

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 Simon 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 consumer 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 offshore. 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 transportation for Lorac's employees. . . . We therefore hold that Lorac was a consumer within the meaning of the DTPA.

[The court went on to find that there had not been a violation of the DTPA; however, because the company did provide insurance, the insurance company breached its agreement. Thus, there was no misrepresentation. The concurring opinion felt this fact was important:]

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 the station subject to 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 purchased or leased for use, including services furnished in connection with the sale or repair of goods."

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

[On June 24, 1987, the Texas Supreme Court issued an opinion in *E.F. Hutton & Co. v. Youngblood*, dealing with the relationship between the DTPA and the sale of securities. On November 10, the court withdrew that opinion, and substituted a new one that failed to discuss the

DTPA issue. 741 S.W.2d 363 (Tex. 1987). The following is the opinion of the court that was withdrawn. Would you have concurred or dissented?]

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

CAMPBELL, JUSTICE.

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

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

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

ever, we need not address those issues because we hold the DTPA does not apply to the instant transaction.

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

The holding in *Pennington* is in stark contrast to the due diligence defense allowed under the TSA wherein a person is not liable for inaccurate or incomplete information given to a client if the person proves he or she did not know and could not have reasonably known of the inaccuracy or incompleteness of the information. . . .

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

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

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

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

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

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

NOTES 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 Youngbloods, DTPA liability would lie. In future cases the court should pay careful attention to the transaction in question and ask: Was this the sale of securities or the rendering of an independent service? Only in the former should the DTPA be deemed incompatible and inapplicable.

12 CAVEAT VENDOR at 94 (1987).

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

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

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.

QUESTION

Could the consumer have argued that the “object” of her transaction with Circle K was the purchase of the services of its employees?

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

RIVERSIDE NATIONAL BANK

v.

LEWIS

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 El Dorado. Allied Bank provided almost \$10,500.00 in financing. To secure the loan, Allied Bank took a security interest in the car and kept a \$6,000.00 certificate of deposit as security. Lewis failed to make the first payment due on April 10, and a check that he gave a few days later was returned for insufficient funds. After these occurrences, Mr. Little, Lewis’ loan officer at Allied Bank, asked Lewis to move the loan to another bank.

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

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

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

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

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

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

* * *

RIVERSIDE'S LIABILITY UNDER THE DECEPTIVE TRADE PRACTICES ACT.

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

* * *

The Act thus differentiates between the remedies available to correct violations of the Act. A "person" may have engaged in a deceptive act by presenting any misleading information concerning any item of value. *See* Sections 17.46(a), 17.45(6). Any person engaging in such deceptive practices may be subjected to a suit by the Consumer Protection Division of the Attorney General's Office, under Section 17.47. But, one who engages in deceptive acts may not be subjected to a private suit for damages under the Act unless the aggrieved party is a consumer. Section 17.50 expressly declares, in its caption: Relief for Consumers. Furthermore, Section 17.50 provides that a consumer may maintain a cause of action if aggrieved by deceptive practices. The Legislature granted no such remedy by means of a private cause of action for any person; one must be a consumer.

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

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

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

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

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

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

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

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

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

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

Section 17.45(2) of the DTPA defines services as "work, labor, and services for other than commercial or business use, including services furnished in connection with the sale or repair of goods." Lewis contends that, in the instant transaction, he sought an "extension of credit." This extension of credit, he claims, is a service as defined by the DTPA. We disagree.

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

"Services" was defined by this Court in *Van Zandt v. Fort Worth Press*, 359 S.W.2d 893, 895 (Tex. 1962). We defined services as: "action or use that furthers some end or purpose; conduct

or performance that assists or benefits someone or something; deeds useful or instrumental toward some object.” This definition described “services” in terms of “action,” “conduct,” “performance” and “deeds.” All of these synonyms demonstrate that services includes an activity on behalf of one party by another. This characterization indicates that “services” is similar in nature to work or labor. Accordingly, we hold that Lewis’ attempt to acquire money, or the use of money, was not an attempt to acquire services.

We find support for our conclusion that the DTPA’s use of the word “services” did not include the extension of credit, or the borrowing of money, in another statute: the Home Solicitations Transactions chapter of the Interest-Consumer Credit-Consumer Protection Title. In the Home Solicitations Transactions Act, the Legislature gave to “consumers,” as defined in that act, certain rights with respect to contracts that had been signed as a result of a home solicitation. In that act, the Legislature defined “consumer” as “an individual who seeks or acquires real or personal property, services, money, or credit for personal, family, or household purposes.” [I]nterestingly enough, the Legislature enacted this statute during the same session in which the DTPA was originally enacted. The presence of the words “money or credit” within the definition of “consumer” in the Home Solicitations Act, and their corresponding absence from the analogous provision in the DTPA, indicates that the seeking of an “extension of credit” is not the seeking of a “service” as defined in the DTPA. Obviously, the Legislature knew how to include the extension of credit and borrowing of money within the scope of coverage of protective legislation, when it intended to cover such transactions. The simple addition of the words “money or credit” within the definition of “consumer” in the DTPA would have accomplished such a purpose in the DTPA. The Legislature’s exclusion of these terms from the DTPA, in light of its contemporaneous inclusion of the same terms in the Home Solicitations Transactions Act, evidences a clear legislative intent that the extension of credit was not to be covered under the DTPA.

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

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

The argument that services existed in the lending of money, and in the process of determining whether to lend money, and were necessarily a part of the interest rate or purchase price of the loan, is not supported by the evidence adduced at trial. This argument, contained in the briefs, is merely hypothetical. There is nothing to support it in the Statement of Facts.

Additionally, Lewis’ sole complaint about the transaction concerned the Bank’s failure to make him the loan. He has made no complaint concerning the quality of these collateral activities that he now claims constitute a service. In the absence of a claim concerning these collateral ac-

tivities, we hold that Lewis did not seek either “goods or services” as defined under the DTPA.² Accordingly, Lewis was not a “consumer” who could bring suit under Section 17.50 of the DTPA.

* * *

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

NOTES 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.

² Accordingly, we do not pass upon the question whether a bank’s misrepresentation concerning its activities, such as the availability of financial counseling, the cost of processing a loan or the ability to pay a customer’s monthly bills, could constitute a deceptive act in connection with a sale of “services.” We only hold that where those activities are not the subject of the complaint, then the presence of such collateral activities in a transaction otherwise not covered by the DTPA does not subject the parties to liability under the DTPA. Nor do we have before us a case where in connection with a sale of tangible personal property on credit, the seller misrepresents to the buyer the terms of the credit.

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.

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

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

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

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

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

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

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

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

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

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

In his transaction with Riverside Bank, Lewis sought only to borrow money in an effort to avoid repossession of his car. . . . Other than Lewis' payment for the use of money, there was nothing else for which he paid or which he sought to ac-

quire. . . . 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, JUSTICE.

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

lishes 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 Krahrmer, Lovell and McCormick, *Banks and the Texas Deceptive Trade Practices Act*, 18 TEX. TECH L. REV. 1 (1987).

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.

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?

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 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: