# Chapter 1.
# Deceptive Trade Practices Act

## A. Introduction

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

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

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

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

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

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

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

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

**Introduction, Consumer Protection Symposium**

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

John Hill

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

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

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

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

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

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

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

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

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

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

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

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

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

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**Note**

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

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

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

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

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

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

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

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

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## B. Proper Party Plaintiff—Consumer

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

### *1. Introduction*

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

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

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

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

Consider the following:

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

### *2. Seek or Acquire*

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

OPINION ON MOTION FOR REHEARING

Draughn, Justice.

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

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

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

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CONSUMER STATUS ISSUE

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

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

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

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

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

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

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

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

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

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

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

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

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

Ellis, Justice, concurring.

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

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

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

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

**Notes & Questions**

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

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

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

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

Anderson, Justice

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

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

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

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

* * * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * * *

We affirm the judgment of the trial court.

### *3. Purchase or Lease*

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

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

**KENNEDY**
**v.**
**SALE**
689 S.W.2d 890 (Tex. 1985)

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. . . ."

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. . . .

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**Comment**

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

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

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

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

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

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

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

Garza, Judge.

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

I

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

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

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

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

* * * *

C

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

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

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

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

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

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

* * * *

III

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

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**Questions**

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

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

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

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

**Problem**

Read the following opinion. Write a dissenting opinion.

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

Robertson, Justice.

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

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

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

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

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

Reversed and rendered.

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**Notes & Questions**

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

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

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

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

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

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

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

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

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

**Problem**

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

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### *4. Goods or Services*

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

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

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

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

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

CAMPBELL, JUSTICE.

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

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

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

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

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

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

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

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

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

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

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

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

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**Notes & Questions**

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

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

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

12 CAVEAT VENDOR at 94 (1987).

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

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

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

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

Brown, Chief Justice.

* * * *

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

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

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

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

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

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

* * * *

Modified and Affirmed.

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**Notes & Questions**

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

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

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

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

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

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

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

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

GREENHILL, CHIEF JUSTICE.

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

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

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

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

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

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

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

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

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

* * * *

RIVERSIDE'S LIABILITY UNDER THE DECEPTIVE TRADE PRACTICES ACT.

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

* * * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * * *

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

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**Notes & Questions**

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

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

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

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

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

MCGEE, JUSTICE.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## WALKER
## v.
## FEDERAL DEPOSIT INSURANCE CORPORATION

970 F.2d 114 (5th Cir. 1992)

Brown, Judge.

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

to make a loan as promised, these interrelated issues emerge: 1) whether the FDIC is a proper party which could remove; 2) whether the district court acquired jurisdiction after the FDIC removed the case from the state appellate court; 3) whether FIRREA applies to cases pending on the date of its enactment; 4) whether the FDIC's voluntary dismissal from the case bars federal jurisdiction; and 5) the merits (or demerits) of the claims against the lender's officers and agents, Hill and Bearden. The district court entertained jurisdiction and granted summary judgment in favor of the FDIC and the officers. First, due to the settlement of all claims involving the FDIC, we dismiss the FDIC from the case; second, we reverse the summary judgment in favor of Defendant Bearden on Walker/Brunson's fraud claim; and third, we affirm the summary judgment in favor of Defendants as to Walker/Brunson's fraud claim against Hill, and with respect to Walker/Brunson's conspiracy and deceptive trade practice claims.

* * * *

The Merits

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

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

* * * *

(ii) DTPA

This brings us to the DTPA claims against Hill and Bearden. To avoid summary judgment, Walker/Brunson first were required to produce summary judgment evidence showing that they were consumers seeking or acquiring "by purchase or lease, any goods or services." Defendants claim that summary judgment was proper on the DTPA claim because Walker/Brunson are not consumers within the meaning of the DTPA as a matter of law, reasoning that they did not seek or acquire goods or services by purchase or lease.

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

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

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**Questions**

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

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

2. Assume consumer goes to bank to borrow money to buy a car. The bank, in order to induce consumer to sign the loan agreement, misrepresents the terms of the loan. May consumer maintain a DTPA action against bank? Does it matter if consumer is satisfied with the car? For a general discussion of banks and the DTPA, *see* Krahmer, Lovell and McCormick, *Banks and the Texas Deceptive Trade Practices Act*, 18 TEX. TECH L. REV. 1 (1987).

