CHAPTER ONE
DECEPTIVE TRADE PRACTICES ACT

SECTION ONE: 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 mislead 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 $150?

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 Article 21.21 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.

SECTION TWO: 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.

I. 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. Does Carey have a claim under the DTPA? (*See Williams v. Hills Fitness Center, Inc.*, 705 S.W.2d 189 (Tex. App.—Texarkana 1985)).

II. SEEK OR ACQUIRE

**MARTIN**

v.

**LOU POLIQUIN ENTERPRISES, INC.**

Court of Appeals of Texas, 1985

696 S.W.2d 180

**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 AND 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?

3. Assume that a car dealer made a mistake and advertised a new 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
Court of Appeals of Texas, 1999
989 S.W.2d 395

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.

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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. Id. at 184-85.

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. Id. at 582. 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.

III. 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 makes the purchase? For example, if father buys a baseball bat for son, is son a consumer? Should the son have the benefits of the DTPA?

KENNEDY

v.

SALE

Supreme Court of Texas, 1985
689 S.W.2d 890

ROBERTSON, JUSTICE.

This cause involves the definition of “consumer” under the Texas Deceptive Trade Practice—Consumer Protection Act (“DTPA”). TEX. BUS. & COMM. CODE ANN. § 17.45(4) (Vernon Supp. 1985). The question presented is whether an employee complaining of misrepresentations of the provisions of a group insurance policy is a “consumer,” though the employer alone purchased the policy. The court of appeals held that the employee was not a consumer. . . . We reverse the judgment of the court of appeals and affirm that of the trial court.

Francis Kennedy was an employee of the Martin County Hospital District. The Board of Managers of the hospital district decided to change group insurance carriers, from Blue Cross/Blue Shield to Southwest Medical Corporation Trust. J. Woodford Sale was the insurance agent.

After the policy was accepted, but before it went into effect, Sale met with hospital employees to explain the new provisions and benefits, as well as to collect signed enrollment cards from each employee. Kennedy and other employees testified that at this meeting Sale misrepresented the preexisting condition coverage, claiming that the policy offered full coverage without qualification, when in fact the policy provided only $4,000 maximum coverage during the first year. Ken-
nedy also testified that had he been correctly informed, he would have enrolled under his wife’s group plan, which provided full coverage.

 Shortly thereafter, Kennedy underwent surgery for a pre-existing condition. The policy paid $4,000; Kennedy brought suit against Sale for the balance of $11,338.21, alleging a violation of the DTPA and common law fraud. The jury found that Sale had misrepresented pre-existing condition coverage to Kennedy, but not to the Board of Managers. The trial court rendered judgment for Kennedy on his DTPA cause of action. The court of appeals, with one justice dissenting, reversed this judgment but remanded for a new trial on the common law fraud theory.

 The court of appeals held that because Kennedy did not purchase the policy benefits directly from Sale, he was not a “consumer” as defined by the DTPA. In reaching this conclusion, the court of appeals placed substantial reliance on Delaney Realty, Inc. v. Ozuna, 593 S.W.2d 797 (Tex. Civ. App.—El Paso), writ ref’d n.r.e. per curiam, 600 S.W.2d 780 (Tex. 1980). This court, while refusing writ, did not endorse the Delaney Realty court’s reasoning. . . . Less than one year later, we expressly disapproved the result in Cameron v. Terrell & Garrett, Inc. . . .

 While Cameron v. Terrell & Garrett, Inc. is not conclusive on the question here presented, the decision is nonetheless highly instructive. The question presented in Cameron was whether a real estate agent could be held in violation of the DTPA where he was neither the buyer nor the seller of the property. In a unanimous opinion, we stated:

 We find no indication in the definition of consumer in Section 17.45(4), or any other provision of the Act, that the legislature intended to restrict its application only to deceptive trade practices committed by persons who furnish the goods or services on which the complaint is based. Nor do we 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?

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.”

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WELLBORN v. SEARS, ROEBUCK & CO.
United States Court of Appeals, Fifth Circuit, 1992
970 F.2d 1420

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.
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.

* * *

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. See, e.g., Clark v. Smith, 494 S.W.2d 192 (Tex. Civ. App.—Dallas 1973, writ ref’d n.r.e.). 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 1

Read the following opinion. Write a dissenting opinion.

EXXON CORPORATION

v.

DUNN

Court of Civil Appeals of Texas, 1979

581 S.W.2d 500

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 AND 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. What is the effect of an agent purchasing services for a principal? In Sherman Simon Enterprises, Inc. v. Lorac, 724 S.W.2d 13 (Tex. 1987) the Supreme Court held as follows:

   [J. R. Davis, James Kirk, and James Westerhaus were employees of Lorac, working on board a boat in the Gulf of Mexico. On October 1, 1978, the boat was
coming into a port in Jefferson County and Kirk called Lorac’s supervisor of off-
shore personnel to find out how the men were to get home. The supervisor author-
ized the workers to rent a car and to drive to their homes in Galveston and Houston. After Davis, Kirk, and Westerhaus docked, Davis rented a car from Sherman Simon Enterprises at the Jefferson County Airport. Davis used a company credit card to rent the car. The charges under the rental agreement were to be billed to Seismo-
graph Service Corporation, of which Lorac is a wholly owned subsidiary. Both are owned by Raytheon Corporation.]

Sherman Simon Enterprises initially attacks Lorac’s status as a consumer. We have recognized at least two requirements that must be established of a person to qualify as a consumer under the DTPA. In *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 538 (Tex. 1981), we reaffirmed the requirement that a person must qualify as a consumer as that term is defined in TEX. BUS. & COM. CODE Section 17.45(4) in order to maintain a private cause of action for treble damages under Section 17.50 of the Act. Section 17.45(4) defines consumer as “an individual, partnership, or corporation who seeks or acquires by purchase or lease, any goods or services.” Another requirement recognized by this court is that the goods or services purchased or leased must form the basis of the complaint. *Woods v. Littleton*, 554 S.W.2d 662, 666 (Tex. 1977). Lorac has satisfied both of these requirements. It became indebted for certain services provided by the lease agreement, including rental of the car.

But, Sherman Simon Enterprises argues that because there was no evidence that Lorac was billed or paid for the rental car, Lorac was not a consumer. Sherman Si-
mon and two of his employees testified that the charge under the rental agreement was billable to Seismograph from Hertz’ Oklahoma City data center in accordance with the provisions of the air travel card used by Davis. It was customary for Lorac employees to use such a card to rent and pay for transportation. Furthermore, the rental agreement defines “customer” as “the persons signing this agreement and any other party to whom the charges incurred are billed at the express direction of such party or the person signing this agreement. . . .”

Sherman Simon Enterprises stated in oral argument that it never submitted the charge receipt to Hertz for ultimate billing to Seismograph. The failure of Sherman Simon Enterprises to actually bill Seismograph poses two questions. Of what effect is the fact that the rental fee was never actually paid, and of what effect is the fact that the charge was ostensibly only billable to Seismograph?

The language of Section 17.45(4) clearly indicates that a claimant can be a con-
sumer under the DTPA even if the transaction is not consummated since a consumer is defined as “a corporation who seeks or acquires . . . by . . . lease, any goods. . . .”

Furthermore, a corporation can only act through its agents. It was Lorac’s policy to provide transportation home to its employees after they had been working off-
shore. Davis used a company credit card for the rental of the automobile. Davis was acting as an agent of Lorac for the purpose of acquiring a means of transporta-
tion for Lorac’s employees. . . . We therefore hold that Lorac was a consumer within the meaning of the DTPA.
CONCURRING OPINION

I concur with the result in this case because the record contains no evidence of a false, misleading or deceptive act or practice. However, I disagree that Respondents have standing to sue under the DTPA.

Only consumers may recover under the DTPA. The Act defines “consumer” as an “individual . . . who seeks or acquires by purchase or lease, any goods or services.” TEX. BUS. CODE ANN. § 17.45(4) (Vernon 1982).

A two-prong test must be satisfied in order to qualify as a “consumer:”

(1) the plaintiff must have sought or acquired goods or services by purchase or lease; and

(2) the goods or services purchased or leased must form the basis of the complaint.

A plaintiff failing to establish either of these two requirements does not have standing and is relegated to pursue other remedies. . . .

The court glosses over the second prong of the test and concludes it has been satisfied. If this were a football game, the court would be guilty of falling for the quarterback fake and tackling the fullback—only to discover that the quarterback had kept the ball and scored on a bootleg play. The “goods or services” here are the leased vehicle and the lease agreement. There was no complaint about the vehicle. Furthermore, the lease agreement does not impose a duty on Petitioner to defend a lawsuit arising out of the use of the vehicle, nor to indemnify or hold Respondent harmless for any damages relating to the transaction. It merely represented that Petitioner would provide liability coverage and this was done. The fact that National Union refused to defend Respondent is not Petitioner’s problem. Respondent had a cause of action against National Union for failure to defend. This lawsuit was brought for the wrong cause of action against the wrong party.

For the above reasons, I concur with the result.

GONZALEZ, JUSTICE.

What are the concerns of JUSTICE GONZALEZ?

3. 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).

4. 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).

5. 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).

6. 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 2

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?

IV. 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 pur-
chased 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?]

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**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 . . .
CHAPTER 1. DECEPTIVE TRADE PRACTICES ACT

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 AND 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 Youngblooeds, 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).
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
Court of Appeals of Texas, 1985
698 S.W.2d 382

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.

SEARS, JUSTICE, concurring.

I agree with the results reached in this appeal. However, I do so because the trial court entered findings of fact that appellant purchased an interest in the herd before the parties entered into a partnership agreement as to the raising and selling of the cattle. This finding of fact is not attacked on appeal.

In the event appellant had entered into a “joint venture” or a “partnership agreement” to raise and sell cattle, without first buying an interest in the herd, I would hold the transaction did not fall within the Texas Deceptive Trade Practices Act.

NOTES AND QUESTIONS

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.

* * *

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.

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**QUESTION**

Could the consumer have argued that the “object” of the 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 winner’s and the clerk was believed to be a “lucky seller”?

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”?

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CHAPTER 1. DECEPTIVE TRADE PRACTICES ACT

RIVERSIDE NATIONAL BANK
v.
LEWIS
Supreme Court of Texas, 1980
603 S.W.2d 169

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 Eldorado. 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.

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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. . . .

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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
CHAPTER 1. DECEPTIVE TRADE PRACTICES ACT

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.” Interestingly 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. Accordingly, Lewis was not a “consumer” who could bring suit under Section 17.50 of the DTPA.

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
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 AND 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.**

Supreme Court of Texas, 1983

661 S.W.2d 705

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 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.

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.
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 the 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.” Section 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
United States Court of Appeals, Fifth Circuit, 1992
970 F.2d 114

BROWN, JUDGE.

In this swelter of multi-court lawsuits, removal, remand, re-removal, settlement and a long-expected en banc decision, arising out of an atypical land transaction in which the lender allegedly fraudulently failed to make a loan as promised, these interrelated issues emerge: 1) whether the FDIC is a proper party which could remove; 2) whether the district court acquired jurisdiction after the FDIC removed the case from the state appellate court; 3) whether FIRREA applies to cases pending on the date of its enactment; 4) whether the FDIC’s voluntary dismissal from the case bars federal jurisdiction; and 5) the merits (or demerits) of the claims against the lender’s officers and agents, Hill and Bearden. The district court entertained jurisdiction and granted summary judgment in favor of the FDIC and the officers. First, due to the settlement of all claims involving the FDIC, we dismiss the FDIC from the case; second, we reverse the summary judgment in favor of Defendant Bearden on Walker/Brunson’s fraud claim; and third, we affirm the summary judgment in favor of Defendants as to Walker/Brunson’s fraud claim against Hill, and with respect to Walker/Brunson’s conspiracy and deceptive trade practice claims.

* * *

The Merits

This brings us to a review of the federal district court’s grant of summary judgment in favor of the FDIC and individual Defendants Hill and Bearden. Because all claims by and against the FDIC were dismissed at the outset of this opinion, we consider only the summary judgments awarded in favor of Hill and Bearden.

Walker/Brunson charged that Hill and Bearden were liable for violations of the Deceptive Trade Practices-Consumer Protection Act (DTPA) and for fraud, conspiracy, and estoppel. Specifically, Walker/Brunson asserted that Hill and Bearden promised, but never delivered on, a $21 million loan from Mainland to be advanced contemporaneously with the transfer of title to the IEC Building. Both Hill and Bearden moved for summary judgment on the basis that Texas law does not hold persons acting within the scope of their employment personally liable, which the district court granted. Based on our independent review of the summary judgment evidence, we reverse the summary judgment with respect to Walker/Brunson’s fraud claim against Bearden and remand for a trial on the merits, and affirm the summary judgment in all other respects.

* * *

(ii) DTPA

This brings us to the DTPA claims against Hill and Bearden. To avoid summary judgment, Walker/Brunson first were required to produce summary judgment evidence showing that they were consumers seeking or acquiring “by purchase or lease, any goods or services.” Defendants claim that summary judgment was proper on the DTPA claim because Walker/Brunson are not consumers within the meaning of the DTPA as a matter of law, reasoning that they did not seek or acquire goods or services by purchase or lease.
A pure loan transaction lies outside the DTPA based on the logic that money is neither a good nor service. Since 1980, however, Texas law has undergone considerable departure from this facially simple statement. In Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705 (Tex. 1983), the consumer sought financing for a house. Without overruling Riverside, the Supreme Court held that the DTPA applied, reasoning that plaintiffs were consumers since they “did not seek to borrow money; they sought to acquire a house.” Similarly, in Knight v. Int’l Harvester Credit Corp., 627 S.W.2d 382 (Tex. 1982), plaintiff was a consumer since he sought a loan in order to purchase a dump truck. In both cases, however, the goods or services sought by the borrower formed the basis for the DTPA complaint. Based on this distinguishing factor, the court in Central Texas Hardware v. First City, 810 S.W.2d 234, 237 (Tex. App.—Houston [14th Dist.] 1991, writ denied), recently held that the plaintiff was not a consumer simply because he intended to acquire seasonal inventory goods with the loan. Because the plaintiff did not allege any complaint regarding the inventory items they intended to purchase with the loan, the court ruled that the second step of the two-prong test in determining consumer status was not satisfied.

Likewise, in the instant case, although Walker/Brunson sought to use the multi-million dollar loan for the construction of a 238-room Homotel, they allege no complaint pertaining to the Homotel itself. We find that Walker/Brunson are not consumers within the meaning of the DTPA, and hold that summary judgment was correctly granted in favor of Defendants with respect to Walker/Brunson’s DTPA claim.

**QUESTIONS**

1. What is the test under Flenniken for determining if a person is a consumer with respect to a bank? Must the consumer be complaining about the goods or services purchased? How do you view the transaction? Is Walker a correct application of Flenniken? Compare the decision in Megason v. Red River Employees Federal Credit Union, 868 S.W.2d 871 (Tex. App.—Texarkana 1993) wherein the court noted:

   The goods sought to be acquired must form the basis of the complaint for a consumer to prevail in a DTPA action. The summary judgment evidence here establishes that Megason’s complaint is that Red River sold the repossessed automobile for less than the amount agreed. Thus, her complaint relates directly to the good sought and brings her complaint within the provisions of the DTPA. It is not necessary that the complaint be based on a defect, condition, or inadequacy of the good itself.

2. Assume consumer goes to bank to borrow money to buy a car. The bank, in order to induce consumer to sign the loan agreement, misrepresents the terms of the loan. May consumer maintain a DTPA action against bank? Does it matter if consumer is satisfied with the car? For a general discussion of banks and the DTPA, see Krahmer, Lovell and McCormick, Banks and the Texas Deceptive Trade Practices Act, 18 TEX. TECH L. REV. 1 (1987). Most courts recognize that a borrower only qualifies as a consumer under the DTPA if her “primary objective in obtaining the loan was to acquire a good or service, and that good or service forms the basis of the complaint.” Miller v. BAC Home Loans Servicing, L.P., 726 F.3d 717, 725 (5th Cir. 2013). See, e.g., Villarreal v. Wells Fargo Bank, N.A., 814 F.3d 763 (5th Cir. 2016) (Services incidental to a loan cannot provide basis for consumer standing under DTPA.); Payne v. Wells Fargo Bank Nat’l
Ass’n, 2016 U.S. App. LEXIS 2400 (5th Cir. 2016) (per curiam) (Complaint based on lending activities is not covered by DTPA.);
Perkins v. Bank of Am., 2015 U.S. App. LEXIS 3457 (5th Cir. 2015) (A person who seeks refinancing is not a consumer under DTPA.);
Guajardo v. JP Morgan Chase Bank, N.A., 2015 U.S. App. LEXIS 3731 (5th Cir. 2015) (A claim based on a loan modification not subject to DTPA.);
Wagner v. PennyMac Loan Servs. LLC, 2016 U.S. Dist. LEXIS 78422 (N.D. Tex. 2016) (Sole purpose to borrow money is not within scope of DTPA.);
Rivers v. Bank of Am. N.A., 2016 U.S. Dist. LEXIS 82776 (N.D. Tex. 2016). (Complaint based on foreclosure not within scope of DTPA.);
Franco v. U.S. Bank Nat’l Ass’n, 2014 U.S. Dist. LEXIS 125634 (W.D. Tex. 2014) (Loan modification is not a good or service.);
Sanchez v. Wells Fargo Bank, N.A., 2014 U.S. Dist. LEXIS 159688 (W.D. Tex. 2014) (Loan or loan modification is not a good or service.);

3. A “consumer” may maintain a cause of action under the DTPA. Whether the defendant has done what the consumer has alleged should not affect the determination of consumer status. Consider the following quote from Riddick v. Quail Harbor Condominium Assoc., 7 S.W.3d 663 (Tex. App.—Houston [14th Dist.] 1999), “because appellant produced no evidence to show any deceptive trade practice in violation of DTPA, the trial court did not err in finding appellant was not a “consumer” because his cause of action was for contract only.” Do you agree with the court’s analysis? Does a person lose consumer status if he or she fails to establish a violation of the Act?

4. To constitute “goods” the thing purchased must be purchased for “use.” When is something not purchased for “use”? Is resale “use”? Consider the following opinion.

BIG H AUTO AUCTION, INC.
v.
SAENZ MOTORS
Supreme Court of Texas, 1984
665 S.W.2d 756

CAMPBELL, JUSTICE.

This is a deceptive trade practices case. Saenz Motors, a used car dealer, sued Big H Auto, for damages resulting from the purchase of two vehicles. The trial court held Saenz Motors was not a consumer under the Deceptive Trade Practices Act (DTPA) and rendered judgment for actual damages only. The court of appeals reversed the trial court judgment holding that Saenz Motors was a consumer and awarded treble damages and attorneys’ fees. . . . We affirm the judgment of the court of appeals.

In December 1978, Saenz Motors bought from Big H Auto Auction, Inc. a 1976 Dodge Van and a 1979 Ford Thunderbird for $9,340.00. At the sale, Big H told Saenz Motors that the original titles had been lost, and provided certified copies of the original titles. The cars were resold by Saenz Motors and the new owners were refused certificates of title by the Department of Public Safety because the automobiles had been stolen. Saenz Motors then requested Big H to return its money. When Big H refused, Saenz Motors sued Big H for treble damages, attorneys’ fees and costs under the DTPA.
Our question is whether a buyer of goods for resale is a consumer under the DTPA. Specifically, the issue is whether resale of goods constitutes “use” as required by the DTPA. The statutory provisions that govern are those in effect at the time the act occurred, 1978. . . . At the time of these actions, the pertinent parts of the DTPA then applicable were:

Sec. 17.45. Definitions

As used in this subchapter:

1) “Goods” means tangible chattels or real property purchased or leased for use. . . .

4) “Consumer” means an individual, partnership, corporation, or governmental entity who seeks or acquires by purchase or lease, any goods or services.

Unfortunately, the legislature failed to define use and failed to define the scope of the Act. To determine legislative intent we will study the history of the Act.

In 1973, the Act was introduced in the House of Representatives as H.B. 417. The same bill was introduced in the Senate as S.B. 75. Both forms defined goods, services and consumer as:

(1) “Goods” means tangible chattels bought for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for such goods, and including goods, which, at the time of the sale or subsequently, are to be affixed to real property, as to become a part of the real property whether or not severable.

(2) “Services” means work, labor, and services for other than commercial or business use, including services furnished in connection with the sale or repair of goods.

(3) “Consumer” means an individual who seeks or acquires by purchase or lease, any goods or services for personal, family, or household purposes.

On the Senate floor, Senator Snelson offered an amendment to the proposed Act and stated:

Mr. President and members of the Senate, in reading the definition of “goods,” it seems to me that business people also could be the victims of deceptive practices in purchases of various equipment which they use and I don’t see the purpose of nailing down the definition to the extent that they have it there because even if I am victimized in my business, I feel that I should have a right to an action under this particular bill. So that’s the purpose of it. I think that the definition simply draws it down to what we are talking about and if there has been a deceptive practice in the sale of tangible goods to one that they should have access to the remedy, and that is the whole purpose of it.

Transcript of a Portion of the Floor Debate on S.B. 75, April 13, 1973. “The personal, family or household purpose was stricken and the Act passed the Senate with new definitions of “Goods” and “Consumer”: (1) “Goods” means tangible chattels bought for use. (2) “Consumer” means an individual who seeks or acquires by purchase or lease any goods or services.”

The House of Representatives concurred with the amended Senate Bill and H.B. 417, as amended, was signed by the Governor.

In 1975, the scope of “consumer” was again changed in what we consider to be a broadening of the term. Senate Bill 48 sought to add the word “final” so that “goods” would mean “tangible chattels or real property purchased for final use” and “services” means “work, labor, or service...
purchased or leased for final use and for other than commercial or business use. . . .” The word “final” was stricken prior to final passage. In support of deleting “final,” a representative of the Texas Automobile Dealer Association testified that if “use” were restricted to “final use” automobile dealers would lose their standing to sue companies or individuals who sell products which are intended to be sold to dealers’ customers. In Senate floor debate, Senator Mauzy stated that “final” had been inadvertently added by the Senate Human Resources Committee, and that the amendment to delete the word was a committee amendment; that a consumer is a person who makes use of the goods but may not be the final user, and, that inserting the word would be restrictive and less broad than the present law. Senator Meier argued that the purpose of the Act was not to protect those buying goods for further processing or further marketing. Also, the Act was further amended to add to the definition of “consumer” corporations and partnerships. . . .

In 1977, the Act was again amended. The “commercial or business use” exemption was deleted, thus removing all possible restriction on the word “use.” Also, governmental entities were added to the definition of consumer.

The Act, as originally passed in 1973, included a definition of “merchant” as meaning a party to a consumer transaction other than a consumer. Merchant was deleted from the definition section in 1977. With this history, we now have the Act as it existed in 1978.

Sec. 17.45. Definitions—As used in this subchapter:

1) “Goods” means tangible chattels or real property purchased or leased for use. . . .

4) “Consumer” means an individual, partnership, corporation, or governmental entity who seeks or acquires by purchase or lease, any goods or services.

Did the legislature intend that goods bought for resale be covered by the DTPA? It is a common statutory construction rule that if the legislature does not define a term, its ordinary meaning will be applied. . . . “Use” was defined in Southwestern Telegraph & Tel. Co. v. City of Dallas, 174 S.W. 636 (Tex. Civ. App.—Dallas 1915, writ ref’d), as follows: “‘Use’ means to make use of; to convert to one’s own service; to put to a purpose; to hold, occupy, enjoy, or take the benefit of.” BLACK’S LAW DICTIONARY (Rev. 4th ed., 1968) says that in the non-technical sense, the “‘use’ of a thing means that one is to enjoy, hold, occupy, or have some manner of benefit thereof.” The word “use,” as used in The Texas Tort Claims Act, was defined in Beggs v. Texas Dep’t. of Mental Health & Mental Ret., 496 S.W.2d 252, 254 (Tex. Civ. App.—San Antonio 1973, writ ref’d), as “to put or bring into action or service; to employ for or apply to a given purpose.” However, in Pennington v. Singleton, 606 S.W.2d 682 (Tex. 1980), this Court held that in construing the DTPA, a court is not necessarily confined to the literal meaning of the words used and that legislative intent rather than the strict letter of the Act will control. The intent should be determined from the entire Act and not from an isolated part. We are mandated by § 17.44 of the DTPA that the Act be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false misleading and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.

Consumer, under the 1977 Act, means any individual, partnership or corporation who seeks or acquires by purchase or lease any goods or services. Saenz Motors is a consumer. The sale and representation by Big H of stolen vehicles was a deceptive business practice and an unconscionable action. Saenz, whether an individual, partnership or corporation, whether large or small, was
deprived of $9,340.00 for whatever use was intended to be made of the cars. To limit “use” would be contrary to the statutory mandate of § 17.44 on construction and application of the Act.

The cases holding that a purchase for resale is not a use are inapplicable.

* * *

We hold that the purchase by Saenz Motors of two vehicles from Big H Auto Auction, Inc., for resale, is a “use” within the meaning of the Act. The judgment of the court of appeals is affirmed.

BARROW, JUSTICE, dissents.

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V. BUSINESS CONSUMER

There is one exception within the definition of “consumer,” the “business consumer.” Business consumer is defined by section 17.45(10) as “an individual, partnership, or corporation who seeks or acquires by purchase or lease, any goods or services for commercial or business use. The term does not include this state or a subdivision of this state.” The Act includes business consumers with assets of less than $25 million dollars. How do you value assets? Who has the burden of proving the applicability, or non-applicability, of the exception?

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ECKMAN
v.
CENTENNIAL SAVINGS BANK

Supreme Court of Texas, 1990
784 S.W.2d 672

HIGHTOWER, JUSTICE.

* * *

A plaintiff must be a “consumer” to maintain a private action under the DTPA. The DTPA defines a consumer as:

. . . 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.

TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987). “Business consumers” are defined to include individuals, partnerships, or corporations who seek or acquire by purchase or lease, any goods or services for commercial or business use. TEX. BUS. & COM. CODE ANN. § 17.45(10) (Vernon 1987). Thus, business consumers, whether individuals or businesses, with assets of $25,000,000 or more are excluded from DTPA coverage. This case raises the narrow issue of whether the plaintiff must plead and prove the inapplicability of the $25,000,000 exception or
SECTION TWO: PROPER PARTY PLAINTIFF—CONSUMER

whether the defendant has the burden to plead and prove the applicability of the $25,000,000 exception as an affirmative defense.

The Eckman group asserts that the court of appeals erred in holding that the plaintiffs had the burden to plead and prove that they did not have assets of $25,000,000 or more in order to qualify as a “business consumer” under the DTPA. In response, Centennial asserts that the Eckman group should be required to show that they did not have assets of $25,000,000 or more as part of the proof required to establish consumer status.

In support of the proposition that the defendant should bear the burden to plead and prove the applicability of the $25,000,000 exception of section 17.45(4), the Eckman group relies upon Challenge Transportation v. J-Gem Transportation, Inc., 717 S.W.2d 115 (Tex. App.—Houston [14th Dist.] 1986, writ ref’d n.r.e.). In that case, the court of appeals held that the defendant had the burden to plead and prove that the plaintiff fell within the category of excepted businesses. The court observed that:

J-Gem pled and proved by undisputed evidence that it was a corporation which had acquired services by lease; in so doing J-Gem satisfied its burden of proof regarding its status as a consumer. J-Gem was not required to prove a negative by showing it did not fall within the exception. Appellants had the burden of proving the affirmative defense that J-Gem fell within the category of excepted businesses.  

Id. at 117. We agree with the Eckman group and hold that the defendant has the burden to plead and prove the applicability of the $25,000,000 exception to business consumer status as an affirmative defense.

Treating the $25,000,000 exception as an affirmative defense promotes efficiency in DTPA litigation. The comparative likelihood that a certain situation may occur in a reasonable percentage of cases should be considered when determining whether a fact should be allocated as an element of the plaintiff’s case or to the defendant as an affirmative defense. Obviously, most litigants do not have assets of $25,000,000 or more. Requiring every DTPA plaintiff to prove that he is not a multimillionaire would be an inefficient and uneconomical use of judicial resources. Section 17.44 requires that the DTPA “shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers . . . and to provide efficient and economical procedures to secure such protection.” Tex. Bus. & Com. Code Ann. § 17.44 (Vernon 1987). Requiring the defendant to plead and prove the $25,000,000 exception as an affirmative defense is consistent with the statutory mandate “to provide efficient and economical procedures” to protect consumers. Adopting this procedure best serves the interests of judicial efficiency and economy.

Since in most cases the claimant does not have assets of $25,000,000 or more, the burden of raising and negating the applicability of the $25,000,000 exception to business consumer status should not be cast upon the plaintiff. The result reached by the court of appeals in this case is unduly prejudicial toward a business consumer in a DTPA suit because the claimant would be required to plead and prove both that he is a consumer under section 17.45(10) and that he does not fall within the $25,000,000 exception to business consumer status under section 17.45(4). If the plaintiff should fail to plead specifically the inapplicability of the exception and fail to produce evidence that he falls outside the exception, the defendant would be entitled to a directed verdict. Barring a plaintiff’s recovery because he did not raise and prove the inapplicability of an exception to standing would be unfair, especially if the plaintiff had succeeded in pleading and proving all other elements necessary for recovery under the DTPA.
Under our present holding—treating the $25,000,000 exception as an affirmative defense—evidence concerning the plaintiff’s financial status is irrelevant unless the issue is raised by the defendant. However, once the issue is raised, information concerning the plaintiff’s assets and financial status will be discoverable to determine the applicability of the $25,000,000 exception. This court has long recognized the danger that a jury will be prejudiced by evidence of a party’s financial status. As a result, Texas courts have been cautious concerning evidence of a party’s wealth. Consequently, whenever possible, trial courts and parties should attempt to resolve the applicability of the $25,000,000 exception prior to trial. For the reasons explained herein, we hold that the defendant has the burden to plead and prove the applicability of the $25,000,000 exception to business consumer status as an affirmative defense.

***

Accordingly, we reverse and remand the cause to the court of appeals.

QUESTIONS

1. How do you value assets? Suppose that a business consumer owns a building appraised at $50 million but encumbered by a $53 million mortgage. Is she a DTPA “consumer”? What about the farmer with large land holdings but larger debt? When is the relevant time for determining assets? For many businesses, assets widely fluctuate. Is the relevant date the date negotiations begin, the date of the contract, the date of the misrepresentation, the date the petition is filed, or the date of the trial? Which time makes the most sense?

