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Antitrust and Consumer Protection

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ANTITRUST AND CONSUMER PROTECTION

*Michael Ferrill**
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I. INTRODUCTION

CONSUMER welfare is the common concern of the antitrust laws and the Texas Deceptive Trade Practices – Consumer Protection Act (DTPA).¹ Antitrust, however, is primarily addressed to the

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1. TEX. BUS. & COM. CODE ANN. §§ 17.41–63 (West 2011). Section 17.50(a) of the DTPA provides:

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

(1) the use or employment by any person of a false, misleading, or deceptive act or practice that is: (A) specifically enumerated in a subdivision of Subsec-

misuse of market power to harm consumers, while the DTPA focuses on consumer harm brought about through deception.² The antitrust laws and the DTPA, therefore, are best viewed as focusing on complementary aspects of consumer welfare.

This Article covers significant developments under the federal and Texas antitrust laws and the DTPA during the Survey period, November 1, 2010, through October 31, 2011.

II. ANTITRUST

The past year has been a quiet one for antitrust law. Neither the United States Supreme Court nor the Texas Supreme Court issued any antitrust decisions since last year's Survey. The Texas state courts of appeal likewise issued no reported antitrust decisions in the past year, and only two Fifth Circuit opinions and two Texas federal district court opinions touched antitrust issues.

A. INTERSTATE COMMERCE REQUIREMENT

In *Gulf Coast Hotel-Motel Ass'n v. Mississippi Gulf Coast Golf Course Ass'n*, the Fifth Circuit reversed a district court's dismissal of an antitrust claim for failure to plead a connection to interstate commerce.³ The case involved competing programs for the sale of vouchers for rounds of golf at courses located along the Mississippi Gulf Coast.⁴ The complaint alleged that customers for the vouchers were drawn from outside Mississippi, but the district court nonetheless held that it lacked subject matter jurisdiction over the federal antitrust claims because the plaintiff's allegations "were insufficiently detailed" to plead a substantial effect on interstate commerce.⁵ The Sherman Act's reach has been described as "coextensive with the reach of congressional power under the Commerce Clause," which itself has been broadly interpreted when economic activity is involved.⁶ A plaintiff is not required to quantify the adverse impact on interstate commerce, but merely to show that there was some effect.⁷ Applying this framework, the Fifth Circuit concluded that the complaint, while sparse, alleged an effect on the economic activity of "bringing out-

tion (b) of Section 17.46 of this subchapter; and (B) relied on by a consumer to the consumer's detriment;

(2) breach of an express or implied warranty;

(3) any unconscionable action or course of action by any person; or

(4) the use or employment by any person of an act or practice in violation of Chapter 541, Insurance Code.

Id. § 17.50(a).

2. *See id.* § 17.44(a); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979); *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1382 (5th Cir. 1994).

3. *Gulf Coast Hotel-Motel Ass'n v. Miss. Gulf Coast Golf Course Ass'n*, 658 F.3d 500, 502 (5th Cir. 2011).

4. *Id.* at 502.

5. *Id.* at 503-04.

6. *Id.* at 504-05.

7. *Id.* at 505.

of-state tourists to hotels to play golf,” which was sufficient to establish the nexus to interstate commerce required to establish jurisdiction over the antitrust claims.⁸

B. THE POLITICAL QUESTION AND ACT OF STATE DOCTRINES

In *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, the Fifth Circuit affirmed dismissal of claims that several non-sovereign producers of refined petroleum products had conspired with OPEC members to fix prices in the United States.⁹ While the case began as five consolidated lawsuits, by the time it reached the Fifth Circuit, the case concerned two antitrust class actions brought by gasoline retailers against oil production companies. The district court determined that both complaints “challenge[d] the traditional structure of international energy policy” by alleging a price-fixing conspiracy involving OPEC member nations and their wholly-owned oil production companies and subsidiaries.¹⁰

The Fifth Circuit first considered whether the claims were barred by the political question doctrine. On this issue, the court treated the defendants’ Rule 12(b)(6) motion as a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.¹¹ Quoting *Japan Whaling Ass’n v. American Cetacean Society*, the court described the political question doctrine as “exclud[ing] from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.”¹² The court then applied the landmark *Baker v. Carr* test for analyzing whether a claim presents a political question and determined that because adjudication of the plaintiffs’ antitrust claims would require review of foreign policy decisions of the political branches, a non-justiciable political question was presented.¹³ While “a court may examine the merits of a case that touches on a foreign policy in some instances, such as where a statutory scheme exists to guide the court’s determination of an issue,” the Fifth Circuit concluded that the Sherman and Clayton Acts do not provide sufficiently manageable standards to allow for such review.¹⁴ The court thus affirmed the district court’s dismissal on political question grounds.¹⁵

The court alternatively held that the act of state doctrine, pursuant to which “the courts of one country will not sit in judgment on the acts of

8. *Id.* at 505, 507–08. The court noted that had the complaint merely alleged that the anticompetitive behavior “substantially affected interstate commerce,” without including facts in support of the allegation, the complaint would have been insufficient. *Id.* at 506–07.

9. *Spectrum Stores, Inc. v. Citgo Petrol. Corp.*, 632 F.3d 938, 942–43 (5th Cir. 2011).

10. *Id.* at 944, 947.

11. *Id.* at 948.

12. *Id.* at 949 (quoting *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986)) (internal quotation marks omitted).

13. *Id.* at 949–50 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

14. *Id.* at 952.