3. Most courts recognize that a borrower only qualifies as a consumer under the DTPA if her "primary objective in obtaining the loan was to acquire a good or service, and that good or service forms the basis of the complaint." *Miller v. BAC Home Loans Servicing*, L.P., 726 F.3d 717, 725 (5th Cir. 2013). *See*, *e.g.*, *Villarreal v. Wells Fargo Bank*, N.A., 814 F.3d 763 (5th Cir. 2016) (Services incidental to a loan cannot provide basis for consumer standing under DTPA.); *Payne v. Wells Fargo Bank Nat'l Ass'n*, 2016 U.S. App. LEXIS 2400 (5th Cir. 2016) (per curiam) (Complaint based on lending activities is not covered by DTPA.); Perkins v. Bank of Am., 2015 U.S. App. LEXIS 3457 (5th Cir. 2015) (A person who seeks refinancing is not a consumer under DTPA.); *Guajardo v. JP Morgan Chase Bank, N.A.*, 2015 U.S. App. LEXIS 3731 (5th Cir. 2015) (A claim based on a loan modification not subject to DTPA.); *Wagner v. PennyMac Loan Servs. LLC*, 2016 U.S. Dist. LEXIS 78422 (N.D. Tex. 2016) (Sole purpose to borrow money is not within scope of DTPA.); *Rivers v. Bank of Am. N.A.*, 2016 U.S. Dist. LEXIS 82776 (N.D. Tex. 2016). (Complaint based on foreclosure not within scope of DTPA.); *Franco v. U.S. Bank Nat'l Ass'n*, 2014 U.S. Dist. LEXIS 125634 (W.D. Tex. 2014) (Loan modification is not a good or service.); *Sanchez v. Wells Fargo Bank, N.A.*, 2014 U.S. Dist. LEXIS 159688 (W.D. Tex. 2014) (Loan or loan modification is not a good or service.); *Sgroe v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 56843 (E.D. Tex. 2013) (mem. op.) (Claim arising out of loan modification is not subject to DTPA.).

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

5. To constitute "goods" the thing purchased must be purchased for "use." When is something not purchased for "use"? Is resale "use"? Can anything be a use? Consider the following opinion.

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**BIG H AUTO AUCTION, INC.**
**v.**
**SAENZ MOTORS**
665 S.W.2d 756 (Tex. 1984)

CAMPBELL, JUSTICE.

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

In December 1978, Saenz Motors bought from Big H Auto Auction, Inc. a 1976 Dodge Van and a 1979 Ford Thunderbird for $9,340.00. At the sale, Big H told Saenz Motors that the original titles had been lost, and provided certified copies of the original titles. The cars were resold by Saenz Motors and the new owners were refused certificates of title by the Department of Public Safety because the automobiles had been stolen. Saenz Motors then requested Big H to return its money. When Big H refused, Saenz Motors sued Big H for treble damages, attorneys' fees and costs under the DTPA.

Our question is whether a buyer of goods for resale is a consumer under the DTPA. Specifically, the issue is whether resale of goods constitutes "use" as required by the DTPA. The statutory provisions that govern are those in effect at the time the act occurred, 1978. . . . At the time of these actions, the pertinent parts of the DTPA then applicable were:

Sec. 17.45. Definitions

As used in this subchapter:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Did the legislature intend that goods bought for resale be covered by the DTPA? It is a common statutory construction rule that if the legislature does not define a term, its ordinary meaning will be applied. . . . "Use" was defined in *Southwestern Telegraph & Tel. Co. v. City of Dallas*, 174 S.W. 636 (Tex. Civ. App.—Dallas 1915, writ ref'd), as follows: "`Use' means to make use of; to convert to one's own service; to put to a purpose; to hold, occupy, enjoy, or take the benefit of." BLACK'S LAW DICTIONARY (Rev. 4th ed., 1968) says that in the non-technical sense, the "`use' of a thing means that one is to enjoy, hold, occupy, or have some manner of benefit thereof." The word "use," as used in The Texas Tort Claims Act, was defined in

*Beggs v. Texas Dep't. of Mental Health & Mental Ret.*, 496 S.W.2d 252, 254 (Tex. Civ. App.—San Antonio 1973, writ ref'd), as "to put or bring into action or service; to employ for or apply to a given purpose." However, in *Pennington v. Singleton*, 606 S.W.2d 682 (Tex. 1980), this Court held that in construing the DTPA, a court is not necessarily confined to the literal meaning of the words used and that legislative intent rather than the strict letter of the Act will control. The intent should be determined from the entire Act and not from an isolated part. We are mandated by § 17.44 of the DTPA that the Act be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false misleading and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.