2. In Symons Group v. Motorola, Inc., 292 F3d 466 (5th Cir. 2002), the court considered what test to apply when determining the meaning of the term “assets” for purposes of the business consumer exception.

Hugh Symon claims that Motorola violated the DTPA, TEX. BUS. & COM CODE § 17.44, by “misrepresenting the quality, grade and characteristics of its MPC821 micro processing chip.” The elements of a valid DTPA complaint are: (1) the plaintiff is a consumer; (2) the defendant engaged in false, misleading, or deceptive acts; and (3) these acts constituted a producing cause of the consumer’s damages. A consumer is defined as:

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.

Id. § 17.45(4) (emphasis added). Therefore, a complaining plaintiff under the DTPA must be a consumer meeting the definition of § 17.45(4).

“Assets” for the purposes of § 17.45(4) means “gross assets.” See Eckman v. Centennial Savings Bank, 784 S.W.2d 672, 673 n.3, 674 (Tex. 1990). Hugh Symons’s total gross assets exceed $25 million, disqualifying it as a “consumer” capable of bringing a claim under the DTPA. It contends, however, that Concept Technologies was the interested party bringing the DTPA suit and that Concept had less
than $25 million in assets. Further, Hugh Symons asserts that it transferred its shares in Concept to Elata, plc, on October 17, 2000. Symons then substituted in as the plaintiff on December 29, 2000. Concept then assigned its interest in the DTPA suit to Symons on March 5, 2001.

Where a DTPA plaintiff is asserting a claim acquired by assignment, the assignor’s consumer status controls. *PPG Indus., Inc. v. JMB/Houston Ctr. Partners Ltd. Partnership*, 41 S.W.3d 270, 279 (Tex. App.—Houston [14th Dist.] 2001, pet. granted). Therefore, Hugh Symons contends, because Concept held less than $25 million in assets, it was a consumer under the DTPA and Hugh Symons, as its assignee, may pursue the suit. We disagree. At all pertinent times—at the time of the alleged violation of the DTPA and at the time that the lawsuit was brought—Concept was a wholly-owned subsidiary of Symons. Despite the later transfer of shares within the Hugh Symons family of businesses, § 17.45(4) acts to bar an entity controlled by another with assets of greater than $25 million from bringing a DTPA suit because it is a non-consumer.

VI. WAIVER

As a general rule, any waiver of the DTPA is void and unenforceable. Section 17.42 allows a consumer to waive the Act in only limited circumstances. This section states:

§ 17.42. Waivers: Public Policy.

(a) Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void; provided, however, that a waiver is valid and enforceable if:

1. the waiver is in writing and is signed by the consumer;
2. the consumer is not in a significantly disparate bargaining position; and
3. the consumer is represented by legal counsel in seeking or acquiring the goods or services.

(b) A waiver under Subsection (a) is not effective if the consumer’s legal counsel was directly or indirectly identified, suggested, or selected by a defendant or an agent of the defendant.

(c) A waiver under this section must be:

1. conspicuous and in bold-face type of at least 10 points in size;
2. identified by the heading “Waiver of Consumer Rights,” or words of similar meaning; and
3. in substantially the following form:

“I waive my rights under the Deceptive Trade Practices-Consumer Protection Act, Section 17.41 et seq., Business & Commerce Code, a law that gives consumers special rights and protections. After consultation with an attorney of my own selection, I voluntarily consent to this waiver.”

(d) The waiver required by Subsection (c) may be modified to waive only specified rights under this subchapter.

(e) The fact that a consumer has signed a waiver under this section is not a defense to an action brought by the attorney general under Section 17.47.
Consider the following problem.

Tommy Morrow was in the process of purchasing a new home. After shopping around for a builder and a home he finally narrowed his choices down to two. He then chose the one he liked the most. After discussing the details of the home and agreeing to most of the costs, he was presented with a formal contract to sign. The contract contained the following provisions:

20. DTPA Waiver:

WAIVER OF CONSUMER RIGHTS

I WAIVE MY RIGHTS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES—CONSUMER PROTECTION ACT, SECTION 17.41 ET SEQ., BUSINESS COMMERCE CODE, A LAW THAT GIVES CONSUMERS SPECIAL RIGHTS AND PROTECTIONS.

AFTER CONSULTATION WITH AN ATTORNEY OF MY OWN SELECTION, I VOLUNTARILY CONSENT TO THIS WAIVER.

____________________________________
Buyer

Is this waiver valid under the DTPA? What additional information, if any, would you need?

SECTION THREE: STATUTORY EXEMPTIONS TO THE DTPA

In 1995, the Texas Legislature enacted several exemptions to the DTPA. Section 17.49 states:

§ 17.49. Exemptions.

(a) Nothing in this subchapter shall apply to the owner or employees of a regularly published newspaper, magazine, or telephone directory, or broadcast station, or billboard, wherein any advertisement in violation of this subchapter is published or disseminated, unless it is established that the owner or employees of the advertising medium have knowledge of the false, deceptive, or misleading acts or practices declared to be unlawful by this subchapter, or had a direct or substantial financial interest in the sale or distribution of the unlawfully advertised good or service. Financial interest as used in this section relates to an expectation which would be the direct result of such advertisement.

(b) Nothing in this subchapter shall apply to acts or practices authorized under specific rules or regulations promulgated by the Federal Trade Commission under Section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C.A. 45(a)(1)]. The provisions of this subchapter do apply to any act or practice prohibited or not specifically authorized by a rule or regulation of the Federal Trade Commission. An act or practice is not specifically authorized if no rule or regulation has been issued on the act or practice.
(c) Nothing in this subchapter shall apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill. This exemption does not apply to:

(1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion;

(2) a failure to disclose information in violation of Section 17.46(b)(24);

(3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion;

(4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion; or

(5) a violation of Section 17.46(b)(26).

(d) Subsection (c) applies to a cause of action brought against the person who provided the professional service and a cause of action brought against any entity that could be found to be vicariously liable for the person’s conduct.

(e) Except as specifically provided by Subsections (b) and (h), Section 17.50, nothing in this subchapter shall apply to a cause of action for bodily injury or death or for the infliction of mental anguish.

(f) Nothing in the subchapter shall apply to a claim arising out of a written contract if:

(1) the contract relates to a transaction, a project, or a set of transactions related to the same project involving total consideration by the consumer of more than $100,000;

(2) in negotiating the contract the consumer is represented by legal counsel who is not directly or indirectly identified, suggested, or selected by the defendant or an agent of the defendant; and

(3) the contract does not involve the consumer’s residence.

(g) Nothing in this subchapter shall apply to a cause of action arising from a transaction, a project, or a set of transactions relating to the same project, involving total consideration by the consumer of more than $500,000, other than a cause of action involving a consumer’s residence.

(h) A person who violates Section 17.46(b)(26) is jointly and severally liable under that subdivision for actual damages, court costs, and attorney’s fees. Subject to Chapter 41, Civil Practice and Remedies Code, exemplary damages may be awarded in the event of fraud or malice.

(i) Nothing in this subchapter shall apply to a claim against a person licensed as a broker or salesperson under Chapter 1101, Occupations Code, arising from an act or omission by the person while acting as a broker or salesperson. This exemption does not apply to:

(1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion;

(2) a failure to disclose information in violation of Section 17.46(b)(24); or

(3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion.

What is the purpose of such broad exceptions? When may a professional be liable under the Act? How do you apply the exceptions? Consider the following:
RETHERFORD, JR.
v.
CASTRO
Court of Appeals of Texas, 2012
378 S. W.3d 29

GRAY, CHIEF JUSTICE.

Wesley Retherford, a TREC-licensed professional home inspector, appeals from a judgment entered against him pursuant to the Deceptive Trade Practices Act. TEX. BUS. & COM. CODE Ch. 17 (West 2011). Retherford was sued pursuant to the DTPA and for negligent misrepresentation. After a bench trial, the trial court entered a judgment for violations of the DTPA only. Retherford complains that the trial court failed to properly apply the professional services exemption to the DTPA and that the evidence was legally insufficient for the trial court to find that he had violated the DTPA. Because we find that the professional services exemption applies and no exceptions to that exemption were met, we reverse the judgment of the trial court and remand for a new trial on the issue of negligent misrepresentation.

Factual Background

Retherford, a TREC-licensed professional real estate inspector, was hired by Frank and Terri Castro to perform a home inspection of a residence that they had signed a contract to purchase. Retherford completed the inspection in March of 2008 and noted in the “Roof Structure and Attic” section that it was “Not Functioning or in Need of Repair” because there was water damage in the attic and also observed that there was water damage in two rooms of the house, but believed that the water damage was caused by condensation from the metal roof resulting from a lack of ventilation. Retherford indicated that the water damage was not a serious issue in his inspection report, although he included photos of the relevant areas. In the report, Retherford also gave the Castros advice on how to fix the ventilation issues in the attic. Retherford noted that the roof covering was inspected but stated “No problems were noted.” The Castros purchased the house “as is.”

In October of 2008, in the first big rain after the Castros’ purchase, approximately three inches of rain fell and water started running down the wall of Castro’s residence in the same place where the water damage was noted on the inspection report. The Castros went up on the roof to look for problems and discovered loose screws on the roof, some of which were visibly noticeable and could be turned with their fingers. In November of 2008, Castro took photographs of the roof from the attic which showed the same damage Retherford had included in his report.

The Castros repaired the roof in April of 2009 but could not afford to replace the roof entirely as recommended. Prior to having the roof repaired, in March of 2009, the Castros had a second TREC-licensed professional home inspector to inspect the roof and ascertain why the roof was leaking. This inspector determined that many of the screws on the roof were loose and found black discoloration stains around the screw shanks in the attic, which he contended showed long-term water damage of more than twelve months’ age. The inspector observed screws that were sticking up out of the roof from the ground which he also believed had been in that state for at least a year.

The second inspector explained the proper method to inspect a metal roof and opined that the leaks would have been discovered if Retherford had the necessary experience and knowledge to properly inspect the roof, although he did not know Retherford or anything about his qualifica-
tions. Further, pursuant to TREC rules regarding home inspections the cause of the moisture was not required to be disclosed but that adequate ventilation would not have solved the problem of the moisture because it was actually caused by a leaking roof.

The individual who repaired the roof also testified that the black discoloration he observed in the wooden beams in the attic had to have been there for longer than twelve months and that he found approximately 200 screws of varying degrees of looseness on the roof out of approximately 1500 on the entire roof when his company repaired the roof.

The Castros ultimately sued Retherford and alleged violations of the DTPA and a claim for negligent misrepresentation. At the trial before the court, the trial court found that Retherford represented that his services had characteristics, uses, and benefits which they did not have and that he represented that his services were of a particular standard or quality when they were not. The trial court entered judgment for the cost of the repairs and attorney’s fees.

**Professional Services Exemption**

The DTPA was designed to “protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.” However, the DTPA provides an exemption from liability to those who render professional services when the essence of that service is based on providing advice, judgment, or opinion. *Tex. Bus. & Com. Code Ann. § 17.49(c)* (West 2011), amended by Act of May 28, 2011, 82d Leg., R.S., ch. 189, § 17.49, 2011 Tex. Sess. Law Serv. (West). A professional service is one that arises “out of acts particular to the individual’s specialized vocation.” *Nast v. State Farm Fire & Cas. Co.*, 82 S.W.3d 114, 122 (Tex. App.—San Antonio 2002, no pet.) “An act is not a professional service merely because it is performed by a professional; rather, it must be necessary for the professional to use his specialized knowledge or training.”

Once an individual is determined to have provided “professional services,” there are several exceptions for which the exemption does not apply, such as misrepresentations of fact, failures to disclose information in violation of section 17.46(b)(24), unconscionable actions or courses of action, breaches of an express warranty, or violations of section 17.46(b)(26).

What professions are included in the professional services exemption was not statutorily defined. Generally, lawyers, accountants, and doctors have qualified for this exemption as long as the conduct at issue involves the giving of advice, judgments, or opinions. What other professionals are included or what criteria should be used to determine who is a professional for purposes of the DTPA has not been established with any degree of certainty and rarely has been addressed, much less squarely decided, by the appellate courts. When the professional services exemption was enacted, the Legislature could not agree on a definition and therefore, did not include one and left the language vague. *See David Skeels, The DTPA Professional Services Exemption: Let ’em be Doctors and Lawyers and Such, 55 Baylor L. Rev. 783, 805 & n.97* (2003) (discussion of the legislative history of the exemption).

There are other causes of action that have addressed what constitutes “professional services,” such as insurance policy coverage claims and negligent misrepresentation causes of action. In a case relating to insurance policy exclusions for professional services, the Eastland Court of Appeals has suggested that a professional: (1) engages in work involving mental or intellectual rather than physical labor, (2) requires special education to be used on behalf of others, and (3) earns profits dependent mainly on these considerations. *See Duncanville Diagnostic Ctr., Inc. v.

A cause of action against individuals in certain professions for negligent representation could be compared with those to be considered to be providing “professional services” for purposes of the exemption. This is because a cause of action for negligent representation relates to representations made in the course of a defendant’s business or in a transaction in which he has a pecuniary interest wherein he supplies “false information” for the guidance of others in their business, which has been applied to professionals in various occupations. Fed. Land Bank Ass’n of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991); see also Restatement (Second) Of Torts § 552 (1977); McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 791 (Tex. 1999) (acknowledging the application of section 552 to other professionals, including auditors, physicians, real-estate brokers, securities placement agents, accountants, surveyors, and title insurers and extending the application to attorneys).

The Occupations Code defines a real estate inspection as “a written or oral opinion as to the condition of the improvements to real property, including structural items, electrical items, mechanical systems, plumbing systems, or equipment.” These inspections may be performed by a professional inspector, who is “a person who represents to the public that the person is trained and qualified to perform a real estate inspection and who accepts employment to perform a real estate inspection for a buyer or seller of real property.”

In order to qualify as a professional real estate inspector, a person must have held a real estate inspector’s license for twelve months, have performed at least 175 real estate inspections with indirect supervision, completed at least 30 more hours of “core real estate inspection courses” in addition to those required to qualify as a real estate inspector, completed 8 classroom hours studying the “standards of practice, legal issues, or ethics related to the practice of real estate inspecting,” and pass an exam.

To qualify as a real estate inspector, a person must have held an apprentice home inspector’s license for three months, have completed at least 25 inspections under direct supervision, completed 90 classroom hours of “core real estate inspection courses,” be sponsored by a professional real estate inspector, and pass an exam. There are no educational or other requirements beyond age, citizenship, and character in order to qualify as an apprentice inspector.

There have been other specific statutes enacted that protect other “professions” who provide “professional services” enacted by the Legislature since the adoption of the exemption, such as architects and engineers. See, e.g., Tex. Civ. Prac. & Rem. Code Ann. Ch. 150 (West 2011) (architects, engineers, and surveyors). However, the professions covered by those statutes are specifically defined by statute. Section 17.49 of the DTPA was amended recently to specifically exclude brokers and sellers of real estate included in Chapter 1101 of the Occupations Code from liability under the DTPA for advice or opinions while acting as a broker or seller, with exceptions to the exclusion for misrepresentations of fact, failures to disclose, and unconscionability. Licensed professional home inspectors are not included in Chapter 1101 of the Occupations Code, but are addressed in Chapter 1102.

Retherford cites to one case that he contends classifies a home inspector as a professional under the DTPA. See Head v. U. S. Inspect DFW, Inc., 159 S.W.3d 731 (Tex. App.—Fort Worth 2005, no pet.). However, in Head the specific issue of whether the report prepared by the home inspector qualifies as professional services was “assumed” by the parties and the court specifically did not address whether the home inspection constituted professional services.
Before 1981, there were no requirements for real estate inspectors. To address this, the Legislature enacted legislation to require inspectors to register with the State and post a surety bond. Then, in 1985, the Legislature created the requirement of licensure for real estate inspectors. The creation of the current three levels of inspectors was established in 1991. However, at that time, the top level of inspector was entitled “real estate inspector.” In 1993, the Legislature amended the three levels and renamed them, with the top level becoming the “professional real estate inspector” and the “real estate inspector” a level beneath that. The real estate inspector was then required to work under the indirect supervision of a professional real estate inspector.

The professional services exemption was added to the DTPA in 1995.

The title of “professional real estate inspector” is similar to that of a “licensed professional engineer” or “registered professional land surveyor” as used in Chapter 150 of the Civil Practice and Remedies Code. We believe that the amendments to Chapter 1102 of the Occupations Code changing the title of the highest level of real estate inspector from “real estate inspector” to “professional real estate inspector” indicates that the Legislature regarded achieving that level to demonstrate a higher degree of specialization.

We believe that another indicator of professional status to be that the Legislature has imposed a requirement of carrying liability insurance with a minimum limit of $100,000 per occurrence to protect against a violation of Subchapter G of Chapter 1102 of the Occupations Code, which refers to prohibited acts, including negligence, dishonesty, and violating any statutes or rules. Additionally, the Legislature established the Real Estate Inspection Recovery Fund for the specific purpose of collecting claims against inspectors for violations of statutes or rules in Subchapter G. Subchapter I includes discipline procedures, administrative, and criminal penalties for prohibited acts in certain circumstances. These requirements and provisions indicate that the Legislature has placed significance on the role of the home inspector.

In order to fulfill the broad objectives of the DTPA and yet give full meaning to the exemption for professional services from its application it is necessary to draw the line somewhere regarding who is a professional, preferably an objective one. We agree with the Eastland Court of Appeals’ definition that a professional: (1) engages in work involving mental or intellectual rather than physical labor, (2) requires special education to be used on behalf of others, and (3) earns profits dependent mainly on these considerations. We find that a professional real estate inspector fits these qualifications.

Upon determining that an individual is a professional, we must next determine whether the conduct complained of involved services that the essence of which is providing advice, judgment, or an opinion. Clearly the contents of the real estate inspection report constituted the inspector’s opinion as to the condition of the house, as it has been statutorily defined as such. Further, the essence of an inspector’s service is providing that opinion. We find that the professional services exemption applies to the report of professional real estate inspectors.

Our inquiry then shifts to a determination of whether any of the exceptions to the exemption applies. The trial court found that Retherford’s representations were “representations of fact which cannot be characterized as advice, judgment or opinion.” The representations were that Retherford’s services had characteristics, uses, and benefits which they did not have and that his services were of a particular standard or quality when they were not.
No findings of fact or conclusions of law were requested by either party. In the absence of written findings, we imply that the trial court made all necessary findings and we will uphold the judgment on any legal theory supported by the evidence.

The Castros complained that Retherford was unqualified to inspect a metal roof, that he did not perform the inspection according to TREC rules, he did not inspect the screws on the roof, and went beyond the scope of the inspection when he gave his opinion as to the cause of the water damage in the attic. In determining whether the Castros’ misrepresentation claim is barred by the professional services exemption or meets one of the exceptions to the exemption, we look to the underlying nature of the claim, which ultimately is a breach of contract and negligence in rendering the inspection services.

The facts and claims alleged in *Head v. U.S. Inspect DFW, Inc.* are similar in nature to those asserted by the Castros. In *Head*, the complaints were that the inspection report did not disclose a leaking roof and that the inspection was completed in part by an apprentice inspector, neither of which fit an exception to the professional services exemption. We agree with the analysis in *Head* that the findings contained in the inspection report were the opinions of Retherford and were not representations of fact. Additionally, Retherford’s qualifications and how he performed the inspection cannot be pursued as a DTPA claim, but are claims for breach of contract, which is not actionable under the DTPA. We find that the trial court erred by finding that the professional services exemption did not preclude the Castros’ claims because they did not constitute misrepresentations of fact. We sustain issue one. Because of this holding, we do not reach Retherford’s second issue.

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**Conclusion**

Because we have found that the professional services exemption applies in this case, we reverse the judgment of the trial court and remand for a new trial on the issue of negligent misrepresentation.

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**PROBLEM 3**

Casey Consumer consulted attorney Roger Wilkins about possibly representing her in a claim against her employer. Casey had been fired and believed that she had been wrongfully terminated.

Wilkins, who knew a little about employment law, but nothing about the ADA, told Casey that her firing appeared to be wrongful, “because the employer had no basis to fire her.” (In fact, under Texas law there is no question that her termination was proper. The termination may, however, have been improper under federal law, the Americans with Disabilities Act.) He told her he had handled many similar cases (In fact, this was his first employment case; as a recent graduate this was only his second case), and that there was a very good chance that she would recover in excess of $100,000. (In fact, he had no idea if she would even win.)

Based on these statements, Casey, who had never spoken with an attorney before and was overwhelmed by his oratory skills and appearance of intelligence,
agreed to retain him. He told her he would need a $10,000 non-refundable retainer, which she paid.

Needless to say, Wilkins quickly discovers that he has no claim under state law, so he informs his client that after extensive research he has determined that it is not in her best interest to pursue a claim.

1. Does Casey have a claim against Wilkins under the DTPA? Is he “exempt” under subsection 17.49(c)? What are her possible damages?

2. Read subsection 17.49(e). To what extent is a claim for personal injury covered by the Act. What are the exceptions to this exception? Consider the following:

   Casey takes her car into Bob’s repair shop to have the brakes repaired. Bob asks his assistant to work on the car. When Casey returns, Bob charges her $600 and tells her that the brakes were repaired and are “good as new.”

   In fact, the assistant had to run to the rest room and forgot to fix the brakes. Shortly after leaving, the brakes failed, and Casey ran the car into a tree.

   The car is totaled, and the $2,000 computer Casey was carrying in the car was destroyed. Additionally, Casey incurs $10,000 in hospital bills, and loses $5,000 in income because she cannot work. She also is severely upset and would claim mental anguish and pain and suffering.

   Which, if any, of Casey’s damages may be recovered under the DTPA?

Consider the following article. We will re-visit this question when we consider damages.

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**Personal Injury Damages Under the DTPA**


Richard M. Alderman

*Introduction*

In 1995 the Texas Legislature substantially amended the Deceptive Trade Practices Act. (Hereinafter referred to as “the Act” or “DTPA.”) Among the many modifications were two designed to limit the Act’s applicability to personal injury claims. First, the term “actual damages” was replaced with the term “economic damages,” to define damages that are recoverable under the Act. Second, a new provision was added exempting “a cause of action for personal injury.” In a recent article, written by several legislators directly involved with the enactment of these amendments, it is stated that “The 74th Legislature opted to exclude claims for bodily injury and death as part of the effort to restore the DTPA to be chiefly a means of relief for individual or small business consumers who have been taken advantage of by unscrupulous individuals or businesses.” This article will discuss the changes to the DTPA and consider to what extent this statement is consistent with what the Legislature actually enacted.

For purposes of discussion, the following hypothetical will be used:
Sara contacted the newly opened Get Fit Health Club about a possible membership. Sara, who is very overweight and extremely uncoordinated, specifically asked about the qualifications of the instructors. She was told by the sales representative that “all our instructors are certified, and you will receive a comprehensive evaluation test before you begin your program.” Relying on this assurance, Sara signed up for the one-year deluxe plan for $750.

The following week Sara showed up for her evaluation. After a short workout, she was told she was in “good shape” and could begin on the machines. She was then given ten minutes of instruction on how to work the machines. After a few minutes of workout, Sara seriously injured herself.

You have discovered that the instructors are not certified, they did not properly evaluate Sara, and their failure to fully explain how to use the machines caused her injuries. It can also be established that when representations were made to Sara, the person who made them knew that they were false. In addition, one of the machines was apparently defective.

Sara’s damages include $18,000 in medical bills, $5,000 in lost commissions, $4,000 for physical therapy, $16,000 for future therapy, and an unspecified amount of mental anguish, pain and suffering, and physical impairment.

These facts will probably lead Sara’s attorney to consider claims based on negligence, strict products liability, breach of contract and breach of warranty. Defendants may include the health club, the sales representative, and the trainer, as well as the seller and the manufacturer of the equipment. If successful under a theory of negligence or strict liability, Sara would be able to recover all of her damages, plus exemplary damages, if it is established that the defendants acted with malice. She could not recover her attorneys’ fees. Recovery for breach of contract would not include exemplary damages; however, attorneys’ fees would probably be recoverable. A successful breach of warranty claim against the manufacturer of the machine might include all of her damages and attorneys’ fees, but probably would not permit recovery of exemplary damages.

But what about a claim under the DTPA? Based on the above hypothetical, Sara could probably establish reliance and a violation of the laundry list, as well as a breach of warranty claim. Both are actionable under Section 17.50(a) of the Act. Recovery under the DTPA would also entitle Sara to treble damages, if she established that the defendant acted “knowingly,” and attorneys’ fees. The central question, however, is whether Sara’s personal injury claim is within the scope of the Act as amended in 1995.

**Pre-1995: Actual damages**

Prior to the 1995 Amendments, Section 17.50(b)(1) provided that a consumer who prevailed could recover “the amount of actual damages found by the trier of fact.” Although the term “actual damages” was not defined by the Act, the courts were uniform in giving it the broadest, most inclusive meaning. Generally, “actual damages” included any damages recoverable at common law. The courts also consistently held that the measure of damages they chose should be that which affords the consumer the “greatest recovery.” “Actual damages” was uniformly found to include damages for personal injury, as well as mental anguish.

If Sara’s DTPA claim had been made prior to the 1995 Amendments, she could have recovered all of the out-of-pocket expenses she incurred, plus damages for mental anguish, pain and suffering, and disfigurement, under the Act’s “actual damage” standard. She would also be enti-
tled to additional damages of $2,000, plus up to two times all the “actual damages” recovered, in excess of $1,000.

The 1995 Amendments

As noted in the introduction, in 1995 the Legislature substantially amended the DTPA. Among the revisions were two changes that affect the recovery of damages for a claim arising out of a personal injury. First, Section 17.50(b) was amended to permit a consumer who prevails to recover “the amount of economic damages.” Thus, the term “actual damages” was replaced by the term “economic damages.”

Although the definition of “economic damages” expressly excludes recovery for damages based on “mental anguish,” Section 17.50(b) authorizes such recovery in certain circumstances. This section provides that “If the trier of fact finds that the conduct of the defendant was committed knowingly, the consumer may recover damages for mental anguish, as found by the trier of fact . . . .” (emphasis added). Mental anguish damages are, therefore, recoverable for a violation of the DTPA provided that there is a finding that the defendant acted knowingly. “Knowingly” is defined by Section 17.45(9) to mean:

. . . [A]ctual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practices giving rise to the consumer’s claim or, in an action brought under subdivision (2) of subsection (a) of Section 17.50, actual awareness of the act, practice, condition, defect, or failure constituting the breach of warranty, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

The second major modification of the DTPA dealing with personal injury claims is a new provision added by the 1995 Amendments found in Section 17.49(e). This section states:

Except as specifically provided by Subsections (b) and (h), Section 17.50, nothing in this subchapter shall apply to a cause of action for bodily injury or death or for the infliction of mental anguish.

The recovery of damages based on personal injury, therefore, involves a determination of what claims are exempted from the Act, or, if the claim is not exempt, whether recovery may be had within the definition of “economic damages.”

Economic Damages: Definition

Under Section 17.50(b), as amended in 1995, a consumer who prevails may recover “economic damages.” This term is defined in Section 17.45(11) to mean:

. . . [C]ompensatory damages for pecuniary loss, including costs of repair and replacement. The term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.

In addition, a consumer may recover damages for mental anguish if he establishes that acts of the defendant were committed “knowingly.”

The key question is: to what extent are claims arising out of a personal injury within the scope of the term “economic damages?” The answer appears to be that it depends upon the nature of the claim.
CHAPTER 1. DECEPTIVE TRADE PRACTICES ACT

Damages sought for monetary loss resulting from a personal injury are clearly pecuniary loss, and as such should be recoverable as economic damages under the Act. For example, in the above hypothetical, Sara should be entitled to recover her medical expenses, $18,000, her lost commissions, $5,000, and the costs of therapy, $20,000.18.

On the other hand, her claim for physical pain and suffering and disfigurement would not be allowable as economic damages. Her claim for mental anguish, however, would be compensable under the Act if, and only if, she establishes that the defendant acted knowingly. Thus, only certain “soft” damages resulting from her personal injury are no longer recoverable under the Act.

**Personal Injury Exemption: Section 17.49(e)**

In addition to changing the standard for damages recoverable under the Act, the Legislature substantially amended Section 17.49 to include several new exemptions to the Act. Among the transactions added to the exemption list was a cause of action for “bodily injury or death.” Section 17.49(e) states:

> Except as specifically provided by Subsections (b) and (h), Section 17.50, nothing in this subchapter shall apply to a cause of action for bodily injury or death or for the infliction of mental anguish.

Precisely what this provision adds to the Act, in light of the limitations already contained in the definition of “economic damages,” is difficult to determine. Arguably, it adds little of substance and is intended merely to reinforce the limitation on damages established by the definition of “economic loss.”

On the other hand, by making such a claim exempt from the DTPA, this provision prohibits a consumer from asking for other relief where economic damages would not be recoverable. For example, assume that a consumer sues based on an incident that results in only disfigurement and pain and suffering. If the Act did not contain Section 17.49(e), the consumer could establish a violation of the Act, and although she could not recover any economic damages, she could pursue an alternative form of relief, such as an injunction. Section 17.49(e) makes it clear, however, that no provision of the DTPA applies to such a claim, and it should be dismissed.

An argument may be made, however, that Section 17.49(e) is designed to be more than merely “suspenders on top of a belt.” Arguably this provision is designed to exempt any action which involves a bodily injury, regardless of what damages are sought. For example, it may be asserted that if a consumer is injured, her claim is exempt from the DTPA, whether she seeks damages for her medical bills or pain and suffering.

Although such an interpretation may be consistent with the belief of some that the 1995 Amendments virtually eliminated personal injury claims from the DTPA, it cannot be supported by the language of the Act. Section 17.49(e) does not exempt any claim for personal injury from the DTPA. It expressly exempts only a “cause of action for bodily injury”, subject to Subsections 17.50(b) and (h). If the drafters desired to exempt all causes of action that arose out of an event involving a bodily injury, they easily could have done so. For example, prior to the 1995 Amendments, Section 17.50(b)(1)(A) provided that certain claims brought under the DTPA were subject to Chapters 33 and 41 of the Civil Practice and Remedies Code. Among the claims subject to these provisions were claims where the “damage arises out of an occurrence that involves death or bodily injury.” (emphasis added). The Legislature clearly chose to use the broader, more inclusive language in this provision. The decision to use the more restrictive language, “cause of
action for bodily injury,” in Section 17.49(e), and to make the exemption expressly subject to Subsections 17.50(b) and (h), indicates that claims merely “arising out of an occurrence involving a bodily injury” are still within the scope of the DTPA provided they fall within Section 17.50(b) or (h). Therefore, the phrase, “cause of action for bodily injury,” contained in Section 17.49(e), should be read to mean, “a cause of action other than one for economic damages, or non-recoverable mental anguish.”