15. *Id.* at 954, 956.

the government of another, done within its own territory,” barred consideration of the plaintiffs’ claims because “adjudication of th[e] suit would necessarily call into question the acts of foreign governments with respect to exploitation of their natural resources.”¹⁶ The court therefore affirmed the district court’s dismissal on act of state grounds.¹⁷

C. ISSUE PRECLUSION

In *Chavers v. Hall*, the Southern District of Texas considered the preclusive effect of dismissed claims on subsequently pleaded antitrust claims.¹⁸ The plaintiff towing companies alleged that the cities of Bryan and College Station and their respective agents had conspired to remove the plaintiffs from the cities’ non-consent towing lists. The plaintiffs alleged civil rights and RICO violations, libel, business disparagement, civil conspiracy, and abuse of process. The court held that the plaintiffs should take nothing on their claims and that those claims should be dismissed with prejudice.¹⁹

After the court issued its rulings, but before entry of final judgment, the plaintiffs filed a second lawsuit against the same defendants based upon the same facts and circumstances. When the defendants moved to dismiss the second suit on claim preclusion grounds, the plaintiffs dismissed the original defendants, named new defendants, and added claims for violations of state and federal antitrust laws, tortious interference with business relationships, and malicious prosecution in addition to civil rights violations and civil conspiracy.²⁰

The newly named defendants moved for dismissal. Three were connected with the cities’ police departments—the successor Chief of Police for the City of College Station, the successor Chief of Police for the City of Bryan, and a City of Bryan police officer. The court held that these new defendants were in privity with the prior police chiefs and with the cities, all of whom were defendants in the original lawsuit, and that the plaintiffs’ antitrust claims were based upon “the same nucleus of operative facts alleged” in the original lawsuit.²¹ The court therefore concluded that the plaintiffs could not “avoid the preclusive effect of [the original lawsuit] merely by raising different legal theories on that same set of alleged facts.”²²

Another group of newly named defendants included a competitor towing company and related parties (the competitor defendants). The competitor defendants alleged that a “special relationship” existed between them and the original defendants such that they were entitled to claim

16. *Id.* at 954 (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)).

17. *Id.* at 956.

18. *Chavers v. Hall*, No. H-10-3922, 2011 U.S. Dist. LEXIS 63649, at *9–10 (S.D. Tex. June 16, 2011).

19. *Id.* at *3.

20. *Id.* at *4.

21. *Id.* at *12–16.

22. *Id.* at *17–18.

preclusion.²³ The district court relied upon *Lubrizol Corp. v. Exxon Corp.* and *Gambocz v. Yelencsis* for the proposition that claim preclusion applies where a plaintiff in one lawsuit brings a second lawsuit against new defendants based upon the same essential allegations and seeking essentially the same relief.²⁴ In *Gambocz*, the newly named defendants were “so close to parties to the first complaint that the second complaint was merely a repetition” of the first lawsuit.²⁵ Noting that (1) the last live complaint in the original lawsuit and the live complaint in the case before it contained the same basic factual allegations; (2) the competitor towing company had been named in the original lawsuit as a conspirator; (3) the newly-pleaded antitrust claim was merely a substitution for the original RICO claim based upon the same nucleus of operative facts; and (4) the plaintiffs had ample information to sue the competitor defendants in the original suit,²⁶ the court determined that there was sufficient privity to bar claims against the competitor defendants.²⁷

D. WALKER PROCESS

Aguirre v. Powerchute Sports, LLC was a patent dispute involving a physical conditioning aid for golfers.²⁸ The plaintiff originally brought suit for patent infringement and then amended to add a *Walker Process* claim alleging attempted monopolization in violation of Section 2 of the Sherman Act by enforcement of a patent procured by fraud. The defendants moved for dismissal on the ground that the plaintiff had failed to allege any action to enforce the patent in question or any other act of monopolization.²⁹

The magistrate judge found, and the district court agreed, that the plaintiff’s complaint alleged only marketing of the defendants’ product as a patented design, which had a legitimate business justification.³⁰ The plaintiff also pointed to a letter from the defendants’ counsel in response to a demand letter from the plaintiff’s counsel. Because neither action was an attempt to enforce the patent and because the plaintiff failed to allege (1) any other “predatory or anti-competitive conduct or” (2) “a dangerous probability of achieving monopoly power,” the plaintiff failed to state a claim under Section 2.³¹

23. *Id.* at *18.

24. *Id.* at *18–19 (citing *Lubrizol v. Exxon Corp.*, 871 F.2d 1279, 1288 (5th Cir. 1989); *Gambocz v. Yelencsis*, 468 F.2d 837, 842 (3d Cir. 1972)).

25. *Id.* at *20 (quoting *Gambocz*, 468 F.2d at 842) (internal quotation marks omitted).

26. In fact, the plaintiffs had attempted to file a fourth amended complaint in that suit adding the competitor defendants. *Id.* at *21.

27. *Id.* at *20–21, 23–24.

28. The case was referred to a U.S. magistrate judge for pretrial matters. The magistrate judge’s report and recommendation is available at *Aguirre v. Powerchute Sports, LLC*, No. SA-10-CV-0702-XR, 2011 U.S. Dist. LEXIS 65003 (W.D. Tex. June 17, 2011) and the district court’s opinion is available at *Aguirre v. Powerchute Sports, LLC*, No. SA-10-CV-0702-XR, 2011 U.S. Dist. LEXIS 86207 (W.D. Tex. Aug. 4, 2011).

