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Deceptive Trade Practices - Consumer Protection Act

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DECEPTIVE TRADE PRACTICES— CONSUMER PROTECTION ACT

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TABLE OF CONTENTS

I.	INTRODUCTION	862
II.	CONSUMER STATUS	863
	A. THE PLAINTIFF'S RELATIONSHIP TO THE TRANSACTION.....	863
	B. EQUAL PROTECTION CHALLENGE TO CONSUMER STATUS REQUIREMENT.....	868
III.	DECEPTIVE PRACTICES	869
	A. LAUNDRY LIST CLAIMS	870
	1. <i>Section 17.46(b)(12)—Misrepresentation of Rights, Remedies or Obligations</i>	871
	2. <i>Section 17.46(b)(23)—Failure to Disclose</i>	872
	3. <i>Section 17.50—Breach of Express or Implied Warranties</i>	874
	B. INCORPORATION OF THE DTPA INTO THE TEXAS INSURANCE CODE.....	875
	C. UNCONSCIONABILITY	876
	D. CONSPIRACY TO VIOLATE THE DTPA	876
IV.	DETERMINING THE MEASURE OF DAMAGES	877
	A. DAMAGES	877
	B. ATTORNEY'S FEES	879
V.	DTPA DEFENSES AND EXEMPTIONS	879
	A. A "MERE" BREACH OF CONTRACT IS NOT ACTIONABLE UNDER THE DTPA	880
	B. LEGAL MALPRACTICE CASES AND THE DTPA	881
	C. PREEMPTION AND EXEMPTION FROM THE DTPA.....	882
	1. <i>Medical Liability and Insurance Improvement Act</i>	882
	2. <i>Texas Motor Vehicle Commission Code</i>	883
	3. <i>The Texas Seed Arbitration Act</i>	884
	D. "AS IS" CLAUSES	884

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E. ASSIGNABILITY OF DTPA CLAIMS 885
 F. AGENCY AND THE DTPA..... 885
 G. LIMITATIONS 887
 VI. CLASS ACTIONS..... 887
 VII. CONCLUSION..... 889

I. INTRODUCTION

THE Texas Deceptive Trade Practices—Consumer Protection Act (“DTPA”)¹ was enacted in 1973 “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.”² Two sets of amendments were enacted in 2001 by the 77th Texas Legislature. One set was effective September 1, 2001 and the other set will be effective June 1, 2002. Effective September 1, 2001, DTPA section 17.46 has been amended include a new laundry list violation. Section 17.46(b)(18) now provides that the term “false, misleading, or deceptive acts or practices”³ also includes “advertising, selling, or distributing a card which purports to be a prescription drug identification card issued under Section 19A, Article 21.07-6, Insurance Code, in accordance with rules adopted by the commissioner of insurance, which offers a discount on the purchase of health care goods or services from a third party provider, and which is not evidence of insurance coverage.”⁴ This provision contains an exception. Such activity does not constitute a violation of the DTPA if “(A) the discount is authorized under an agreement between the seller of the card and the provider of those goods and services or the discount or card is offered to members of the seller; (B) the seller does not represent that the card provides insurance coverage of any kind; and (C) the discount is not false, misleading, or deceptive.”⁵ Because of the addition of this particular laundry list violation, it should be noted that the numbering for the other violations that follow section 17.46(b)(18) has shifted slightly.

Additionally, the Legislature added section 17.46(b)(26), effective June 1, 2002. New section 17.46(b)(26) provides that “selling, offering to sell, or illegally promoting an annuity contract under Chapter 22, Acts of the 57th Legislature, 3rd Called Session, 1962 (Article 6228a-5, Vernon’s Texas Civil Statutes), with the intent that the annuity contract will be the subject of a salary reduction agreement, as defined by that Act, if the annuity contract is not an eligible qualified investment under that Act,” constitutes a deceptive trade practice.⁶

1. TEX. BUS. & COM. CODE §§ 17.41 et seq. (Vernon 1987 & Supp. 2002) [hereinafter “DTPA”].
 2. *Id.* § 17.44(a).
 3. *Id.* § 17.46(b).
 4. *Id.* § 17.46(b)(18).
 5. *Id.*
 6. TEX. BUS. & COM. CODE § 17.46(b)(26).