For example, in the introductory hypothetical, the consumer should be able to maintain a DTPA claim for her medical bills, lost commissions, and physical therapy, regardless of whether these damages arose from an event that involved a personal injury. On the other hand, the DTPA would not apply to her claims for pain and suffering or physical impairment. Whether the DTPA applies to her claim for mental anguish cannot be decided until it is determined whether the defendant acted “knowingly.” If the defendant did not act knowingly, the claim for mental anguish would be exempt from the DTPA.

_Tie-in Statutes: Actual Damages_

Regardless of how the issues discussed above are resolved, there remains one instance in which all damages arising out of a DTPA claim involving a personal injury are clearly recoverable. Section 17.50(h), to which Section 17.49 is expressly subordinate, states:

Notwithstanding any other provision of this subchapter, if a claimant is granted the right to bring a cause of action under this subchapter by another law, the claimant is not limited to recovery of economic damages only, but may recover any actual damages incurred by the claimant, without regard to whether the conduct of the defendant was committed intentionally. For the purposes of the recovery of damages for a cause of action described by this subsection only, a reference in this subchapter to economic damages means actual damages. In applying Subsection (b)(1) to an award of damages under this subsection, the trier of fact is authorized to award a total of not more than three times actual damages, in accordance with that subsection.

The effect of this provision is to permit a consumer, in certain instances, to use the law as it existed prior to 1995. Under this subsection, a consumer is entitled to recover actual damages, which include all damages for personal injury, whenever the claim is brought through one of the so-called “tie-in” statutes. “Tie-in” statutes are those laws that cross-reference the DTPA and make a violation of that statute actionable through the DTPA.

For example, the Health Spa Act provides in Section 21 that:

A violation of this Act is a false, misleading, or deceptive act or practice within the meaning of Section 17.46, Business & Commerce Code. Any public or private right or remedy prescribed by Chapter 17 of the Business & Commerce Code may be used to enforce this Act.

Therefore, any violation of the Health Spa Act is actionable through the DTPA, and, in accordance with Section 17.50(h), all actual damages may be recovered. In the above example, the health spa made a material misrepresentation of the qualifications of its staff, the availability of services, and the results obtained through its exercise programs. This conduct violates Section 21 of the Health Spa Act. The consumer may use this cause of action as the basis for her DTPA claim and recover all actual damages. This would include recovery for pain and suffering and disfigurement. Note again that the exemption in Section 17.49(e) expressly authorizes such a suit.
Conclusion

If, as some suggest, the drafters of the 1995 Amendments intended to eliminate all claims involving a personal injury from the coverage of the DTPA, they clearly have not succeeded. On the other hand, if the drafters intended to limit the DTPA to true “consumers,” and reduce the use of so-called “soft damages” to inflate claims brought under the DTPA, they may have accomplished their goal. They also may have done so in a way that may not substantially reduce the rights of consumers. As the above analysis demonstrates, consumers dealing with businesses still have the right to sue for any pecuniary loss that arises out of a violation of the Act, even if that pecuniary loss results from an event involving a personal injury. Additionally, damages for mental anguish may be recovered in any case where the consumer establishes that the defendant acted knowingly. In those situations where the consumer is able to access the DTPA through one of the “tie-in” statutes, all damages recoverable at common law are recoverable under the Act. Finally, in all cases where the consumer recovers under the Act, attorneys’ fees may be recovered.

Under the DTPA, consumers have the right to sue for damages resulting from a false, deceptive or misleading act, an unconscionable course of action, or a breach of warranty. Consumers have this right regardless of whether the wrongful conduct injures the consumer or the consumer’s property. Interpreting the 1995 Amendments to provide greater rights where actionable conduct injures property, rather than a person, would be illogical, not to mention inconsistent with the legislative mandate in Section 17.44 that the Act be “liberally construed and applied to promote its underlying purposes...” The above analysis, permitting the recovery of economic damages without regard to the underlying injury that produces them, should achieve the sponsor’s goal of restoring “the DTPA to be chiefly a means of relief for individual or small business consumers who have been taken advantage of by unscrupulous individuals or businesses.”

PROBLEM 4

Carey Consumer saw an ad in the newspaper for a new health club. The ad promised the “most up-to-date equipment and fully trained instructors to tailor a program to your needs.”

Carey, who is very overweight and non-athletic, visits the club and signs a membership agreement. She is then given a ten-minute lesson in how to use the machines by the receptionist. Because the receptionist is wearing exercise togs, Carey assumes she is an instructor.

As you guessed, within the first hour of her workout, Carey is seriously injured. Her injury is caused by a combination of a defective machine and improper instructions.

What damages may Carey recover under the DTPA? Now consider the Health Spa Act in the Appendix. Section 702.403 of the Health Spa Act states:

(a) A person who violates this chapter commits a false, misleading, or deceptive act or practice within the meaning of Section 17.46, Business & Commerce Code.
(b) A public or private right or remedy under Chapter 17, Business & Commerce Code, may be used to enforce this chapter.

Review section 17.50(h). Does this change your answer? Subsection 17.50(h) is an extremely
important section. Why? What does it apply to? Can you recover damages for a personal injury if the claim is based on section 17.50(h)?

**NOTE**

1. The drafters of the 1995 Amendments intended to exempt large transactions from the coverage of the Act. To this end, subsection 17.49(f) and (g) exempt certain large claims arising from a “transaction, or a set of transactions relating to the same project.” Suppose Casey Consumer purchases land for $300,000, builds a building upon it for $300,000 and purchases fixtures for the building for $105,000. Does the DTPA apply to the purchase of the fixtures? Does it matter if any of the contracts are in writing?

   Is there a way to avoid the application of these subsections? Suppose that X Corp. purchased the land, its subsidiary purchased the building, and a third subsidiary purchased the fixtures.

   Finally, note that these subsections do not apply to the consumer’s residence. In light of the fact that this is the most expensive purchase most individuals will make, this is a very significant exclusion.

2. Section 17.49(c) uses the term “consideration.” How should it be defined? Is the consideration the contract amount or what is actually paid? In the only case to consider this issue, the court found it unnecessary to resolve this question.

   CNB contends in its second issue that the trial court abused its discretion by allowing ARI to recover under the DTPA because ARI’s Bed & Bath project involved total consideration of more than $500,000; consequently, CNB concludes, the DTPA does not apply to ARI’s lawsuit. ARI contends that, because CNB advanced only $463,193.45 to ARI under its $600,000 note, the DTPA does apply. Section 17.49(g) of the Act provides the following exemption:

   Nothing in this subchapter shall apply to a cause of action arising from a transaction, a project, or a set of transactions relating to the same project, involving total consideration by the consumer of more than $500,000, other than a cause of action involving a consumer’s residence.

   Based on the parties’ representations and our own review of the law, this appears to be the first time that this subsection has been discussed in an appellate opinion. However, in a 1995 law review article, the authors, who include Senate and House co-sponsors of the bill resulting in the above section, point out:

   The reform law has eliminated many high-dollar transactions from the reach of the DTPA. These changes were part of lawmakers’ efforts to maintain the DTPA as a viable source of relief for consumers who encounter and are harmed by unscrupulous business practices, but to remove from the scope of the Act . . . litigation between big businesses.

   The authors interpret the section to mean that “the DTPA will no longer govern transactions in which the overall consideration exceeds $500,000.”
In their briefs, the parties provide conflicting interpretations of the meaning of “total consideration by the consumer,” with CNB contending that the promissory note of $600,000 alone bars a DTPA recovery and ARI contending that its consideration included only the unpaid principal and accrued interest due on the note at the time of foreclosure, $463,193.45. Under Texas case law, “consideration is a present exchange bargained for in return for a promise. It consists of either a benefit to the promisor or a detriment to the promisee.” Similarly, in the sixth edition of Black's Law Dictionary, consideration is defined as “some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other,” and pecuniary consideration is “consideration for an act of forbearance which consists either in money presently passing or in money to be paid in the future.”

For this case, however, we do not need to determine whether “consideration” as used in the statute involves only detriment actually incurred by the consumer or detriment that a consumer promises to incur in the future. The balance of principal and accrued interest due on the note at the time of foreclosure was $463,193.45. Additionally, ARI paid $22,006.08 in interest on the note before defaulting. Finally, ARI paid $122,096.81 to CNB at the time of closing, $90,000 of which went to purchase the lot on which the motel would be built. Thus, looking only at the detriment ARI had incurred at the time of foreclosure, we can easily say that ARI’s overall consideration exceeded $500,000 on the Bed & Bath project.

Because ARI’s consideration exceeded $500,000, and because the project did not involve a consumer’s residence, the DTPA does not apply to ARI’s cause of action regarding the project. Consequently, the trial court abused its discretion in submitting the DTPA jury question and in allowing ARI to recover from CNB under the DTPA. Furthermore, the awards of trial and appellate attorney’s fees were also in error, because attorney’s fees are not recoverable for any other theory of recovery alleged by Appellees. We sustain CNB’s second issue.


SECTION FOUR: WHOM MAY YOU SUDE?

Once it is determined that a plaintiff is a consumer, as that term is defined in subsection 17.45(4), the next issue is against whom may the consumer maintain an action? Specifically, does the DTPA require any form of “privity” between the plaintiff and the defendant?
This is a deceptive trade practice case. Jerry D. Cameron and Jo Ann Cameron, purchasers of a house, brought this suit for treble damages against the seller’s real estate agent, Terrell & Garrett, Inc., for a misrepresentation of the square footage in the house. The primary question presented is whether the Camerons are consumers within the meaning of the Deceptive Trade Practices-Consumer Protection Act (DTPA). The trial court rendered a take-nothing judgment non obstante veredicto for Terrell & Garrett. The court of civil appeals affirmed but on different grounds. The court of civil appeals held that the Camerons were not consumers and, therefore, could not bring a private lawsuit against Terrell & Garrett for a deceptive trade practice violation. . . . We hold the Camerons are consumers. We also hold that there is some evidence to support the jury verdict for the Camerons. Accordingly, we reverse the judgment of the court of civil appeals and render judgment for the Camerons in accordance with the verdict.

In October 1975 the Camerons purchased a house in Arlington, Texas. The sellers, who are not parties to this lawsuit, had listed the house for sale with Terrell & Garrett, a real estate brokerage and agency firm. In listing the house for sale, the sellers were required to execute a listing agreement whereby they were to pay Terrell & Garrett a commission of six percent of the purchase price if Terrell & Garrett obtained a sale within a certain period. As part of its normal business practice, Terrell & Garrett then listed the house in the Multiple Listing Service (MLS) guide of the Arlington Board of Realtors. In doing so, Terrell & Garrett submitted some general information about the house for publication in the MLS guide. Included in this information was a statement that the house contained 2400 square feet. There is testimony that this statement was made to represent the number of square feet of heated and air conditioned space in the house.

On September 6, 1975, the Camerons were driving with their own real estate agent and looking for a house when they found the house in question. While stopped in front of the house, their realtor showed them the statement in the MLS guide that it contained 2400 square feet. The Camerons testified that they relied on the statement to mean that the house had 2400 square feet of heated and air conditioned space. Also, the Camerons testified that they agreed to purchase the house for $52,957.04 in reliance on this statement because they thought they were purchasing a house with 2400 square feet of heated and air conditioned space for $22.06 per square foot.

After purchasing and moving into the house, the Camerons had it measured and found out it actually contained only 2245 square feet of heated and air conditioned space—155 feet less than represented by Terrell & Garrett. However, they also discovered that if the garage, porch, and wall space were included, the house would have had a total of 2400 square feet of space.

The Camerons sued Terrell & Garrett for damages, alleging a cause of action under the DTPA for a misrepresentation made in a real estate transaction. The basis of the Camerons’ deceptive trade practice claim is that Terrell & Garrett falsely represented in the MLS guide the number of square feet in the house. They alleged actual damages of $3,419.30, which they computed by multiplying the cost of the house per square foot as represented ($22.06) times the square footage.
deficiency (155 feet). The Camerons sought treble damages, reasonable attorney’s fees and court costs under Section 17.50(b) of the Act.

The case was submitted on special issues to the jury for a violation of the general prohibition in Section 17.46(a) as authorized by Section 17.50(a)(1). The jury returned a verdict for the Camerons. Terrell & Garrett then filed motions to disregard jury findings and for judgment notwithstanding the verdict, challenging in part the legal sufficiency of the evidence to support the jury’s answers to special issues. The trial court sustained Terrell & Garrett’s motions on the basis there was no evidence to support the jury’s answers to the following special issues:

SPECIAL ISSUE NO. 2. . . .

Do you find from a preponderance of the evidence that the Defendant’s representation that the house in question contained two thousand four hundred square feet was false, misleading or deceptive act or practice? . . . Answer “We do” or “We do not.”

ANSWER: “We do.”

SPECIAL ISSUE NO. 3. . . .

Do you find from a preponderance of the evidence that the Defendant’s representation of the quantity of square feet in the house in question was a producing cause of actual damages sustained by the Plaintiffs? . . . Answer “We do” or “We do not.”

ANSWER: “We do”; and

SPECIAL ISSUE NO. 4. . . .

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the Plaintiffs for their actual damages, if any? Answer in dollars and cents, if any.

ANSWER: $3,419.30.

The trial court rendered a take-nothing judgment against the Camerons notwithstanding the verdict.

On appeal, the Camerons contended that the trial court erred in setting aside the jury verdict because there was some evidence to support the jury’s answers to special issues numbers 2, 3, and 4. However, to vitiate the verdict, Terrell & Garrett contended by crosspoint that the Camerons could not bring a private lawsuit under the DTPA because the Camerons were not consumers, as defined in Section 17.45(4), as to them. The court of civil appeals sustained the contentions of both parties and, as a result, affirmed the trial court’s take-nothing judgment. In this case, the Camerons’ sole contention is that the court of civil appeals erred in holding they were not consumers as defined in Section 17.45(4).

In Riverside National Bank v. Lewis, 603 S.W.2d 169, 173 (Tex. 1980), we recognized that a person must qualify as a consumer as that term is defined in Section 17.45(4) to maintain a private cause of action for treble damages under Section 17.50 of the Act. . . . Section 17.45(4) defines

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3 Section 17.50 (a)(1) was amended in 1979 so that a private cause of action is no longer available under Section 17.46(a). The provisions of the DTPA in effect on the date the alleged misrepresentation occurred, September 6, 1975, govern the disposition of this case. See Riverside National Bank v. Lewis, 603 S.W.2d 169, 172 (Tex. 1980), and Woods v. Littleton, 554 S.W.2d 662, 666 (Tex. 1977).
consumer as “an individual, partnership, or corporation who seeks or acquires by purchase or lease, any goods or services.”

We have also recognized at least two requirements that must be established for a person to qualify as a consumer under the DTPA. One requirement is that the person must have sought or acquired goods or services by purchase or lease. . . . Another requirement recognized by this Court is that the goods or services purchased or leased must form the basis of the complaint. . . . If either requirement is lacking, the person aggrieved by a deceptive act or practice must look to the common law or some other statutory provision for redress.

The Camerons satisfy both of these requirements in the case at hand. Although the Camerons alleged that they “sought or acquired the services” of Terrell & Garrett, it is clear that their complaint is not based on any alleged misrepresentation of the quality or quantity of services rendered by Terrell & Garrett. Instead, the Camerons’ complaint is based solely on an alleged misrepresentation of the quantity of square feet in the house. At the time of this alleged deceptive trade practice, Section 17.45(1) defined goods to include “[r]eal property purchased . . . for use.”

Terrell & Garrett seeks to have this Court impose a type of privity requirement into the definition of consumer. It contends that a person must seek or acquire goods or services furnished by the person he is suing to qualify as a consumer under the DTPA. To be a consumer, it is submitted that if this requirement were imposed, a defendant would have to be in the same chain of title with the good or service on which the complaint is based. It argues that under this requirement the Camerons could not be consumers as to Terrell & Garrett because it was the seller’s agent and did not furnish any goods or services that were sought or acquired by the Camerons.

In the case of Delaney Realty Co. v. Ozuna, 593 S.W.2d 797 (Tex. Civ. App.—El Paso), writ ref’d n.r.e. per curiam, 600 S.W.2d 780 (1980), a seller of a house represented to the purchaser that the house was not subject to flooding. The seller’s real estate agent, however, made no representation about the tendency of the house to flood. The house did flood. The purchaser sued the seller and seller’s agent under the DTPA, alleging that the seller misrepresented that the house was not susceptible to flooding and the seller’s agent should have ascertained this condition of the house, and should have warned them about the susceptibility of the house to flooding. The court of civil appeals held that since the purchaser did not purchase any goods or services from the seller’s agent, the purchaser did not fall within the definition of consumer and thus could not bring suit under the DTPA. In a per curiam opinion, we agreed with the judgment of the court of civil appeals stating there was no evidence that the seller’s agent made any misrepresentation about flooding. However, we refused the purchasers’ application for writ of error, no reversible error, stating: “This action should not be interpreted as an implied approval of the lower court’s discussion concerning the (purchasers) failure to qualify as “consumers” under the DTPA with respect to (the seller’s agent). . . . We reserve this question of statutory construction for the future. . . .”

We are now called upon to answer this question of statutory construction expressly reserved in Delaney. In all interpretations of the Act, our primary objective is to ascertain the legislature’s intent. . . . To do that, we must look to the Act as a whole, and not its isolated provisions, keeping in mind at all times “the old law, the evil, and the remedy.” Id. The legislature itself directed that the Act “shall be liberally construed to promote its underlying purposes which are to protect consumers against false, misleading, and deceptive acts or practices, unconscionable actions and breaches of warranty and to provide efficient and economical procedures to secure such protection.”
The breadth of the Act is evidenced by Section 17.49 which sets out the exemptions to the DTPA. That section does not provide an exemption for deceptive trade practices by persons who do not furnish the goods or services on which the complaint is based. Rather, it only exempts from the Act certain media owners and employees who publish and diseminate deceptive advertisements of goods and services for third parties. That same exemption, however, does not extend immunity from the Act where the media defendants (1) knew of the deception in the advertisement or (2) had a direct or substantial financial interest in the unlawfully advertised good or service. These media defendants, of course, do not furnish the goods or services that they advertise for third parties. Consequently, if the Act already excluded defendants who do not furnish the goods or services, as argued by Terrell & Garrett, there would have been no need for the legislature to exempt media defendants from liability or to have provided that media defendants could be sued in the two situations mentioned above. The legislature is never presumed to have done a useless act.

Similarly, if the legislature had intended to place such a restriction on the class of persons who could be sued under the Act for deceptive trade practices, it could easily have done so by simply drafting the restriction into the definition of consumer or some other provision of the Act. It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose. Likewise, we believe every word excluded from a statute must also be presumed to have been excluded for a purpose. 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 find no indication in the definition of consumer in Section 17.45(4), or any other provision of the Act, that the legislature intended to restrict its application only to deceptive trade practices committed by persons who furnish the goods or services on which the complaint is based. Nor do we find any indication that the legislature intended to restrict its application by any other similar privity requirement. In contrast, privity requirements have been dispensed with altogether in negligence suits, in implied warranty suits for economic loss, and, for the most part, privity requirements have also been abolished in strict liability suits. 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.

Consumer is defined in Section 17.45(4) only in terms of a person’s relationship to a transaction in goods or services. It does not purport to define a consumer in terms of a person’s relationship to the party he is suing. Section 17.45(4) does nothing more than describe the class of persons who can bring a suit for treble damages under Section 17.50. It does not say who a consumer can sue under Section 17.50 for a deceptive trade practice violation. With respect to whom a consumer can sue, Section 17.50(a)(1), the subsection under which this suit was tried, expressly states that a consumer can bring a suit if he has been adversely affected by “the use or employment by any person of an act or practice declared to be unlawful in Section 17.46.” Terrell & Garrett is a person under the Act. We, therefore, hold that a person need not seek or acquire goods or services furnished by the defendant to be a consumer as defined in the DTPA.

To the extent that language in Hi-Line Electric Co. v. Travelers Insurance Co. and Barthlow v. Metcalf is inconsistent with this opinion, it is disapproved. We have considered both cases and find their respective holdings to be supported on other grounds announced therein. Whether the Act should be so restricted is a matter for the legislature and not this Court. Accordingly, we hold the Camerons are consumers because they purchased the goods on which their complaint is based.
Because we have held that the court of civil appeals erred on the grounds on which it affirmed the judgment of the trial court, we must consider Terrell & Garrett’s crosspoints before this Court to see if there are any grounds presented therein to affirm the court of civil appeals’ judgment. In doing so, we find three crosspoints challenging the court of civil appeals’ ruling there is some evidence to support the jury findings to special issue numbers 2, 3, and 4, which are set out above. The jury answered each special issue in favor of the Camerons. For that reason, we are required to consider only the evidence and the reasonable inferences that can be drawn therefrom, in their most favorable light, to support these jury findings. We have considered each of these crosspoints and we agree with the ruling of the court of civil appeals on the legal sufficiency of the evidence to support these jury findings.

We, therefore, reverse the judgments below and render judgment for the Camerons in accordance with the jury verdict. The Camerons are also entitled to treble damages, reasonable attorney’s fees, and costs as authorized by the DTPA.

NOTES AND QUESTIONS

The court in Cameron makes it clear that the term consumer deals only with the definition of a class of plaintiffs. There is no requirement of privity between the “consumer” and the defendant. Does this mean, however, that anyone may be sued regardless of his or her relationship to the consumer? In 1996, the Texas Supreme Court answered this question with a resounding, “no.”

AMSTADT

v.

UNITED STATES BRASS CORP.

Supreme Court of Texas, 1996

919 S.W.2d 644

CORNYN, JUSTICE.

In these three cases, homeowners have sued the manufacturers of a polybutylene plumbing system for negligence and violations of the Deceptive Trade Practices-Consumer Protection Act. TEX. BUS. & COM. CODE §§ 17.41-17.63 (DTPA). The common issue is whether the Legislature intended that upstream suppliers of raw materials and component parts be liable under the DTPA when none of their misrepresentations reached the consumers. This precise issue, which to our knowledge has never before been raised in the twenty-three-year history of the DTPA, animates the appeals in Barrett v. United States Brass Corp., United States Brass Corp. v. Knowlton/Kochie, and United States Brass Corp. v. Andraus.

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We hold that, although the homeowners who obtained a jury finding of negligence may recover on that theory, no homeowner may recover from Celanese, Shell, or U.S. Brass under the DTPA because these manufacturers’ alleged DTPA violations did not occur in connection with
CHAPTER 1. DECEPTIVE TRADE PRACTICES ACT

the homeowners’ purchase of their homes. We accordingly reverse the judgments of the courts of appeals with regard to DTPA liability in all three causes.

* * *

I. FACTS

U.S. Brass, Shell, and Celanese v. Andraus

In Andraus, the owners of approximately 95 homes in the Fairmont Park West subdivision in La Porte, Texas, sued General Homes Corporation (the developer and homebuilder), U.S. Brass, Shell Oil Company, and Hoechst Celanese Corporation after experiencing problems with their plumbing. U.S. Brass designed and manufactured the plumbing system.

The plumbing system used flexible plastic pipes made of polybutylene resin connected by fittings made of a plastic compound called Celcon. The pipes and fittings were joined together by a copper or aluminum crimp ring placed around the outside of the pipe at the point where the pipe and fitting were connected. The ring, fitting, and pipe were then compressed using a large wrench-like tool designed by U.S. Brass. The pressure from the crimp ring deformed the pipe and fitting, creating a water-tight seal.

Celanese manufactured Celcon and supplied Celcon pellets to U.S. Brass to be molded into fittings. Celanese promoted the use of Celcon in plumbing applications to U.S. Brass and other manufacturers, and knew that U.S. Brass used Celcon to make the fittings. Shell produced the polybutylene resin and provided it in raw form to U.S. Brass. U.S. Brass formed the resin into the pipe used in the plumbing system.

In the early 1980s, U.S. Brass and Shell promoted the plumbing system to municipal officials in La Porte in order to obtain building code approval of the system for residential use. U.S. Brass and Shell also marketed the system to homebuilders, including General Homes. General Homes installed U.S. Brass’ plumbing system in homes it built in 1980, 1981, and 1982. In 1982, some of these systems began to fail. Cracks developed in the Celcon fittings that eventually caused leaks. At trial, the parties vigorously disputed what caused the fittings to fail. Some of the experts testified that degradation of the Celcon from exposure to the households’ chlorinated water caused the cracks in the fittings. Others testified that inadequate design, defective manufacture, and improper installation, or a combination of these problems along with chemical degradation created excessive stress, which caused the fittings to crack.

The homeowners sued General Homes, U.S. Brass, Shell, Celanese, and Vanguard Plastics, Inc. (a competitor of U.S. Brass, later dismissed from the suit). General Homes is not a party to this appeal. The homeowners alleged that the plumbing system’s failure caused property damage and mental anguish. They sought damages based on negligence, fraud, and violations of the DTPA.

A jury found that U.S. Brass, Shell, and Celanese had made misrepresentations under the DTPA and were negligent. The jury also found that U.S. Brass had acted unconscionably and was grossly negligent. The trial court ruled that the statute of limitations barred the negligence claims of fifty-six households, and rendered a take-nothing judgment against five households for unspecified reasons. Three households elected to recover on the negligence findings, and the trial court rendered judgment accordingly. The trial court also rendered judgment for the eighty-six households that elected recovery under the DTPA.
Celanese, Shell, and U.S. Brass appealed. The court of appeals reversed the trial court’s judgment in part and affirmed it in part. Specifically, the court of appeals affirmed DTPA liability because it concluded that “there was a link between the representations made and the use of the plumbing system in the plaintiffs’ homes, which ultimately caused damage.”

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II. DTPA

A.

The DTPA grants consumers a cause of action for false, misleading, or deceptive acts or practices. TEX. BUS. & COM. CODE § 17.50(a)(1); § 603 S.W.2d 169, 173 (Tex. 1980). The DTPA defines a “consumer” as “an individual . . . who seeks or acquires by purchase or lease, any goods or services.” TEX. BUS. & COM. CODE § 17.45(4). Privity of contract with a defendant is not required for the plaintiff to be a consumer. E.g., Home Sav. Ass’n v. Guerra, 733 S.W.2d 134, 136 (Tex. 1987); Kennedy v. Sale, 689 S.W.2d 890, 892-93 (Tex. 1985); Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705, 707 (Tex. 1983); Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 540-41 (Tex. 1981). A consumer must, in order to prevail on a DTPA claim, also establish that each defendant violated a specific provision of the Act, and that the violation was a producing cause of the claimant’s injury.

The manufacturers argue that DTPA liability, while not limited to those in contractual privity with the consumer, cannot extend to all entities in the chain of production or distribution when none of those entities’ alleged misrepresentations ever reached the consumer. The homeowners, on the other hand, argue that a misrepresentation by any entity in the chain of distribution that is the cause-in-fact of actual damages entitles them to recover under the DTPA. We do not agree with the homeowners’ contention. To accept the homeowners’ argument would extend DTPA liability to upstream manufacturers or suppliers to an extent not intended by the Legislature when it enacted the DTPA.

The purpose of the DTPA is to “protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.” TEX. BUS. & COM. CODE § 17.44. As we have explained, that purpose is, in part, to encourage consumers to litigate claims that would not otherwise be economically feasible and to deter the conduct the DTPA forbids.

Although the DTPA was designed to supplement common-law causes of action, we are not persuaded that the Legislature intended the DTPA to reach upstream manufacturers and suppliers when their misrepresentations are not communicated to the consumer. Despite its broad, overlapping prohibitions, we must keep in mind why the Legislature created this simple, nontechnical cause of action: to protect consumers in consumer transactions. Consistent with that intent, we hold that the defendant’s deceptive conduct must occur in connection with a consumer transaction, as we explain below.

In Cameron v. Terrell & Garrett, Inc., we said: “The Act is designed to protect consumers from any deceptive trade practices made in connection with the purchase or lease of any goods or services.” 618 S.W.2d 535, 541 (Tex. 1981). The in-connection-with requirement imposes a limitation on liability that is consistent with the underlying purposes of the DTPA. Without this limitation, we would merely substitute the defendant’s introduction of a particular product into the stream of commerce for the conduct that was found to have violated the DTPA. We find no authority for shifting the focus of a DTPA claim from whether the defendant committed a deceptive
act to whether a product that was sold caused an injury. Requiring a connection between the plaintiffs, their transactions, and the defendants’ conduct enunciates a limitation we have alluded to, but not fully articulated, in prior cases.

While our words have varied, the concept has been consistent: the defendant’s deceptive trade act or practice is not actionable under the DTPA unless it was committed in connection with the plaintiff’s transaction in goods or services.

In the three cases before us today, the homeowners purchased homes equipped with polybutylene plumbing systems. These systems are goods, and they form the basis of the homeowners’ complaints. The homeowners are, therefore, consumers under the DTPA. TEX. BUS. & COM. CODE § 17.45(4). To determine whether the defendants may be liable under the DTPA, we must examine whether their conduct occurred in connection with the plaintiffs’ purchase of their homes.

B. Celanese

Celanese manufactured the polybutylene compound, Celcon, and supplied Celcon pellets to U.S. Brass for its use in molding the plumbing system fittings. Celanese promoted the use of Celcon in plumbing applications to U.S. Brass and other manufacturers, and knew that U.S. Brass used Celcon to make fittings for its plumbing systems. Celanese did not control U.S. Brass’ selection of raw materials, did not design the parts or tools, and did not instruct or train the homebuilders’ plumbers. Celanese told U.S. Brass that it should mold prototype components from Celcon and subject them to the most severe anticipated end-use conditions. Celanese also informed U.S. Brass of Celcon’s potential limitations in high-chlorine conditions. Celanese’s marketing efforts were limited to promoting its material to the manufacturers of the plumbing systems. It did not market the systems to homebuilders or building code officials, or market the finished homes to the consumers. The manufacturers of the plumbing systems and the building code officials, and to a lesser degree the homebuilders, were intermediaries capable of assessing the suitability of Celcon for use in the systems.