29. *Aguirre*, 2011 U.S. Dist. LEXIS 86207 at *8.

30. *Id.* at *20–21.

31. *Id.*

E. CHANGES TO FTC/DOJ GUIDELINES

In 2010, the FTC and DOJ issued new horizontal merger guidelines “to help the agencies identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that either are competitively beneficial or likely will have no competitive impact on the marketplace.”³² The guidelines were intended to “better reflect the agencies’ actual practices” and “provide businesses with an even greater understanding of how [the FTC and DOJ] review transactions.”³³ Changes included clarifying that merger analysis is a fact-specific process using a variety of analytical tools, “[u]pdat[ing] the concentration thresholds that determine whether a transaction warrants further scrutiny by the agencies,” better explaining how the agencies evaluate the evidence, and “[a]dd[ing] new sections on powerful buyers, mergers between competing buyers, and partial acquisitions.”³⁴

In the summer of 2011, the agencies amended the Hart-Scott-Rodino premerger notification rules and report form effective August 18, 2011.³⁵ The FTC announced that the purpose of the amendment was “to streamline the Form and capture new information that will help the FTC and the . . . [DOJ] . . . conduct their initial review of a proposed transaction’s competitive impact.”³⁶

III. DECEPTIVE TRADE PRACTICES – CONSUMER PROTECTION ACT

Noteworthy DTPA decisions during the Survey period examined consumer status, distinguishing between breach of contract cases and DTPA cases, negating reliance and causation, damages, and the dischargeability of DTPA awards in bankruptcy.

A. CONSUMER STATUS

To bring a DTPA claim, a plaintiff must be a “consumer.”³⁷ Determining consumer status continues to be a focus of court decisions.

1. Borrowers Seeking Loan Modifications

During the Survey period, borrowers continued to petition courts to recognize consumer status in the context of failed loan modifications, and the courts continued to reject such efforts.

32. Press Release, FTC, Federal Trade Commission and U.S. Department of Justice Issue Revised Horizontal Merger Guidelines (Aug. 19, 2010), <http://www.ftc.gov/opa/2010/08/hmg.shtm>.

33. *Id.*

34. *Id.*

35. Premerger Notification, 76 Fed. Reg. 42, 471 (July 19, 2011) (to be codified at 16 C.F.R. pt. 801, 802, 803).

36. *Id.*

37. A consumer is a one who seeks or acquires goods or services by purchase or lease. TEX. BUS. COM. CODE ANN. § 17.45(4) (West 2011). Those goods or services must form the basis of the complaint. *Id.* § 17.50.

In a series of cases, including *Ayers v. Aurora Loan Services, LLC*,³⁸ *Manno v. BAC Home Loans Servicing, LP*,³⁹ and *Watson v. Citimortgage, Inc.*,⁴⁰ the courts consistently dismissed borrowers' DTPA claims against their mortgage companies due to lack of consumer status. In each case, the borrower complained that its mortgage company or loan servicer violated the DTPA by failing to process loan modifications.

Generally, a person does not qualify as a DTPA consumer if the underlying transaction is a loan because money is considered neither a good nor a service.⁴¹ Modifications of existing loans also are not DTPA goods or services.⁴² Nor does obtaining an extension of credit qualify one as a "consumer."⁴³

In *Flenniken v. Longview Bank and Trust Co.*, the Texas Supreme Court had permitted a borrower to sue its lender for DTPA violations.⁴⁴ As a result, *Flenniken* is often cited by borrowers as a way to circumvent the holdings of *Riverside* and its progeny.⁴⁵ *Flenniken*, however, is in large part limited to its facts.⁴⁶ "*Flenniken* represents the category of cases in which a loan is connected to the purchase of a good, which is the objective of the transaction," such that the plaintiff can be considered a consumer "who seeks or acquires by purchase . . . any goods."⁴⁷

In *Flenniken*, the "good" in question was a home.⁴⁸ Before the borrowers bought the home, they entered into a loan transaction with a homebuilder who financed the transaction with a note and a deed of trust. The builder then assigned that note and deed of trust to a savings and loan company in order to obtain a construction loan. The homebuilder abandoned construction before completing the home, and the Flennikens stopped making their loan payments. Foreclosure soon followed. The Flennikens sued the savings and loan company, alleging violations of the DTPA for unconscionable conduct. The court held the bank liable under the DTPA without overruling *Riverside*.⁴⁹ To do so, the court viewed the transaction from the buyer's perspective and held

38. *Ayers v. Aurora Loan Servs., LLC*, 787 F. Supp. 2d 451, 455 (E.D. Tex. 2011).

39. *Manno v. BAC Home Loans Servicing, LP*, No. A-11-CA-347-LY, 2011 WL 3844900, at *5 (W.D. Tex. Aug. 26, 2011).

40. *Watson v. Citimortgage, Inc.*, 814 F. Supp. 2d 726, 735 (E.D. Tex. 2011).

41. *Walker v. FDIC*, 970 F.2d 114, 123-24 (5th Cir. 1992); *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 174, 176 (Tex. 1980).

42. See *La Sara Grain Co. v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 567 (Tex. 1984); *Fix v. Flagstar Bank, FSB*, 242 S.W.3d 147, 160 (Tex. App.—Fort Worth 2007, pet. denied); *Maginn v. Norwest Mortg., Inc.*, 919 S.W.2d 164, 167 (Tex. App.—Austin 1996, no writ).

43. *Riverside Nat'l Bank*, 603 S.W.2d at 174, 176.

