TEXAS

CONSUMER

LAW

CASES AND MATERIALS

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FOURTEENTH EDITION

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Dedication

To Janie & Will
Preface

During the past three decades, Texas consumer law has undergone enormous change. “Caveat Emptor,” let the buyer beware, has been eliminated, through both legislation and case law providing consumers with substantial rights. Foremost among the changes in Texas Consumer law is the Texas Deceptive Trade Practices and Consumer Protection Act, commonly referred to as the DTPA.

This book is designed to provide an understanding of Texas consumer law, with an emphasis on the DTPA. The approach taken is to present the material in a combination of traditional case analysis and problem solving. To maintain the continued importance of the book, even after the class has been completed editing of the cases has been kept to a minimum, and footnotes and citations have been retained whenever they are deemed important. Because most Texas consumer law is statutory in nature, this book includes a substantial statutory appendix.

As with any book there are people who must be acknowledged for their contributions. Foremost on my list is my secretary, Judy Strecker, who continually managed to put my chicken scratch into an intelligible form. I also want to thank the many students who have sat through my consumer protection classes, and from whom I have learned so much. It is the students’ input and comments that helped me organize this book into what I believe to be a logical and understandable sequence.
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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.

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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 unreas-
onable 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 adminis-
trative 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 provi-
sion 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 com-
merce” 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 lawsuit 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 overinclusive, 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.

STATUTORY INTERPRETATION

The Texas Deceptive Trade Practices Act is a statute, designed to replace common law doctrines such as fraud, misrepresentation, and deceit that had applied to most consumer disputes. How does the interpretation and application of a statute differ from the interpretation and application of a common law rule? How much “freedom” does a court have when interpreting a statute? To what extent can this “freedom” be increased or decreased by the legislature? What factors should a court consider when interpreting a statute? Is there a “conservative” or a “liberal” approach to statutory interpretation? What is it?

EXERCISE

The following provision provides for damages under a federal law that regulates credit disclosures, known as the Truth in Lending Act [TILA]. Read the provision. Does the limitation in subsection ii, limiting damages to not less than $100 nor greater than $1,000, apply to subparagraph i? What information would you find helpful in making this determination?
After thinking about this question, read the next case. Read all five opinions. Does the Court’s opinion favor consumers or businesses? What about the dissent? What factors does each opinion find relevant? Which Justice employs what you would describe as a “conservative” or “liberal” approach? Which approach do you think should be applied when interpreting the Texas Deceptive Trade Practices Act? Is there such a thing as a “liberal” or conservative” approach?

§1640. Civil Liability.
(a) Individual or class action damages for damages, amount of award; factors determining amount of award.

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter, including any requirement under section 125 or chapter 4 or 5 of this title with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;
(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under chapter 5 of this title, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000;

KOONS BUICK PONTIAC GMC, INC.
v.
NIGH
Supreme Court of the United States
543 U.S. 50, 2004

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O’CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion, in which BREYER, J., joined. KENNEDY, J., filed a concurring opinion, in which REHNQUIST, C. J., joined. THOMAS, J., filed an opinion concurring in the judgment. SCALIA, J., filed a dissenting opinion.

OPINION: JUSTICE GINSBURG delivered the opinion of the Court.

The meaning of a subparagraph in a section of the Truth in Lending Act (TILA or Act), 15 U.S.C. § 1601 et seq., is at issue in this case. As originally enacted in 1968, the provision in question bracketed statutory damages for violations of TILA prescriptions governing consumer loans: $100 was made the minimum recovery and $1,000, the maximum award. In 1995, Congress added a new clause increasing recovery for TILA violations relating to closed-end loans “secured by real property or a dwelling.” § 1640(a)(2)(A)(iii). In lieu of the $100/$1000 minimum and maximum recoveries, Congress substituted $200/$2000 as the floor and ceiling.
Less-than-meticulous drafting of the 1995 amendment created an ambiguity. A divided panel of the United States Court of Appeals for the Fourth Circuit held that the 1995 amendment not only raised the statutory damages recoverable for TILA violations involving real-property-secured loans, it also removed the $1000 cap on recoveries involving loans secured by personal property. We reverse that determination and hold that the 1995 amendment left unaltered the $100/$1000 limits prescribed from the start for TILA violations involving personal-property loans. The purpose of the 1995 amendment is not in doubt: Congress meant to raise the minimum and maximum recoveries for closed-end loans secured by real property. There is scant indication that Congress simultaneously sought to remove the $1000 cap on loans secured by personal property.