None of these facts supports the conclusion that Celanese’s misrepresentations were made in connection with the plaintiffs’ purchase of their homes. Celanese exercised little or no control over the manufacture and installation of the finished plumbing systems, much less the manufacture and sale of the homes. Celanese had no influence over the terms of the sales to the homeowners. At most, Celanese enjoyed the benefit of selling a raw material to a downstream manufacturer.

We hold that, under these circumstances, Celanese’s conduct did not occur in connection with the plaintiffs’ purchase of their homes; consequently, that conduct cannot support DTPA liability. Therefore, we reverse the court of appeals’ judgment in Andraus permitting recovery under the DTPA against Celanese.

C. Shell

Shell produced the polybutylene resin from which U.S. Brass manufactured the pipes used in the plumbing system. As with Celanese, Shell did not control U.S. Brass’ selection of raw materials, did not design the parts or tools, and did not instruct or train the homebuilders’ plumbers. However, Shell played a substantial role in marketing U.S. Brass’ entire system for new homes in the early 1980s. It undertook a marketing campaign and directly contacted homebuilders to promote the system and increase the market for polybutylene resin. Several homebuilders testified that they learned about U.S. Brass’ plumbing system from Shell at trade shows and from Shell
salespeople who visited them. The record contains some evidence that La Porte building officials
would not have approved the plumbing system for residential use absent Shell’s representations
about its quality, reliability, and longevity. Finally, there is some evidence that the homebuilders
installed the systems in reliance on the same representations.

As was the case with Celanese, these facts do not support the conclusion that Shell’s misrep-
resentations were made in connection with the relevant consumer transactions, the purchase of
the homes. Shell had no control over the manufacture or installation of the plumbing systems, or
of the homes ultimately purchased by the consumers. Shell had no influence over the terms of the
consumers’ purchases. Although Shell actively promoted use of the plumbing systems in residen-
tial homes, there is no evidence that the information provided to homebuilders or building code
officials was intended to be or actually was passed on to consumers. Importantly, Shell’s market-
ing efforts were not incorporated into the efforts to market homes to the plaintiffs in this case.
Also, any information provided by Shell was subject to independent evaluation by building code
officials and by homebuilders.

We therefore conclude that Shell’s conduct was not sufficiently connected with the plaintiffs’
purchase of their homes to support DTPA liability. We therefore render judgment in *Andraus*
that plaintiffs take nothing from Shell on their DTPA claims. (No judgment was rendered against
Shell in *Knowlton/Kochie or Barrett*.)

**D. U.S. Brass**

U.S. Brass designed and manufactured the plumbing system at issue. It selected the raw ma-
terials, designed and manufactured the parts and tools, and trained the homebuilders’ plumbers. In
the late 1970s and early 1980s, U.S. Brass sought approval of the system for residential use from
building code officials. Together with Shell it conducted a sales campaign aimed at the new home
market and targeted individual builders. U.S. Brass represented to builders that the polybutylene
plumbing system was durable and would last twenty-five years, was easy to install, required fewer
joints, and was a quality product with characteristics superior to copper, galvanized steel, and
PVC plumbing systems. U.S. Brass’ and Shell’s representatives met with homebuilders many
times. U.S. Brass also provided homebuilders with a catalog on the plumbing system representing
that the pipes and fittings would not corrode and that the pipes would not freeze or experience
mineral build-up.

Although the conduct of U.S. Brass comes closer to being in connection with the plaintiffs’
purchase of their homes than the conduct of Shell or Celanese, it also falls short of meeting the
nexus required for DTPA liability. U.S. Brass exercised significant control over the design and
installation of the plumbing systems, but as with Shell and Celanese, U.S. Brass had no role in the
sale of the homes to the plaintiffs. As with Shell, U.S. Brass’ marketing efforts were not intended
to, nor were they, incorporated into the marketing of the homes to the plaintiffs. Finally, U.S.
Brass’ products were subject to independent evaluation by building code officials, homebuilders,
and the plumbing contractors who installed the materials. Viewed in this context, we conclude
that U.S. Brass’ actions were not connected with the plaintiffs’ transactions, that is, the sale of the
homes, in a way that justifies liability under the DTPA.

Our analysis of U.S. Brass’ connection with the consumer transactions applies with equal
force to allegations based on misrepresentations and unconscionable acts. The subject matter of
the misrepresentations and the conduct found to be unconscionable is virtually identical. Because
we conclude that the totality of U.S. Brass’ involvement in the consumer transaction is insuffi-
cient to support DTPA liability, we reverse the judgments against U.S. Brass under both theories of DTPA liability.

Although we have concluded that the homeowners have no DTPA cause of action against Celanese, Shell, and U.S. Brass, no one disputes that they have a DTPA cause of action against General Homes, their seller. Given this recourse under the DTPA against the seller, and the contribution and indemnity provision of the DTPA, see Tex. Bus. & Com. Code § 17.555, we think that rather than permit limitless upstream DTPA liability under these circumstances, the Legislature more likely intended for consumers to seek DTPA recourse against those with whom they have engaged in a consumer transaction. Then, to the extent that the seller’s DTPA liability is caused or contributed to by the otherwise actionable misconduct of upstream manufacturers or suppliers, the seller may seek contribution or indemnity against them. Additionally, homeowners may obtain direct relief for foreseeable injuries due to the negligence of these parties.

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NOTES AND QUESTIONS

1. Just what is required to establish that a violation occurred “in connection with” the consumer’s purchase? What more would have been required in the case of U.S. Brass? Where in the Act does the court find support for the imposition of the “in connection with” requirement?

2. In Amstadt the court states, “no one disputes” that the consumer may sue General Homes. For what would the consumer sue? Doesn’t Amstadt simply increase the number of lawsuits? Did General Homes do anything wrong? Should they be the one who is sued? (Think about this now. You should be able to answer it after completing Chapter Two.)

3. What if the representation by Shell was in a brochure given to the consumer? Would that be “in connection with” the consumer’s transaction? What if the statement in the manufacturer’s brochure is conveyed to the consumer by the seller?

4. Can a DTPA claim be assigned? Does it survive the death of the consumer? The Texas Supreme Court recently considered these issues, and re-examined its decision in Amstadt.

PPG INDUSTRIES, INC.

v.

JMB/HOUSTON CENTERS PARTNERS LTD. PARTNERSHIP

Supreme Court of Texas, 2004
146 S.W.3d 79

Bristler, Justice.

[JMB purchased a building from HCC that contained many defective windows. JMB brought a DTPA breach of warranty claim against PPG based on the sale and an assignment of warranty claims from HCC to JMB.]
II. Assignment of DTPA Claims A

PPG first attacks the DTPA award, asserting that DTPA claims cannot be assigned. To determine whether DTPA claims are assignable, we look first to the words of the statute.

The sale of Twindows was a sale of goods, and thus subject to the warranty provisions of Chapter 2 of the Texas Business and Commerce Code (the UCC). Chapter 17 of the same Code (the DTPA) allows consumers to bring breach of warranty claims under that chapter as well. Thus, a consumer may choose to bring warranty claims under either chapter, or both as JMB did here.

The purposes and provisions of the UCC and the DTPA are, of course, not the same; otherwise, there would have been no need for both. The primary difference relevant here is that the UCC expressly provides that warranty claims are assignable, while the DTPA says nothing about assignment.

A statute’s silence can be significant. When the Legislature includes a right or remedy in one part of a code but omits it in another, that may be precisely what the Legislature intended. If so, we must honor that difference.

Of course, legislatures do not always mean to say something by silence. Legislative silence may be due to mistake, oversight, lack of consensus, implied delegation to courts or agencies, or an intent to avoid unnecessary repetition. But we must at least begin our analysis by noting that the Legislature clearly knew how to indicate that warranty claims were assignable, but did not do so in the DTPA.

B

In some cases of statutory silence, we have looked to the statute’s purpose for guidance. Accordingly, we next look to the purposes of the DTPA to determine whether assignment of claims is consistent with its goals.

The DTPA’s primary goal was to protect consumers by encouraging them to bring consumer complaints:

This subchapter shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.

While the DTPA allows the attorney general to bring consumer protection actions, one of the statute’s primary purposes is to encourage consumers themselves to file their own complaints:

[The Legislature] provided for the recovery of attorney’s fees under the Deceptive Trade Practices Act, as encouragement to those abused by certain proscribed conduct to avail themselves of the remedies of the Act.

* * *

One purpose of the DTPA’s treble damages provisions is to encourage privately initiated consumer litigation, reducing the need for public enforcement.

* * *
The legislative intent [was] to encourage aggrieved consumers to seek redress and to deter unscrupulous sellers who engage in deceptive trade practices.

Making DTPA claims assignable would have just the opposite effect: instead of swindled consumers bringing their own DTPA claims, they will be brought by someone else.

The Legislature did not intend the DTPA for everybody. It limited DTPA complaints to “consumers,” and excluded a number of parties and transactions from the DTPA, including claims by businesses with more than $25 million in assets, and certain claims in which consumers were represented by legal counsel. If DTPA claims can be assigned, a party excluded by the statute (such as JMB here) could nevertheless assert DTPA claims by stepping into the shoes of a qualifying assignor. This would frustrate the clear intent of the Legislature.

The court of appeals reasoned that assignment would accord with one of the DTPA’s other purposes—discouraging consumer fraud. But this proves too much; commercial trading in almost any kind of claim would likely encourage its proliferation, but raises a host of other concerns.

First, the DTPA’s treble-damage provisions were intended to motivate affected consumers; they may provide a different motivation for those who might traffic in such claims. It is one thing to place the power of treble damages in the hands of aggrieved parties or the attorney general; it is quite another to place it in the hands of those considering litigation for commercial profit.

Second, appraising the value of a chose in action is never easy, due to the absence of objective measures or markets. Consumers are likely to be at a severe negotiating disadvantage with the kinds of entrepreneurs willing to buy DTPA claims cheap and settle them dear. The result of making DTPA claims assignable is likely to be that some consumers will be deceived twice.

Third, in many cases consumers may not even know they have DTPA claims when they sign a general assignment included in contractual boilerplate. If such assignments are valid, the claims meant to protect consumers will quite literally be gone before they know it. In this case for example, both JMB and HCC were wealthy and sophisticated corporations, yet both denied any knowledge of a potential DTPA claim against PPG at the time of the 1989 building sale. There was no assignment of claims generally, and no mention specifically of DTPA claims against PPG; instead, JMB relies solely on a general assignment of the building’s warranties. If this is enough, then HCC assigned away its DTPA rights against PPG without knowing it and without receiving anything for it; the $10 million in incentive damages left over after every window is replaced will serve as a pure windfall for JMB. Every conceivable purpose of the statute is defeated if consumers may lose their claims by accident.

JMB makes no attempt to defend commercial marketing of DTPA claims, arguing only for assignment in cases like this—in which it bought the underlying building and will bear the costs of repairing it. But allowing DTPA claims by those who purchase defective goods from a consumer shifts the focus of the DTPA from deceptive practices to defective products. If DTPA claims may be assigned to subsequent buyers like JMB, treble damages will often go to wealthy entrepreneurs rather than the consumers who were actually defrauded.

Moreover, JMB’s only claim here is based on the written assignment. JMB acquired no DTPA claims merely by becoming a subsequent owner of One Houston Center, and asserts none in its own right. As JMB’s only basis for DTPA claims is the written assignment, it is hard to see how its claims are different from those that might be obtained by arbitrageurs.
In sum, allowing assignment of DTPA claims would ensure that aggrieved consumers do not file them, that some consumers receive nothing in compensation, and others are deceived a second time. All would defeat the very purposes for which the DTPA was enacted.

C

In some cases of statutory silence, we have also looked to related common-law principles. With respect to the assignment of claims, we have recognized the collapse of the common-law rule that generally prohibited such assignments. But the assignability of most claims does not mean all are assignable; exceptions may be required due to equity and public policy.

Courts addressing assignability have often distinguished between claims that are property-based and remedial and claims that are personal and punitive, holding that the former are assignable and the latter are not. The DTPA claims here (unlike the warranty claims under the UCC) clearly fall in the latter category.

Unlike most other states, Texas adopted the UCC without choosing any of its three options concerning who may sue on warranties; instead, the Legislature expressly delegated that choice to the courts. Pursuant to that mandate, in Nobility Homes of Texas, Inc. v. Shivers, we held a downstream purchaser of a mobile home could bring implied warranty claims directly against a remote manufacturer, even though there was no privity of contract between them. While it appears we have never addressed the same issue regarding express warranties, several lower courts have applied the same rule in that context—express warranties pass with the goods.

But in Amstadt v. U.S. Brass Corp., we held downstream purchasers of non-mobile homes could not bring DTPA claims against remote manufacturers and suppliers of a defective plumbing system, because the deceptive acts alleged were not committed against or communicated to them in connection with their own purchases. Recognizing the similarity to this case, JMB asserted no DTPA claims in its own right, as it had no connection with PPG’s original Twindows sale, and never saw any PPG advertisements or warranties before it bought the building.

Thus, we have established a clear distinction between DTPA and warranty claims: a downstream buyer can sue a remote seller for breach of an implied warranty, but cannot sue under the DTPA. Clearly, if warranty claims are assignable because they are “property-based,” DTPA claims must be something else; there must be a “personal” aspect in being “duped” that does not pass to subsequent buyers the way a warranty does.

DTPA claims generally are also punitive rather than remedial. In this respect, it is important to remember that the DTPA overlaps many common-law causes of action, including breach of contract, warranty, fraud, misrepresentation, and negligence. Frequently, the DTPA is pleaded not because it is the only remedy, but because it is the most favorable remedy. In this case, for example, JMB pleaded one set of factual allegations that was then incorporated wholesale into claims for breach of contract, warranty, and the DTPA. The contract and warranty claims offered a remedy, but only the DTPA offered treble damages.

In such cases, the most important role of the DTPA is the remedies it adds, not the ones it duplicates. Economic damages and attorney’s fees are certainly remedial, but they were recoverable in contract and warranty long before the DTPA was passed. The DTPA adds mental anguish and punitive damages—damages that could hardly be more personal.
JMB never asserted a claim for mental anguish, but many DTPA claimants do and will. If consumers can assign their DTPA claims, they may still have to testify at trial about the nature, duration, and severity of their mental anguish, but someone else will keep the money.

JMB argues the DTPA’s treble damages are remedial rather than punitive because they address individual rather than public injuries. Our dissenting colleagues would also find DTPA damages remedial, but overlook the fact that twenty years ago we held exactly the opposite. In *Pace v. State*, we held a DTPA treble-damage award could not be recovered from the Real Estate Recovery Fund (a fund set up for “reimbursing aggrieved persons”) because “treble damages under the DTPA are punitive damages.”

JMB also points to cases in which federal statutory penalties have been held assignable. Statutes that create a remedy where none previously existed may be remedial; for example, there was no remedy at common law for being driven out of business by a monopolist. But that cannot be said of JMB’s warranty claims here.

Of course, if manufacturers make representations or warranties directly to consumers, the latter may sue directly (despite the absence of privity) for breach of express warranty or violation of the DTPA. But JMB neither alleged nor proved that was the case here. As DTPA claims are too “personal” and “punitive” to pass with goods from one owner to the next, it is hard to see why they should pass with the same goods by assignment.

D

Finally, we must consider whether assignment of DTPA claims may increase or distort litigation. “We have never upheld assignments in the face of those concerns.” We have prohibited assignments that may skew the trial process, confuse or mislead the jury, promote collusion among nominal adversaries, or misdirect damages from more culpable to less culpable defendants.

First, as noted above, DTPA claims are unlike most contract-related claims in providing for mental anguish and punitive damages. Jurors are bound to experience some confusion in assessing mental anguish of a consumer, or punitive damages based on “the situation and sensibilities of the parties,” when the affected consumer is not a party. The Legislature intended DTPA lawsuits to be “efficient and economical”; assessing personal and punitive damages in these circumstances is likely to make that goal difficult.

But more important, there is a serious risk here of skewing the adversarial process. When A sells goods to B who sells them to C, if the goods prove defective and there were no dealings between A and C (as is often the case in the stream of commerce), C will naturally look to B for a breach-of-contract remedy. But if DTPA claims are assignable, B and C both have a strong incentive to direct the suit elsewhere for relief. If B settles with C for a small amount and assigns any DTPA claims it may have against A, C now has a case with potential punitive damages, and B has avoided potential liability. Thus the litigation will continue with the parties in different roles—precisely the results that have led us to prohibit assignments in other contexts.

In this case JMB made no complaints against HCC, even though the window problems JMB discovered were very similar to the ones HCC encountered a few years before. Further, to avoid any discovery rule problems, HCC joined JMB in downplaying the earlier problems that must have seemed disastrous to HCC at the time. We cast no aspersions on the litigants here; we only note that assignability of DTPA claims may encourage some buyers to cooperate—if not collude—with a seller who may have been the one that actually misled them.
E

The DTPA is primarily concerned with people—both the deceivers and the deceived. This gives the entire act a personal aspect that cannot be squared with a rule that allows assignment of DTPA claims as if they were merely another piece of property.

Our dissenting colleagues assert we should skip over the question of DTPA assignability (which they proceed to address in detail) to address the “threshold” question whether HCC had a valid DTPA claim to assign. In reviewing this DTPA judgment in favor of an assignee, an appellate court could first ask whether the assignment, if proper, concerned a valid DTPA claim (as our colleagues do), or whether the DTPA claim, if proper, could be assigned (as do we). Clearly, the more important question to the jurisprudence of the state is whether DTPA claims can be transferred (a matter of conflict in the courts of appeals), not whether pre-1983 DTPA claims survived the 1983 amendments (a matter as to which there has been neither case nor conflict in the twenty years since).

Our dissenting colleagues suggest in a hypothetical that under our decision today, if A tampers with a car’s odometer before selling it to B who sells it to C, C has no DTPA remedy against A. Of course, that is already the case under Amstadt if there is no assignment. Moreover, C can also sue B under the DTPA (perhaps for representing the car had lower mileage than it really had), and B can bring an indemnity and contribution claim under the DTPA against A. If we assume (as their hypothetical does) that A did the tampering, the effect is likely to be the same—A pays DTPA damages, and C receives them. But if B did the tampering (and given the severe federal penalties, no one is likely to admit it), the assignment of DTPA claims skews the normal litigation process by encouraging C to combine with B against A.

Because only an assignment is before us, we do not decide whether DTPA claims survive to a consumer’s heirs, a related but sometimes distinct inquiry. For the same reason, we also reserve for another day the assignment of claims that were created within and could not be brought without the DTPA, such as false going-out-of-business sales or price-gouging during a disaster. Finally, our holding does not prohibit equitable assignments, such as a contingent-fee interest assigned to a consumer’s attorney.

But because of the statutory differences between the UCC and the DTPA, the personal litigation by consumers that was the DTPA’s primary purpose, the personal and punitive nature of both DTPA claims and DTPA damages, and the risks to the adversarial process, we hold that DTPA claims generally cannot be assigned by an aggrieved consumer to someone else.

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**PROBLEM 5**

Assume builder builds a house to sell on speculation. The plumbing contractor who installs the plumbing misrepresents the quality of the fixtures he installed. The week after the plumbing is completed, the builder sells the house to homeowner. During the negotiations the builder repeats the representations made by the plumbing contractor to the consumer. Shortly after the consumer discovers problems, the builder files bankruptcy. Can the consumer maintain an action against the plumber under the DTPA? Assume that shortly after discovering the problem, the consumer is transferred to a new location and sells the house. Does the buyer have any claims under the DTPA against the plumbing contractor?
CHAPTER 1. DECEPTIVE TRADE PRACTICES ACT

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The DTPA provides that a consumer may sue any entity that violates the Act. To what extent, if at all, does this authorize a cause of action against an individual, when acting in a representative capacity? For example, if the president of a corporation makes an actionable misrepresentation, does the consumer have a claim against the corporation, the individual, or both? Consider the following decision.

MILLER v. KEYSER
Supreme Court of Texas, 2002
90 S.W.3d 712

ENOCH, JUSTICE

Under the Deceptive Trade Practices-Consumer Protection Act (“DTPA”), we are asked whether an agent for a disclosed principal may be held liable for passing along false representations made in the course and scope of his employment. The court of appeals answered that question no. To the contrary, we hold that because the DTPA allows a consumer to bring suit against “any person,” an agent may be held personally liable for the misrepresentations he makes when acting within the scope of his employment. As a result, we reverse the court of appeals’ judgment, and remand this cause to the court of appeals for proceedings consistent with this opinion.

I. Background

Barry Keyser worked as a sales agent for D.B. Interests, Inc., a Texas corporation doing business as The Homemaker. In 1992 and 1993, Keyser sold Homemaker homes built in Oakbrook, a new subdivision located in Pearland, Texas. Keyser showed prospective purchasers the different lots available, as well as how each home would fit on the lots. The lots were subject to a drainage easement held by the Brazoria County Drainage District on the back twenty-feet of each lot. Each purchaser knew about the drainage easement on his or her lot.

David and Lynette Miller and several other homeowners (the “homeowners”) bought Homemaker homes from Keyser in the Oakbrook subdivision. The homeowners informed Keyser that they were interested in larger backyards, many wanting extra space for their children and pets. Keyser represented to the homeowners that The Homemaker lots were oversized and that they were in fact larger than the lots of a competing builder in the subdivision. Keyser told the homeowners that even with the existence of the easement, the lots could be fenced along the back of the property line. The homeowners paid a premium for these “oversized” lots.

In 1994, after the homeowners built their homes, some received a letter from the Brazoria County Drainage District telling them that all fences in the easement must be removed at the owners’ expense. As a result, the homeowners sued the owner of The Homemaker, Dennis Bailey, and sales agent, Barry Keyser, for common-law fraud and misrepresentations in violation of the DTPA. The homeowners claim that Keyser misrepresented the size of the lots and where the
fencing could be placed at the back of the lots. The homeowners sought to recover damages for the fence and landscaping repairs and a return of the excess charges paid for the lots.

The homeowners also joined The Homemaker, but all claims against the corporation were dismissed as untimely. At trial, the trial court granted a directed verdict in favor of Dennis Bailey. The trial court found that Bailey had no direct communication with the homeowners, and he therefore made no misrepresentations about the lots. After the jury answered seven questions in favor of the homeowners, the trial court rendered judgment against Keyser.

Keyser appealed, arguing that as a matter of law, under the DTPA, a corporate agent cannot be held personally liable for company misrepresentations. In reversing the trial court’s judgment, the court of appeals relied on our decision in Karl & Kelly Co., Inc. v. McLerran to support its conclusion that an agent acting within the scope of his employment cannot be held personally liable under the DTPA. The court of appeals reasoned that, in light of the jury findings that Keyser did not act fraudulently and acted only in the scope of his employment, the trial court erred in rendering a judgment against him. We granted the homeowners’ petition for review to consider this question.

II. Agent Liability Under the DTPA

Under the DTPA, a consumer may bring suit against any person whose false, misleading, or deceptive acts, or other practices enumerated in the Act are the producing cause of the consumer’s harm. A consumer may also bring suit for “any unconscionable action or course of action by any person.” The DTPA broadly defines “person” as “an individual, partnership, corporation, association, or other group, however organized.” The DTPA is a consumer protection statute, and according to the Legislature, is to be construed liberally to promote its central purpose.

Keyser personally participated in the sale of every home sold to the homeowners. He personally made the representations about the size of the lot and the location of the fence. He is the only person with whom the homeowners had any contact. Based on the plain language of the statute, Keyser is liable for his own DTPA violations.

Keyser argues that he should not be held liable because he did not, in fact, know that his representations were false. But a DTPA claim does not require that the consumer prove the employee acted knowingly or intentionally. The DTPA requires that the consumer show that the misrepresentation was false and that the false misrepresentation was the producing cause of the consumer’s damages. A consumer is not required to prove intent to make a misrepresentation to recover under the DTPA. The DTPA was enacted to “protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty” and to provide consumers with a means to redress deceptive practices “without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit.” Misrepresentations that may not be actionable under common law fraud may be actionable under the DTPA. Thus, Keyser may be held liable under the DTPA even if he did not know that his representations were false or even if he did not intend to deceive anyone.

Keyser further argues that he is not a “person” subject to the DTPA because at all times, he was acting solely on behalf of The Homemaker. He contends that the statute should not be read to allow a consumer to sue any individual person absent a showing that this individual acted outside the scope of his employment or that this individual acted knowingly. For support, Keyser points to our per curiam opinion in Karl & Kelly Co., Inc. v. McLerran.
The issues in McLerran arose in the context of a post-answer default judgment. The defendants, an architect and a real-estate agent involved in the construction of a home, were sued under the DTPA based on their representations about the workmanlike quality of the home. The default judgment happened because the defendants answered but failed to appear at trial. To support the default judgment, the McLerrans had the burden to prove that the defendants were liable. In reversing the court of appeals’ judgment, we noted that the McLerrans produced no evidence that the defendants acted in their individual capacities, and we held that agents of a corporation are not liable for the company’s misrepresentations unless there is a finding that the agents acted as the alter ego of the corporation.

Ten months after our decision in McLerran, this Court decided Light v. Wilson. In Light, the owner of a construction company was sued individually for unconscionable acts and breaches of implied and express warranties in violation of the DTPA. We declined to hold this corporate agent individually liable because there was no finding that the agent individually violated the DTPA. This conclusion necessarily implied that individual liability could attach if it was found that the agent personally violated the DTPA.

Justice Spears, in his concurring opinion, asserted that Light implicitly overruled the decision in McLerran. As stated by Justice Spears, “liability in these cases is based on the agent’s own actions, not his status as agent.” We agree with this statement. Thus, if there is evidence that the agent personally made misrepresentations, then that agent can be held personally liable.

We recognized our implicit holding in Light less than two years later in Weitzel v. Barnes. In Weitzel, we concluded that when corporate officers make affirmative misrepresentations in connection with the sale of a home, the agents are personally liable under the DTPA even though they were acting on behalf of the corporation. Liability attaches because the officers themselves made the misrepresentations.

Here, the jury expressly found that Keyser personally violated the DTPA and that his false, misleading, and deceptive actions were the producing cause of the homeowners’ harm. The evidence supports that finding. Keyser showed the homeowners the plats of land, he showed them the size of the lots, he told them where their fences could be located, and he was paid $40,000 in commission as a result of his sales. The plain language of the DTPA grants the homeowners a cause of action against “any person” who violates the Act. Even though the jury found that Keyser acted “solely within the course and scope of his employment . . . as an agent for The Home-maker,” this finding does not excuse Keyser from DTPA liability.

Our analysis on agent liability is not affected by the agent’s or the employee’s position in the company. The court of appeals distinguished Weitzel from this case based on the fact that the corporate agents were officers of the corporation. But the definition of “person” under the DTPA makes no such distinction, and no other provision implies that one’s status in the corporation determines liability. Agents are personally liable for their own torts. There is no basis for concluding differently based on the claims brought under the DTPA. Accordingly, we hold that an agent may be held personally liable for his own violations of the DTPA.

Keyser points to the language of the DTPA indemnity provision to purportedly advance his theory that an agent acting for a corporation cannot be held individually liable. Section 17.555 states: “[a] person against whom an action has been brought under this subchapter may seek contribution or indemnity from one who, under the statute law or at common law, may have liability for the damaging event of which the consumer complains.” Keyser says that because Section 17.555 includes the common law, the DTPA recognizes the common law doctrine of respondeat
superior. Thus, if the agent or employee is acting on behalf of the corporation and in the scope of his employment, the corporation alone is the responsible party. The agent is only liable under the DTPA when he acts knowingly or outside the scope of his employment.

We think this indemnification provision supports a contrary inference. The statute actually contemplates that an agent may be innocent of any knowing misrepresentation by merely passing along information of the company. The language of Section 17.555 does not excuse an agent from being a party to a suit. Rather, the indemnification provision provides a means for an agent to recoup his loss from the employer if the employer is responsible for the consumer’s harm. The DTPA permits “consumers to seek DTPA recourse against those with whom they have engaged in a consumer transaction.” Then, if another causes the agent’s liability, the agent may seek statutory contribution or indemnity against that entity. Here, The Homemaker is an entity that may have liability for the homeowners’ harm. If Keyser was truly just passing along company information, then he has a right to seek indemnity against The Homemaker. Even though the DTPA subjects an agent or employee acting within the scope of employment to DTPA liability, the DTPA also offers protection. Agents and employees receive protection through the indemnification provision.

Finally, the DTPA identifies a wide range of persons who may be sued, but also identifies an exemption in Section 17.49. Section 17.49(a) exempts from DTPA liability “the owner or employees” of certain advertising media. But a media employee may still be sued if the employee acts with “knowledge of the false, deceptive, or misleading acts or practices . . .” or has a “substantial financial interest in the sale or distribution of the unlawfully advertised good or service.” The homeowners argue, and we agree, that the exemption of Section 17.49 only excuses from DTPA liability advertising media employees.

Further, Section 17.49 demonstrates that the Legislature knew how to exempt employees from liability for innocent misrepresentations. And it chose to only exempt media employees. If all employees of any enterprise were meant to be excluded from the DTPA because they were acting on behalf of their employers, then Section 17.49 would be unnecessary. As we stated in Cameron v. Terrell & Garrett, Inc., if the Legislature had intended to place such a restriction on the class of persons who could be sued under the Act for deceptive trade practices, it could easily have done so by simply drafting the restriction into the definition of consumer or some other provision of the Act.

The Legislature did not do so, and we presume the Legislature did not perform a needless act by enacting Section 17.49. The Legislature created a limited exemption for advertising media employees, and it drafted the statute to allow a consumer to bring suit against “any person” who causes the consumer’s harm. Thus, as the statute is written, “any person” who makes a representation is liable under the Act if that representation is false, misleading, or deceptive. Any other reading of the DTPA renders Section 17.49’s language useless.

The court of appeals states that, even if one interprets the statute to excuse from DTPA liability those employees acting innocently on behalf of their employers, Section 17.49 still serves a purpose. Section 17.49 “protects media employees (and their employers) from liability based on another’s false advertising.” But the court of appeals expands the limited exemption in Section 17.49 beyond its own terms. It ignores the plain language of the DTPA to create an additional exemption for employees who pass along company information. The court of appeals interpreted the “any person” language of the DTPA to excuse all employees or agents for their innocent misrepresentations made while on the job, and it distinguished between employees who act on their
own and employees who act on behalf of their employers. Under this interpretation, no express employee exemption provision would be required, and as a result, the language of Section 17.49 would be superfluous.

The purpose of the DTPA is not only to deter the conduct the DTPA forbids but also to provide consumers with an efficient means to redress deceptive business practices. Creating an exemption for corporate agents and employees would do little to further that purpose.

In the event an employee is held liable for unknowingly passing along false company information, that employee can seek statutory contribution or indemnification from the employer. The provision works to ensure that the responsible party is the one that actually pays, even if that party is not the one actually sued. If the indemnification proves to be not enough protection for agents, the Legislature can amend the statute to prevent further mischief. We decline to judicially create an exemption that does not exist in the statute for agents acting solely on behalf of their employers. In doing so, we also acknowledge the amicus brief filed by the Attorney General, in which the General asserts that judicially creating such an exemption would adversely affect the General’s ability to enforce the statute, which ultimately will affect the protections afforded to consumers.

III. Conclusion

Keyser is a “person” under the language of the DTPA. Because the plain language of the DTPA provides for agent liability when that agent personally violates the DTPA, we reverse the judgment of the court of appeals. Keyser raised additional issues in the court of appeals that were not presented to this Court. Pursuant to Rule 53.4 of the Texas Rules of Appellate Procedure, we remand this case to the court of appeals for further proceedings.

NOTE & QUESTIONS

Why is DTPA liability imposed on an agent? Is civil liability the best way to protect consumers? In many countries, criminal liability is often imposed for what we would describe as a consumer protection problem. Should we use criminal law more to protect consumers? What if the officers of a corporation were aware of a dangerous situation and did not take steps to remedy the dangerous condition? Consider the following article from the New York Times, April 21, 2010.

When Heart Devices Fail, Who Should Be Blamed?

It was a landmark episode brought to light by two Minneapolis cardiologists that changed the way the medical device industry deals with the safety of heart implants.

Now the doctors, five years later, are raising a fundamental question about medical safety and the law: who should be held accountable when a company sells a flawed product that can injure or kill patients? Is it the company or the people who run it?

The legal case that grew from the doctors’ revelations involves heart defibrillators once made by the Guidant Corporation, which is now part of Boston Scientific. Guidant continued to sell the devices, evidence indicates, even after it discovered that some might short-circuit and fail. The defibrillators, intended to protect people from erratic, potential-
ly fatal heart rhythms, have been associated with at least six deaths, including that of a 21-
year-old patient of the two cardiologists.

A federal judge will consider an agreement this month with Guidant in which the
company would plead guilty to two criminal misdemeanors and pay a $296 million fine.
The Justice Department is hailing the result, saying the fine would be the largest ever paid
by a medical device maker.

But the cardiologists, Dr. Robert G. Hauser and Dr. Barry J. Maron, are not celebrat-
ing. Instead, they have written a letter to the judge, Donovan W. Frank of United States
District Court in Minneapolis, urging him to reject the deal.

“This is not a plea agreement that should be allowed,” Dr. Hauser said in an interview.
“Nobody is being held accountable.”

Officials at Boston Scientific declined to discuss the plea agreement, but a lawyer for
Guidant defended it as fair at a court hearing earlier this month.

Robert M. Lewis, the assistant United States attorney in Minneapolis who is prosecut-
ing the Guidant case, declined to say whether the government was separately investigating
its executives, who have since left the company. The plea deal would not block additional
charges.

But in an interview by phone, Mr. Lewis emphasized that proving any individual em-
ployee broke the law could be more difficult than holding a company responsible for the
collective actions of its employees. “We don’t bring charges unless we believe that there
is evidence sufficient to convict someone,” Mr. Lewis said.

In recent years, the Justice Department has won hundreds of millions of dollars in
fines from drug and device makers, including a string of cases in which the companies
have pleaded guilty to violating federal laws.

But corporate executives rarely face criminal charges in such actions, even though
they can be held liable under federal law for regulatory violations that occur on their
watch — whether or not prosecutors can prove the executives participated in the wrongdo-
ing or even knew about it.

More broadly, officials of the Food and Drug Administration say that the Obama ad-
ministration intends to push for more prosecutions of corporate officials, a move that is
likely to please patient advocates but also to touch off intense debate.

John M. Taylor III, counselor to the F.D.A. commissioner, Dr. Margaret Hamburg,
said the agency would soon start training agency personnel about the reach of the Food,
Drug and Cosmetic Act of 1938 as part of a heightened approach to enforcement. The
United States Supreme Court has held that the statute places an inherent duty on execu-
tives of drug, device and food companies to act lawfully and ensure product safety.

“What we plan to do both internally and externally is make people aware that this is
another arrow in the quiver that we plan to use,” Mr. Taylor said.

John R. Fleder, a lawyer who represents drug and device companies, said the F.D.A.
seemed to be tilting toward the view that the Justice Department, which determines how to
pursue cases referred to it by regulatory agencies, had not used all the legal weapons
available to it.
“Prosecutors want the money,” said Mr. Fleder, of Hyman, Phelps & McNamara. “And at least in the big money settlements they have had in pharma cases, it appears that prosecutors are willing to settle even if it means forgoing prosecutions against individuals.”

Short of executives facing prosecution, companies see the hefty financial settlements demanded by the Justice Department as another price of doing business, industry critics say.

In the corporate world, the likelihood that an executive would face criminal prosecution depends on the industry and the shifting interests of prosecutors.

In recent years, the Justice Department has placed a particular emphasis on charging individuals in bribery, antitrust and other financial cases, said Jonathan L. Stern, a lawyer with the firm, Arnold & Porter. In one of the most notable cases, Bernard L. Madoff was sentenced to 150 years for running a Ponzi scheme.

While officials of medical products companies have sometimes been prosecuted, one of the few recent criminal cases involving corporate officers of a major medical manufacturer was in 2007, when federal prosecutors in Virginia brought misdemeanor charges against three top executives of the drug company Purdue Pharma, which makes the prescription narcotic OxyContin.

That year, when the company pleaded guilty to a felony charge that it falsely promoted the painkiller as less prone to abuse than other narcotics, the executives also pleaded guilty to charges against them. The company paid $600 million in fines, and the three men paid a combined $34.5 million in fines.

John L. Brownlee, a former United States attorney who led the case, said the officials were charged because it was their job to make sure OxyContin was properly promoted and they had a responsibility to prevent it from being marketed illegally.

“A lot of people got addicted to this drug and died of overdoses,” said Mr. Brownlee, now with the law firm Holland & Knight.

But lawyers for the Purdue executives accused prosecutors of acting punitively. And other lawyers like Mr. Fleder who defend F.D.A.-regulated companies are expressing concern that the agency, if it steps up its push for criminal prosecutions, might go after executives unnecessarily.

In addition to other fallout, the Department of Health and Human Services can bar executives convicted of criminal offenses from dealing with federal health plans like Medicaid and Medicare. The executives in the OxyContin case, for example, were barred for 12 years.

A former prosecutor in many drug and medical device-related cases, Michael K. Loucks, said he never charged corporate executives with misdemeanors — which apply in cases when the violations are deemed unintentional — because he believed that being barred from the industry was too harsh a consequence. “I think that if you are going to take actions that take away someone’s liberty or livelihood, you should have to prove felony conduct,” said Mr. Loucks, who spent over 20 years as an assistant United States attorney in Boston.
But in the Guidant case, Dr. Hauser and Dr. Maron told Judge Frank in their letter that they did not believe simply exacting money from a company was deterrent enough to prevent other company officials from making bad decisions.

“It looks like the only people really being affected here are the shareholders of Boston Scientific,” Dr. Hauser said, referring to the proposed fine.

At the time of the incident five years ago, Guidant had defended its actions by saying it feared that alerting doctors about the potentially flawed defibrillators could create problems because replacing them also posed risks.

Lee Oukrop, the father of the cardiologists’ 21-year-old patient who died in 2005, said he still found it difficult to talk about what happened to his son, Joshua. But one thing was certain, he said in an interview by phone. It did not matter how big a fine was imposed on the company. “Somebody, somewhere said, ‘We don’t care about this, let’s just let it go,’” Mr. Oukrop said, referring to the flawed device his son received. “It would have been a lot nicer if they would have dug a little deeper and found out who that person was. That might have made sure it didn’t happen again.”

The problems involving Guidant’s heart devices came to light in 2005 when The New York Times published an article based on interviews with Dr. Hauser and Dr. Maron.

It was soon disclosed that Guidant had known that two of its defibrillator models could fail catastrophically by short-circuiting just when they were charging up to send out a life-saving jolt.

The company fixed the flaw in newer devices. Guidant, however, never alerted doctors or regulators about the problem, and patients continued for a time to get the potentially flawed older defibrillators because the company did not pull the implants from hospital shelves.

The case highlighted problems with the way makers of medical devices disclosed defects, and it resulted in both greater regulatory oversight of the industry and increased self-regulation.

Prosecutors charged in court papers that Guidant had knowingly sold the potentially flawed defibrillators, but that issue was not addressed in the company’s plea agreement this month. The two misdemeanor charges in that agreement relate to the completeness and accuracy of the company’s filings with the F.D.A.

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**QUESTION**

Toyota Motors recently discovered a problem with its acceleration system. They believed that the problem would affect only a small number of cars and was not serious. In fact, although the problem was limited to a very small number of cars, it had the potential to cause the accelerator to stick, with a strong possibility of a serious accident.

As part of its yearly review of its dealerships, Toyota sent a representative, Hisakasu Hirose to meet with the sales manager at each of its dealerships. One of the largest is Richmond Toyota in Houston, Texas. Richmond maintains an inventory of close to 1,500 cars, valued at over $30 mil-
lion. (Of course, most of those cars are financed and the amount owed on the cars closely approximates their value). On February 1, 2010, Hirose met with Richmond’s sales manager Joe Parson.

During the meeting, Hirose told Parson of the problem and stated, “Toyota has authorized me to tell you that any problem is very minor and cannot cause any serious problems with the operation of the automobile.” (At the time, Hirose believed the statement was true.) Parson, who had heard rumors of a problem, was relieved to hear this. Hirose also told him that Toyota wants him to make it clear that if the problem does appear, it would be promptly repaired.

After his meeting, Parson met with all his sales staff and relying on what he had been told by Hirose, repeated the comments about the accelerator problem. Fred Johnson, one of the best salespersons at the company, asked if they could relay this information to their customers. Johnson said that he had also heard rumors, and was very concerned about possible problems. Parson replied, “absolutely.”

That afternoon, Johnson met with Casey who was interested in purchasing a car. Casey had almost made up her mind, when Johnson said, “If you are looking for a safe car that will hold its value better than any on the market, Toyota is for you. I know there have been some rumors about accelerator problems, but I assure you any problem is very minor and cannot cause any serious problems with the operation of the automobile. If a problem does pop-up, we will promptly take care of it at no charge.” That was all it took to close the deal. The next day, Casey left with her new Toyota.

Unfortunately, Casey’s car had a defective accelerator, and on the way home it stuck and the car crashed. Casey now wants to sue everyone she can under the DTPA based on the representation that the problem was “very minor and cannot cause any serious problems.” Discuss all possible defendants in Casey’s suit, and the likelihood of success against each of them.

NOTES AND QUESTIONS

Can a party conspire to violate the DTPA? Is such a conspiracy actionable? What does it take to establish a conspiracy? In Laxson v. Giddens, 48 S.W.3d 408 (Tex. App.—Austin 2001), the court considered these questions.

Conspiracy to Violate the DTPA

Wallace contends that conspiracy to violate the DTPA is not actionable. This appears to be an issue of first impression in Texas. Wallace is wrong. A conspiracy is defined as:

A combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means.

Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp., 435 S.W.2d 854, 856 (Tex. 1968)(quoting Great Nat’l Life Ins. Co. v. Chapa, 377 S.W.2d 632, 635 (Tex. 1964)). As the Supreme Court further explained in Schlumberger:

But the gist of a civil conspiracy is the damage resulting from the commission of a wrong which injures another, and not the conspiracy itself. Starling v. Hill, 121 S.W.2d 648 (Tex. Civ. App.—Waco 1928, no writ); Shelton v. Lock, 19 S.W.2d
One without knowledge of the object and purpose of a conspiracy cannot be a co-conspirator; he cannot agree, either expressly or tacitly, to the commission of a wrong which he knows not of. In 15A C.J.S. Conspiracy § 1(2), p. 599, it is said that one of the essential elements required to establish a civil conspiracy is ‘a meeting of the minds on the object or course of action.’ And, of course, one without knowledge of a conspiratorial plan or scheme to injure another by the commission of a particular wrong cannot share the intent to injure such other.

_Schlumberger_, 435 S.W.2d at 856, 857 (emphasis added).

Violation of the DTPA is per se an awful act. There is no reason that when two or more persons agree to act together to violate the DTPA, they cannot each be held liable. Otherwise two persons could agree to each violate a portion of the DTPA for the express objective of deceiving a consumer but the consumer may not have a claim unless the consumer combines the conspirators’ actions to show they acted together to achieve the objective which violated the act. We hold that two or more persons can be held liable for a conspiracy to violate the DTPA.

But the charge in this case asked about and defined conspiracy as follows:

Was Tony Wallace part of a conspiracy to engage in the actions described in Questions 4 or 5 [alternative forms of DTPA violations by Giddens] that damage Vanessa Laxson?

To be part of a conspiracy, Tony Wallace and another person or persons, must have had knowledge of, agreed to, and intended a common objective or course of action that resulted in the damages to Vanessa Laxson. One or more persons involved in the conspiracy must have performed some act or acts to further the conspiracy.

Answer: _Yes_

As worded, the charge does not require a finding that Wallace agreed to an unlawful purpose that caused the injury or an agreement to engage in unlawful conduct which caused the injury. The charge as worded only required a finding that Wallace “knowledge of, agreed to, and intended a common objective.” No objection to the wording of the charge as given was made.

Wallace did object that there was no evidence of a conspiracy to commit any of the deceptive trade practices upon which the question is based and that there is no cause of action for conspiracy to violate the DTPA. (CR vol. 4, page 102). We have already ruled against Wallace on his second objection. His first objection did not address the definition of conspiracy as contained in the charge.

We are required to review the sufficiency of the evidence based upon the charge submitted, even if erroneous. Because the trial court was obligated to render judgment on the jury verdict that was supported by evidence, Wallace’s motion to disregard the jury verdict could not substitute for a proper objection to the definition in the charge of conspira-
In evaluating the motion to render judgment notwithstanding the verdict, the trial court must evaluate the evidence with regard to the charge given, not the charge that should have been given. A trial court may disregard the jury finding only if it is unsupported by evidence or if the issue is immaterial.

In light of the charge given, it was undisputed that Wallace and Giddens had agreed to acquire Sugars and resell the horse to Laxson. They did. Wallace actively participated in this common objective by repeatedly going to Whitehead trying to acquire Sugars. His efforts, which were part of the agreed upon plan to acquire Sugars, ultimately resulted in acquiring Sugars from Whitehead. Sugars was then sold to Laxson. The entire transaction could not have occurred without Wallace’s agreement and active participation. There was ample evidence to support the jury’s answer to the question and definition of conspiracy as worded.

**NOTES AND QUESTIONS**

One of the important consequences of establishing a civil conspiracy is that each conspirator is responsible for all acts done by the conspirators in furtherance of the conspiracy. In other words, there is joint and several liability. *J.T.T v. Tri*, 111 S.W.3d 680 (Tex. App. Houston [1st Dist.] 2003).

**QUESTION**

The following question appeared on the Spring 2001 Bar Exam.

In 1997, Joe and Ann Jones built a custom home in San Antonio, Texas. The home was in an area where the exclusive supplier of electrical power was Strong Power & Light Company (“Strong”).

In order to obtain electrical power, the Joneses were required to purchase from Strong an electrical meter box that met Strong’s specifications. Strong connected the electrical line from the street to the meter box, which was attached to the outside of the house, and then from the meter box into the house. Although the meter box belonged to the Joneses, it was to be maintained by Strong and was sealed to prevent access to the internal wiring board by anyone other than Strong. Strong attached a warning tag to the meter box; the tag stated: “WARNING Breaking the seal or accessing this meter box other than for maintenance by Strong Power & Light is prohibited.” Strong advertised widely that its services were second to none and that its equipment was maintenance free.

In March 1999, the Joneses moved out of state, where they continue to reside at the present time. They leased their San Antonio home to Happy Schools, Inc., a nationwide nursery school entity which had total assets of approximately sixteen million dollars. Use of the home as a nursery school was a lawful use under the local zoning ordinance.
The last electricity bill paid by the Joneses was for the month of March 1999. Happy Schools contracted with Strong to start up its electrical power in April 1999 and began paying the electricity bills at that time.

In February 2000, an electrical short occurred within the meter box, resulting in a fire that destroyed the Jones’ home and forced Happy Schools to shut down its San Antonio operation. An investigation revealed that Strong had never performed any maintenance on the meter box and that the fire would not have occurred if Strong had inspected and maintained the box.

Do the Joneses and Happy Schools have a standing to assert claims against Strong under the Texas Deceptive Trade Practices Act, and, if so, what defenses might Strong reasonable assert against each? Explain fully.

SECTION FIVE: CLASS ACTIONS

As originally enacted, the DTPA had a class action provision. However, this section was repealed in 1977. Does this indicate that DTPA actions should not be brought as class actions? Consider the following:

Appellant also assigns error to the class action certification order on the assertion that class actions are precluded as a matter of law in deceptive trade practices actions. His primary argument under this point is that the Legislature’s repeal on May 23, 1977, of Section 17.51, 17.52, 17.53 and 17.54 of the DTPA which provided for class actions evinces legislative intent to preclude class action suits under the Act. We believe the more logical reason for the Legislature’s action was that the special class action provisions of the DTPA were rendered unnecessary by the Supreme Court’s approval of the present Rule 42 on May 9, 1977, and were repealed to avoid any interference with the application of the Rule. This is the view of the commentators, including Justice Jack Pope of the Supreme Court. Pope and McConnico, Texas Civil Procedure Rule Making, 30 BAYLOR L. REV. 5, 15 (1978); Dorsaneo, Creditors’ Rights, 32 SW. L.J. 245, 268 (1978).

Mahoney v. Cupp, 638 S.W.2d 257 (Tex. App.—Waco 1982).

Can a DTPA claim now be brought as a class action? Rule 42 of the Texas Rules of Civil Procedure, as amended in 2003, states:

TEXAS RULES OF CIVIL PROCEDURE
PART II. RULES OF PRACTICE IN DISTRICT AND COUNTY COURTS
SECTION 3. PARTIES TO SUITS

RULE 42. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact
(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

1. the prosecution of separate actions by or against individual members of the class would create a risk of
   (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
   (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
2. the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
3. the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to these issues include:
   (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
   (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
   (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
   (D) the difficulties likely to be encountered in the management of a class action.

(c) Determining by Order Whether to Certify a Class Action; Notice and Membership in Class.

1. (A) When a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action.
2. (B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 42 (g).
3. (C) An order under Rule 42 (c)(1) may be altered or amended before final judgment. The court may order the naming of additional parties in order to insure the adequacy of representation.
4. (D) An order granting or denying certification under Rule 42(b)(3) must state:
   (i) the elements of each claim or defense asserted in the pleadings;
   (ii) any issues of law or fact common to the class members;
   (iii) any issues of law or fact affecting only individual class members;
   (iv) the issues that will be the object of most of the efforts of the litigants and the court;
(v) other available methods of adjudication that exist for the controversy;

(vi) why the issues common to the members of the class do or do not predominate over individual issues;

(vii) why a class action is or is not superior to other available methods for the fair and efficient adjudication of the controversy; and

(viii) if a class is certified, how the class claims and any issues affecting only individual members, raised by the claims or defenses asserted in the pleadings, will be tried in a manageable, time efficient manner.

(2)(A) For any class certified under Rule 42(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 42(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through counsel if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and

(vi) the binding effect of a class judgment on class members under Rule 42 (c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(d) Actions Conducted Partially as Class Actions; Multiple Classes and Subclasses. When appropriate (1) an action may be brought or maintained as a class action with respect to particular issues, or (2) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(e) Settlement, Dismissal or Compromise.

(1)(A) The court must approve any settlement, dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) Notice of the material terms of the proposed settlement, dismissal or compromise, together with an explanation of when and how the members may elect to be excluded from the class, shall be given to all members in such manner as the court directs.

(C) The court may approve a settlement, dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, dismissal, or compromise is fair, reasonable, and adequate.
(2) The parties seeking approval of a settlement, dismissal, or compromise under Rule 42(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 42(b)(3), the court may not approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, dismissal, or compromise that requires court approval under Rule 42(e)(1)(A).

(B) An objection made under Rule 42(e)(4)(A) may be withdrawn only with the court’s approval.

(f) Discovery. Unnamed members of a class action are not to be considered as parties for purposes of discovery.

(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

---the work counsel has done in identifying or investigating potential claims in the action;

---counsel’s experience in handling class actions, other complex litigation, and claims of the type asserted in the action;

---counsel’s knowledge of the applicable law; and

---the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 42(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant or applicants best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 42(h) and (i).

(h) Procedure for determining Attorney Fees Award. In an action certified as a class action, the court may award attorney fees in accordance with subdivision (i) and nontaxable costs authorized by law or by agreement of the parties as follows:
SECTION FIVE: CLASS ACTIONS

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion, subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearing and Findings. The court must hold a hearing in open court and must find the facts and state its conclusions of law on the motion. The court must state its findings and conclusions in writing or orally on the record.

(i) Attorney’s fees award.

(1) In awarding attorney fees, the court must first determine a lodestar figure by multiplying the number of hours reasonably worked times a reasonable hourly rate. The attorney fees award must be in the range of 25% to 400% of the lodestar figure. In making these determinations, the court must consider the factors specified in Rule 1.04(b), Tex. Disciplinary R. Prof. Conduct.

(2) If any portion of the benefits recovered for the class are in the form of coupons or other noncash common benefits, the attorney fees awarded in the action must be in cash and noncash amounts in the same proportion as the recovery for the class.

(j) Effective Date. Rule 42(i) applies only in actions filed after September 1, 2003.

IN RE ALFORD CHEVROLET-GEO, ET AL.
Supreme Court of Texas, 1999
997 S.W.2d 173

HANKINSON, JUSTICE

OPINION

This original mandamus proceeding arises out of a class-action lawsuit. Relators, defendants in the underlying proceeding, present two issues for determination. First, have Plaintiffs sent proper notice of their claims under the Deceptive Trade Practices Act (DTPA)? Second, are Relators entitled to an order bifurcating class and merits discovery? We conclude that Plaintiffs’ DTPA notices, which demanded settlement on behalf of the entire putative class, were proper. We also conclude that, because Relators did not clearly distinguish class and merits discovery, Relators are not entitled to an order bifurcating the two. Accordingly, we deny the writ of mandamus.

Envo-Tech, Inc., Jett Jones, Sheryl M. Nickerson, and Leon M. Andrews, III, filed a class-action lawsuit against 636 Texas motor vehicle dealerships, alleging that the dealerships committed fraud, conspiracy, and DTPA violations by passing on their inventory taxes to consumers as an itemized charge in addition to the advertised or negotiated purchase price. Plaintiffs allege that “each Defendant conspired and agreed to charge the so-called ‘tax’ to each purchaser, to mislead and fail to inform each purchaser as to the nature and legal obligation to pay such tax, and to re-
quire ‘add-on’ of the so-called tax as a condition to purchasing the vehicle in Texas.” Plaintiffs seek to represent consumers who bought vehicles from the dealers since January 1, 1994.

Relators, 598 of the 636 defendant dealers, moved to abate on the ground that Plaintiffs did not send then-adequate DTPA notices. They also moved for a protective order to abate all merits discovery until after class certification, urging that the broad, expensive classwide discovery the Plaintiffs sought would be unnecessary if the class were not certified. Relators further objected to Plaintiffs’ interrogatories and requests for production. The trial court denied the motion to abate and the motion to bifurcate. It sustained in part and overruled in part Relators’ objections. Relators petition for mandamus relief from the two orders denying abatement and bifurcation. They do not challenge the trial court’s ruling on the specific discovery objections. We address the abatement and bifurcation issues in turn.

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II

DTPA Notice

Before filing a DTPA claim, a consumer must timely advise the defendant “in reasonable detail of the consumer’s specific complaint and the amount of economic damages, damages for mental anguish, and expenses, including attorneys’ fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant. Upon receipt of the notice, a defendant may establish a defense to the suit as a matter of law by tendering the full amount of damages claimed plus a reasonable amount for fees and expenses. Alternatively, a defendant may establish a defense to the amount of damages by offering to tender an amount of damages that is substantially the same as, or more than, the damages the factfinder ultimately awards. If a consumer files a DTPA suit without sending notice, the defendant is entitled to abatement of the suit until sixty days after proper notice is sent.

Plaintiffs did not send the required DTPA notices before filing suit. After Relators filed pleas in abatement complaining of that omission, Plaintiffs sent Relators belated notices demanding that Relators reimburse all consumers who paid an itemized vehicle inventory or similar tax since January 1, 1994, plus expenses incurred both before and after suit was filed. Relators contend that the notices are not proper under section 17.505(a) because they demand relief for the class, not just the named Plaintiffs, plus expenses incurred after Plaintiffs filed suit. They argue that before a DTPA action can proceed, the consumer must demand a settlement limited to the named consumer’s own economic and mental anguish damages and presuit expenses, and that the demand cannot include damages sought on a class’s behalf.

As originally enacted in 1973, the DTPA specifically authorized a plaintiff to give notice on behalf of an uncertified class. In 1977, the Legislature repealed the consumer class provisions. Relators argue that these deletions signified a legislative intent to either eliminate DTPA class actions altogether or empower defendants to unilaterally preempt DTPA class action suits by tendering full payment to only the named plaintiffs.

We disagree. Several commentators have pointed out that the likely motive for repealing the DTPA class-action provisions was the Supreme Court’s revision of Texas Rule of Civil Procedure 42, approved on May 9, 1977, which rendered the DTPA provisions unnecessary. The 1973 DTPA class action provisions were patterned after the federal class-action rule, which commentators generally favored over the then-current version of Texas rule 42. Because the 1977 revisions
to rule 42 made it almost identical to its federal counterpart, there was no longer a need to retain the DTPA’s separate class-action provisions.

Relators point out, however, that when the Legislature adopted the class-action provisions of the DTPA in 1973, it also amended article 21.21 of the Texas Insurance Code to add virtually identical class-action procedures. The Legislature did not, however, repeal the Insurance Code class-action provisions. Also, the DTPA originally had two provisions relating to class actions—one for procedure, and one for preliminary notice—but only the former would have duplicated amended rule 42. Relators argue that had the Legislature merely intended to remove any inconsistency between rule 42 and the DTPA class-action procedures, it would have also repealed the Insurance Code class-action provisions and would not have abolished the DTPA’s class-action preliminary notice provision.

Neither the Legislature’s jettisoning of the class-action provisions of the DTPA but not of the Insurance Code, nor its substitution of the DTPA’s class-specific preliminary notice provision with more general notice provisions, reveals an obvious legislative intent to abolish DTPA class actions. Nothing in the legislative history of the 1977 amendments indicates that the Legislature intended to abolish DTPA class actions, and we decline to infer such an intent. If the Legislature had intended to abolish DTPA class actions, it could have expressly done so. We hold that the DTPA permits a consumer to provide preliminary notice on behalf of a putative class.

Courts have long recognized the authority of individual plaintiffs to negotiate settlements on behalf of putative classes. Of course, such settlements are ultimately subject to class certification and court approval. Plaintiffs’ demand that Relators reimburse the members of the putative class did not circumvent the DTPA’s statutory notice requirements.

Relators also object to the notices on the ground that Plaintiffs are permitted to demand only presuit damages and expenses, including attorneys’ fees, that Plaintiffs incurred in asserting the DTPA claim. Plaintiffs have demanded more than just presuit expenses. Their April 29, 1998, notice demands $110,000 in “attorneys’ fees to date” and $49,762 in “costs to date.” This complaint, however, challenges the requested fees’ reasonableness, not the notice’s validity. Even if this request was excessive or unreasonable, an issue we do not decide, it did not interfere with Relators’ ability to create a defense to the suit by tendering the amount of economic and mental anguish damages claimed, and the expenses, including attorneys’ fees, reasonably incurred by the consumers in asserting the claims. A defendant’s ability to assert a complete defense depends on the reasonableness of the amount tendered to pay for the consumer’s expenses, not on whether the tender matches or exceeds the consumer’s claimed expenses.

Relators further argue that even if Plaintiffs’ belated notices were proper, the trial court abused its discretion by refusing to order the case abated for sixty days. For those DTPA claims controlled by the current DTPA, the trial court did not need to formally abate the suit because by the time it issued its ruling, more than sixty days had passed since Plaintiffs sent their notices. Under section 17.505, “[a] suit is automatically abated without the order of the court beginning on the 11th day after the date a [verified and uncontroverted] plea in abatement is filed” and continuing “until the 60th day after the date the written notice is served in compliance with Subsection (a).” Therefore, with respect to those claims that had already been automatically abated, the trial court did not need to formally grant another sixty-day abatement.

Relators assert, however, that the claims of one of the named plaintiffs, Envo-Tech, Inc., were not automatically abated because they were governed by the pre-1995 version of the DTPA. Envo-Tech purchased vehicles from Relators on October 17, 1994, and April 26, 1995, before the
automatic abatement provisions became effective. Before the 1995 amendments, the DTPA did not specify the consequences for noncompliance with the notice requirement. In *Hines v. Hash*, 843 S.W.2d 464, 469 (Tex. 1992), we held that “if a plaintiff files an action for damages under the DTPA without first giving the required notice, and a defendant timely requests an abatement, the trial court must abate the proceedings for 60 days.” Relators insist, therefore, that under the pre-1995 DTPA, the trial court was required to formally abate the proceedings for sixty days.

Which DTPA version applies to Envo-Tech’s claims, however, depends on the date the claims accrued. Suits filed before September 1, 1996, relating to claims accruing before September 1, 1995, are governed by the law in effect before the 1995 amendments. A DTPA claim accrues when “the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice.” Relying on this statutory accrual rule, Envo-Tech alleges that its claims accrued not when it paid the challenged tax, but rather when it discovered the alleged deceptive act. Because the parties dispute when Envo-Tech’s claims accrued, we cannot conclude that the trial court’s refusal to order abatement was an abuse of discretion. Plaintiffs’ DTPA notices were adequate, and Relators have had several months to make a settlement offer since receiving them. Therefore, Relators have not established their right to relief by mandamus on the abatement issue.