44. *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 706 (Tex. 1983).

45. See, e.g., *Bennett v. Bank United*, 114 S.W.3d 75, 79-81 (Tex. App.—Austin 2003, no pet.); *Hand v. Dean Witter Reynolds Inc.*, 889 S.W.2d 483, 499 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

46. See *FDIC v. Munn*, 804 F.2d 860, 864-65 (5th Cir. 1986).

47. See *id.* at 865 (quoting *Flenniken*, 661 S.W.2d at 706) (internal quotation marks omitted).

48. *Flenniken*, 661 S.W.2d at 707.

49. *Id.* at 707-08.

that the plaintiffs were consumers because they “did not seek to borrow money; they sought to acquire a house.”⁵⁰

In *Ayers*, the court dismissed the borrower’s DTPA claim because he was not a consumer.⁵¹ The court reasoned that Ayers was not seeking a loan for the purpose of obtaining a good or service; Ayers already had the home. Rather, Ayers sought only a modification of his existing loan.⁵² Therefore, Ayers fell squarely within the line of cases finding no consumer status in loan situations.⁵³ Unlike the borrowers in *Flenniken*, Ayers was not seeking to purchase a good; he sought only “refinancing services.”⁵⁴ Citing *Broyles v. Chase Home Finance*⁵⁵ and *Cavil v. Trendmaker Homes, Inc.*,⁵⁶ also decided during the Survey period, the court concluded that “[r]efinancing is simply an extension of credit that does not qualify Plaintiff as a consumer.”⁵⁷ Accordingly, the court dismissed Ayers’s DTPA claim.⁵⁸

In *Manno*, the borrower fell behind on his mortgage, and his efforts to refinance that loan failed.⁵⁹ His bank eventually foreclosed, and in response, Manno sued his bank for violations of the DTPA. The bank moved to dismiss Manno’s DTPA claim. In response, Manno relied on *Flenniken* to argue that he qualified as a consumer because the home he was trying to save qualified as a “good” and the home was the basis of his complaint. Manno also argued that “his claims d[id] not pertain to a loan application or the attempt to seek a loan modification.”⁶⁰

The court held *Flenniken* inapplicable as Manno was in fact complaining about his lender’s failure to extend credit to him or otherwise to re-negotiate his loan as allegedly promised. The court concluded as a matter of law that Manno’s home simply was not the basis of his complaint and, therefore, that Manno did not qualify as a consumer.⁶¹ As a result, the court dismissed Manno’s DTPA claim.⁶²

Similarly, in *Watson*, the borrowers claimed that they were DTPA consumers because they were led to believe that their home loan would be modified, but their mortgage company instead accelerated the loan and

50. *Id.* at 708.

51. *Ayers v. Aurora Loan Servs., LLC*, 787 F. Supp. 2d 451, 455 (E.D. Tex. 2011).

52. *Id.*

53. *Id.*

54. *Id.* (citing *Flenniken*, 661 S.W.2d at 706–07).

55. *Broyles v. Chase Homes Fin.*, No. 3:10-CV2256-G, 2011 WL 1428904, at *4 (N.D. Tex. Apr. 13, 2011) (holding that “subsequent actions related to mortgage accounts—for example, extensions of further credit or modifications of the original loan—do not satisfy the ‘good or services’ element of the DTPA”).

56. *Cavil v. Trendmaker Homes, Inc.*, No. G-10-304, 2010 WL 5464238, at *4 (S.D. Tex. Dec. 29, 2010) (holding that “a mortgage or modification of a mortgage is not a good or service under the DTPA”).

57. *Ayers*, 787 F. Supp. 2d at 455.

58. *Id.*

59. *Manno v. BAC Home Loans Servicing, LP*, No. A-11-CA-347-LY, 2011 WL 3844900, at *1 (W.D. Tex. Aug. 26, 2011).

60. *Id.* at *4.

61. *Id.* at *5.

62. *Id.*

attempted foreclosure.⁶³ The court granted the mortgage company's motion to dismiss Watson's DTPA claim for failure to state a claim because the Watsons were not consumers.⁶⁴ The court reasoned that the Watsons were not consumers because "borrowing money does not constitute the acquisition of a good or service."⁶⁵

2. Assignees, Heirs, and Incidental Beneficiaries

Assignees, heirs, and incidental beneficiaries was another class of litigants analyzed during the Survey period for consumer status. Each was held not to qualify as a DTPA consumer. In the context of assignees and heirs, the courts relied on *PPG Industries, Inc. v. JMB/Houston Centers Partners Ltd. Partnership*, in which the Texas Supreme Court held that "the personal and punitive aspects of DTPA claims cannot be squared with a rule allowing them to be assigned as if they were mere property."⁶⁶

In *Encompass Office Solutions, Inc. v. Ingenix, Inc.*, Encompass sought payment for medical equipment and nurse services that it provided to physicians for the care of various patients insured by United.⁶⁷ The patients executed Assignment of Benefits forms in favor of Encompass, and pursuant to such assignments, Encompass sought payment from United. Claiming Encompass was double-billing, United refused to pay, and Encompass sued. Among Encompass's claims were DTPA claims. The court granted United's motion to dismiss Encompass's DTPA claims due to lack of consumer status.⁶⁸

As an initial matter, Encompass was not a consumer in its own right. Although Encompass provided goods and services pursuant to an insurance policy, Encompass was not the direct purchaser of goods or services. Its only relation to the policy was to receive or otherwise seek the proceeds of such policy.⁶⁹ Following *PPG Industries*, the court also rejected Encompass's argument that it could bring its DTPA claim as an assignee of its patients, who did qualify as consumers, because DTPA claims are generally not assignable.⁷⁰

The Texas Supreme Court has not yet addressed survivability of DTPA

63. *Watson v. Citimortgage, Inc.*, No. 4:10-CV-707, 2011 WL 4526980, at *1 (E.D. Tex. Sept. 30, 2011).