I

Congress enacted TILA in 1968, as part of the Consumer Credit Protection Act, Pub. L. 90-321, 82 Stat. 146, as amended, 15 U.S.C. § 1601 et seq., to “assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit,” § 102, codified in 15 U.S.C. § 1601(a). The Act requires a creditor to disclose information relating to such things as finance charges, annual percentage rates of interest, and borrowers’ rights, see §§ 1631-1632, 1635, 1637-1639, and it prescribes civil liability for any creditor who fails to do so, see § 1640. As originally enacted in 1968, the Act provided for statutory damages of twice the finance charge in connection with the transaction, except that recovery could not be less than $100 or greater than $1,000. The original civil-liability provision stated:

“(a) Any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this chapter to be disclosed to that person is liable to that person in an amount . . . of

“(1) twice the amount of the finance charge in connection with the transaction, except that liability under this paragraph shall not be less than $100 nor greater than $1000. . . .”

In 1974, Congress amended TILA’s civil-liability provision, to allow for the recovery of actual damages in addition to statutory damages and to provide separate statutory damages for class actions. Congress reworded the original statutory damages provision to limit it to individual actions, moved the provision from § 1640(a)(1) to § 1640(a)(2)(A), and retained the $100/$1000 brackets on recovery. In order to account for the restructuring of the statute, Congress changed the phrase “under this paragraph” to “under this subparagraph.” The amended statute provided for damages in individual actions as follows:

“(a) Any creditor who fails to comply with any requirement imposed under this chapter . . . is liable to such person in an amount equal to the sum of—

“(1) any actual damage sustained by such person as a result of the failure;

“(2)(A) in the case of an individual action twice the amount of any finance charge in connection with the transaction, except that the liability under this subparagraph shall not be less than $100 nor greater than $1000. . . .”

A further TILA amendment in 1976 applied truth-in-lending protections to consumer leases. Congress inserted a clause into § 1640(a)(2)(A) setting statutory damages for individual actions relating to consumer leases at 25% of the total amount of monthly payments under the lease.
Again, Congress retained the $100/$1000 brackets on statutory damages. The amended § 1640(a)(2)(A) provided for statutory damages equal to

“(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease . . . 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1000. . . .”

Following the insertion of the consumer lease provision, courts consistently held that the $100/$1000 limitation remained applicable to all consumer financing transactions, whether lease or loan. See, e.g., Purtle v. Eldridge Auto Sales, Inc., 91 F.3d 797, 800 (CA6 1996); Cowen v. Bank United of Tex., FSB, 70 F.3d 937, 941 (CA7 1995); Mars v. Spartanburg Chrysler Plymouth, Inc., 713 F.2d 65, 67 (CA4 1983); Dryden v. Lou Budke’s Arrow Finance Co., 661 F.2d 1186, 1191, n. 7 (CA8 1981); Williams v. Public Finance Corp., 598 F.2d 349, 358, 359, n. 17 (CA5 1979).

In 1995, Congress amended TILA’s statutory damages provision once more. The 1995 amendment, which gave rise to the dispute in this case, added a new clause (iii) at the end of § 1640(a)(2)(A), setting a $200 floor and $2000 ceiling for statutory damages in an individual action relating to a closed-end credit transaction “secured by real property or a dwelling.” These closed-end real estate loans, formerly encompassed by clause (i), had earlier been held subject to the $100/$1000 limitation for each TILA violation concerning a secured real estate loan. Section 1640(a), as amended in 1995, thus provides for statutory damages equal to

“(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease . . . 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2000. . . .”