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

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

* * * *

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

### *5. Business Consumer*

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

**ECKMAN**
**v.**
**CENTENNIAL SAVINGS BANK**
784 S.W.2d 672 (Tex. 1990)

HIGHTOWER, JUSTICE.

* * * *

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

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

TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987). "Business consumers" are defined to include individuals, partnerships, or corporations who seek or acquire by purchase or lease, any goods or services for commercial or business use. TEX. BUS. & COM. CODE ANN. § 17.45(10) (Vernon 1987). Thus, business consumers, whether individuals or businesses, with assets of $25,000,000 or more are excluded from DTPA coverage. This case raises the narrow issue of whether the plaintiff must plead and prove the inapplicability of the $25,000,000 exception or whether the defendant has the burden to plead and prove the applicability of the $25,000,000 exception as an affirmative defense.

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

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

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

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

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

Since in most cases the claimant does not have assets of $25,000,000 or more, the burden of raising and negating the applicability of the $25,000,000 exception to business consumer status should not be cast upon the plaintiff. The result reached by the court of appeals in this case is unduly prejudicial toward a business consumer in a DTPA suit because the claimant would be required to plead and prove both that he is a consumer under section 17.45(10) and that he does not fall within the $25,000,000 exception to business consumer status under section 17.45(4). If the plaintiff should fail to plead specifically the inapplicability of the exception and fail to produce evidence that he falls outside the exception, the defendant would be entitled to a directed verdict. Barring a plaintiff's recovery because he did not raise and prove the inapplicability of an exception to standing would be unfair, especially if the plaintiff had succeeded in pleading and proving all other elements necessary for recovery under the DTPA.

Under our present holding—treating the $25,000,000 exception as an affirmative defense—evidence concerning the plaintiff's financial status is irrelevant unless the issue is raised by the defendant. However, once the issue is raised, information concerning the plaintiff's assets and financial status will be discoverable to determine the applicability of the $25,000,000 exception. This court has long recognized the danger that a jury will be prejudiced by evidence of a party's financial status. As a result, Texas courts have been cautious concerning evidence of a party's wealth. Consequently, whenever possible, trial courts and parties should attempt to resolve the applicability of the $25,000,000 exception prior to trial. For the reasons explained herein, we hold that the defendant has the burden to plead and prove the applicability of the $25,000,000 exception to business consumer status as an affirmative defense.

* * * *

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

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**Questions**

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

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

> Hugh Symon claims that Motorola violated the DTPA, Tex. Bus. & Com Code § 17.44, by "misrepresenting the quality, grade and characteristics of its MPC821 micro processing chip." The elements of a valid DTPA complaint are: (1) the plaintiff is a consumer; (2) the defendant engaged in false, misleading, or deceptive acts; and (3) these acts constituted a producing cause of the consumer's damages. A consumer is defined as:
>
> An individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of $25 million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more.

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

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

Where a DTPA plaintiff is asserting a claim acquired by assignment, the assignor's consumer status controls. *PPG Indus., Inc. v. JMB/Houston Ctr. Partners Ltd. Partnership*, 41 S.W.3d 270, 279 (Tex. App.—Houston [14th Dist.] 2001, pet. granted). Therefore, Hugh Symons contends, because Concept held less than $25 million in assets, it was a consumer under the DTPA and Hugh Symons, as its assignee, may

pursue the suit. We disagree. At all pertinent times—at the time of the alleged violation of the DTPA and at the time that the lawsuit was brought—Concept was a wholly-owned subsidiary of Symons. Despite the later transfer of shares within the Hugh Symons family of businesses, § 17.45(4) acts to bar an entity controlled by another with assets of greater than $25 million from bringing a DTPA suit because it is a non-consumer.

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### *6. Waiver*

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

> § 17.42. Waivers: Public Policy.
>
> (a) Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void; provided, however, that a waiver is valid and enforceable if:
>
> (1) the waiver is in writing and is signed by the consumer;
>
> (2) the consumer is not in a significantly disparate bargaining position; and
>
> (3) the consumer is represented by legal counsel in seeking or acquiring the goods or services.
>
> (b) A waiver under Subsection (a) is not effective if the consumer's legal counsel was directly or indirectly identified, suggested, or selected by a defendant or an agent of the defendant.
>
> (c) A waiver under this section must be:
>
> (1) conspicuous and in bold-face type of at least 10 points in size;
>
> (2) identified by the heading "Waiver of Consumer Rights," or words of similar meaning; and
>
> (3) in substantially the following form:
>
> "I waive my rights under the Deceptive Trade Practices-Consumer Protection Act, Section 17.41 et seq., Business & Commerce Code, a law that gives consumers special rights and protections. After consultation with an attorney of my own selection, I voluntarily consent to this waiver."
>
> (d) The waiver required by Subsection (c) may be modified to waive only specified rights under this subchapter.
>
> (e) The fact that a consumer has signed a waiver under this section is not a defense to an action brought by the attorney general under Section 17.47.