64. *Id.* at *7.

65. *Id.* (citing *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 174-75 (Tex. 1980) (holding that (1) money is not "tangible chattel" or a "good" under the DTPA; (2) borrowing money is not seeking or acquiring any services; and (3) any "attempt to acquire money, or the use of money, [i]s not an attempt to acquire services").

66. *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 82 (Tex. 2004) (holding that DTPA claims cannot be assigned).

67. *Encompass Office Solutions, Inc. v. Ingenix, Inc.*, 775 F. Supp. 2d 938, 946 (E.D. Tex. 2011). Defendants, *UnitedHealth Group, Inc.* and *United Healthcare Services, Inc.*, were collectively referred to by the court as "United." *Id.*

68. *Id.* at 962.

69. *Id.* at 961 (citing *Transp. Ins. Co. v. Faircloth*, 898 S.W.2d 269, 274 (Tex. 1995)).

70. *Id.*

claims.⁷¹ Therefore, whether an heir of a DTPA consumer can qualify as a DTPA consumer in order to bring forward the decedent's DTPA claim presently depends on the court in which the claim is heard, because there is a split among the intermediate Texas appellate courts on this issue.⁷² During the Survey period, the San Antonio Court of Appeals addressed the issue in *Texas Farm Bureau Mutual Insurance Co. v. Rogers*, which arose from a home fire.⁷³ The home owner sued her insurer for nonpayment of policy proceeds and DTPA violations, but died prior to trial, and her children proceeded in her place. The court of appeals followed its own precedent, holding that DTPA claims do not survive the consumer's death and cannot be brought by the consumer's estate.⁷⁴ The court of appeals reiterated that DTPA recovery is both personal and punitive in nature.⁷⁵

B. DISTINGUISHING BETWEEN BREACH OF CONTRACT AND DTPA CLAIMS

It is not uncommon for a party defending against a DTPA claim to argue that the facts of a case give rise, at most, to a breach of contract claim and not a DTPA claim. While both claims allow for an award of attorneys' fees to a prevailing claimant,⁷⁶ defending a breach of contract claim may be preferred because there is no exposure to double or treble damages for knowing or intentional conduct.⁷⁷ Defending a breach of contract claim may also be preferable if the contract sets venue or limits available damages.

An allegation of a mere breach of contract, "without more,"⁷⁸ does not constitute a false, misleading, or deceptive act in violation of the DTPA.⁷⁹

71. *PPG Indus., Inc. v. JMP/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 91 (Tex. 2004) (stating "Because only an assignment is before us, we do not decide whether DTPA claims survive to a consumer's heirs, a related but sometimes distinct inquiry.").

72. *McCoy v. Pfizer, Inc.*, No. 4:09-CV-496, 2010 WL 3365110, at *1 (E.D. Tex. Aug. 25, 2010) (adopting magistrate's recommendations set forth in *McCoy v. Pfizer, Inc.*, No. 4:09-CV-496, 2010 WL 3365284, at *4-6 (E.D. Tex. Aug. 3, 2010) (collecting cases)).

73. *Tex. Farm Bureau Mut. Ins. Co. v. Rogers*, 351 S.W.3d 103, 105 (Tex. App.—San Antonio 2011, pet. denied).

74. *Id.* at 107 (following *Lukasik v. San Antonio Blue Haven Pools, Inc.*, 21 S.W.3d 394, 402 (Tex. App.—San Antonio 2000, no pet.); *Mendoza v. Am. Nat'l Ins. Co.*, 932 S.W.2d 605, 609 (Tex. App.—San Antonio 1996, no writ); and *First Nat'l Bank of Kerrville v. Hackworth*, 673 S.W.2d 218, 221 (Tex. App.—San Antonio 1984, no writ)).

75. *Id.*

76. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (West 2008); TEX. BUS. & COM. CODE ANN. § 17.50(d) (West 2011).

77. Under the DTPA, if the defendant's violation is found to be committed "knowingly" then the jury may award additional damages up to three times the amount of economic damages awarded. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011). If the defendant's violation was "intentional[.]" then the additional damages may be in an amount not more than three times the economic and mental anguish damages. *Id.*

78. *Rocky Mountain Helicopters, Inc., v. Lubbock Cnty. Hosp. Dist.*, 987 S.W.2d 50, 53 (Tex. 1998); *Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 14 (Tex. 1996) (quoting *Ashford Dev., Inc. v. USLife Real Estate Servs. Corp.*, 661 S.W.2d 933, 935 (Tex. 1983)).

79. *See also Ken Petrol. Corp. v. Questor Drilling Corp.*, 24 S.W.3d 344, 357 (Tex. 2000) (holding contract's indemnity provision was an agreement and not misrepresentation that agreement conferred rights and benefits that it did not have in violation of the DTPA);

During the Survey period, Texas courts once again examined what “more” is needed to transform a contract-related claim from a mere breach of contract claim to a DTPA claim.

