do. Thus, we hold that a person who brings a private lawsuit under Section 17.50 must be a consumer, as defined in Section 17.45(4). The other courts that have considered this issue have been in accord. . . .

In his transaction with Riverside Bank, Lewis sought only to borrow money in an effort to avoid repossession of his car. He sought to pay for the use of money over a period of time. Other than Lewis' payment for the use of money, there was nothing else for which he paid, or which he sought to acquire. In order to determine whether Lewis was a "consumer" entitled to maintain a private cause of action under Section 17.50 of the DTPA, we must determine whether, in this transaction, Lewis sought or acquired "by purchase or lease, any goods or services."

1. Lewis did not seek or acquire any "goods" in his transaction with Riverside Bank.

Section 17.45(1) of the DTPA defines goods as "tangible chattels bought for use." Since Lewis sought nothing other than the use of money from Riverside Bank, it is necessary to determine whether money was a "tangible chattel" that could be classified as a good. After examination of the appropriate statutes, we conclude that money is not such a "good."

Nowhere in the DTPA is "chattel" defined so as to specifically include or exclude "money" from the definition of "goods." A cursory examination of analogous statutes, however, demonstrates that money has not yet been included in the category of "goods" or "chattels."

The DTPA is a part of the Texas Business and Commerce Code. Accordingly, it is appropriate to look to other sections of the Code to determine the proper characterization of money. Section 1.201 of the Texas Business and Commerce Code, which sets forth the general definitions of the terms used in the Code, provides: (24) "Money" means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency.

A specific definition of "goods" is found in Section 2.105, which provides: (a) "Goods" means all things . . . which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid. . . .

Section 9.105(a)(8) similarly provides: (8) "Goods" includes all things which are movable at the time the security interest attaches or which are fixtures . . . but does not include money. . . .

Thus, consistent with these analogous statutory provisions, we hold that money is not a "tangible chattel," or "goods" as defined by the DTPA. Rather, money is properly characterized as a currency of exchange that enables the holder to acquire goods. Thus, Lewis, in arranging for the instant loan, did not seek to acquire, through purchase or lease, any "goods" as defined by the DTPA.

2. Lewis did not seek or acquire any "services" in his transaction with Riverside Bank.

Section 17.45(2) of the DTPA defines 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." Lewis contends that, in the instant transaction, he sought an "extension of credit." This extension of credit, he claims, is a service as defined by the DTPA. We disagree.

In this case, Lewis sought to borrow money; he sought nothing else. Money, as money, is quite obviously neither work nor labor. Seeking to acquire the use of money likewise is not a seeking of work or labor. Rather, it is an attempt to acquire an item of value. We hold that an attempt to borrow money is not an attempt to acquire either work or labor as contemplated in the DTPA.

"Services" was defined by this Court in *Van Zandt v. Fort Worth Press*, 359 S.W.2d 893, 895 (Tex. 1962). We defined services as: "action or use that furthers some end or purpose; conduct or performance that assists or benefits someone or something; deeds useful or instrumental toward some object." This definition described "services" in terms of "action," "conduct," "performance" and "deeds." All of these synonyms demonstrate that services includes an activity on behalf of one party by another. This characterization indicates that "services" is similar in nature to work or labor. Accordingly, we hold that Lewis' attempt to acquire money, or the use of money, was not an attempt to acquire services.

We find support for our conclusion that the DTPA's use of the word "services" did not include the extension of credit, or the borrowing of money, in another statute: the Home Solicitations Transactions chapter of the Interest-Consumer Credit-Consumer Protection Title. In the Home Solicitations Transactions Act, the Legislature gave to "consumers," as defined in that act, certain rights with respect to contracts that had been signed as a result of a home solicitation. In that act, the Legislature defined "consumer" as "an individual who seeks or acquires real or personal property, services, money, or credit for personal, family, or household purposes." [I]nterestingly enough, the Legislature enacted this statute during the same session in which the DTPA was originally enacted. The presence of the words "money or credit" within the definition of "consumer" in the Home Solicitations Act, and their corresponding absence from the analogous provision in the DTPA, indicates that the seeking of an "extension of credit" is not the seeking of a "service" as defined in the DTPA. 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.

It has also been argued that in the course of extending credit, Riverside Bank necessarily provided other services to Lewis. These services could have included such things as help in filling out his loan application, financial counseling, and the processing of his loan. It has been contended that these activities constituted "services" as defined by the DTPA, and thus made Lewis a "consumer" who could maintain a private cause of action under Section 17.50. We disagree.