---

**Question**

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

20. DTPA Waiver:

WAIVER OF CONSUMER RIGHTS

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

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

_____

Buyer

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

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## C. Statutory Exemptions to the DTPA

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

**§ 17.49. Exemptions.**

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

(b) Nothing in this subchapter shall apply to acts or practices authorized under specific rules or regulations promulgated by the Federal Trade Commission under Section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C.A. 45(a)(1)]. The provisions of this subchapter do apply to any act or practice prohibited or not specifically authorized by a rule or regulation of the Federal Trade Commission. An act or practice is not specifically authorized if no rule or regulation has been issued on the act or practice.

(c) Nothing in this subchapter shall apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill. This exemption does not apply to:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

What is the purpose of such broad exceptions? When may a professional be liable under the Act? How do you apply the exceptions? Consider the following:

**RETHERFORD, JR.**
**v.**
**CASTRO**
378 S. W.3d 29 (Tex. App.—Waco 2012, pet. denied)

Gray, Chief Justice.

Wesley Retherford, a TREC-licensed professional home inspector, appeals from a judgment entered against him pursuant to the Deceptive Trade Practices Act. TEX. BUS. & COM. CODE Ch. 17 (West 2011). Retherford was sued pursuant to the DTPA and for negligent misrepresentation. After a bench trial, the trial court entered a judgment for violations of the DTPA only. Retherford complains that the trial court failed to properly apply the professional services exemption to the DTPA and that the evidence was legally insufficient for the trial court to find that he had violated the DTPA. Because we find that the professional

services exemption applies and no exceptions to that exemption were met, we reverse the judgment of the trial court and remand for a new trial on the issue of negligent misrepresentation.

### *Factual Background*

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

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

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

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

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

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

### *Professional Services Exemption*

The DTPA was designed to "protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures

to secure such protection." However, the DTPA provides an exemption from liability to those who render professional services when the essence of that service is based on providing advice, judgment, or opinion. TEX. BUS. & COM. CODE ANN. § 17.49(c) (West 2011), amended by Act of May 28, 2011, 82d Leg., R.S., ch. 189, § 17.49, 2011 Tex. Sess. Law Serv. (West). A professional service is one that arises "out of acts particular to the individual's specialized vocation." *Nast v. State Farm Fire & Cas. Co.*, 82 S.W.3d 114, 122 (Tex. App.—San Antonio 2002, no pet.). "An act is not a professional service merely because it is performed by a professional; rather, it must be necessary for the professional to use his specialized knowledge or training."

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

What professions are included in the professional services exemption was not statutorily defined. Generally, lawyers, accountants, and doctors have qualified for this exemption as long as the conduct at issue involves the giving of advice, judgments, or opinions. What other professionals are included or what criteria should be used to determine who is a professional for purposes of the DTPA has not been established with any degree of certainty and rarely has been addressed, much less squarely decided, by the appellate courts. When the professional services exemption was enacted, the Legislature could not agree on a definition and therefore, did not include one and left the language vague.

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

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

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

In order to qualify as a professional real estate inspector, a person must have held a real estate inspector's license for twelve months, have performed at least 175 real estate inspections with indirect supervision, completed at least 30 more hours of "core real estate inspection courses" in addition to those required to

qualify as a real estate inspector, completed 8 classroom hours studying the "standards of practice, legal issues, or ethics related to the practice of real estate inspecting," and pass an exam.

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

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

Retherford cites to one case that he contends classifies a home inspector as a professional under the DTPA. *See Head v. U. S. Inspect DFW, Inc.*, 159 S.W.3d 731 (Tex. App.—Fort Worth 2005, no pet.) However, in *Head* the specific issue of whether the report prepared by the home inspector qualifies as professional services was "assumed" by the parties and the court specifically did not address whether the home inspection constituted professional services.

Before 1981, there were no requirements for real estate inspectors. To address this, the Legislature enacted legislation to require inspectors to register with the State and post a surety bond. Then, in 1985, the Legislature created the requirement of licensure for real estate inspectors. The creation of the current three levels of inspectors was established in 1991. However, at that time, the top level of inspector was entitled "real estate inspector." In 1993, the Legislature amended the three levels and renamed them, with the top level becoming the "professional real estate inspector" and the "real estate inspector" a level beneath that. The real estate inspector was then required to work under the indirect supervision of a professional real estate inspector.

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

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

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

In order to fulfill the broad objectives of the DTPA and yet give full meaning to the exemption for professional services from its application it is necessary to draw the line somewhere regarding who is a

professional, preferably an objective one. We agree with the Eastland Court of Appeals' definition that a professional: (1) engages in work involving mental or intellectual rather than physical labor, (2) requires special education to be used on behalf of others, and (3) earns profits dependent mainly on these considerations. We find that a professional real estate inspector fits these qualifications.

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

Our inquiry then shifts to a determination of whether any of the exceptions to the exemption applies. The trial court found that Retherford's representations were "representations of fact which cannot be characterized as advice, judgment or opinion." The representations were that Retherford's services had characteristics, uses, and benefits which they did not have and that his services were of a particular standard or quality when they were not.

No findings of fact or conclusions of law were requested by either party. In the absence of written findings, we imply that the trial court made all necessary findings and we will uphold the judgment on any legal theory supported by the evidence.

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

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

* * * *

### *Conclusion*

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

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### Problem

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

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

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

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

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

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

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

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

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

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

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

**Personal Injury Damages Under the DTPA**

1 J. TEX. CONSUMER L. 2, (1997)

Richard M. Alderman

*Introduction*

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

For purposes of discussion, the following hypothetical will be used:

> Sara contacted the newly opened Get Fit Health Club about a possible membership. Sara, who is very overweight and extremely uncoordinated, specifically asked about the qualifications of the instructors. She was told by the sales representative that "all our instructors are certified, and you will receive a comprehensive evaluation test before you begin your program." Relying on this assurance, Sara signed up for the one-year deluxe plan for $750.
>
> The following week Sara showed up for her evaluation. After a short workout, she was told she was in "good shape" and could begin on the machines. She was then given ten minutes of instruction on how to work the machines. After a few minutes of workout, Sara seriously injured herself.
>
> You have discovered that the instructors are not certified, they did not properly evaluate Sara, and their failure to fully explain how to use the machines caused her injuries. It can also be established that when representations were made to Sara, the person who made them knew that they were false. In addition, one of the machines was apparently defective.
>
> Sara's damages include $18,000 in medical bills, $5,000 in lost commissions, $4,000 for physical therapy, $16,000 for future therapy, and an unspecified amount of mental anguish, pain and suffering, and physical impairment.

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

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

*Pre-1995: Actual damages*

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

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

*The 1995 Amendments*

As noted in the introduction, in 1995 the Legislature substantially amended the DTPA. Among the revisions were two changes that affect the recovery of damages for a claim arising out of a personal injury.

First, Section 17.50(b) was amended to permit a consumer who prevails to recover "the amount of economic damages." Thus, the term "actual damages" was replaced by the term "economic damages."

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

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

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

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

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

*Economic Damages: Definition*

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

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

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

The key question is: to what extent are claims arising out of a personal injury within the scope of the term "economic damages?" The answer appears to be that it depends upon the nature of the claim.

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

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

*Personal Injury Exemption: Section 17.49(e)*

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

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

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

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

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

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

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

*Tie-in Statutes: Actual Damages*

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

> Notwithstanding any other provision of this subchapter, if a claimant is granted the right to bring a cause of action under this subchapter by another law, the claimant is not limited to recovery of economic damages only, but may recover any actual damages incurred by the claimant, without regard to whether the conduct of the defendant was committed intentionally. For the purposes of

> the recovery of damages for a cause of action described by this subsection only, a reference in this subchapter to economic damages means actual damages. In applying Subsection (b)(1) to an award of damages under this subsection, the trier of fact is authorized to award a total of not more than three times actual damages, in accordance with that subsection.

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

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

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

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

*Conclusion*

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

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

### Problem

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

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

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

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

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

Review section 17.50(h). Does this change your answer? Subsection 17.50(h) is an extremely important section. Why? What does it apply to? Can you recover damages for a personal injury if the claim is based on section 17.50(h)? The statutes subject to section 17.50(h) are referred to as "Tie-in" statutes and will be discussed in Chapter Three.