In *Drury Southwest, Inc. v. Louie Ledeaux #1, Inc.*, the San Antonio Court of Appeals examined whether a misrepresentation made during contract negotiations and effectively woven into the terms of the ensuing contract gave rise to a DTPA claim.⁸⁰ The parties had negotiated a lease permitting Ledeaux to operate a restaurant on property owned by Drury. During the negotiations, Drury promised that Ledeaux could install a large “reader board” sign on the premises. The resulting lease detailed what steps would be followed to erect the sign. Drury also agreed to build a patio on the existing restaurant space.⁸¹

During lease negotiations, Drury failed to disclose that it previously had been embroiled in a three-year dispute with the City of San Antonio regarding the erection of another sign on the property, and that ultimately the City had denied Drury’s sign permit application. Drury also failed to disclose that some of the property on which the patio was to be built was not owned by Drury. Finally, Drury withheld from Ledeaux that an exit ramp off of the nearest highway would soon be closed permanently.⁸²

Ledeaux’s restaurant failed, and Ledeaux’s owners requested a change in restaurant format. Days after this request, Drury filed an application for a temporary restraining order against Ledeaux. Ledeaux countered with several claims, including a breach of contract claim and DTPA claims, and was ultimately awarded actual damages and additional damages for Drury’s knowing conduct.⁸³

On appeal, Drury argued that the evidence was legally insufficient to support a finding that Drury engaged in conduct actionable under the DTPA.⁸⁴ Drury further argued that the alleged misrepresentation regarding the ability to erect a sign on the property was merely an oral

Conquest Drilling Fluids, Inc. v. Tri-Flo Int’l, Inc., 137 S.W.3d 299, 309 (Tex. App.—Beaumont 2004, no pet.) (holding failure to fulfill promise to build unit free of defects did not state violation of DTPA); *Cont’l Dredging, Inc. v. De-Kaizerred, Inc.*, 120 S.W.3d 380, 390 (Tex. App.—Texarkana 2003, pet. denied) (holding misrepresentations that contract had been performed when it allegedly had not been gave rise to breach of contract only, not DTPA violation); *Wayne Duddleston, Inc. v. Highland Ins. Co.*, 110 S.W.3d 85, 92 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (holding alleged misrepresentations stemming from failure to comply with policy was not violation of DTPA).

80. *Drury Sw., Inc. v. Louie, Ledeaux #1, Inc.*, 350 S.W.3d 287, 291 (Tex. App.—San Antonio 2011, pet. denied).

81. *Id.* at 290.

82. *Id.*

83. *Id.*

84. The jury considered whether Drury (1) misrepresented legal rights; (2) failed to disclose information; (3) engaged in false advertising; and (4) misrepresented the uses, benefits or quality of the leased premises. *Id.* at 290–91; see TEX. BUS. & COM. CODE ANN. §§ 17.46(a), (b)(5), (b)(9), (b)(24) (West 2011).

statement that Drury would perform its obligations under the lease.⁸⁵

The evidence showed, however, that (1) Drury told Ledeaux that it could install whatever sign it wanted to on the premises; (2) Drury knew what the sign would look like; and (3) the City of San Antonio had denied a prior application for a permit to install a sign on the premises. Taken together, the court of appeals reasoned that Drury misrepresented that Ledeaux could erect the sign Ledeaux envisioned. Moreover, the court of appeals deemed the misrepresentation material because the evidence also showed that Ledeaux's owners testified that they believed that the sign was "essential to the success of the restaurant."⁸⁶

It was this misrepresentation that proved essential to Ledeaux's DTPA claim. A misrepresentation made during contract negotiations may form the basis of a DTPA claim if the defendant misrepresented a material fact about the goods or services sold to the plaintiff.⁸⁷ Here, the evidence showed that Drury made such material misrepresentation regarding Ledeaux's ability to erect a sign on the premises. This was more than just a promise to perform the terms of the lease and constituted that something "more" needed to give rise to a DTPA claim. Therefore, the court of appeals affirmed the DTPA judgment.⁸⁸

C. NEGATING RELIANCE AND CAUSATION

To recover under certain provisions of the DTPA, a consumer must prove that the defendant's actions were the "producing cause" of the consumer's damage.⁸⁹ "Producing cause" requires proof that the acts in question be both a cause-in-fact and a "substantial factor" in causing injuries that would not have occurred otherwise.⁹⁰ The consumer also must show reliance on the false, misleading, or deceptive act or practice.⁹¹

*Mewhinney v. London Wineman*⁹² addressed whether a consumer's pre-purchase inspection negated causation and reliance. The parties' dispute concerned the sale of five bottles of vintage wine. Mewhinney put

85. *Drury Sw., Inc.*, 350 S.W.2d at 291 (citing *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995); *Church & Dwight Co. v. Huey*, 961 S.W.2d 560, 567 (Tex. App.—San Antonio 1997, pet. denied)).

86. *Id.*

87. *Id.*

88. *Id.* at 292.

89. See TEX. BUS. & COM CODE ANN. § 17.50(a) (West 2011).

A consumer may maintain an action where any of the following constitute a *producing cause* of economic damages or damages for mental anguish: (1) the use or employment by any person of a false, misleading, or deceptive act or practice that is:

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

(B) *relied* on by a consumer to the consumer's detriment. *Id.* (emphasis added).

90. *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995).