Shortly after the passage of the 1995 TILA amendments, the Office of the Comptroller of the Currency issued an official policy announcement describing the changes. With respect to changes in TILA’s civil-liability provisions, the announcement stated only that “punitive damages have been increased for transactions secured by real property or a dwelling from a maximum of $1000 to a maximum of $2000 (closed-end credit only).”

In 1997, the Seventh Circuit, in Strange v. Monogram Credit Card Bank of Ga., 129 F.3d 943, held that the meaning of clauses (i) and (ii) remained untouched by the addition of clause (iii). The Seventh Circuit observed that prior to the addition of clause (iii) in 1995, “courts uniformly interpreted the final clause, which established the $100 minimum and the $1000 maximum, as applying to both (A)(i) and (A)(ii).” The 1995 amendment, the Seventh Circuit reasoned, “was designed simply to establish a more generous minimum and maximum for certain secured transactions, without changing the general rule on minimum and maximum damage awards for the other two parts of § 1640(a)(2)(A).” As Strange illustrates, TILA violations may involve finance charges that, when doubled, are less than $100. There, double-the-finance-charge liability was $54.27, entitling the plaintiff to the $100 minimum.
On February 4, 2000, respondent Bradley Nigh attempted to purchase a used 1997 Chevrolet Blazer truck from petitioner Koons Buick Pontiac GMC. Nigh traded in his old vehicle and signed a buyer’s order and a retail installment sales contract reflecting financing to be provided by Koons Buick. Koons Buick could not find a lender to purchase an assignment of the payments owed under the sales contract and consequently restructured the deal to require a larger down-payment. On February 25, after Koons Buick falsely told Nigh that his trade-in vehicle had been sold, Nigh signed a new retail installment sales contract. Once again, however, Koons Buick was unable to find a willing lender. Nigh ultimately signed, under protest, a third retail installment sales contract.

Nigh later discovered one reason why Koons Buick had been unable to find an assignee for the installment payments due under the second contract: That contract contained an improperly documented charge of $965 for a Silencer car alarm Nigh never requested, agreed to accept, or received. Ibid. Nigh made no payments on the Blazer and returned the truck to Koons Buick.

On October 3, 2000, Nigh filed suit against Koons Buick alleging, among other things, a violation of TILA. Nigh sought uncapped recovery of twice the finance charge, an amount equal to $24,192.80. Koons Buick urged a $1000 limitation on statutory damages under § 1640(a)(2)(A)(i). The District Court held that damages were not capped at $1,000, and the jury awarded Nigh $24,192.80 (twice the amount of the finance charge).

A divided panel of the Fourth Circuit affirmed. The Court of Appeals acknowledged that it had previously interpreted the $1000 cap to apply to clauses (i) and (ii). But the majority held that “by striking the ‘or’ preceding (ii), and inserting (iii) after the ‘under this subparagraph’ phrase,” Congress had “rendered Mars’ interpretation defunct.” According to the majority: “The inclusion of the new maximum and minimum in (iii) shows that the clause previously interpreted to apply to all of (A), can no longer apply to (A), but must now apply solely to (ii), so as not to render meaningless the maximum and minimum articulated in (iii).” The Court of Appeals therefore allowed Nigh to recover the full uncapped amount of $24,192.80 under clause (i).

JUDGE GREGORY dissented. The new clause (iii), he stated, operates as a specific “carve-out” for real estate transactions from the general rule establishing the $100/$1000 liability limitation. Both parties acknowledged, and it was Fourth Circuit law under Mars, 713 F.2d 65, that, before 1995, the $100/$1000 brackets applied to the entire subparagraph. JUDGE GREGORY found “no evidence that Congress intended to override the Fourth Circuit’s longstanding application of the $1000 cap to both (2)(A)(i) and (2)(A)(ii).” If the $1000 cap applied only to clause (ii), the dissent reasoned, the phrase “under this subparagraph” in clause (ii) would be “superfluous,” because “the meaning of (ii) would be unchanged by its deletion.” Moreover, JUDGE GREGORY added, limiting the $1000 cap to recoveries for consumer leases under clause (ii) would create an inconsistency within the statute: The damage cap in clause (ii) would include the “under this subparagraph” modifier, but the cap in clause (iii) would not.