### Notes & Questions

1. The drafters of the 1995 Amendments intended to exempt large transactions from the coverage of the Act. To this end, subsection 17.49(f) and (g) exempt certain large claims arising from a "transaction, or a set of transactions relating to the same project." Review these sections.

> (f) Nothing in the subchapter shall apply to a claim arising out of a written contract if:
>
> (1) the contract relates to a transaction, a project, or a set of transactions related to the same project involving total consideration by the consumer of more than $100,000;
>
> (2) in negotiating the contract the consumer is represented by legal counsel who is not directly or indirectly identified, suggested, or selected by the defendant or an agent of the defendant; and
>
> (3) the contract does not involve the consumer's residence.
>
> (g) Nothing in this subchapter shall apply to a cause of action arising from a transaction, a project, or a set of transactions relating to the same project, involving total consideration by the consumer of more than $500,000, other than a cause of action involving a consumer's residence.

2. Suppose Casey Consumer purchases land for $300,000, builds a building upon it for $300,000 and purchases fixtures for the building for $15,000. Does the DTPA apply to the purchase of the fixtures? Does it matter if any of the contracts are in writing?

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

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

5. Section 17.49(c) uses the term "consideration." How should it be defined? Is the consideration the contract amount or what is actually paid? In one of the few cases to consider this issue, *Citizens Nat'l Bank v. Allen Rae Investments, Inc.*, the court found it unnecessary to resolve this question.

> CNB contends in its second issue that the trial court abused its discretion by allowing ARI to recover under the DTPA because ARI's Bed & Bath project involved total consideration of more than $500,000; consequently, CNB concludes, the DTPA does not apply to ARI's lawsuit. ARI contends that, because CNB advanced only $463,193.45 to ARI under its $600,000 note, the DTPA does apply. Section 17.49(g) of the Act provides the following exemption:
>
> Nothing in this subchapter shall apply to a cause of action arising from a *transaction, a project, or a set of transactions* relating to the same project, involving *total consideration by the consumer of more than $500,000*, other than a cause of action involving a consumer's residence.
>
> Based on the parties' representations and our own review of the law, this appears to be the first time that this subsection has been discussed in an appellate opinion. However, in a 1995 law review article, the authors, who include Senate and House co-sponsors of the bill resulting in the above section, point out:
>
> The reform law has eliminated many high-dollar transactions from the reach of the DTPA. These changes were part of lawmakers' efforts to maintain the DTPA as a viable source of relief for consumers who encounter and are harmed by unscrupulous business practices, but to remove from the scope of the Act . . . litigation between big businesses.
>
> The authors interpret the section to mean that "the DTPA will no longer govern transactions in which the overall consideration exceeds $500,000."
>
> In their briefs, the parties provide conflicting interpretations of the meaning of "total consideration by the consumer," with CNB contending that the promissory note of $600,000 alone bars a DTPA recovery and ARI contending that its consideration included only the unpaid principal and accrued interest due on the note at the time of foreclosure, $463,193.45. Under Texas case law, "consideration is a present exchange bargained for in return for a promise. It consists of either a benefit to the promisor or a detriment to the promisee." Similarly, in the sixth edition of Black's Law Dictionary, consideration is defined as "some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other," and pecuniary consideration is "consideration for an act of forbearance which consists either in money presently passing or in money to be paid in the future."
>
> For this case, however, we do not need to determine whether "consideration" as used in the statute involves only detriment actually incurred by the consumer or detriment that a consumer promises to incur in the future. The balance of principal and accrued interest due on the note at the time of foreclosure was $463,193.45. Additionally, ARI paid $22,006.08 in interest on the note before defaulting. Finally, ARI paid $122,096.81 to CNB at the time of closing, $90,000 of which went to purchase the lot on which the motel would be built. Thus, looking only at the detriment ARI had incurred at the time of foreclosure, we can easily say that ARI's overall consideration exceeded $500,000 on the Bed & Bath project.
>
> Because ARI's consideration exceeded $500,000, and because the project did not involve a consumer's residence, the DTPA does not apply to ARI's cause of action regarding the project. Consequently, the trial court abused its discretion in submitting the DTPA jury question and in allowing ARI to recover from CNB under the DTPA. Furthermore, the awards of trial and appellate attorney's fees were also in error, because attorney's fees are not recoverable for any other theory of recovery alleged by Appellees. We sustain CNB's second issue.