91. *Id.*

92. *Mewhinney v. London Wineman, Inc.*, 339 S.W.3d 177, 177 (Tex. App.—Dallas 2011, pet. denied).

the contents of his wine cellar up for sale and represented that he owned and was selling five bottles of 1945 Chateau Mouton Rothschild wine. The London Wineman responded to Mewhinney's advertisement and sent two employees to inspect the wine collection to determine whether Mewhinney's wine could be resold. The employees confirmed that Mewhinney's collection included five bottles of alleged vintage Mouton Rothschild. One bottle of Mouton Rothschild appeared suspect. Upon closer inspection, however, the employees concluded the five bottles were authentic and purchased Mewhinney's entire collection on behalf of The London Wineman. Soon after its purchase, The London Wineman learned that the four Chateau Mouton Rothschild bottles that had not been inspected were counterfeit and then sued Mewhinney when he refused to refund the money paid for the counterfeit bottles.⁹³

While the court dismissed The London Wineman's breach of contract claim against Mewhinney, the jury assessed \$24,000 in damages to The London Wineman based on its DTPA claim.⁹⁴ After the verdict, Mewhinney moved for a judgment notwithstanding the verdict, which was denied.⁹⁵

On appeal, Mewhinney argued that there was no evidence that he engaged in false, misleading, or deceptive act or practices because there was no evidence that he substituted one brand of wine for another or that the wine sold was not authentic.⁹⁶ For these reasons, Mewhinney argued there was no evidence to support a DTPA award.⁹⁷

The Dallas Court of Appeals disagreed, holding that there was sufficient evidence to conclude that the wine was counterfeit and to find that Mewhinney engaged in false, misleading, or deceptive acts or practices when he claimed to own five bottles of 1945 Chateau Mouton Rothschild.⁹⁸ The court further held that the claim arose from Mewhinney's misrepresentation that he owned five bottles of 1945 Chateau Mouton Rothschild, and therefore, the misrepresentation about the wine's vintage was separate and apart from the sales contract executed between the parties. Thus, the claim was properly raised as a DTPA claim as opposed to a breach of contract claim.⁹⁹

Mewhinney also argued that there was no evidence of detrimental reliance on any false, misleading, or deceptive act or practice and that any

93. *Id.* at 180. The London Wineman paid \$6,000 for each bottle of 1945 Chateau Mouton Rothschild wine. *Id.* at 179-80.

94. Mewhinney argued that the trial court erred in denying his motion for judgment notwithstanding the verdict because the DTPA claim was merely a dressed up breach of contract claim. The court of appeals disagreed, finding the misrepresentations at issue were separate and apart from the sales contract and therefore actionable under the DTPA. *Id.* at 181.

95. *Id.* at 180.

96. *Id.* at 182. The evidence showed that the wine had never been tested to determine its authenticity. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 181.

such reliance was not the producing cause of damage to The London Wineman. Mewhinney reasoned that The London Wineman's pre-purchase inspection of the wine bottles negated any reliance on any statement by Mewhinney and, moreover, negated causation.¹⁰⁰

The court of appeals once again disagreed with Mewhinney. While an independent inspection can negate causation, the buyer must rely exclusively on the independent examination as the basis for the purchase, and such inspection should: (1) reveal the truth regarding the purchase and (2) indicate that the buyer was not relying on the information provided by the seller.¹⁰¹ In this case, the evidence showed that when it made the decision to purchase the bottles, The London Wineman relied on Mewhinney's representation that the wine cellar contained the five vintage bottles when it made the decision to purchase the bottles. The evidence also showed that the purpose of the prepurchase inspection was only to determine fitness for resale, not authenticity. This evidence demonstrated that The London Wineman relied on Mewhinney's representation and not on its own inspection when deciding to purchase the wine. Therefore, the inspection "did not supplant Mewhinney's representations" and was not broad enough in scope to "reveal the truth about the wine."¹⁰²

Williams v. Dardenne examined whether an "as is" clause was valid, and if so, whether it negated causation and reliance.¹⁰³ The buyers of a home sold as is sued the sellers for failure to disclose an inspection that addressed the home's foundation problems. The sellers disclosed three inspection reports revealing some foundation problems but did not disclose a letter from Knight Engineering that detailed repairs the firm could perform on the house.¹⁰⁴

The home's foundation problems became very evident after only a few months. The buyers hired Knight Engineering to inspect their foundation and for the first time learned of Knight Engineering's prior letter to the sellers. The buyers then sued the sellers, and a jury found in favor of the buyers on their DTPA claims. The sellers moved for a judgment notwithstanding the verdict, arguing that the "as is" clause barred the buyers' recovery.¹⁰⁵

A valid "as is" clause may negate reliance and causation in a DTPA claim; however, if induced by misrepresentation, it does not protect a seller from liability.¹⁰⁶ The buyers argued that the "as-is" clause was not

100. *Id.* at 182.

101. *Id.* at 182-83 (citing *Bernstein v. Thomas*, 298 S.W.3d 817, 822 (Tex. App.—Dallas 2009, no pet); *Pleasant v. Bradford*, 260 S.W.3d 546, 554 (Tex. App.—Austin 2008, pet. denied); *Dubow v. Dragon*, 746 S.W.2d 857, 860 (Tex. App.—Dallas 1988, no writ)).

102. *Id.* at 183.

103. *Williams v. Dardenne*, 345 S.W.3d 118, 119-20 (Tex. App.—Houston [1st Dist.] 2011, pet. denied).

104. *Id.* at 120.

105. *Id.* at 122-23.