We granted certiorari, to resolve the division between the Fourth Circuit and the Seventh Circuit on the question whether the $100 floor and $1000 ceiling apply to recoveries under § 1640(a)(2)(A)(i). We now reverse the judgment of the Court of Appeals for the Fourth Circuit.

Statutory construction is a “holistic endeavor.” “A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminol-
ogy is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.” United Sav. Assn. of Tex., 484 U.S. 365, at 371, (citations omitted). In this case, both the conventional meaning of “subparagraph” and standard interpretive guides point to the same conclusion: The $1000 cap applies to recoveries under clause (i).

Congress ordinarily adheres to a hierarchical scheme in subdividing statutory sections. This hierarchy is set forth in drafting manuals prepared by the legislative counsel’s offices in the House and the Senate. The House manual provides:

“To the maximum extent practicable, a section should be broken into—

“(A) subsections (starting with (a));

“(B) paragraphs (starting with (1));

“(C) subparagraphs (starting with (A));


The Senate manual similarly provides:

“A section is subdivided and indented as follows:

“(a) SUBSECTION.—

“(1) PARAGRAPH.—

“(A) SUBPARAGRAPH.—

“(i) CLAUSE.—” Senate Office of the Legislative Counsel, Legislative Drafting Manual 10 (1997).

Congress followed this hierarchical scheme in drafting TILA. The word “subparagraph” is generally used to refer to a subdivision preceded by a capital letter, and the word “clause” is generally used to refer to a subdivision preceded by a lower case Roman numeral. Congress applied this hierarchy in § 1640(a)(2)(B), which covers statutory damages in TILA class actions and states: “The total recovery under this subparagraph . . . shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor . . . .” (Emphasis added.) In 1995, Congress plainly meant “to establish a more generous minimum and maximum” for closed-end mortgages. On that point, there is no disagreement. Had Congress simultaneously meant to repeal the longstanding $100/$1000 limitation on § 1640(a)(2)(A)(i), thereby confining the $100/$1000 limitation solely to clause (ii), Congress likely would have flagged that substantial change. At the very least, a Congress so minded might have stated in clause (ii): “liability under this clause.”

The statutory history resolves any ambiguity whether the $100/$1000 brackets apply to recoveries under clause (i). Before 1995, clauses (i) and (ii) set statutory damages for the entire realm of TILA-regulated consumer credit transactions. Closed-end mortgages were encompassed by clause (i). As a result of the addition of clause (iii), closed-end mortgages are subject to a higher floor and ceiling. But clause (iii) contains no other measure of damages. The specification of statutory damages in clause (i) of twice the finance charge continues to apply to loans secured by
real property as it does to loans secured by personal property. Clause (iii) removes closed-end mortgages from clause (i)’s governance only to the extent that clause (iii) prescribes $ 200/$2000 brackets in lieu of $100/$1,000.

There is scant indication that Congress meant to alter the meaning of clause (i) when it added clause (iii). By adding clause (iii), Congress sought to provide increased recovery when a TILA violation occurs in the context of a loan secured by real property. “There is no canon against using common sense in construing laws as saying what they obviously mean.” It would be passing strange to read the statute to cap recovery in connection with a closed-end, real-property-secured loan at an amount substantially lower than the recovery available when a violation occurs in the context of a personal-property-secured loan or an open-end, real-property-secured loan. The text does not dictate this result; the statutory history suggests otherwise; and there is scant indication Congress meant to change the well-established meaning of clause (i).

For the reasons stated, the judgment of the Court of Appeals for the Fourth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CONCUR: JUSTICE STEVENS, with whom JUSTICE BREYER joins, concurring.