**QUESTIONS**

1. Exactly how does settlement work in a DTPA class action? Assume the defendant offers to settle with just the named plaintiff. How does that affect settlement? What if the defendant offers to settle with the class? What happens next? How do you determine the scope of the class? Must the class be certified by the court before settlement is completed? What if the court certifies a class different from the one described in the demand letter? Does the defendant have another opportunity to settle? Does the plaintiff have to send a second notice letter?

2. In a series of cases, the Texas Supreme Court has made it clear that a court must perform a “rigorous analysis” before certifying a class. *See, e.g.*, *Southwest Refining Co., Inc. v. Bernal*, 22 S.W.3d 425 (Tex. 2000); *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398 (Tex. 2000); *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444 (Tex. 2000).

3. Can you have a DTPA laundry list class action? One of the elements of a claim under section 17.50(a)(1) is reliance. Does this defeat a possible class? Under what circumstances could you bring a DTPA class action? Consider the following:

   We review a district court’s certification of a class for abuse of discretion. Rule 23(a) requires the plaintiff to show that the class is too numerous to allow simple joinder; there are common questions of law or fact; the claims or defenses of the class representatives are typical of those of the class; and the class representatives will adequately protect the interests of the class. To receive (b)(3) certification, a plaintiff must also show that the common issues predominate, and that class treatment is the superior way of resolving the dispute.

   Claims for money damages in which individual reliance is an element are poor candidates for class treatment, at best. We have made that plain. We recently held that “a fraud class action cannot be certified when individual reliance will be an issue.” Recently, in
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Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 978-79 (5th Cir. 2000) we applied that rule to civil RICO claims. We do so again, concluding that the district court erred as a matter of law in certifying this class because the predominance requirement could not be met.

In Bolin, we reviewed an order certifying a class comprised of debtors claiming unfair collection practices by Sears. The class alleged violations of the bankruptcy laws, the Fair Debt Collection Practices Act, the Truth in Lending Act, and RICO. We held that consideration of class certification should proceed on a claim by claim basis, with reference to the statutory elements of and remedies for each claim. In regard to the RICO claims, we held that “the individual findings of reliance necessary to establish RICO liability and damaged preclude not only (b)(2) certification of this class under RICO, but (b)(3) certification as well.”

Each member of this putative class must then prove reliance upon Mobil’s alleged fraud in stating it was covered by workers’ compensation insurance. To do that, each plaintiff would have to make an individual showing that she could have and would have sued Mobil, but did not do so because the asserted false statements led her to believe her suit to be barred by the workers’ compensation regime.

While there may be an issue of fact common to all class members—the question of whether or not Mobil was a valid subscriber to the workers’ compensation system—that question does not predominate over the question of whether or not each member of the class suffered a RICO injury. We so held on the facts of Bolin, and on the facts of Castano v. American Tobacco Company, 84 F.3d 734 (5th Cir. 1996) and we see no compelling distinction here. To determine reliance for each individual class member would defeat the economies ordinarily associated with the class action device. An effort to decide only the question of whether Mobil was effectively insured under the Texas compensation scheme would be no more than the trial of an abstraction—for which subclassing and bifurcation is no cure.

Patterson v. Mobil Oil Corp., 241 F.3d 417, 419 (5th Cir. 2001).

4. In Peltier Enterprises, Inc. v. Hilton, 51 S.W.3d 616 (Tex. App.—Tyler 2000), the court denied class certification on a DTPA claim, noting:

Another cause of action pleaded by Appellees is unconscionability under the DTPA. Unconscionability requires proof of (1) an act or practice that, (2) to a person’s detriment, (3) takes advantage of his lack of knowledge, ability, experience, or capacity, (4) to a grossly unfair degree. There must be a showing of what the consumer could have or would have done if he had known about the information. For example, if the consumer could not get financing through any other source and still wanted the car, he may have purchased it under the retail installment contract as written even if told of the transaction with the Bank. Or if the difference in payments was very small, the consumer might not have cared at all. Plus, there would need to be some showing of each customer’s “knowledge, ability, experience, or capacity.” A plaintiff with knowledge about indirect lending or with years of experience in the car-selling business would not be able to show that Peltier did anything that was “unconscionable.”

Under DTPA section 17.46(b)(23), Appellees’ third cause of action, a plaintiff must show that the defendant failed to disclose facts known at the time of the transaction with the intent to induce the plaintiff into a transaction he would not have entered had the in-
information been disclosed. This claim requires individualized proof because reliance is an essential element of this DTPA claim. A class member who could not obtain credit elsewhere is in a different circumstance than one who could. Here, again, the question remains as to what each class member could or would have done if he or she had known of the transaction between Peltier and the Bank. It is not possible that any one individual’s evidence on this point could be substituted for another’s.

5. Under section 17.50(a)(1)(B), reliance is always an element of a misrepresentation claim. Can reliance be shown on a classwide basis? The following is from the Texas Supreme Court’s opinion in *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675 (2002).

As we have noted, reliance is an element of five of the plaintiffs’ causes of action: fraud, breach of express warranty (to a certain extent), negligent misrepresentation, promissory estoppel, and DTPA “laundry list violations”. The burden on plaintiffs to prove reliance in order to recover on any of these theories is in no way altered by the assertion of claims on behalf of a class. As we stressed in *Bernal*:

The class action is a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment. It is not meant to alter the parties’ burdens of proof, right to a jury trial, or the substantive prerequisites to recovery under a given tort. Procedural devices may “not be construed to enlarge or diminish any substantive rights or obligations of any parties to any civil action.” Although a goal of our system is to resolve lawsuits with “great expedition and dispatch and at the least expense,” the supreme objective of the courts is “to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law.” This means that “convenience and economy must yield to a paramount concern for a fair and impartial trial.” And basic to the right to a fair trial—indeed, basic to the very essence of the adversarial process—is that each party have the opportunity to adequately and vigorously present any material claims and defenses.

Thus, the 20,000 class members in the present case are held to the same standards of proof of reliance—and for that matter all the other elements of their claims—that they would be required to meet if each sued individually. This does not mean, of course, that reliance or other elements of their causes of action cannot be proved class-wide with evidence generally applicable to all class members; class-wide proof is possible when class-wide evidence exists. But evidence insufficient to prove reliance in a suit by an individual does not become sufficient in a class action simply because there are more plaintiffs. Inescapably individual differences cannot be concealed in a throng. The procedural device of a class action eliminates the necessity of adducing the same evidence over and over again in a multitude of individual actions; it does not lessen the quality of evidence required in an individual action or relax substantive burdens of proof. If a plaintiff could prove reliance in an individual action with the same evidence offered to show class-wide reliance, then the issue is one of law and fact common to the class. The question the court must decide before certifying a class, after rigorous analysis and not merely a lick and a prayer, is whether the plaintiffs have demonstrated that they can meet their burden of proof in such a way that common issues predominate over individual ones.

The plaintiffs contend that they have established “class-wide reliance” on misrepresentations made by Schein, but this is not supported by the record. It is true, as the plain-
tiffs say, that there is evidence that Schein *wanted* purchasers to rely on its advertisements and other representations about its software products, as most marketers of any product would, but there is no evidence that purchasers *actually did* rely on Schein’s statements so uniformly that common issues of reliance predominate over individual issues. To the contrary, there is, for example, significant evidence that purchasers relied on recommendations from colleagues and others rather than any statements made directly or indirectly by Schein. The trial court did not explain in its certification order how the plaintiffs can avoid individual proof of reliance or why the necessity for such proof would not defeat the predominance requirement for certification. Such an explanation would be an important part of the trial plan required by *Bernal*. The court of appeals premised affirmance of the order on the mistaken belief that reliance was not an element of the plaintiffs’ principal causes of action.

The Fifth Circuit has recently observed that if “individual reliance is necessary to prove actual damages, a class action may not be certified on this issue.” We need not and do not decide whether a class asserting a cause of action requiring proof of reliance, like the class alleged here, can ever be certified. We hold only that the plaintiffs in this case have failed to show that individual issues of reliance do not preclude the necessary finding of predominance under Rule 42(b)(4).

**COMMENT**

In a case with far reaching implications for consumer class actions, the United States Supreme Court recently held that a business may include an arbitration clause in a consumer contract, and such a clause may also prohibit the consumer from bringing or joining a class action in litigation or arbitration. *AT&T v. Concepcion*, 131 S. Ct. 1740 (2011) involved an arbitration agreement entered into by Vincent and Liza Concepcion as part of the sale and servicing of cellular telephones with AT&T Mobility LCC (AT&T). The contract provided for arbitration of all disputes between the parties, but required that claims be brought in the parties’ “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.”

The Ninth Circuit found the provision unconscionable under California law as announced in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005). It also held that the Federal Arbitration Act [FAA] did not preempt the “Discover Bank rule” because that rule was simply “a refinement of the unconscionability analysis applicable to contracts generally in California.” In response to AT&T’s argument that the Concepcions’ interpretation of California law discriminated against arbitration, the Ninth Circuit rejected the contention that “class proceedings will reduce the efficiency and expeditiousness of arbitration” and noted that “Discover Bank placed arbitration agreements with class action waivers on the exact same footing as contracts that bar class action litigation outside the context of arbitration.” The Supreme Court reversed, holding that “because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, California’s Discover Bank rule is preempted by the FAA.” Thus, a business may include a provision requiring arbitration, and prohibiting class wide relief.

What is the practical effect of this decision? [The opinion in *Concepcion* is in Chapter Four, as part of the discussion of arbitration.]
SECTION SIX: VIOLATIONS OF THE ACT

Once you have established that your client is a consumer, that the DTPA applies and that your transaction is not exempt, the next step is to show the use of conduct prohibited by subsection 17.50(a). As noted earlier, this subsection provides that four separate and distinct types of conduct may be actionable under the DTPA. Section 17.50(a) states:

(a) A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish:
   (1) the use or employment by any person of a false, misleading, or deceptive act or practice that is:
      (A) specifically enumerated in a subdivision of Subsection (b) of Section 17.46 of this subchapter; and
      (B) relied on by a consumer to the consumer’s detriment;
   (2) breach of an express or implied warranty;
   (3) any unconscionable action or course of action by any person; or
   (4) the use or employment by any person of an act or practice in violation of Chapter 541, Insurance Code.

Subsection 17.50(a)(1) makes any conduct “specifically enumerated in subdivision of section (b) of section 17.46 of this subchapter” actionable. This list of prohibited practices is generally referred to as “the laundry list.” The most common DTPA claims involve a violation of the laundry list.

Subsection 17.50(a)(2) makes any “breach of an express or implied warranty” actionable under the DTPA. As will be discussed in detail in Chapter Two, the DTPA does not create any warranties. The DTPA simply provides an additional mechanism through which a breach of warranty may be asserted.

The third category of prohibited conduct is “any unconscionable action or course of action.” DTPA unconscionability is a defined term that is separate and distinct from unconscionability under the Uniform Commercial Code or common law.

Finally, under section 17.50(a)(4), the use or employment by any person of an act or practice in violation of Chapter 541, Insurance Code also constitutes a violation of the DTPA. Insurance Code claims generally involve an action under both the Insurance Code and the DTPA. Due to the complex nature of such claims, they will be discussed only superficially in this text.

Of the four claims discussed above, only two are creatures of the DTPA. Breach of Warranty and Insurance Code violations exist independent of the DTPA, and are incorporated into the Act by virtue of Subsections 17.50(a)(2) and (4). On the other hand, the laundry list and unconscionability provisions of the DTPA were created by the legislature as part of the DTPA. Thus, the interpretation and application of these provisions must be based exclusively on the Act. The next two subsections discuss these two “pure” DTPA claims.
I. THE LAUNDRY LIST

The most common law asserted under the DTPA is a violation of section 17.46(b) generally referred to as the “laundry list.” This section states:

(b) Except as provided in Subsection (d) of this section, the term “false, misleading, or deceptive acts or practices” includes, but is not limited to, the following acts:

(1) passing off goods or services as those of another;
(2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
(3) causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;
(4) using deceptive representations or designations of geographic origin in connection with goods or services;
(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;
(6) representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or secondhand;
(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
(8) disparaging the goods, services, or business of another by false or misleading representation of facts;
(9) advertising goods or services with intent not to sell them as advertised;
(10) advertising goods or services with intent not to supply a reasonable expectable public demand, unless the advertisements disclosed a limitation of quantity;
(11) making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions;
(12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;
(13) knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service;
(14) misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction;
(15) basing a charge for the repair of any item in whole or in part on a guaranty or warranty instead of on the value of the actual repairs made or work to be performed on the item without stating separately the charges for the work and the charge for the warranty or guaranty, if any;
(16) disconnecting, turning back, or resetting the odometer of any motor vehicle so as to reduce the number of miles indicated on the odometer gauge;
(17) advertising of any sale by fraudulently representing that a person is going out of business;
(18) advertising, selling, or distributing a card which purports to be a prescription drug identification card issued under Section 4151.152, Insurance Code, in accordance with rules adopted by the commissioner of insurance, which offers a discount on the purchase of health care goods or services from a third party provider, and which is not evidence of insurance coverage, unless:

(A) the discount is authorized under an agreement between the seller of the card and the provider of those goods and services or the discount or card is offered to members of the seller;

(B) the seller does not represent that the card provides insurance coverage of any kind; and

(C) the discount is not false, misleading, or deceptive;

(19) using or employing a chain referral sales plan in connection with the sale or offer to sell of goods, merchandise, or anything of value, which uses the sales technique, plan, arrangement, or agreement in which the buyer or prospective buyer is offered the opportunity to purchase merchandise or goods and in connection with the purchase receives the seller’s promise or representation that the buyer shall have the right to receive compensation or consideration in any form for furnishing to the seller the names of other prospective buyers if receipt of the compensation or consideration is contingent upon the occurrence of an event subsequent to the time the buyer purchases the merchandise or goods;

(20) representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve, provided, however, that nothing in this subchapter shall be construed to expand the implied warranty of merchantability as defined in Sections 2.314 through 2.318 and Sections 2A.212 through 2A.216 to involve obligations in excess of those which are appropriate to the goods;

(21) promoting a pyramid promotional scheme, as defined by Section 17.461;

(22) representing that work or services have been performed on, or parts replaced in, goods when the work or services were not performed or the parts replaced;

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

(24) failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed;
SECTION SIX: VIOLATIONS OF THE ACT

(25) using the term “corporation,” “incorporated,” or an abbreviation of either of those terms in the name of a business entity that is not incorporated under the laws of this state or another jurisdiction;

(26) selling, offering to sell, or illegally promoting an annuity contract under Chapter 22, Acts of the 57th Legislature, 3rd Called Session, 1962 (Article 6228a-5, Vernon’s Texas Civil Statutes), with the intent that the annuity contract will be the subject of a salary reduction agreement, as defined by that Act, if the annuity contract is not an eligible qualified investment under that Act; or

(27) taking advantage of a disaster declared by the governor under Chapter 418, Government Code, by:

(A) selling or leasing fuel, food, medicine, or another necessity at an exorbitant or excessive price; or

(B) demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, or another necessity.

(c)(1) It is the intent of the legislature that in construing Subsection (a) of this section in suits brought under Section 17.47 of this subchapter the courts to the extent possible will be guided by Subsection (b) of this section and the interpretations given by the Federal Trade Commission and federal courts to Section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C.A. § 45(a)(1)].

(2) In construing this subchapter the court shall not be prohibited from considering relevant and pertinent decisions of courts in other jurisdictions.

(d) For the purposes of the relief authorized in Subdivision (1) of Subsection (a) of Section 17.50 of this subchapter, the term “false, misleading, or deceptive acts or practices” is limited to the acts enumerated in specific subdivisions of Subsection (b) of this section.

(28) using the translation into a foreign language of a title or other word, including “attorney,” “lawyer,” “licensed,” “notary,” and “notary public,” in any written or electronic material, including an advertisement, a business card, a letterhead, stationery, a website, or an online video, in reference to a person who is not an attorney in order to imply that the person is authorized to practice law in the United States;

(29) delivering or distributing a solicitation in connection with a good or service that:

(A) represents that the solicitation is sent on behalf of a governmental entity when it is not; or

(B) resembles a governmental notice or form that represents or implies that a criminal penalty may be imposed if the recipient does not remit payment for the good or service;

(30) delivering or distributing a solicitation in connection with a good or service that resembles a check or other negotiable instrument or invoice, unless the portion of the solicitation that resembles a check or other negotiable instrument or invoice includes the following notice, clearly and conspicuously printed in at least 18-point type:

“SPECIMEN-NON-NEGOTIABLE”;

(31) in the production, sale, distribution, or promotion of a synthetic substance that produces and is intended to produce an effect when consumed or ingested similar to, or in excess of, the effect of a controlled substance or controlled
substance analogue, as those terms are defined by Section 481.002, Health and Safety Code:

(A) making a deceptive representation or designation about the synthetic substance; or

(B) causing confusion or misunderstanding as to the effects the synthetic substance causes when consumed or ingested; [or]

(32) a licensed public insurance adjuster directly or indirectly soliciting employment, as defined by Section 38.01, Penal Code, for an attorney, or a licensed public insurance adjuster entering into a contract with an insured for the primary purpose of referring the insured to an attorney without the intent to actually perform the services customarily provided by a licensed public insurance adjuster, provided that this subdivision may not be construed to prohibit a licensed public insurance adjuster from recommending a particular attorney to an insured; or

(33) a warrantor of a vehicle protection product warranty using, in connection with the product, a name that includes “casualty,” “surety,” “insurance,” “mutual,” or any other word descriptive of an insurance business, including property or casualty insurance, or a surety business.

(34) owning, operating, maintaining, or advertising a massage establishment, as defined by Section 455.001, Occupations Code, that:

(A) is not appropriately licensed under Chapter 455, Occupations Code, or is not in compliance with the applicable licensing and other requirements of that chapter; or

(B) is not in compliance with an applicable local ordinance relating to the licensing or regulation of massage establishments.

QUESTIONS

Review the provisions of the “laundry list.” To what extent do they require a showing of knowledge or intent? Do they overlap? What type of language or conduct is necessary to establish a “representation”?

PENNINGTON
v.
SINGLETON
Supreme Court of Texas, 1980
606 S.W.2d 682

McGee, Justice.

This suit was brought by the purchaser of a boat for damages for misrepresentations made by the seller to induce the sale. The trial court rendered judgment for the plaintiff. The court of civil appeals, on motion for rehearing, reversed and rendered judgment that the plaintiff take nothing. . . . We reverse the judgment of the court of civil appeals and affirm that of the trial court.
The facts, as found by the trial court, are as follows: In May of 1975 J. W. Singleton sold his used boat, motor, and trailer to Charles Pennington. Singleton had never sold a boat before and was not in the business of selling boats. Singleton made oral statements to Pennington to the effect that the boat, motor, and trailer had just had $500 worth of work done, making the boat and motor in “excellent condition,” “perfect condition,” and “just like new.” These statements were made as statements of material fact, and not as merely opinion or puffing. The statements were false because the gear housing of the motor had been cracked and inadequately repaired. Singleton did not know the statements were false, nor did he make the statements recklessly because he had not experienced any difficulty with the boat after it was repaired. Pennington relied on the statements and would not have purchased the boat without them.

In July of 1975 the gear housing required repairs costing $481.68 because at the time of the sale to Pennington, the gear housing was not in adequate condition for its intended use. The statements made by Singleton were found to have caused an unconscionable result.

The trial court’s conclusions of law were that 1) Pennington had not proved the elements of common law fraud, and 2) that he had proved a cause of action under the Texas Deceptive Trade Practices—Consumer Protection Act. Accordingly, the trial court found that Pennington was entitled to an amount equal to three times his actual damages of $481.68. Before trial, however, the parties had agreed to a $500 limit on exemplary damages, if such damages were recoverable. Because of this stipulation the trial court’s judgment was reduced to $981.68.

On appeal to the court of civil appeals, Singleton contended that the Deceptive Trade Practices—Consumer Protection Act (DTPA) is inapplicable when the person misrepresenting goods or services is not in the business of selling or leasing those goods or services. The court of civil appeals, with one judge dissenting, disagreed and affirmed the trial court’s judgment. In his motion for rehearing, Singleton contended that the treble damages provision of the DTPA could not be constitutionally applied. The court of civil appeals agreed, holding that none of the subdivisions of § 17.46(b) were applicable, and that Singleton could not be held liable for treble damages under § 17.46(a) or § 17.50(a)(3) without a showing that his misrepresentations were made knowingly or with wrongful intent. Accordingly, the court of civil appeals reversed the judgment of the trial court and rendered judgment that Pennington take nothing.

Pennington’s application for writ of error to this court was granted to consider whether the court of civil appeals correctly construed the DTPA as applied to a private cause of action.

In Woods v. Littleton, 554 S.W.2d 662 (Tex. 1977), the principles applicable in construing the DTPA were set out. The primary emphasis is on the intention of the legislature, keeping in view “the old law, the evil and the remedy.” Legislative intent should be determined from the language of the entire Act and not isolated portions. The court is not necessarily confined to the literal meaning of the words used, and the legislative intent rather than the strict letter of the Act will control. The Act itself provides in § 17.44 that it “shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection. . . .”

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4 The provisions of the DTPA in effect when the misrepresentations occurred govern the disposition of this case. See Woods v. Littleton, 554 S.W.2d 662, 666 (Tex. 1977). All references in this opinion to the DTPA are to the Act in effect at that time. See Tex. Laws 1973, ch. 143, at 322-43.
CHAPTER 1. DECEPTIVE TRADE PRACTICES ACT

To provide individual consumers with a method and incentive to discourage deceptive trade practices, the legislature included § 17.50, thereby creating a private cause of action for mandatory treble damages. *Woods v. Littleton,* supra at 670. Section 17.50(a) has four subdivisions, which list categories of prohibited conduct. A finding that the defendant’s acts fall within one of these subdivisions may entitle the plaintiff to the remedies allowed by § 17.50(b). Sections 17.50(a) and (b) provide in pertinent part:

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With these considerations in mind, we will determine whether Pennington has proved one or more causes of action under § 17.50(a), and if so, whether Singleton is liable for treble damages as provided in § 17.50(b).

CONSUMER CAUSES OF ACTION UNDER SEC. 17.50(a)

Section 17.50(a)(1) provides that a consumer may maintain an action for violations of § 17.46. Section 17.46(a) declares unlawful any “[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce.” Section 17.46(b) lists a number of more specifically defined acts that are prohibited as being unlawfully false, misleading, or deceptive. Section 17.46(a) and the relevant subdivisions of § 17.46(b) provide:

Sec. 17.46. Deceptive Trade Practices Unlawful

(a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) The term “false, misleading, or deceptive acts or practices” includes, but is not limited to, the following acts: . . .

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, . . . approval, status, affiliation, or connection which he does not;

(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another. . . .

Pennington contends that subdivisions (5) and (7) of § 17.46(b) are applicable to the misrepresentations made about the boat.

Subdivision (5) prohibits representing that a good has characteristics, uses, or benefits that it does not have. The boat sold to Pennington was represented to have the characteristics of a “new” boat or a boat in “excellent” or “perfect” condition. The boat did not have these characteristics because of the cracked gear housing. The boat was also represented to produce the uses and benefits of a “new” boat or a boat in “excellent” or “perfect” condition. Because of the cracked gear housing, the boat could not produce those benefits. A good may lack its claimed characteristics or fail to bring about its claimed uses or benefits because it is not in good mechanical condition, or for other reasons such as its design or manufacture. In *United Postage Corp. v. Kammeyer,* 581 S.W.2d 716 (Tex. Civ. App.—Dallas 1979, no writ), a vending machine was represented to have a certain selling capacity. Because it lacked that capacity, it was held to lack its claimed characteristics, uses, or benefits. . . . We do not agree with Singleton’s argument that false statements about the boat’s mechanical condition did not relate to its characteristics, uses, or benefits. Regardless of the reason, when a good does not have the characteristics it is represented to have, or perform as represented, 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.
SECTION SIX: VIOLATIONS OF THE ACT

Subdivision (7) prohibits representing that a good is of a particular standard, quality, grade, style, or model if it is of another. Quality is a measure of degree; as to particular goods quality may be calibrated by standard or grade, as with eggs or meat, or specified by style or model, as with machinery. Even when specific categories are not devised, the good may still be described with more general words of quality. Words like “excellent” and “perfect” are words indicating a high degree of quality. Because the boat was in poor mechanical condition, its condition was of poor quality and the representations were false.

The terms used in § 17.46(b)(5) and (7) such as “characteristics” or “quality” are not defined in the DTPA. Therefore, they must be given their ordinary meanings. The general objective of subdivisions (5) and (7) is to ensure that descriptions of goods or services offered for sale are accurate. Misrepresentations, so long as they are of a material fact and not merely “puffing” or opinion, are nevertheless actionable even though they are broad descriptions such as were made to Pennington. The DTPA prohibits false general descriptions about the good, as well as misrepresentations pertaining to more specific information. Sometimes language only generally related to a product or its attributes will convey definite implications.

Some overlap may occur as a result of broadly interpreting the listed violations in § 17.46(b). A broad interpretation is warranted, however, due to human inventiveness in engaging in deceptive or misleading conduct. The legislature did not intend its express purpose of protecting consumers from false trade practices to be circumvented by those who would seek out loopholes in the Act’s provisions. For this reason, the legislature initially provided consumers with an action under the “catch-all” provisions of § 17.46(a), as well as for the violations listed in § 17.46(b).

According to Pennington, apart from a cause of action under § 17.46(b), he has alternative causes of action under § 17.50(a). Before the 1979 amendments to the DTPA, misrepresentations not falling within any subdivision of § 17.46(b) could give rise to a cause of action under § 17.46(a). Pennington argues that by its literal terms, § 17.46(a) is applicable, the trial court having found that Singleton’s statements were false and misleading. The trial court also found that the misrepresentations caused an unconscionable result. Section 17.50(a)(3) gives rise to a private cause of action for “any unconscionable action,” and, according to Pennington, is also applicable to the facts as found by the trial court. The court of civil appeals, however, denied recovery under § 17.46(a) and § 17.50(a)(3), reasoning that treble damages could not be constitutionally imposed without proof that Singleton intended to deceive Pennington or knew the falsity of his statements. This brings us to the decisive issue in this case: whether treble damages may be constitutionally imposed as a remedy for any of the causes of action allowed by § 17.50(a).

[The court found the Act’s damage provisions to be constitutional.]

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APPLICABILITY OF THE DTPA TO NONMERCHANTS

By cross-point Singleton urges that the DTPA does not apply to an isolated sale of a good by one who is not engaged in the business of selling that good. We agree with the court of civil appeals’ first opinion, which held that the Act cannot reasonably be construed as so restricted. Section 17.46 prohibits false, misleading, or deceptive acts in “trade or commerce.” “Trade” and “commerce” are broadly defined in § 17.45(6) as “the advertising, offering for sale, sale, lease, or distribution of any good or service, of any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value, wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this state.” Section...
CHAPTER 1. DECEPTIVE TRADE PRACTICES ACT

17.50(a)(1) allows a private cause of action for “any person’s” unlawful trade practice. “Person” is defined in § 17.45(3) as “an individual, partnership, corporation, association, or other group, however organized.” No exception is provided for persons engaged in trade or commerce who are not in the business of selling; other exemptions are allowed in § 17.49.

The legislature explicitly defined the type of transactions included within the DTPA and the persons against whom a private action may be brought. No indication is made that persons not in the business of selling are to be excluded. Furthermore, it is reasonable to assume that the private action was included in the DTPA to provide a remedy for one-time abuses that could not be adequately handled by state enforcement. . . . For these reasons, we hold that a private cause of action is available against nonmerchants as well as merchants.

CONCLUSION

For the reasons stated above, we conclude that the misrepresentations made by Singleton give rise to a cause of action under § 17.46(b) and that treble damage liability does not make § 17.46(b) unconstitutionally vague or unconstitutional as an excessive fine. Accordingly, we hold that Pennington is entitled to the relief granted under the DTPA by the trial court. The judgment of the court of civil appeals is reversed and that of the trial court is affirmed.

NOTES AND QUESTIONS

1. Why does the court consider section 17.46(a)? (Hint—review the version of the Act in effect in 1975.)

2. What constitutes a “misrepresentation” under subsections (b) (5) and (7)? In Pennington, the court notes that “the DTPA prohibits general descriptions about the good, as well as misrepresentations pertaining to more specific information.” In Douglas v. Delp, 937 S.W.2d 613 (Tex. 1999) the Supreme Court recently reconsidered this question, stating:

Finally, Gertrude alleged that DKW, by advising the Delps to sign the compromise settlement agreement, misrepresented that the agreement was adequate to protect the Delps’ interests and thereby violated sections 17.46(b)(5), (7), and (12) of the DTPA. The trial court granted a directed verdict for DKW on all three sections, but the court of appeals concluded that the jury could have inferred a misrepresentation, and reversed on sections (b)(5) and (12).

These subsections are intended to protect consumers against misrepresentations of material fact; statements of opinion alone are generally insufficient to rise to the level of actionable misrepresentations under the DTPA. See Pennington v. Singleton, 606 S.W.2d 682, 687 (Tex. 1980) (noting that misrepresentations of material fact are actionable under sections 17.46(b)(5) and (7) so long as they are not merely “puffing” or opinion.).

Gertrude identified no particular statements by DKW about the settlement agreement’s “characteristics” or “benefits,” or about any “rights, remedies, or obligations” conferred by the agreement. She testified that while she did not recall specifically anything DKW explained to her about the agreement, DKW advised her to sign it and she did in fact sign it on DKW’s advice. Based on this testimony, the
court of appeals concluded that a jury could infer “that DKW had represented to [the Delps] that the [agreement] protected their interests.”

Assuming that a representation, as that term is used in the DTPA, could be inferred from DKW’s advice to sign the agreement, a general representation that the agreement would protect the Delps’ interests is too vague under the facts of this case to support DTPA liability. Without any evidence about which interests DKW represented would be protected, a jury would have no standard by which to measure the accuracy of the representation. Accordingly, Gertrude’s evidence constitutes, at most, nonactionable opinion.