The evidence in this case establishes that Lewis approached Riverside Bank with one objective; he sought to acquire money. He attempted to obtain this money by promising to repay the indebtedness in the future, with interest. Put simply, he sought to exchange future amounts of money for that amount which he desired to have in the present. There is no evidence that he sought to acquire anything other than this use of money.

The argument that services existed in the lending of money, and in the process of determining whether to lend money, and were necessarily a part of the interest rate or purchase price of the loan, is not supported

by the evidence adduced at trial. This argument, contained in the briefs, is merely hypothetical. There is nothing to support it in the Statement of Facts.

Additionally, Lewis' sole complaint about the transaction concerned the Bank's failure to make him the loan. He has made no complaint concerning the quality of these collateral activities that he now claims constitute a service. In the absence of a claim concerning these collateral activities, we hold that Lewis did not seek either "goods or services" as defined under the DTPA.[2] Accordingly, Lewis was not a "consumer" who could bring suit under Section 17.50 of the DTPA.

* * * *

The cause of action based upon the Deceptive Trade Practices Act is severed. The holding of the court of civil appeals awarding Lewis $16,562.50 under the Deceptive Trade Practices Act is reversed, and judgment rendered that Lewis take nothing by his claims under the DTPA. The holding of the court of civil appeals that Lewis is entitled to recover actual damages under his allegations of fraud is affirmed. The holding of the court of civil appeals that there was no evidence of malice to support the award of exemplary damages is reversed, and the cause is remanded to the court of civil appeals for further proceedings consistent with this opinion.

Notes & Questions

1. Reread the UCC sections referred to in *Riverside*. Do you agree with the court's conclusions? Is money not a good under Chapter 2 of the Code? *See* § 2.105(a).

2. Does *Riverside* stand for the proposition that banks are excluded from the provisions of the DTPA? Is the exclusion total or partial? Under what circumstances could a bank be liable under the DTPA?

3. Check your next bank statement. Have you been charged a "service charge"? Does that mean that the bank has provided a service? Would the bank be liable if, in connection with this "service," they violated the DTPA?

4. When, if at all, is lending money subject to the DTPA? Consider the following opinion.

FLENNIKEN
v.
LONGVIEW BANK AND TRUST CO.
661 S.W.2d 705 (Tex. 1983)

MCGEE, JUSTICE.

Mr. and Mrs. James Flenniken instituted this suit against the Longview Bank & Trust Co. seeking damages for wrongful foreclosure and violation of the Deceptive Trade Practices Act, TEX. BUS. & COM. CODE

[2] 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. 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.

ANN. § 17.41, et seq. Based on the jury's finding that the Bank engaged in an unconscionable course of action in causing the sale of the Flennikens' property, the trial court rendered judgment that the Flennikens recover $25,974 treble damages, attorney's fees, and court costs. The court of appeals reversed the trial court's judgment in part, holding that the Flennikens were not "consumers" and were not entitled to recover treble damages or attorney's fees under the DTPA. . . . We reverse the judgment of the court of appeals and affirm the judgment of the trial court.

On October 28, 1976, the Flennikens and Charles Easterwood entered into a mechanic's and materialman's lien contract, whereby Easterwood agreed to construct a residence on the Flennikens' property. In exchange for Easterwood's services, the Flennikens paid Easterwood $5,010 and executed a $42,500 mechanic's lien note, naming Easterwood as payee. This note was further secured by a deed of trust to the Flennikens' property, in which the Bank's vice-president, J. M. Bell, was named as trustee. On this same date, Easterwood assigned the Flennikens' note and his contract lien to the Bank in return for the Bank's commitment to provide interim construction financing.

Under the terms of the lien contract, Easterwood was to complete the Flennikens' residence by April 28, 1977. Between November 2, 1976, and January 7, 1977, the Bank made four disbursements of construction funds to Easterwood, totaling $32,000. Easterwood, however, later abandoned the contract after completing only 20 percent of the work. On December 6, 1977, after the Flennikens and the Bank failed to agree on what to do with the unfinished house, the Bank foreclosed on the property under the terms of the deed of trust.

The Bank does not challenge the jury's finding that foreclosure was an unconscionable course of action. Instead, the Bank argues that the Flennikens are not "consumers" as that term is defined in Section 17.45(4) of the DTPA. We disagree.