If an unambiguous text describing a plausible policy decision were a sufficient basis for determining the meaning of a statute, we would have to affirm the judgment of the Court of Appeals. The ordinary reader would think that § 1640(a)(2)(A) is a paragraph including three subparagraphs identified as (i), (ii), and (iii). There is nothing implausible about a scheme that uses a formula to measure the maximum recovery under (i) without designating a ceiling or floor. Thus we cannot escape this unambiguous statutory command by proclaiming that it would produce an absurd result.

We can, however, escape by using common sense. The history of the provision makes it perfectly clear that Congress did not intend its 1995 amendment adding (iii) to repeal the pre-existing interpretation of (i) as being limited by the ceiling contained in (ii). Thus, the Court unquestionably decides this case correctly. It has demonstrated that a busy Congress is fully capable of enacting a scrivener’s error into law.

In recent years the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress’ true intent when interpreting its work product. Common sense is often more reliable than rote repetition of canons of statutory construction. It is unfortunate that wooden reliance on those canons has led to unjust results from time to time. Fortunately, today the Court has provided us with a lucid opinion that reflects the sound application of common sense.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE joins, concurring.

In the case before us, there is a respectable argument that the statutory text, 15 U.S.C. § 1640 (a)(2)(A)(ii), provides unambiguous instruction in resolving the issue: The word “subparagraph” directs that the $1000 cap applies to recoveries under both clause (A)(i) and clause (A)(ii), as both fall under subparagraph (A). Were we to adopt that analysis, our holdings in cases such as Lamie v. United States Trustee, 540 U.S. 526, 533-35, 157 L. Ed. 2d 1024, 124 S. Ct. 1023 (2004), Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-54, 117 L. Ed. 2d 391, 112 S. Ct.
The Court properly chooses not to rest its holding solely on the words of the statute. That is because of a counter-argument that “subparagraph” cannot be read straightforwardly to apply to all of subparagraph (A) in light of the different recovery cap of $2000 for recoveries under clause (A)(iii). I agree with the Court’s decision to proceed on the premise that the text is not altogether clear. That means that examination of other interpretive resources, including predecessor statutes, is necessary for a full and complete understanding of the congressional intent. This approach is fully consistent with cases in which, because the statutory provision at issue had only one plausible textual reading, we did not rely on such sources. In the instant case, the Court consults extratextual sources and, in my view, looking to these materials confirms the usual interpretation of the word “subparagraph.”

With these observations, I join the Court’s opinion.

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that the judgment of the Court of Appeals should be reversed. I write separately, however, because I believe that it is unnecessary to rely on inferences from silence in the legislative history or the perceived anomalous results posed by an alternative interpretation to answer the question presented in this case. Instead, in my view, the text of 15 U.S.C. § 1640(a)(2)(A) prior to Congress’s 1995 amendment to it, the consistent interpretation that the Courts of Appeals had given to the statutory language prior to the amendment, and the text of the amendment itself make clear that Congress tacked on a provision addressing a very specific set of transactions otherwise covered by the Truth in Lending Act (TILA) but not materially altering the provisions at issue here.

If the text in this case were clear, resort to anything else would be unwarranted. But I agree with the Court that § 1640(a)(2)(A) is ambiguous, rather than unambiguous as JUSTICE STEVENS contends, because on its face it is susceptible of several plausible interpretations. Congress, as the Court points out, used “subparagraph” consistently in TILA, albeit not with perfect consistency, to refer to a third-level division introduced by a capital letter. See ante, at 10 and n. 4 (majority opinion). This consistent usage points toward the view that “subparagraph” here refers to the whole of subdivision (A). But other textual evidence is in tension with that reading. As the Court of Appeals correctly pointed out and JUSTICE SCALIA notes, (dissenting opinion), if “subparagraph” refers to the whole of subdivision (A), the limit of $100-$1000 for liability set forth in clause (ii) is in direct conflict with the $200-$2000 limit on liability found in clause (iii). Still other textual clues point away from the Court of Appeals’ reading. It is possible, for example, to read the $100-$1000 limit in clause (ii) to be an exception that applies only to the liability set forth in clauses (i) and (ii), since it comes after clauses (i) and (ii) but before clause (iii). These conflicting textual indicators show that, whatever the practices suggested in the manuals relied upon by the Court, is not a model of the best practices in legislative drafting.