3. Note that subsection 17.50(a)(1) requires that any violation of the laundry list be accompanied by reliance by a consumer. This subsection reads, in relevant part:

(a) A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish;

(1) the use or employment by any person of a false, misleading, or deceptive act or practice that is:

(A) specifically enumerated in a subdivision of Subsection (b) of section 17.46 of this subchapter; and

(B) relied on by a consumer to the consumer’s detriment . . .

What is the effect of this change? How, if at all does this affect Amstadt v. United States Brass Corp.? Does this amendment to subsection 17.50(b)(1) mean that reliance is not an express element of other laundry list claims? Note that reliance must be by “a” consumer to “the” consumer’s detriment. Why did the legislature choose to use two different words?

FIRST TITLE CO. OF WACO

v.

GARRETT

Supreme Court of Texas, 1993
860 S.W.2d 74

SPECTOR, JUSTICE.

* * *

I.

In September of 1986, Charles and Dorinda Garrett contracted to purchase nine acres of land from Raymond Jenkins and James Dameron for use as an automobile salvage yard. Just over one year earlier, Jenkins and Dameron had obtained the land by a deed containing a restrictive covenant; the covenant provided that the land could not be used for any “noxious or offensive activity, which by example only, would include junk yard or auto salvage yard and all similar activities. . .”

The Garretts were never told of this covenant, which clearly prohibited the use for which they intended the property. The Garretts relied on the representations of First Title Company of Waco and Alamo Title Insurance of Texas in finalizing the purchase. First Title Co. conducted a title search, but failed to discover the restrictive covenant that was actually listed within their files; Al-
amo Title issued a title commitment affirmatively representing that no restrictive covenants appeared in the county deed records.

The Garretts finalized the purchase, and began to prepare the property for use as an auto salvage yard. Alice Faye Heitkamp Landry, who sold the tract to Jenkins and Dameron, and out of whose larger holdings the tract was carved, objected and successfully obtained an injunction prohibiting the Garretts from using the land as an auto salvage yard in violation of the restrictive covenant.

The Garretts then sued Jenkins and Dameron for their misrepresentations, and subsequently received $69,000 in settlement of the claims. On July 19, 1988, the Garretts filed a separate lawsuit, the one that is the basis of this appeal, charging First Title Co. and Alamo Title with negligence and breach of the DTPA. The jury found that First Title Co. and Alamo Title proximately caused injuries to the Garretts, and returned a verdict in favor of the Garretts for $85,500; the jury was never asked to make any findings with regard to Jenkins and Dameron, or to make any apportionment of comparative negligence. In a motion for judgment notwithstanding the verdict, First Title Co. and Alamo Title requested that the $69,000 settlement with Jenkins and Dameron be credited against the amount of the judgment. The trial court overruled the motion.

After calculating prejudgment interest, the trial court rendered judgment against First Title Co. and Alamo Title for $101,952.84 plus attorney’s fees; there was an additional award of $13,460.85 rendered against Alamo Title only. The court of appeals affirmed the trial court’s decisions in all respects. On motion for rehearing, the court of appeals issued a supplemental opinion holding that First Title Co. and Alamo Title were not entitled to a credit based on the collateral settlement, because they had not met their burden of establishing that Jenkins and Dameron were joint tortfeasors.

II.

Initially, apart from the settlement credit issue, the title companies contest the jury’s underlying finding of DTPA liability. The title companies argue that the contract entered into with the Garretts was one of indemnity, not of guaranty; so, any incorrect representation as to the status of the property should subject them to liquidated damages under the insurance policy, not damages for misrepresentation under the DTPA. We disagree.

Under Texas law, when a seller makes an affirmative representation, the law imposes a duty to know whether that statement is true. In the context of title insurance, this principle requires that a title insurer be held responsible for an affirmative representation that is the “producing cause” of damages to the party purchasing the insurance. TEX. BUS. & COM. CODE § 17.50(a).

The title commitment contains the following representation as to the state of the title: THE POLICY WILL BE SUBJECT TO... THE FOLLOWING MATTERS WHICH WILL BE ADDITIONAL EXCEPTIONS FROM THE COVERAGE OF THE POLICY: THE FOLLOWING RESTRICTIVE COVENANTS OF RECORD ITEMIZED BELOW... (INSERT SPECIFIC RECORDING DATA OR STATE “NONE OF RECORD”): NONE OF RECORD. (Emphasis added.) The italicized language clearly represents that there were no restrictive covenants in the county deed records. Significantly, this language was included as part of the title commitment, for the purpose of making some representation to the parties involved in the transaction. Indeed, the record includes testimony from officials in the title companies acknowledging
that purchasers often rely on title companies’ assessments of the state of the title.\(^5\) There is further testimony from the Garretts indicating that they had expressed their interest in “something in writing” verifying clear title before purchasing the property. Based on the evidence in the record, we believe the jury could properly have found that the Garretts acted reasonably in viewing the quoted paragraph as a representation of the state of the property’s title, thereby causing the damages they suffered. The title companies’ argument that there is no evidence to support the jury’s findings is without merit.

III.

The title companies also claim relief from liability because a clause in the title commitment allegedly protects them from claims such as the Garretts’. The language of the disclaimer is as follows: The policy to be issued pursuant to this commitment does not guarantee that the insured property has adequate title to allow it to be used, sold, transferred, leased, or mortgaged for any purpose intended by the purchaser nor will it provide coverage for possible loss of opportunity or economic expectation. In support of their argument, the title companies analogize the present case to *Stewart Title Guaranty Co. v. Cheatham*, 764 S.W.2d 315 (Tex. App.—Texarkana 1988, writ denied), a case also involving a title company and its ability to disclaim liability for any reliance by the consumer. We disagree that *Cheatham* can be read to relieve First Title Co. and Alamo Title from liability.

In *Cheatham*, the court of appeals focused on the fact that the title insurance policy contained specific language explaining the limited purpose for which the results of the title company’s search efforts could be used. A portion of the policy stated: [I]t is to facilitate preparation of the necessary instruments, to point out curative requirements, if any, and to show the results of the Company’s title search (upon which only the Company may rely). None of the information contained herein, or the absence of other information, constitutes a representation to any party, other than the Company, as to the status of the title. Given such clear language, the court of appeals concluded that the title report could not serve as the basis of an actionable representation. The court also noted that, irrespective of the contractual language, the evidence in the record established that the property purchasers had not even relied on the statements in the title report. Unlike the title report in *Cheatham*, the title report in the present case contains misrepresentations actually causing the damages suffered; and neither First Title Co. nor Alamo Title defined the title reports as being for a limited purpose.

As implied by its name, the DTPA’s purpose is “to protect consumers against false, misleading, and deceptive business practices.” TEX. BUS. & COM. CODE § 17.44. Although we decline to disapprove all contractual caveats against reliance, we agree with the court of appeals that when representations are made, a consumer cannot waive DTPA protection. Accordingly, we hold that the clause purporting to waive the Garretts’ DTPA protection from affirmative misrepresentations is invalid.

Absent a valid disclaimer, the Garretts were entitled to seek damages based on the title companies’ affirmative misrepresentations. Because there is evidence supporting the jury’s findings

\(^5\) For example, the direct examination of John Hugh Johnson, President and Manager of First Title Co., includes the following exchange: Q: . . . The commitment also serves to show the parties to the transaction what the status of the public record is with regard to that property, doesn’t it? A: Yes, sir. Q: And you know that at the time that you send it out, that people are going to rely on it? A: We assume that they could or they couldn’t. You know, they can. Q: But you know that it’s customary and usual for them to do so, don’t you? A: Yes.
that such representations proximately caused damages to the Garretts, we will not disturb the lower courts’ rulings on the title companies’ liability.

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We remand this cause to the trial court for proceedings consistent with this opinion.

HECHT, JUSTICE, dissenting.

If someone says, “there is no restrictive covenant on your property,” when actually there is, the statement is a misrepresentation. It asserts as fact what is demonstrably false. But if someone says, “I will pay you damages if there is a restrictive covenant on your property,” that statement is not a representation that no such covenant exists; rather, it is a promise that if a covenant does exist, any resulting harm will be paid for. And if the promise is kept, the statement was not false but true. The Court does not appear to grasp the distinction between these two statements. It treats the promise of insurance as the equivalent of a statement that no restrictive covenants exist. Because the distinction is important in the law as well as this case, I dissent.

In this case, Charles and Dorinda Garrett paid $46,318.20 for a 9.081-acre tract of land on which they intended to operate an auto wrecking and salvage yard. The Garretts sought and received from their sellers assurances that no restrictive covenant on the property prevented their intended operation. One of the sellers obtained from First Title Company of Waco the commitment of its principal, Alamo Title Insurance of Texas, to issue a policy of title insurance. That commitment stated:  SCHEDULE B OF THE POLICY OR POLICIES TO BE ISSUED WILL ALSO CONTAIN THE FOLLOWING EXCLUSIONS AND EXCEPTIONS:  THE POLICY WILL BE SUBJECT TO . . . THE FOLLOWING MATTERS WHICH WILL BE ADDITIONAL EXCEPTIONS FROM THE COVERAGE OF THE POLICY:  1. THE FOLLOWING RESTRICTIVE COVENANTS OF RECORD ITEMIZED BELOW . . . :  NONE OF RECORD

The commitment does not say that there are no restrictive covenants of record on the property the Garretts proposed to buy. It says that a title policy will issue which will not except any restrictive covenants of record. The statement was true: at the closing of the sale, Alamo Title issued the Garretts its title insurance policy in accordance with its commitment. The Garretts paid the premium for the policy.

Documents in First Title’s files, which it overlooked, showed that the Garretts’ property was subject to a restrictive covenant prohibiting the operation of an auto salvage yard on the property. Shortly after the Garretts opened their business, a neighboring landowner complained and eventually obtained an injunction against their operation. The Garretts sued their sellers and obtained $69,000.00 in settlement of their claims. The Garretts then brought this suit against Alamo Title and its agent, First Title. In addition to their claim against Alamo Title under its policy for the reduction in market value of the property due to the restrictive covenant, which the parties stipulate to be $4,618.00, the Garretts assert two other causes of action against both defendants. The Garretts allege that the title insurance commitment misrepresented that there were no restrictive covenants on the property, and that defendants are liable under the Texas Deceptive Trade Practices and Consumer Protection Act, Tex. Bus. & Com. Code §§ 17.41-.63 (“DTPA”), for damages caused by this misrepresentation. The Garretts also allege that defendants were negligent in failing to disclose the existence of the restrictive covenant.

***
The Garretts’ DTPA action is based upon their assertion that the language in the title insurance commitment which I have quoted above misrepresents the state of the title to their property. It quite plainly does not. In fact, it says nothing at all about title to the property. It contains the words, “none of record” in the same sentence with the words “restrictive covenants,” but the mere physical proximity of these phrases does not say that there are no restrictive covenants of record. One must read the rest of the sentence. The quoted language says that a title policy will issue excepting and excluding no restrictive covenants of record. This statement (about a future event) was absolutely true: a policy did issue which excepted no restrictive covenants. The statement in the commitment misrepresents nothing; to the contrary, it states exactly what occurred.

The Garretts assert that they were very concerned about the existence of restrictive covenants on the property, and that they took from the statement in the title insurance commitment that no such covenants existed. There is no reason to question these assertions, but the Garretts’ anxieties and expectations cannot transform a statement about what will be excluded from a title policy into a statement about the title of property. The Garretts may have misunderstood the commitment, but they could not have been misled by it.

The Court cites testimony of First Title’s president to the effect that it is customary and usual for people to rely upon a title policy commitment to state the public record of title. From this testimony the Court concludes that the purpose of the commitment is to represent the status of title to the parties to a transaction. This conclusion does not follow from the testimony on which it is based. The reason one may suppose that a title policy commitment lists restrictions or defects in the title to property is that the title company has a financial interest in not insuring against certain contingencies. Since it is in the title company’s interest to list all the exceptions it will not insure against, one may usually suppose the list to be complete. That supposition, although entirely reasonable in most instances, does not transform a statement about what the title insurance will cover to one about what the status of title is.

The existence of a restrictive covenant on the Garretts’ property which defendants did not acknowledge when they issued the title policy does not violate the DTPA. If it did, every claim against a title policy would also be a DTPA claim against the insurer. The purpose of the policy is to indemnify the insured against the possibility that there are title defects unrecognized at the time the policy issues. The policy does not represent that no defects exist, only that if they do, the insurer will pay specified damages. The issuance of a policy that may require payment of a claim is the purpose of title insurance; it is not a violation of the DTPA.

Of course, this does not mean that title insurers are immune from liability under the DTPA. They may be liable under that statute as any other person. Had defendants told the Garretts that there were no restrictive covenants of record, they could be liable under the DTPA for that misrepresentation. But the commitment does not make that representation, and it is the only communication the Garretts claim to have had with defendants. In the circumstances of this case, there is no evidence that defendants violated the DTPA.

* * *

Persons who undertake to represent the state of title to property may be liable for their misrepresentations. Title abstractors accept this undertaking regularly. Title insurance companies do not. The purpose of title insurance is not to describe the state of title but to insure against a loss in value due to undisclosed defects. To impose upon title insurers the same responsibility undertaken by abstractors would be to render title insurance useless. Having chosen a title policy, one cannot impose upon the insurer the same duty an abstractor would have assumed.
For these reasons, I would reverse the judgment against First Title and Alamo Title awarding damages for negligence and under the DTPA. I therefore dissent.

NOTES AND QUESTIONS

1. How can the Title Company avoid this problem in the future?

2. Read the “laundry list” carefully. Note that while some of the provisions require knowledge, most do not.

3. In which of the following cases would a consumer have a DTPA laundry list claim when the statement proved to be untrue? Under what subsection?
   A. A salesperson tells a buyer that a car is “the best engineered in the world” and “probably will not have any mechanical difficulties.” (Autohaus, Inc. v. Aguilar, 794 S.W.2d 459 (Tex. App.—Dallas 1990)).
   B. A mechanic tells a customer a car is “completely fixed.” (Padgett v. Bert Ogden Motors, Inc., 869 S.W.2d 532 (Tex. App.—Corpus Christi 1993)).
   C. Film distributor tells theater owner a film will be “the next blockbuster.” (Presidio Enter., Inc. v. Warner Brothers Dist. Corp., 784 F.2d 674 (5th Cir. 1986)).
   D. A landlord tells a tenant that the lease does not require it to perform certain services. (West Anderson Plaza v. Feyznia, 876 S.W.2d 528 (Tex. App.—Austin 1994)).
   E. Landlord tows tenant’s car and says that lease gives him the right to do so. Would it matter if landlord’s representation was implied? (River Oaks Townhomes v. Bunt, 712 S.W.2d 529 (Tex. App.—Houston [14th Dist.] 1980)).

4. Note that subsection 17.46(b)(23) was renumbered in 2001. The provision is now subsection (24). How does a consumer prove intent under subsection 17.46(24)? Must a seller disclose what it doesn’t know? Must a seller disclose information the buyer already knows? (Pfeiffer v. Ebby Halliday Real Estate, Inc., 747 S.W.2d 887 (Tex. App.—Dallas, 1988); Medallion Homes v. Thermar Invs., Inc., 698 S.W.2d 400 (Tex. App.—Houston [14th Dist.] 1985)).

5. To effectively use the DTPA, the provisions of the laundry list must be fully understood. The following excerpt suggests some “Innovative Uses,” of the laundry list. [Note subsection b(23) is now b(24).]
Innovative Use of the Deceptive Trade Practices Act

18 TEX. TECH L. REV. 45 (1987)
Richard M. Alderman

The most common DTPA lawsuit is an action under the so-called “laundry list.” Of the twenty-three possible claims provided for in this section, only a few are generally used. This is not unexpected, however, because in most cases there is little need to be innovative. The broad language of subsections (5) and (7) appears to cover most conduct. These provisions make the following actions violations of the DTPA:

(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not; [or]
(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another. . . .

These subsections cover nearly any representation about the goods, and their language should be broadly interpreted. Even though these subsections have been widely used, their application could be extended. For example, in Texas Farm Bureau Mutual Insurance Co. v. Vail, the court held that there was no violation of the DTPA for unfair claims’ settlement procedures. The court’s decision was based on the application of the DTPA through Section 21.21 of the Insurance Code. Consider whether this case could have been argued as a violation of the laundry list, subsections (5) and (7). These subsections provide that nearly any misrepresentation is actionable. There is no requirement in these subsections that the representation be express; it may arise by implication. Therefore, it can be argued that the insurance company and its agents represent, at least indirectly and through implication, that as part of the service they provide they will settle claims fairly. Once this representation is established as a laundry list violation, an additional cause of action is maintainable. Representations do not have to be express or explicit. Implied representations arising out of the transactions involved should be sufficient to support a DTPA claim. It must also be noted that DTPA misrepresentations may be oral. The parol evidence rule does not prevent introduction of testimony relating to an oral violation of the DTPA, notwithstanding a contractual term to the contrary.

Although subsections (5) and (7) account for most DTPA laundry list cases, there are several other laundry list provisions that should not be overlooked. For example, Section 17.46(b)(12) of the Act provides that it is a deceptive act to represent “that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law.”

This subsection has the potential to be one of the most far-reaching of Section 17.46. Arguably, any conduct taken by a party who is subsequently found to be in breach of a contract, or in violation of any state or federal law, violates this subsection. Consider:

An apartment complex tows Tenant’s car because Tenant parked in another tenant’s space. A city ordinance prohibits towing unless signs are posted advising that this will occur. The complex had no signs. Tenant calls apartment manager who tells her that the car was parked illegally, and they had the right to tow it. Does this statement, or in fact the mere act of towing itself, constitute a misrepresentation of the legal rights of the apartment complex arising out of the rental agreement?
It appears that the apartment complex has represented, by words and deed, that it had the right to do something which it did not in fact have the legal right to do. Thus, a violation of Section 17.46(b)(12) may be established.

All illegal repossessions or foreclosures potentially violate the DTPA. For example:

Seller believes Machine Owner to be in default and comes to repossess the machine. Owner tries to stop the repo man and is told: “Get lost; you didn’t pay, and we have the right to take the machine.” Owner backs off after being threatened with violence. Under the law the repossession probably constituted a wrongful breach of the peace. Has Seller violated the DTPA?

Again, the repossession, both directly and by implication, constituted a representation that the dealer had the legal right not only to repossess the car, but also to do so in the manner in which he did. In fact, a repossession can only be done without a breach of the peace, and Owner’s objection usually means that the repossession must stop. Thus, the creditor’s implicit representation that it had the right to repossess in the manner in which it did may be argued as violating the DTPA. This is a very useful section whenever the defendant has acted or threatened to act in a wrongful manner.

Another seldom-used laundry list provision is Section 17.46(b)(19). This subsection states that it is a deceptive practice to represent “that a guarantee or warranty confers or involves rights or remedies which it does not have or involve. . . .” The obvious use of this section occurs when a dealer tells a buyer that the merchandise has a three-year warranty when it in fact has only a one-year warranty. In such a case the subsection is probably not even necessary, because there would be a violation of either subsection (5) or (7). But consider the following:

Farmer purchases seed which fails to germinate properly. Farmer complains to Seller and is told that the warranty does not apply because the crop failure was due to insufficient rain. In fact, insufficient rain does not affect germination of the seeds; it only affects the growth and productivity rates. How many violations of the DTPA can be established?

Assuming that there was an express warranty and an implied warranty, Seller has violated these and would be responsible under the DTPA. But under the Texas Business and Commerce Code, the seller can contractually limit damages for breach of warranty. It is therefore beneficial to plead an alternative DTPA claim that cannot be contractually limited. A nonwaivable claim under the laundry list can be established under either subsections (5), (7), (12) or (19). First, Seller’s statement that there was no warranty, when in fact there was, should be considered a misrepresentation of the benefits, characteristics, and quality of the goods. Second, Seller represented that the legal agreement (the warranty) involved rights which it did not involve: the right to not pay in this case. Finally, Seller has represented that the warranty confers rights, or in other words, no liability, which it does not confer. There is nothing in subsection (19) that limits the representation of positive rights. A representation that a warranty does not confer rights, when in fact it does, should also be considered a violation of subsection (19). It might even be argued that the representation should not have to be direct. Arguably, the mere denial of warranty liability is sufficient to give rise to an implicit representation that the warranty does not confer certain rights when in fact it does.
Subsection (19) can be viewed as merely a more specific application of the general principles established in subsections (5), (7) and (12). Therefore, whether the misrepresentation is about the goods or services, legal rights, or warranty, a DTPA claim exists.

Last, but definitely not least, the laundry list prohibits more than simply affirmative acts that mislead or deceive; it also prohibits “deceptive silence.” Section 17.46(b)(23) requires that the consumer establish “intent.” Arguably, intent should be presumed whenever the consumer shows: (1) that the defendant knew of information concerning the goods; (2) the information is material; and (3) the information is negative. For example, if a dealer sells a car with a faulty transmission, proof of the following should be sufficient to establish a claim under subsection (23): “The price of the car was $5,000; the dealer knew the transmission needed repairs that would cost $1,700; and the consumer would not buy a defective car for $5,000.”

At this point there appears to be no reason why the seller would fail to disclose the information, except that he intended to induce the consumer into the transaction. Thus a presumption of intent should arise. Of course, the seller must be given an opportunity to rebut this presumption, for example, by showing that he believed the buyer wanted a car with a faulty transmission.

If literally applied, subsection (23) would impose a duty to disclose in nearly all cases. Even a sale “as is” should not negate this obligation. Consider:

Seller of equipment is approached by Buyer to purchase an industrial drill press. The press costs $17,000 and is perfect for Buyer’s needs. Seller knows, however, that the company is coming out with a new energy-efficient model that will list for substantially less. Buyer does not ask about new models or if there is anything else available. Seller knows that no one would purchase this model with knowledge of the new model. The sale is made “as is,” with “no refunds.” Does Seller have a duty to inform Buyer about the new model?

I would answer yes. Seller failed to disclose information in order to induce Buyer into the transaction. This failure cannot be waived by general or specific language. For example, consider a Seller that posts a notice stating: “All models are the best currently available.” Though Seller makes no promises concerning the availability of newer or more efficient models, he would still have an obligation under Section 17.46(b)(23) to disclose the information he had regarding the new model.

It should also be noted that the disclosure requirements of Section 17.46(b)(23) apply to everyone. There is no need that there be a fiduciary or quasi-fiduciary relationship between the seller and the consumer. Therefore, decisions such as First City Mortgage Co. v. Gillis, which imply that the standard of disclosure should be measured by contract principles relating to fiduciary duty, are incorrect. The essence of the statute remains that any person must disclose any relevant information if he knows that the failure to disclose will induce the consumer into a transaction into which he would not otherwise have entered.
CHAPTER 1. DECEPTIVE TRADE PRACTICES ACT

NOTES AND QUESTIONS

Reread subsection (24) of the laundry list. What must be disclosed? To whom? Under what circumstances? How do you prove intent?

PROBLEM 6

Tom Seller went to drive to work and noticed a big oil spill under his car. He took the car to his mechanic who told him he needed a major transmission overhaul that would cost $3-5,000. Because Tom had already put $1,500 into the car in the past few months, he decided to sell the car. He placed the following ad on Craigslist:

“2006 Ford Mustang. Red with black interior. Must sell, $8,000.”

Bob Buyer came to see the car, drove it, and liked it. He asked Tom why he was selling and Tom said, “It is costing me too much in repairs.” Bob asked how much, and Tom replied, “I have put over $1,500 into the car in the past year.” This statement was true. Bob bought the car and discovered the transmission problem. What possible claims does Bob have under the DTPA? Would it matter to your analysis if the value of the car in good condition was $12,000? Does it matter if Bob is an individual or a car dealer?

PROBLEM 7

Cindy recently traded in her used Chevy Blazer. She had had nothing but problems with it for two years and believed it was a lemon. The last time she brought it in they said it needed a major transmission overhaul at a cost of $1,500. Instead of spending the money, she went across town to the Chrysler dealer and bought a new car. She traded in her Chevy and got $8,500—a fair price for a car in good condition. Two weeks later she got a letter from the dealer asking for $1,500 in damages because of the defects in her trade-in. The dealer alleged that she breached express and implied warranties and failed to disclose the known defects. What defense would you establish for her?

PROBLEM 8

Eli, a world traveler and bon vivant, recently took a trip to Ixtapa, Mexico. When he bought his ticket, the agent told him that the plane “stopped in Mexico City, and that he stayed on the same plane and went right to Ixtapa.” She told him that it was the same plane the whole way but that he would have to get off in Mexico City to clear customs. During that period, however, the airlines changed the schedule. On the return trip it was necessary to change planes in Mexico
City. Eli didn’t know this and relying on what he was told he missed his plane. He had to spend $200 extra for a return ticket. What claim, if any, does he have against the travel agent? What arguments would you make in defense of the agent?

NOTES AND QUESTIONS

1. What representations does a store make to its customers? When is a misrepresentation by a store actionable under the DTPA? For example, if a store has a sign saying “lowest prices guaranteed,” not charging the lowest price would be a violation of the laundry list. But what about implied representations? Suppose a customer is injured when a heavy box falls from a high shelf. Does the store impliedly represent that the product has been properly shelved and secured? Or what if the customer slips and falls on a wet spot? Does this store impliedly represent that it has properly maintained the floors and taken reasonable care to prevent such injuries?

2. In large part, the answer to these questions is determined by the two part definition of consumer established by Cameron v. Terrell & Garrett, Inc., discussed in Chapter One. In Cameron, the court said the plaintiff must meet the statutory definition of consumer, and that “the goods or services must form the basis of the complaint.” In each of the above examples, what was the consumer purchasing? Is that the basis of his or her complaint? See, e.g., Rojas v. Wal-Mart Stores, Inc., 857 F.Supp. 533 (N.D. Tex. 1994); Ramires v. H.E. Butt Grocery Stores, Inc., 909 S.W.2d 62 (Tex. App.—Waco 1995).

PROBLEM 9

Tom Tinker was driving home very late at night when he decided to stop for gas and cigarettes. Tom usually goes to his local Exxon dealer because he feels safer at a major dealer. In fact, he always goes to a national brand dealer even if it is a little out of the way.

Tom was turning around under a freeway to return to his local Exxon station when he noticed a Fetty station on the corner. Fetty is a large national retailer similar to Exxon. The station had Fetty signs all around, was painted in Fetty colors, and had a staff wearing Fetty uniforms. Tom assumed this was as good a place as the Exxon station, so he went in. As soon as he entered the store, Tom was robbed and seriously beaten by a thief.

You have discovered that the Fetty station is not owned by Fetty, and, in fact, up until one week ago was Joe’s Ice House and Station. Joe simply paid Fetty for the right to use their insignia. Fetty had no control over the management of the station. Tom would testify that he would not have gone to the station if he knew it was not controlled by Fetty.

Is this a violation of the laundry list? Is Tom a consumer?
1. Can something that is actually true be false, deceptive, or misleading under the DTPA? Suppose I sold you a sugar pill and guaranteed you that if you “take the pill each day with a large glass of orange juice you will receive your daily requirement of vitamin C.” Assuming the juice provides the vitamin C, the statement is truthful. Is this statement deceptive?

2. Consider the following problem:

Casey Consumer received an advertisement, directed to Ms. Casey Consumer, from a company selling land in Conroe. The ad described the land and the development and then stated, “Visit our wonderful property and we will give you a free television or grandfather clock, worth up to $1000. Just call 1-800-989-0909 to make your no-obligation appointment.”

Casey called the number and was told that she could visit the property any morning but to receive the free gifts she had to stay for the two-hour presentation and must bring her driver’s license and spouse. Casey and her husband had nothing to do so they agreed to visit on Saturday. They arrived at 8:00 am and spent the entire morning with a salesperson looking at land. At noon they said they were not interested in purchasing anything and wanted to go home. The salesperson said, ok, and directed them to the gift center.

At the gift center they were shown a pile of small boxes and one large box. They were told to choose a number between 1 and 750. They selected 456 and were given a small box, numbered 456. The box contained a miniature grandfather’s clock, approximately 8 inches high. The clock worked properly. The salesperson told them that the large box contained an expensive television, and would be given to whoever got the lucky number.

Casey and her husband are mad. They wasted a day and expected to receive some nice gifts in return. They have contacted you about a claim under the Texas Deceptive Trade Practices Act. Are they consumers? Has there been a violation of the Act?

II. UNCONSCIONABILITY

Section 17.50(a)(3) provides that a consumer may maintain a DTPA action whenever he or she has been damaged as a result of “any unconscionable action or course of action by any person.” Today, the term is defined by section 17.45(5) to mean “an act or practice which, to a consumer’s detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.” This is a change from the prior version of the Act, which defined unconscionability as an action or course of action which:

(A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or
(B) results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration.

How do these definitions differ from the traditional definitions employed in contract law? Is it “procedural” or “substantive” unconscionability” Is it an objective or subjective test? Consider the following decision, based on the earlier version of the DTPA.

CHASTAIN
v.
KOONCE
Supreme Court of Texas, 1985
700 S.W.2d 579

KILGARLIN, JUSTICE.

[In its initial opinion the Supreme Court held that to prove unconscionability under the DTPA, the consumer had to show that the defendant acted with “intent, knowledge or a conscious indifference.”]

Our opinion of June 19, 1985 is withdrawn and this opinion is substituted.

* * *

The arguments made in this case relative to whether the purchasers are consumers under the DTPA are extremely similar to arguments made in Parks v. U.S. Homes Corporation, Inc., 652 S.W.2d 479, 484 (Tex. Civ. App.—Houston [1st Dist.] 1983, writ dism’d). In Parks, the purchasers bought homes in a subdivision after relying on representations of the seller’s agent that the subdivision would be restricted to homes of a particular style and price range. After the three complainants purchased their houses by deeds lacking deed restrictions, the developer altered its plan and the purchasers brought suit under the DTPA. In that case, the court of appeals determined that under the two-prong test [(1) acquiring or seeking to acquire goods or services by purchase or lease and (2) those goods or services must be the basis of the complaint], the purchasers of those homes were consumers. Similarly, we find the four couples who purchased land from Koonce and Stroud to be consumers within the meaning of the DTPA.

Recognizing that consumers have to meet both parts of the two-part definition, the Parks court first pointed out that real property is a good under the act. . . . The act was specifically amended in 1975 to clarify the legislature’s intent to insure that real property purchases could support individual causes of action. Because the four couples purchased land from the seller, they qualify as consumers under the first part of the definition.