*Citizens Nat'l Bank v. Allen Rae Investments, Inc.*, 142 S.W.3d 459 (Tex. App.—Fort Worth 2004).

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### D. Whom May You Sue?

Once it is determined that a plaintiff is a consumer, as that term is defined in subsection 17.45(4), the next issue is against whom may the consumer maintain an action? Specifically, does the DTPA require any form of "privity" between the plaintiff and the defendant?

**CAMERON**
**v.**
**TERRELL & GARRETT, INC.**
618 S.W.2d 535 (Tex. 1981)

MCGEE, JUSTICE.

This is a deceptive trade practice case. Jerry D. Cameron and Jo Ann Cameron, purchasers of a house, brought this suit for treble damages against the seller's real estate agent, Terrell & Garrett, Inc., for a misrepresentation of the square footage in the house. The primary question presented is whether the Camerons are consumers within the meaning of the Deceptive Trade Practices-Consumer Protection Act (DTPA). The trial court rendered a take-nothing judgment *non obstante veredicto* for Terrell & Garrett. The court of civil appeals affirmed but on different grounds. The court of civil appeals held that the Camerons were not consumers and, therefore, could not bring a private lawsuit against Terrell & Garrett for a deceptive trade practice violation. . . . We hold the Camerons are consumers. We also hold that there is some evidence to support the jury verdict for the Camerons. Accordingly, we reverse the judgment of the court of civil appeals and render judgment for the Camerons in accordance with the verdict.

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

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

After purchasing and moving into the house, the Camerons had it measured and found out it actually contained only 2245 square feet of heated and air conditioned space—155 feet less than represented by

Terrell & Garrett. However, they also discovered that if the garage, porch, and wall space were included, the house would have had a total of 2400 square feet of space.

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

The case was submitted on special issues to the jury for a violation of the general prohibition in Section 17.46(a) as authorized by Section 17.50(a)(1).[3] The jury returned a verdict for the Camerons.

* * * *

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

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

In *Riverside National Bank v. Lewis*, 603 S.W.2d 169, 173 (Tex. 1980), we recognized that a person must qualify as a consumer as that term is defined in Section 17.45(4) to maintain a private cause of action for treble damages under Section 17.50 of the Act. . . . Section 17.45(4) defines consumer as "an individual, partnership, or corporation who seeks or acquires by purchase or lease, any goods or services."

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

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

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

[3] Section 17.50 (a)(1) was amended in 1979 so that a private cause of action is no longer available under Section 17.46(a). The provisions of the DTPA in effect on the date the alleged misrepresentation occurred, September 6, 1975, govern the disposition of this case. *See* Riverside National Bank v. Lewis, 603 S.W.2d 169, 172 (Tex. 1980), *and* Woods v. Littleton, 554 S.W.2d 662, 666 (Tex. 1977).

Terrell & Garrett because it was the seller's agent and did not furnish any goods or services that were sought or acquired by the Camerons.

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

We are now called upon to answer this question of statutory construction expressly reserved in Delaney. In all interpretations of the Act, our primary objective is to ascertain the legislature's intent. . . . To do that, we must look to the Act as a whole, and not its isolated provisions, keeping in mind at all times "the old law, the evil, and the remedy." Id. The legislature itself directed that the Act "shall be liberally construed to promote its underlying purposes which are to protect consumers against false, misleading, and deceptive acts or practices, unconscionable actions and breaches of warranty and to provide efficient and economical procedures to secure such protection."

The breadth of the Act is evidenced by Section 17.49 which sets out the exemptions to the DTPA. That section does not provide an exemption for deceptive trade practices by persons who do not furnish the goods or services on which the complaint is based. Rather, it only exempts from the Act certain media owners and employees who publish and disseminate deceptive advertisements of goods and services for third parties. That same exemption, however, does not extend immunity from the Act where the media defendants (1) knew of the deception in the advertisement or (2) had a direct or substantial financial interest in the unlawfully advertised good or service. These media defendants, of course, do not furnish the goods or services that they advertise for third parties. Consequently, if the Act already excluded defendants who do not furnish the goods or services, as argued by Terrell & Garrett, there would have been no need for the legislature to exempt media defendants from liability or to have provided that media defendants could be sued in the two situations mentioned above. The legislature is never presumed to have done a useless act. . . .

Similarly, if the legislature had intended to place such a restriction on the class of persons who could be sued under the Act for deceptive trade practices, it could easily have done so by simply drafting the restriction into the definition of consumer or some other provision of the Act. . . . It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose. . . . Likewise, we believe every word excluded from a statute must also be presumed to have been excluded for a purpose. Only when it is necessary to give effect to the clear legislative intent can we insert additional words or requirements into a statutory provision. . . .