The statutory history of § 1640(a)(2)(A) resolves this ambiguity. Prior to the 1995 amendment, the meaning of subdivisions (A)(i) and (ii) was clear. As the Court recounts, after the 1976 amendment and prior to 1995, § 1640(a) provided for statutory damages equal to
“(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease . . . 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000.” 15 U.S.C. § 1640(a) (1976 ed.).

There is no doubt that under this version of the statute the phrase “under this subparagraph” extended the liability limits to subdivision (A)(i) as well as subdivision (A)(ii). As noted above, “subparagraph” is generally used in TILA to refer to a section’s third-level subdivision introduced by a capital letter. By virtue of the phrase “under this subparagraph,” the liability extended to the whole of subdivision (A). The placement of this clause at the end of subdivision (A) further indicated that it was meant to refer to the whole of subdivision (A). The clarity of the meaning is borne out by the Courts of Appeals’ consistent application of the limit to both clauses (i) and (ii) as they stood before the 1995 amendment.

Congress’s 1995 amendment did not materially alter the text of § 1640(a)(2)(A)(i) or (ii). It removed “or” between clauses (i) and (ii) and placed it between clause (ii) and the new clause (iii). Apart from this change, it neither deleted any language from clause (i) or clause (ii) nor added any language to these clauses. The only substantive change that amendment wrought was the creation of clause (iii), which established a higher $2000 cap on damages for a very specific set of credit transactions—closed-end credit transactions secured by real property or a dwelling—that had previously been covered by § 1640(a)(2)(A)(i) and subject to the lower $1000 cap. By so structuring the amendment, Congress evinced its intent to address only the creation of a different limit for a specific set of transactions.

In light of this history, as well as the text’s clear meaning prior to the 1995 amendment and the lower courts’ consistent application of the limit in clause (ii) to clause (i) prior to the 1995 amendment, the limit in clause (ii) remains best read as applying also to clause (i).

DISSENT: JUSTICE SCALIA, dissenting.

The Court views this case as a dispute about the meaning of “subparagraph” in 15 U.S.C. § 1640(a)(2)(A). I think it involves more than that. For while I agree with the construction of that word adopted by the Court, by JUSTICE KENNEDY, and by JUSTICE THOMAS, I disagree with the conclusion that the Court believes follows. The ultimate question here is not the meaning of “subparagraph,” but the scope of the exception which contains that term. When is “liability under this subparagraph” limited by the $100/$1000 brackets? In answering that question, I would give dispositive weight to the structure of § 1640(a)(2)(A), which indicates that the exception is part of clause (ii) and thus does not apply to clause (i).

After establishing the fact that “subparagraph” refers to a third-level subdivision within a section, denominated by a capital letter (here subparagraph (A)), the Court’s analysis proceeds in five steps. First, the Court presumes that this fact determines the scope of the exception. It does not. In context, the reference to “liability under this subparagraph” is indeterminate. Since it is not a freestanding limitation, but an exception to the liability imposed by clause (ii), it is quite possible to read it as saying that, in the consumer-lease cases covered by clause (ii), “the liability under this subparagraph” would be subject to the $100/$1000 brackets. Using “subparagraph” in that way would hardly be nonsensical, since the only liability under subparagraph (A) that applies to consumer-lease cases is the amount of damages specified by clause (ii). In other words, if the exception is part of clause (ii), then “liability under this subparagraph” is actually synonymous
with “liability under this clause,” in the sense that either phrase would have the same effect were it to appear in clause (ii). As a result, the term “subparagraph” cannot end our inquiry.