It is clear that only a "consumer" has standing to maintain a private cause of action for treble damages and attorney's fees under Section 17.50(a) of the DTPA. . . . Section 17.45(4) defines a consumer as "an individual . . . who seeks or acquires by purchase or lease, any goods or services." Under the DTPA, goods include "real property purchased . . . for use," TEX. BUS. & COM. CODE ANN. § 17.45(1), and services include "services furnished in connection with the sale . . . of goods." [S]ection 17.45(4), however, only describes the class of persons entitled to bring suit under Section 17.50; it does not define the class of persons subject to liability under the DTPA. The range of possible defendants is limited only by the exemptions provided in Section 17.49. Section 17.50(a)(3), for example, allows a consumer to "maintain an action if he has been adversely affected by . . . any unconscionable action or course of action by any person."

In the instant case, the court of appeals recognized that the Flennikens were consumers to the extent they sought to acquire a house from Easterwood, as well as his services. The court of appeals, however, treated Easterwood's assignment of their note to the Bank as a separate transaction in which the Flennikens did not seek or acquire any goods or services. According to the court of appeals, the Bank's unconscionable course of action did not occur in connection with the Flennikens' transaction with Easterwood, but in connection with Easterwood's transaction with the Bank. Thus, the court of appeals held that the Flennikens were not consumers as to the Bank because the purchase of the house and Easterwood's services did not form the basis of their complaint. . . .

This holding erroneously suggests that the Flennikens were required to seek or acquire goods or services from the Bank in order to meet the statutory definition of consumer, a contention we rejected in *Cameron v. Terrell & Garrett, Inc.*, *supra*. Privity between the plaintiff and defendant is not a consideration in deciding the plaintiff's status as a consumer under the DTPA. . . . A plaintiff establishes his standing as a consumer in terms of his relationship to a transaction, not by a contractual relationship with the defendant.

The only requirement is that the goods or services sought or acquired by the consumer form the basis of his complaint. . . .

Similarly, the fact that the Bank's unconscionable course of action occurred after the Flennikens and Easterwood entered into the contract for the sale of the house does not exempt the Bank from liability under the DTPA. Under Section 17.50(a)(3) there is no requirement that the defendant's unconscionable act occur simultaneously with the sale or lease of the goods or services that form the basis of the consumer's complaint. . . . If, in the context of a transaction in goods or services, any person engages in an unconscionable course of action which adversely affects a consumer, that person is subject to liability under the DTPA. . . .

The court of appeals erred in holding that the basis of the Flennikens' complaint was Easterwood's transaction with the Bank, rather than their transaction with Easterwood. From the Flennikens' perspective, there was only one transaction: the purchase of a house. The financing scheme Easterwood 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 Easterwood. The Flennikens, therefore, were consumers as to all parties who sought to enjoy the benefits of that transaction, including the Bank. . . . Clearly, the Bank had no greater right to foreclose on the Flennikens' property than did Easterwood. If Easterwood had foreclosed his lien under these circumstances, and if a jury had found his actions to be unconscionable, there is no question that he would be subject to liability under the DTPA. The Bank—which wrongfully exercised a power it derived from Easterwood's transaction with the Flennikens—is subject to the same liability.

The Bank, however, also argues that the Flennikens are not consumers under our holding in *Riverside National Bank v. Lewis*, *supra*. Again, we disagree.

In *Riverside*, we held that money is not a good or service under the DTPA, and that one who seeks only money in a transaction is not a consumer under Section 17.45(4). In *Riverside*, however, the sole basis of Lewis' complaint was the Bank's failure to lend him money as it had promised it would. The limited nature of his complaint was reiterated throughout our opinion:

In his transaction with Riverside Bank, Lewis sought only to borrow money in an effort to avoid repossession of his car. . . . Other than Lewis' payment for the use of money, there was nothing else for which he paid or which he sought to acquire. . . . In this case, Lewis sought to borrow money: he sought nothing else. *Id*. at 174. There is no evidence that he sought to acquire anything other than this use of money. . . . Lewis' sole complaint about the transaction concerned the Bank's failure to make him the loan. . . .

In this case, the Flennikens make no complaint as to the Bank's lending activities. Unlike Lewis, the Flennikens did not seek to borrow money; they sought to acquire a house. The house thus forms the basis of their complaint.

The judgment of the court of appeals is reversed. The judgment of the trial court awarding the Flennikens treble damages and attorney's fees under the DTPA is affirmed.

WALKER
v.
FEDERAL DEPOSIT INSURANCE CORPORATION
970 F.2d 114 (5th Cir. 1992)

Brown, Judge.

In this swelter of multi-court lawsuits, removal, remand, re-removal, settlement and a long-awaited en banc decision, arising out of an atypical land transaction in which the lender allegedly fraudulently failed