Koonce and Stroud contest the purchasers’ standing under the second prong of the test. This prong was first enunciated in Riverside National Bank v. Lewis, 603 S.W.2d 169 (Tex. 1980), and in Cameron. The DTPA is to be construed liberally to promote its underlying purposes “which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty.” TEX. BUS. & COM. CODE § 17.44. In addition, this court has determined that the act “clearly declares deceptive trade practices in the conduct of a real estate sale to be unlawful.”
The purchasers here are complaining of conduct occurring during the transaction which resulted in the purchase of these lots. Koonce and Stroud made representations calculated to induce these purchasers to buy the lots and which enhanced the desirability of the property. Thus, the purchasers are complaining about an aspect of the lots purchased and the transaction involved. Finally, we note that the legislature contemplated this type of situation as exhibited by the floor debate in the Texas Senate discussing sellers’ promises which would not be fulfilled. The specific example used in the debate was promising the erection of a shopping center with no intent to follow through on the promise. . . . Thus, we conclude that the purchasers in this suit qualify as consumers and have standing to sue under the DTPA.

Having decided that the purchasers are covered by the DTPA, we now may consider the second point of error, which complains that there was evidence to support the jury finding of unconscionability. The jury found that Koonce and Stroud had engaged in an unconscionable action or course of action with regard to the purchasers. Unconscionable action or course of action is defined by statute to describe an act which:

A. Takes advantage of the lack of knowledge, ability, or capacity of a person to a grossly unfair degree; or
B. Results in a gross disparity between the value received and the consideration paid in a transaction involving the transfer of consideration.

TEX. BUS. & COM. CODE § 17.45(5). The purchasers did not specify whether they sought to show unconscionability under part A or B of the definition, so we must examine the facts to see if they support a finding of unconscionability under either definition.

Under the facts of our case, the purchasers failed to show any disparity between the value received and the consideration paid in the transaction. The record is devoid of any expert testimony relating to the value of the property at the time of the purchase. In addition, among the purchasers only Gary Chastain testified as to the consideration paid for the property. The only relevant testimony concerning land values in the record is expert testimony which explains the value at the time of trial and the value the land would have attained had the pipeyard not been placed on lot 2. These values were far in excess of the amount which Gary and Georgia Chastain paid for their lot.

The only other way in which the purchasers can recover is to show that Koonce and Stroud took advantage of the purchasers’ lack of knowledge, ability, or capacity to a grossly unfair degree. We must assume that every word of a statute was used for a purpose and every word in that statute must be given effect if possible. . . . Thus we must find evidence not simply that Koonce and Stroud took unfair advantage of the purchasers but that the advantage was grossly unfair. . . . We are unable to find any Texas case which defines this distinction. In Hurst v. Sears, Roebuck & Co., 647 S.W.2d 249 (Tex. 1983), we explained that impossibility of performance did not preclude a representation from being unconscionable. In addition, in that case we pointed out that a failure to do the impossible could be unconscionable if the promisor knew of the impossibility of the task when he promised to undertake it. . . . Knowledge or intent alone cannot, however, be the distinguishing factor of unconscionability, because the DTPA specifically provides for special damages if a consumer can show that the deceptive or misleading act was committed knowingly. . . . Although knowledge and intent may make an act unconscionable, there must be some other means of distinction as well.

Koonce and Stroud contend that defining the difference between gross unfairness and mere unfairness is analogous to defining the difference between gross negligence and negligence.
comparison and analogy to this case are inappropriate. In *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 920 (Tex. 1981), this court defined gross negligence as:

[T]hat entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it.

We also wrote:

What lifts ordinary negligence into gross negligence is the mental attitude of the defendant; that is what justifies the penal nature of the imposition of exemplary damages. The plaintiff must show that the defendant was consciously, i.e., knowingly, indifferent to his rights, welfare and safety. In other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrated that he didn’t care.

*Burk Royalty Co.*, 616 S.W.2d at 922.

Section 17.45(5) does not expressly require a consumer prove the mental attitude of the defendant in order to recover actual damages. The legislative history of the 1979 amendments to the DTPA supports the conclusion that the legislature did not intend to require proof of intent, knowledge or conscious indifference to support recovery. As originally filed in the Senate, Section 17.45(5)(A) would have been amended to read:

“Unconscionable action or course of action” means an act or practice which, to a person’s detriment:

(A) was intended to and did take [takes] advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree.

The intent language was deleted prior to the legislature’s passage of the DTPA amendments. This deletion discloses a legislative intent to reject a scienter requirement . . .

Section 17.45(5) is intended to be an objective standard. As the laundry list provisions of Section 17.46(b) demonstrate, the legislature knows how to include a scienter requirement when it so chooses. In six of the twenty-three prohibitions listed in Section 17.46(b), the legislature incorporated scienter requirements. . . . The remaining seventeen prohibitions are objective. For example, it is not necessary to show under Section 17.46(b)(7) that the defendant intended to mislead or deceive the consumer—only that the defendant represented goods or services to be of a particular standard when they were of another. . . . By this analysis, under Section 17.45(5)(A), a consumer need only prove that he was taken advantage of to a grossly unfair degree. This should be determined by examining the entire transaction and not by inquiring whether the defendant intended to take advantage of the consumer or acted with knowledge or conscious indifference.

It is a traditional rule of statutory construction that a word used in different parts of a statute will generally be given the same meaning throughout. The legislature used forms of the word “gross” in both subdivisions A and B of Section 17.45(5). In subdivision B, an unconscionable action is defined as one which results in a gross disparity between the value received and the consideration paid. Subdivision A defines an unconscionable action as one which takes advantage of a person to a grossly unfair degree.

A consumer’s proof of gross disparity under subdivision B does not require proof that the defendant acted intentionally, knowingly or with conscious indifference. Likewise, a consumer’s
proof of gross unfairness does not require proof that the defendant acted intentionally or knowing-
ly to bring about the result.

The term “gross” should be given its ordinary meaning of glaringly noticeable, flagrant, com-
plete and unmitigated. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, 1002 (1976). The
courts have had no problem determining what constitutes a gross disparity under subdivision B of
Section 17.45(5). A slight disparity between the consideration paid and the value received is not
unconscionable; a glaring and flagrant disparity is. Unfairness is perhaps a more nebulous term
than disparity, but this is not a reason to create a new definition for “gross.”

Taking advantage of a consumer’s lack of knowledge to a grossly unfair degree thus requires
a showing that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigat-
ed. Based on the record as a whole, we find no evidence that the Chastains and the other three
couples were taken advantage of to a grossly unfair degree.

The purchasers emphasize the telephone conversation between Gary Chastain and J. P.
Stroud, in which Stroud threatened physical violence and to place a rubber burning plant in the
vicinity of Gary Chastain’s land. We find this unpersuasive. The phone conversation occurred
approximately one year after the alleged misrepresentations occurred and does not reflect on the
unfairness of the original transaction between the purchasers and Koonce and Stroud. As a result,
we find no evidence of unconscionability.

Although we find that the purchasers have standing to sue under the DTPA, we affirm the
court of appeals’ judgment that there is no evidence of unconscionability. Accordingly, the judg-
ment of the court of appeals is affirmed. Petitioners’ motion for rehearing is overruled.

NOTE

What is the effect of the amended definition of unconscionability, which removed price dis-
parity? How does it affect the usefulness of unconscionability? To what extent does it affect the
value of prior unconscionability cases as precedent?

LATHAM
v.
CASTILLO
Supreme Court of Texas, 1998
972 S.W.2d 66

SPECTOR, JUSTICE.

In this case, we consider whether an attorney’s affirmative misrepresentations to his clients
that cause the clients to lose their day in court can constitute unconscionable action under the De-
ceptive Trade Practices—Consumer Protection Act. The court of appeals answered in the af-
firmative. We affirm the court of appeals’ remand of the DTPA claim, and we reverse and render
judgment that the Castillos take nothing on their remaining claims.
I.

On January 3, 1986, Audona Castillo prematurely gave birth to twin daughters, Kay and Sara, at Taft Hospital. Born with birth defects, the girls were immediately transferred to Driscoll Foundation Children’s Hospital where both underwent surgery. Sara died approximately one week later. The Castillos then filed a medical malpractice suit against Driscoll Hospital on Sara’s behalf and received a $6,000,000 default judgment. Later, their attorney, Rene Rodriguez, settled the case for $70,000.

Kay Castillo, the surviving twin, died on February 14, 1988. In December 1989, the Castillos hired B. Mills Latham to file a legal malpractice claim against Rodriguez for settling the default judgment and to pursue a medical malpractice claim against Driscoll Hospital for Kay’s death. While Latham settled the legal malpractice claim against Rodriguez for $400,000, the statute of limitations ran on the Castillos’ medical malpractice claim on February 14, 1990 without suit being filed. The Castillos then sued Latham for legal malpractice because Latham failed to file the medical malpractice action for Kay’s death within the two-year statute of limitations. The Castillos also sued Latham for unconscionable action under the DTPA because Latham affirmatively represented to them that he had filed and was actively prosecuting the medical malpractice claim. Finally, the Castillos alleged that Latham wrongfully misrepresented himself, breached the contract of employment, and was negligent.

After the Castillos presented their case to a jury, the trial court granted a directed verdict for Latham that the Castillos take nothing. The court of appeals reversed and remanded, holding that the Castillos had presented some evidence to prevent a directed verdict on their DTPA claim. The court of appeals also remanded the “remaining theories of recovery”—fraudulent misrepresentation and breach of contract—without discussion. The court of appeals affirmed the directed verdict on the negligence claim, however, because the Castillos did not present evidence that but for Latham’s negligence, the medical malpractice suit would have been successful.

The central question before us is whether the Castillos have presented some evidence to support each element of their DTPA cause of action. We hold that they have done so.

* * *

A.

The Castillos alleged Latham’s conduct constituted an “unconscionable action or course of action” that violated the DTPA. TEX. BUS. & COM. CODE § 17.50(a)(3). Under section 17.45, “unconscionable action or course of action” means “an act or practice which, to a person’s detriment: (A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or (B) results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration.” The Castillos have relied only on subsection (A) in asserting that Latham’s actions were unconscionable. To be actionable under subsection (A), the resulting unfairness must be “glaringly noticeable, flagrant, complete and unmitigated.” Chastain v. Koonce, 700 S.W.2d 579, 584 (Tex. 1985).

The Legislature’s stated public policy in enacting the DTPA is to “protect consumers against false, misleading, and deceptive business practices [and] unconscionable actions.” To achieve that goal, the Legislature has mandated that the Act shall be “liberally construed and applied.” Therefore, we must view Latham’s actions with this legislative directive in mind.
Attorneys can be found to have engaged in unconscionable conduct by the way they represent their clients. See, e.g., DeBakey v. Staggs, 605 S.W.2d 631, 633 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref’d n.r.e. per curiam), 612 S.W.2d 924 (Tex. 1981) (finding an attorney unconscionably took advantage of a client to a grossly unfair degree when the attorney knowingly failed to obtain in a timely manner a name change for the client’s minor child). The Castillos assert that Latham acted unconscionably in representing that he was actively prosecuting their medical malpractice claim for Kay’s death when in fact he was not.

The Castillos depended on Latham to file suit against the hospital for Kay’s death. As Mrs. Castillo testified, “You trust in a professional because they know more than you.” The record reveals, and Latham’s attorney conceded at oral argument before this Court, that there is some evidence that Latham told the Castillos he had filed the medical malpractice claim when in fact he had not. Although he affirmatively represented to them that he was actively pursuing the claim, Latham never did file the suit and limitations ran. As a result, the Castillos lost the opportunity to prosecute their claim against the hospital for Kay’s death.

Viewing Latham’s actions in the light we must, his actions are similar to the attorney’s conduct in DeBakey. Latham took advantage of the trust the Castillos placed in him as an attorney.

Therefore, the Castillos have presented some evidence that they were taken advantage of to a grossly unfair degree.

OWEN, JUSTICE concurring in part, dissenting in part.

The Court today places heavy reliance not on our decision in DeBakey, but on that of the court of appeals in DeBakey, even though we expressly called into question the precedential value of the court of appeals’ determination that the attorney’s misfeasance rose to the level of unconscionability. See Debakey v. Staggs, 612 S.W.2d at 925. The holding today is contrary to prior decisions of this Court that have more narrowly defined what is meant by “unconscionable action” within the meaning of the DTPA.

We had the opportunity in Chastain v. Koonce, 700 S.W.2d 579, 583 (Tex.1985), to consider what section 17.45(5) of the DTPA means when it says that an act or practice must “take advantage . . . to a grossly unfair degree” to be unconscionable. In Chastain, a jury had found that false statements and threats made by sellers of land to purchasers and to residents in the area were unconscionable. The court of appeals reversed, finding no evidence of unconscionable conduct. We agreed and held that evidence that a defendant “simply . . . took unfair advantage” is not enough. The resulting unfairness must be “grossly unfair,” which means “glaringly noticeable, flagrant, complete and unmitigated.” Id. at 584.

In its decision in this case, the Court seems to equate “unconscionability” with “deception” when it says that Latham’s misrepresentation “is the difference between negligent conduct and deceptive conduct.” But if every misrepresentation and deceptive act could also constitute an unconscionable act, then the laundry list violations in section 17.46(b), which include numerous specific representations and deceptive acts, would be redundant. See TEX. BUS. & COM. CODE § 17.46(b)(1)-(25).

More than a decade ago, we held that not every misrepresentation of fact, even an intentional one, constitutes unconscionable conduct. See Chastain, 700 S.W.2d at 582-83. We explained that “[a]lthough knowledge and intent may make an act unconscionable, there must be some other means of distinction as well.” Id. at 582. The test is whether the consumer was taken advantage
of to a grossly unfair degree. *Id.* “This should be determined by examining the entire transaction and not by inquiring whether the defendant intended to take advantage of the consumer or acted with knowledge or conscious indifference.” *Id.* at 583. The misrepresentation in this case cannot be distinguished from those in *Chastain*, which we held were not unconscionable under the DTPA.

The transaction between the Castillos and Latham did not take advantage of the Castillos and was not grossly unfair. Latham certainly gained no advantage. There is no evidence that he was ever paid a fee or that the Castillos agreed to pay a fee other than one contingent on the success of the suit against the hospital. And how were the Castillos disadvantaged if their claims against the hospital had no merit? While Latham’s conduct was wrong and unethical, it is not actionable under section 17.45(5) of the DTPA because it is not grossly unfair to represent that a suit that has no merit has been filed when it has not.

[The remainder of the opinion appears in Chapter Three.]

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**QUESTION**

The following question appeared on the February 2003 Texas Bar Exam.

In February 2000, Pablo sustained personal injuries when his vehicle was rear-ended by a truck in Webb County, Texas. As a result of his injuries, Pablo lost six months from work at a local factory and incurred substantial medical bills.

In September 2000, Pablo contacted Attorney. Attorney told Pablo, who had limited education and had difficulty understanding English, that, in his opinion, Pablo had a good case. Attorney also told Pablo that he would be willing to take the case on a contingent fee basis and that he could file the suit against the other driver in a couple of weeks. Pablo agreed to hire Attorney. Pablo never signed any contract or paid Attorney any money.

Periodically, Pablo would contact Attorney’s office to check on the status of his case. Attorney and his assistants always told Pablo that things were going well. At one point, Attorney told Pablo that he had already filed the lawsuit and was merely waiting to hear from the opposing lawyer to settle the case.

In September 2002, Attorney’s new legal assistant told Pablo that no suit had ever been filed on his behalf and that he should contact another lawyer. Upon hearing the news, Pablo became physically ill and depressed, requiring medical treatment and hospitalization.

1. On what grounds, if any, might Pablo assert he is a “consumer” under the Texas Deceptive Trade Practices Act (DTPA)? Explain fully.

2. Assuming Pablo is a consumer, what rights and remedies, if any, does he have against Attorney under the DTPA? Explain fully.
Once a party has established the status of a “consumer,” an action may be maintained against any party who has violated the DTPA. As was seen in *Flenniken*, a bank that loans money for the transaction may be sued, if, in the eyes of the consumer, it was not simply a loan, but an essential element of a purchase or lease. But what about the pure assignee? For example, suppose that Builder takes a promissory note and deceives Consumer regarding what work would be done. A week later, builder negotiates the note to Bank. Builder then skips town, and when Consumer stops paying, Bank sues. Can Consumer raise as a counterclaim and defense to Builder’s violations of the DTPA. Is this proper?

Generally, once an instrument is negotiated, the holder becomes a holder in due course and takes free of any claims or defenses that could be raised against the transferor. To be a holder in due course the party must take for value, in good faith, and without notice of a claim or defense. Other assignees usually take subject to claims and defenses, unless the contract contains a waiver of these by the consumer. In other words, in most cases once an instrument is assigned or negotiated, the consumer’s right to raise a DTPA claim against the assignee or transferee is cut off. Unless the party with the instrument commits a separate violation of the DTPA, the consumer would have a claim only against the party he or she dealt with. But a Federal Trade Commission Rule changes this result.

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**HOME SAVINGS ASSOCIATION v. GUERRA**

Supreme Court of Texas, 1987

733 S.W.2d 134

CAMPBELL, JUSTICE.

This is an action brought by Louis Guerra against Modern Builders and Supply and Home Savings Association to recover damages as a result of a home solicitation transaction. On appeal, the issue is whether an assignee of a retail installment contract can be held derivatively liable for the seller’s misconduct in excess of the amount paid by the buyer under the contract.

In 1984, Guerra and Modern Builders entered into a retail installment contract which contained a notice provision required by the Federal Trade Commission (discussed below). Under the contract, Modern Builders agreed to add rock siding to Guerra’s home and make repairs to the existing structure for $7,700.00. Guerra executed a ten-year promissory note which included a time-price differential payable in monthly installments of $125.69. Modern Builders assigned the note and the retail installment contract to Home Savings in exchange for $7,700.00. Thereafter, the rock siding crumbled, and Guerra brought suit against Modern Builders and Home Savings, as assignee, alleging violations of the Deceptive Trade Practices Act (DTPA) and the Home Solicitation Act. At that time, Guerra had made installment payments totaling $1,256.90. Pursuant to a jury verdict, the trial court rendered judgment for Guerra against Modern Builders and Home Savings, jointly and severally, for $25,000.00 plus attorney’s fees of $10,000.00. In addition, the trial court declared the promissory note void. On appeal by Home Savings, the court of appeals affirmed the trial court judgment and held that an assignee of commercial paper could be held lia-

We disagree and therefore reverse the judgment of the court of appeals.

The FTC rule provides:

In connection with any sale or lease of goods or services to consumers, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of Section 5 of that Act for a seller, directly or indirectly to:

(a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold face, type:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.


In adopting this rule, the FTC determined that a consumer credit transaction, which separated the consumer’s duty to pay from the seller’s duty to fulfill his obligations, constituted an unfair and deceptive practice. . . . The rule was aimed primarily at situations in which a seller executed a credit contract and then assigned the contract to a credit company which took it free and clear of any claims and defenses the buyer had against the seller. . . . The creditor’s status as a holder in due course operated to cut off claims and defenses such as breach of contract, breach of warranty, misrepresentation, or fraud on the part of the seller. . . . The reciprocal duties of the buyer and seller which were mutually dependent under ordinary contract law became independent of one another. Thus, the buyer’s duty to pay the creditor was not excused upon the seller’s failure to perform. In abrogating the holder in due course rule in consumer credit transactions, the FTC preserved the consumer’s claims and defenses against the creditor-assignee. The FTC rule was therefore designed to reallocate the cost of seller misconduct to the creditor. The commission felt the creditor was in a better position to absorb the loss or recover the cost from the guilty party the seller.

We must determine the extent to which the buyer’s claim for seller misconduct is preserved against the creditor. Home Savings contends its liability to Guerra is limited to the amount paid by Guerra under the contract, $1,256.90. We agree. The notice provision required by the FTC rule includes the sentence, “Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder.” In explaining the mechanics of the rule, the FTC’s Bureau of Consumer Protection stated:

This limits the consumer to a refund of monies paid under the contract, in the event that an affirmative money recovery is sought. In other words, the consumer may assert, by way of claim or defense, a right not to pay all or part of the outstanding balance owed the creditor under the contract; but the consumer will not be enti-
tled to receive from the creditor an affirmative recovery which exceeds the amounts of money the consumer has paid in.

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The limitation on affirmative recovery does not eliminate any other rights the consumer may have as a matter of local, state, or federal statute. The words “recovery hereunder” which appear in the text of the Notice refer specifically to a recovery under the Notice. If a larger affirmative recovery is available against a creditor as a matter of state law, the consumer would retain this right.

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The Rule does apply to all claims or defenses connected with the transaction, whether in tort or contract. When, under state law, a consumer would have a tort claim against the seller that would defeat a seller’s right to further payments or allow the consumer to recover affirmatively, this claim is preserved against the holder. This is, of course, subject to the limitation of recovery under this Rule to the amounts paid in.

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These guidelines limit the creditor’s derivative liability to the amount paid under the contract. A rule of unlimited liability would place the creditor in the position of an absolute insurer or guarantor of the seller’s performance. We do not construe this to be the purpose of the FTC rule. We hold that a creditor’s derivative liability for seller misconduct under the FTC rule is limited to the amount paid by the consumer under the credit contract. Our holding is supported by several commercial law commentators. . . . We disapprove of the language in De La Fuenta v. Home Savings Association, 669 S.W.2d 137 (Tex. Civ. App.—Corpus Christi 1984, no writ), to the extent that it is inconsistent with this opinion.

We realize the limitation provision does not limit or foreclose a consumer’s right of recovery against the creditor based on independent state law grounds. . . . However, Guerra has not pleaded or proven an independent cause of action against Home Savings under either the DTPA or the Home Solicitation Act. Moreover, Guerra obtained no jury findings that Home Savings participated in any of the wrongful acts of which he complains. All of the jury findings pertained to wrongful acts committed solely by Modern Builders. Guerra premised Home Savings’ liability strictly on its admission that it was the holder of the note.

In the absence of evidence and jury findings that Guerra was adversely affected by a false, misleading or deceptive act or unconscionable action on the part of Home Savings, Home Savings has no liability under the DTPA. Although a consumer suing under the DTPA need not establish contractual privity with the defendant, he must show that the defendant has committed a deceptive act which is the producing cause of the consumer’s damages. . . . The DTPA does not attach derivative liability to a defendant based on an innocent involvement in a business transaction. . . . To hold a creditor liable in a consumer credit transaction, the creditor must be shown to have some connection either with the actual sales transaction or with a deceptive act related to financing the transaction. . . .

In Knight v. International Harvester Credit Corp., we held that the seller and creditor-assignee “were so inextricably intertwined in the transaction as to be equally responsible for the conduct of the sale.” 627 S.W.2d at 389. In that case, International Harvester had drafted and supplied the seller with the retail installment contract which prominently bore the insignia of International Harvester at the top of the first page. The contract provided both for the sale of the
good and the payment over time with interest. Most of the contracts used by the seller were provided by International Harvester. We concluded that, because of this close connection, International Harvester was involved in more than a mere extension of credit. We held the buyer was a consumer with respect to International Harvester as well as the seller. . . .

Conversely, although Home Savings supplied Modern Builders with the installment contract used in this transaction, the contract was a standard FHA form. There was no indication that Home Savings drafted the contract nor any other evidence that Home Savings was “inextricably intertwined” with Modern Builders. Furthermore, there were no pleadings nor jury findings to support a holding that the two defendants were inextricably intertwined. Guerra simply never advanced this theory of recovery.

Because there is no evidence or findings supporting an independent ground of recovery against Home Savings based on state law, we hold Home Savings’ liability is limited to the amount paid under the contract, $1,256.90. This holding is in harmony with our decision in Kish v. Van Note, 692 S.W.2d 463 (Tex. 1985). In that case, we examined the liability of an assignee-bank under an installment contract containing the FTC notice provision. Although we did not discuss the purpose or intent of the FTC rule, we held that, because the bank had not violated the DTPA, its joint and several liability was limited to the amount paid under the contract plus attorneys fees. . . .

The trial court also rendered judgment against Modern Builders and Home Savings, jointly and severally, for $10,000 in attorneys fees. Home Savings claims the trial court erred in holding it jointly and severally liable for attorneys fees because its liability is limited to $1,256.90, rather than the full $25,000. However, the special issue on attorneys fees requested the jury to find Guerra’s attorneys fees for the entire case, rather than separately allocating the fees to each claim. Therefore, because Home Savings did not object to this broad attorneys fees issue, any complaint that the trial court failed to segregate the fees as to each claim has been waived. . . . Accordingly, we hold Home Savings jointly and severally liable for attorneys fees of $10,000.

We affirm the trial court’s judgment awarding Guerra $10,000 attorneys fees. We also affirm that part of the judgment declaring the note void. We reverse the judgment of the court of appeals holding Home Savings jointly and severally liable for $25,000 and render judgment against Home Savings for $1,256.90.

QUESTIONS

1. To what extent is liability imposed under the FTC rule? Is this fair? Note that in Guerra, liability was derivative, not direct.

2. Suppose that in the course of collecting on the retail installment sales contract Home Savings had committed an act that violated the DTPA. Would Guerra have been a consumer for purposes of the DTPA? Although there is no privity requirement under the Act is there some limitation as to the time at which the act occurs and the time at which the person becomes a consumer? Would it matter if the wrongful conduct by Home Savings occurred one day after the sale? One month? Five years? What would you argue to establish that Guerra was a consumer? Was not?

3. Can a party be liable by virtue of the fact that he is “inextricably intertwined” in a transaction? Re-read Guerra.
QANTEL BUSINESS SYSTEMS, INC.

v.

CUSTOM CONTROLS CO.

Supreme Court of Texas, 1988
761 S.W.2d 302

ROBERTSON, JUSTICE.

Computer Results sued Custom Controls on a sworn account. Custom Controls, a business consumer, then filed a separate suit against Computer Results, the retailer/distributor of a Qantel computer system. Custom Controls also sued Mohawk Data Services Corp. and Qantel Corp., the alleged manufacturers of the Qantel computer system. Custom Controls alleged the defendants had committed breach of warranty and engaged in false, misleading and deceptive practices or representations under the Texas Deceptive Trade Practices—Consumer Protection Act in connection with the sale of the Qantel computer system.

The parties agreed to consolidate the two causes into this single cause of action. Custom Controls nonsuited Computer Results and Computer Results nonsuited Custom Controls before trial. Custom Controls’ suit against the remaining two defendants, Mohawk Data Services and Qantel, was then tried before the bench. After Custom Controls rested, Mohawk and Qantel moved for judgment on the grounds that there was no evidence in the record that Mohawk or Qantel engaged in any wrongful, misleading, or deceptive acts directly or vicariously. The trial court granted that motion and rendered judgment that Custom Controls take nothing against Mohawk and Qantel. On appeal, Custom Controls did not assert any points of error with respect to Mohawk; therefore, Qantel is the sole remaining defendant party in this appeal. The court of appeals found there was “some evidence (i.e., more than a scintilla) of a relationship between Qantel and Computer Results,” such that Qantel could be held vicariously liable for the actions of Computer Results. On that basis, the court of appeals reversed the judgment of the trial court and remanded the cause for a new trial. We reverse the judgment of the court of appeals and remand this action to that court for further consideration in accordance with this opinion.

Qantel asserts two points of error before this court. First, Qantel contends that there is no evidence that Qantel directly or vicariously committed any wrongful or deceptive practices.

Additionally, we note that the court of appeals implies that the term “inextricably intertwined” provides an additional theory of vicarious liability in the context of a DTPA cause of action. We are aware that the term “inextricably intertwined” has been urged as another method of establishing vicarious liability under the DTPA. See Colonial Leasing Co. v. Kinerd, 733 S.W.2d 671, 673-74 (Tex. App.—Eastland 1987, writ granted); Potere, Inc. v. National Realty Serv., 667 S.W.2d 252, 256 (Tex. App.—Houston [14th Dist.] 1984, no writ). The term “inextricably intertwined” finds its recent origin in connection with the DTPA in Knight v. International Harvester Credit Corp., 627 S.W.2d 382, 389 (Tex. 1982). In Knight, this court held that when two parties are “inextricably intertwined” to a certain degree they may be held equally responsible for wrongful conduct. However, that statement was made in the context of establishing whether the plaintiff was a consumer with respect to the financing company as well as the seller of the truck involved in the action.
Knight had nothing to do with derivative or vicarious liability. “Inextricably intertwined” is not an additional theory of vicarious liability under the DTPA. This court could not have been more clear when it said in Home Sav. Ass’n v. Guerra, 733 S.W.2d 134, 136 (Tex. 1987): “Although a consumer suing under the DTPA need not establish contractual privity with the defendant, he must show that the defendant has committed a deceptive act which is the producing cause of the consumer’s damages.” The DTPA does not attach derivative liability to its defendants based on innocent involvement in a business transaction. The court of appeals was incorrect to the extent it implied that the term “inextricably intertwined” is an additional source of derivative liability.

The traditional common law theories of vicarious liability, such as agency or respondeat superior, provide an adequate basis for creating vicarious liability under the DTPA. The DTPA does not recognize or envision the expansion of common law theories of vicarious liability to include “inextricably intertwined,” or the mere existence of a “relationship” between parties.

In conclusion, we reverse the judgment of the court of appeals and remand this cause to the court of appeals for further consideration in accordance with this opinion.

PROBLEM 10

Caren Consumer approached First State Bank about a $20,000 loan to remodel her kitchen. The officer at First State told Caren she could have the loan only if she used an approved contractor. Caren had already found a contractor she liked, but she took the list of names from First State. There were only two names on the list that worked on projects of her size. She contacted both of them, and only one, Smith Brothers, would do the work. She told the bank she would rather use another contractor. They insisted, however, that she use an approved contractor because that way they were certain there would be no problems with the work. They assured her this was a very reliable contractor. Caren hired Smith Brothers. The bank immediately gave her the $20,000. She was to repay it in 20 months at the rate of $1100 a month.

First State Bank then discounted the note to Second State Bank. Second State Bank was a holder in due course.

Smith’s contract called for an initial payment of $10,000. Caren made the payment. Smith, however, didn’t do the work as promised. After several months of frustration, Caren fired Smith and demanded her money back. Smith refused and said “sue me.” It turns out that this was the first job Smith Brothers had done since being placed on the “approved list.” It was also their last.

Caren, who is now out $10,000 to Smith Brothers and $3,300 to Second State, wants to bring a DTPA claim. Which parties can she sue? For what cause of action?