The structure of subparagraph (A) provides the best indication of whether the exception is part of clause (ii). In simplified form, the subparagraph reads: “(i) . . ., (ii) . . ., or (iii) . . . .” Clauses (i), (ii), and (iii) are separated by commas, and an “or” appears before clause (iii). It is reasonable to conclude that the exception—which appears between “(ii)” and the comma that precedes “or (iii)”—is part of clause (ii). In fact, the Court admits in passing that the exception appears “in clause (ii).” (emphasis added); see also (STEVENS, J., concurring) (referring to “the ceiling contained in (ii)” (emphasis added)). Yet the Court’s holding necessarily assumes that the exception somehow stands outside of clause (ii)—someplace where its reference to “subparagraph” can have a different effect than “clause” would. The Court effectively requires the exception to be either part of clauses (i) and (ii) simultaneously, or a part of subparagraph (A) that is not within any of the individual clauses. The legislative drafting manuals cited by the Court, reveal how unnatural such an unanchored subdivision would be.

In its second step, the Court notes that, before 1995, the exception was generally read as applying to both clauses (i) and (ii). But the prior meaning is insufficient to reveal the meaning of the current version. As JUSTICE THOMAS points out, the placement of the exception “at the end of (A)” used to “indicate that it was meant to refer to the whole of (A).” That inference, however, is no longer available, since Congress eliminated the “or” between clauses (i) and (ii) and added clause (iii). If the “or” were still there, it might just be possible to conceive of clauses (i) and (ii) as a sub-list to which the exception attached as a whole. But one simply does not find a purportedly universal exception at the end of the second item in a three-item list.

The Court’s third step addresses clause (iii), which is not directly implicated by the facts of this case. The Court concludes that the underlying measure of damages in clause (i) (twice the finance charge) “continues to apply” to actions governed by the newly created clause (iii). That conclusion does not follow from merely reading the exception in clause (ii) to apply to clause (i), but it is necessary because, by reading “subparagraph” in the exception to have the effect of extending the exception to all of subparagraph (A), the Court has caused that exception to conflict with the higher limit in clause (iii). To remedy this, the Court proceeds to do further violence to § 1640(a)(2)(A), simply reading out its division into clauses (i), (ii), and (iii) entirely. It is not sound statutory construction to create a conflict by ignoring one feature of a statute and then to solve the problem by ignoring yet another. My construction of the exception in clause (ii) avoids the conflict altogether.

In its fourth step, the Court returns to the application of the $100/$1000 brackets to clause (i). The Court finds “scant indication that Congress meant to alter the meaning of clause (i)” in 1995 and compares this to “Sir Arthur Conan Doyle’s ‘dog that didn’t bark.’ ” I hardly think it “scant indication” of intent to alter that Congress amended the text of the statute by moving the exception from the end of the list to the middle, making it impossible, without doing violence to the text, to read the exception as applying to the entire list. Needless to say, I also disagree with the Court’s reliance on things that the sponsors and floor managers of the 1995 amendment failed to say. I have often criticized the Court’s use of legislative history because it lends itself to a kind of ventriloquism. The Congressional Record or committee reports are used to make words appear to come from Congress’s mouth which were spoken or written by others (individual Members of Congress, congressional aides, or even enterprising lobbyists). The Canon of Canine Silence that the Court invokes today introduces a reverse—and at least equally dangerous—phenomenon, un-
der which courts may refuse to believe Congress’s own words unless they can see the lips of others moving in unison.

In its fifth and final step, the Court asserts that it would be “anomalous” for liability to be “uncapped by the [$1,000] limit” when real property secures an open-end loan but capped by the $2000 limit when it secures a closed-end loan, and that it would be “passing strange” for damages to be “substantially lower” under clause (iii) than under clause (i). The lack of a $1000 limit does not, of course, make liability under clause (i) limitless. In all cases under clause (i), the damages are twice the finance charge, and the 1-year statute of limitations, 15 U.S.C. § 1640(e), naturally limits the amount of damages that can be sought.