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

privity requirements have been dispensed with altogether in negligence suits, in implied warranty suits for economic loss, and, for the most part, privity requirements have also been abolished in strict liability suits. . . . The Act is designed to protect consumers from any deceptive trade practice made in connection with the purchase or lease of any goods or services. . . . To this end, we must give the Act, under the rule of liberal construction, its most comprehensive application possible without doing any violence to its terms.

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

Because we have held that the court of civil appeals erred on the grounds on which it affirmed the judgment of the trial court, we must consider Terrell & Garrett's crosspoints before this Court to see if there are any grounds presented therein to affirm the court of civil appeals' judgment. In doing so, we find three crosspoints challenging the court of civil appeals' ruling there is some evidence to support the jury findings to special issue numbers 2, 3, and 4, which are set out above. The jury answered each special issue in favor of the Camerons. For that reason, we are required to consider only the evidence and the reasonable inferences that can be drawn therefrom, in their most favorable light, to support these jury findings. . . . We have considered each of these crosspoints and we agree with the ruling of the court of civil appeals on the legal sufficiency of the evidence to support these jury findings.

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

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**Notes & Questions**

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

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**AMSTADT**
**v.**
**UNITED STATES BRASS CORP.**
919 S.W.2d 644 (Tex. 1996)

CORNYN, JUSTICE.

In these three cases, homeowners have sued the manufacturers of a polybutylene plumbing system for negligence and violations of the Deceptive Trade Practices-Consumer Protection Act. Tex. Bus. & Com. Code §§ 17.41-17.63 (DTPA). The common issue is whether the Legislature intended that upstream

suppliers of raw materials and component parts be liable under the DTPA when none of their misrepresentations reached the consumers. This precise issue, which to our knowledge has never before been raised in the twenty-three-year history of the DTPA, animates the appeals in *Barrett v. United States Brass Corp., United States Brass Corp. v. Knowlton/Kochie*, and *United States Brass Corp. v. Andraus*.

* * * *

We hold that, although the homeowners who obtained a jury finding of negligence may recover on that theory, no homeowner may recover from Celanese, Shell, or U.S. Brass under the DTPA because these manufacturers' alleged DTPA violations did not occur in connection with the homeowners' purchase of their homes. We accordingly reverse the judgments of the courts of appeals with regard to DTPA liability in all three causes.

* * * *

## I. FACTS

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

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

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

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

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

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

A jury found that U.S. Brass, Shell, and Celanese had made misrepresentations under the DTPA and were negligent. The jury also found that U.S. Brass had acted unconscionably and was grossly negligent. The trial court ruled that the statute of limitations barred the negligence claims of fifty-six households, and rendered a take-nothing judgment against five households for unspecified reasons. Three households

elected to recover on the negligence findings, and the trial court rendered judgment accordingly. The trial court also rendered judgment for the eighty-six households that elected recovery under the DTPA.

Celanese, Shell, and U.S. Brass appealed. The court of appeals reversed the trial court's judgment in part and affirmed it in part. Specifically, the court of appeals affirmed DTPA liability because it concluded that "there was a link between the representations made and the use of the plumbing system in the plaintiffs' homes, which ultimately caused damage."

* * * *

II. DTPA

A.

The DTPA grants consumers a cause of action for false, misleading, or deceptive acts or practices. The DTPA defines a "consumer" as "an individual . . . who seeks or acquires by purchase or lease, any goods or services." Privity of contract with a defendant is not required for the plaintiff to be a consumer. A consumer must, in order to prevail on a DTPA claim, also establish that each defendant violated a specific provision of the Act, and that the violation was a producing cause of the claimant's injury.

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

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

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

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

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

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

B. Celanese

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

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

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

C. Shell

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

As was the case with Celanese, these facts do not support the conclusion that Shell's misrepresentations were made in connection with the relevant consumer transactions, the purchase of the homes. Shell had no control over the manufacture or installation of the plumbing systems, or of the homes ultimately purchased by the consumers. Shell had no influence over the terms of the consumers' purchases. Although Shell actively promoted use of the plumbing systems in residential homes, there is no evidence that the information provided to homebuilders or building code officials was intended to be or actually was passed on to consumers. Importantly, Shell's marketing efforts were not incorporated into the efforts to market homes