106. *Id.* at 124 (citing *Prudential v. Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995)).

valid because it was procured by fraud insofar as the sellers fraudulently concealed the foundation's condition by withholding Knight Engineering's letter. The relevant question then became whether the nondisclosure of the letter from Knight Engineering caused the buyers to purchase the home as is.¹⁰⁷

While the buyers testified that they would not have bought the home if they knew of the condition of the foundation or the need to repair it, the Houston Court of Appeals held that such testimony simply was not evidence that the buyers would not have purchased the home had the Knight Engineering letter been disclosed by the sellers. The court of appeals also pointed out that the three inspection reports that had been disclosed were in large part duplicative of the information in the Knight Engineering letter. The fact that there was evidence that the buyers had not read all disclosed inspection reports further supported a finding of no fraudulent inducement.¹⁰⁸

The court of appeals thus held that the trial court erred in failing to grant the sellers' motion for judgment notwithstanding the verdict on the fraudulent inducement claim. Because the "as is" clause was not negated by fraudulent inducement, it was valid and negated the causation and reliance elements of the buyers' DTPA claim. Accordingly, the court of appeals reversed and rendered on the buyers' DTPA claim.¹⁰⁹

D. DAMAGES

In *Drury Southwest, Inc. v. Louie Ledeaux #1, Inc.*, discussed above, the San Antonio Court of Appeals also examined the scope of damages available in a DTPA case and whether the jury's award was supported by sufficient evidence.¹¹⁰ The jury had awarded Ledeaux \$625,000 in actual damages and \$450,000 in additional damages for Drury's knowing conduct. The parties agreed that Ledeaux invested approximately \$400,000 in the failed restaurant, leaving \$225,000 in dispute. The court of appeals rejected the argument that the \$225,000 difference was compensable to Ledeaux based on the "sweat equity" of its owners. Without deciding whether the equivalent of "sweat equity" is indeed compensable under the DTPA, the court held that Ledeaux could not recover for the time invested by its owners, especially when the compensation paid to the owners for their labor was already reflected in the \$400,000 that was not in dispute.¹¹¹ The case was remanded to the trial court on the issue of damages.¹¹²

107. *Id.* at 125–27.

108. *Id.* at 128–29.

109. *Id.* at 129.

110. *Drury Sw., Inc. v. Louie Ledeaux #1, Inc.*, 350 S.W.3d 287, 292–93 (Tex. App.—San Antonio 2011, pet. denied).

111. *Id.* at 293 (citing *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990)).

112. *Id.* at 292–93. The court also granted Ledeaux's motion for rehearing requesting remand for a re-election of remedies presumably in the event recovery was higher on other claims for which the jury awarded damages in Ledeaux's favor. *Id.* at 293.

E. DISCHARGE IN BANKRUPTCY

In re Horne examined whether collateral estoppel applied to the determination that, as a matter of law, a DTPA judgment was non-dischargeable in bankruptcy.¹¹³ The debtor and his creditors filed cross-motions for summary judgment on the issue of collateral estoppel, and both motions were denied.¹¹⁴

In the underlying case, the plaintiffs prevailed in a suit against a homebuilder. The resulting arbitration award included damages for knowing and intentional misrepresentations by the homebuilder in violation of the DTPA, as well as a finding of “no fraud.” The arbitration award was reduced to a final judgment, and the homebuilder filed for bankruptcy. In the bankruptcy action, the plaintiffs alleged that their judgment was non-dischargeable under Sections 523(a)(2)(A) and 523(a)(6) of the U.S. Bankruptcy Code.¹¹⁵

The plaintiffs argued that there was no need to relitigate whether the award and judgment satisfied Sections 523(a)(2) and (a)(6), because the finding of knowing or intentional conduct was sufficiently litigated and relitigation was barred by collateral estoppel. The homebuilder argued that there was no need to relitigate whether the award and judgment satisfied Section 523(a)(2) because it required a finding of “actual fraud,” which was negated in the award and judgment.¹¹⁶

The award and judgment provided no detailed findings. The bankruptcy court therefore held that there was insufficient detail from which to discern whether the finding of intentional conduct in fact satisfied the elements of Section 523(a)(2)(A), which called for actual fraud, or Section 523(a)(6), which called for “willful and malicious injury.”¹¹⁷ The arbitrator’s award thus could not be given preclusive effect on either issue.¹¹⁸ The court did not provide guidance on what level of detail would sufficiently insulate a future judgment holder from having to relitigate the dischargeability of a DTPA award in bankruptcy.

IV. CONCLUSION

It was a quiet year for both antitrust and Texas DTPA litigation. Significant decisions heard during the Survey period illustrated and tested the contours and limitations of the relevant statutes. While antitrust decisions appeared to protect and serve the public by managing the scope of litigation before the courts, Texas DTPA decisions foreclosed the court option altogether for any class of litigants that could not demonstrate the

113. *In re Horne*, Bankruptcy No. 10-50859-C, 2011 WL 350473, at *1 (Bankr. W.D. Tex. Feb. 2, 2011).

114. *Id.* at *10.

115. *Id.* at *2. The plaintiffs also alleged the judgment was non-dischargeable under § 523(a)(4), which applies in fiduciary contexts. *Id.*

116. *Id.* at *3.

117. *Id.* at *2, 10.

118. *Id.* at *10.

requisite consumer status. Whether such DTPA decisions effectively promote consumer welfare is unclear. Barring that hurdle, however, the DTPA appears to have a strong foothold in Texas case law and provides litigants with an alternative cause of action nicely falling somewhere between breach of contract and fraud.