More importantly, Congress would have expected the amounts financed (and thus the finance charges) under clause (i) to be generally much lower than those under clause (iii). In cases (like this one) where loans are not secured by real property, the amount financed can be no greater than $25,000. § 1603(3). Where loans are secured by real property, clause (iii) includes both first mortgages and second mortgages (or home equity loans), which are far more common and significantly larger than the open-end home equity lines of credit (HELOCs) that are still covered by clause (i). In 1994, 64% of home-owning households had first or second mortgages, but only 7% had HELOCs with outstanding balances. The mean first mortgage balance was $66,884; the mean second mortgage balance was $16,199; and the mean HELOC outstanding balance was $18,459. Assuming a 10% interest rate (which would have been higher than a typical HELOC in 1994), a year of finance charges on the mean HELOC would still have been less than $2000—which, when doubled, would still be less than two times the maximum damages under clause (iii), a disproportion no greater than what Congress has explicitly prescribed between clauses (ii) and (iii). In addition, very large outstanding balances on HELOCs are comparatively rare. In 2001, roughly 94% of them were less than the median outstanding mortgage principal of $69,227. Because closed-end loans are many times more common, and typically much larger, than open-end ones, the finance charges would generally be much higher under clause (iii) than under clause (i), providing a reason for Congress to focus more intently on limiting damages in clause (iii). As for the difference between clause (i) and the $1000 cap in clause (ii): Consumer leases (principally car leases) are obviously a distinctive category and a special damages cap (which differs from clause (iii) as well as from clause (i)) no more demands an explanation than does the fact that damages for those leases are tied to monthly payments rather than to finance charges. As Justice Stevens acknowledges, applying the $1000 cap to clause (ii) but not clause (i) is a “plausible policy decision.” The Court should not fight the current structure of the statute merely to vindicate the suspicion that Congress actually made—but neglected to explain clearly—different policy decision.

As the Court noted earlier this year: “If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think is the preferred result.” Lamie v. United States Trustee, 540 U.S. 526, 542, 157 L. Ed. 2d 1024, 124 S. Ct. 1023 (2004) (internal quotation marks and alteration omitted). I would apply the exception only to the clause with which it is associated and affirm the judgment of the Court of Appeals.

CHAPTER 1. DECEPTIVE TRADE PRACTICES ACT

16  TEXAS CONSUMER LAW
NOTE

In *Koons Buick*, the Court attempts to find the proper way to determine Congressional intent. The DTPA contains a provision that expressly deals with how the Act should be interpreted. How does section 17.44 affect the approach a court should take when determining the meaning of a provision in the DTPA?

§ 17.44. Construction and Application

(a) 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.

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
CHAPTER 1. DECEPTIVE TRADE PRACTICES ACT

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, indicat-
glare 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

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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. Villareal, 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.
DTPA violations occur prior to the consumer’s knowledge of the cost or his capacity to finance the cost of the goods or services.

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.

* * *

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 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 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?

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. Kennedy 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. . . .”
CHAPTER 1. DECEPTIVE TRADE PRACTICES ACT

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, JUSTICE.**

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

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

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

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

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

* * *

C

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

The DTPA provides that a consumer is entitled to recover both actual and additional damages plus attorney fees. A “consumer” is defined as one “who seeks or acquires by purchase or lease . . . any goods or services . . . .” The Texas Supreme Court has liberally construed terms of the DTPA in order to effectuate the Act’s comprehensive application.
Direct contractual privity between an individual and the defendant is not a consideration in determining an individual’s status as a consumer under the DTPA. Standing as a consumer is established in terms of the individual’s “relationship to the transaction, not by a contractual relationship with the defendant.” \textit{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 \textit{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. \textit{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. \textit{Birchfield} held that the minor acquired goods and services, “regardless of the fact that she obviously did not contract for them.”

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

* * *

III

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

QUESTIONS

1. How does the court define the word “acquire”? When is a third party beneficiary a “consumer”? In \textit{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
Chapter 1. Deceptive Trade Practices Act

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 offshore personnel to find out how the men were to get home. The supervisor authorized 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 Seismograph 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.