In connection with the addition of section 17.46(b)(26), the Legislature also amended section 17.49, concerning exemptions, adding section 17.49(c)(5), which provides that the exemption for claims based on the rendering of a professional service does not apply to a violation of section 17.26(b)(26), and adding section 17.49(h), which provides that “[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.”⁷ So far, there are no reported decisions addressing these changes to the Texas DTPA statutes.

In addition to the foregoing legislative changes, this Survey covers significant developments in the case law applying the DTPA from October 1, 2000 through September 30, 2001. Noteworthy decisions during the Survey period address consumer status and defenses to DTPA claims.

II. CONSUMER STATUS

Many of the more interesting decisions during the Survey period involved the requirement that the plaintiff be a “consumer” as that term is defined in the statute.⁸ To qualify as a consumer, the plaintiff must be an individual “who seeks or acquires by purchase or lease, any goods or services.”⁹ Further, those goods or services must form the basis of the plaintiff’s complaint.¹⁰ Whether a plaintiff qualifies for DTPA consumer status is a question of law.¹¹

A. THE PLAINTIFF’S RELATIONSHIP TO THE TRANSACTION

One statutory issue when determining consumer status is whether the plaintiff sought or acquired “any goods or services”¹² Additionally, consumer status under the DTPA frequently depends upon a showing that the plaintiff’s relationship to the transaction entitles it to relief.¹³ During the Survey period several cases turned on this issue.

In *Canfield v. Bank One, Texas, N.A.*,¹⁴ the Texarkana Court of Appeals held that the plaintiff was not a consumer under the DTPA, and held that summary judgment was appropriate on the plaintiff’s DTPA

7. *Id.* § 17.49(h).

8. *Id.* § 17.50.

9. *Id.* § 17.45(4).

10. *Id.*; *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 351-52 (Tex. 1987).

11. *Hedley Feedlot, Inc. v. Weatherly Trust*, 855 S.W.2d 826, 831 (Tex. App.—Amarillo 1993, writ denied).

12. DTPA § 17.45(4).

13. *Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 649-50 (Tex. 1996); *see Sanchez v. Liggett & Myers, Inc.*, 187 F.3d 486, 491 (5th Cir. 1999) (holding that a “DTPA claim requires an underlying consumer transaction; there must be a nexus between the consumer, the transaction, and the defendant’s conduct”) (citing *Amstadt*, 919 S.W.2d at 650).

14. 51 S.W.3d 828 (Tex. App.—Texarkana 2001, no pet.).

claims.¹⁵ Canfield sued his bank to recover for wrongfully paid items, including forged checks and cashed-out certificates of deposit.¹⁶ On appeal by the plaintiff, the Texarkana Court of Appeals found that the bank's payment of forged checks did not constitute a violation of the DTPA¹⁷ and that Canfield was not a consumer for purposes of the DTPA when he purchased the certificates of deposit.¹⁸

The court first noted that money is not a type of "goods" or "tangible chattel" as defined by the DTPA.¹⁹ The court further stated that "the mere purchase of a certificate of deposit does not confer consumer status under the DTPA," although "the purchase of financial counseling services, collateral to the purchase of a certificate of deposit, can confer consumer status."²⁰ Because Canfield did not "contend that he sought or acquired any ancillary services in the purchase of the certificates of deposit, nor [did] he contend that the bank provided any other services that would provide a basis for a DTPA claim," Canfield was not a consumer under the DTPA in relation to the certificates of deposit.²¹

*Jones v. Star Houston, Inc.*²² involved a car owner who sued his dealership for breach of contract, negligence, and DTPA violations. Jones alleged that his car was damaged while it was being repaired. The dealership contended that there was no evidence to establish Jones's consumer status under the DTPA.²³ The dealership first argued that "because Jones was seeking repairs under a warranty that obligated [the dealership] to repair the vehicle without compensation, [Jones] was precluded from obtaining consumer status."²⁴ The Houston Court of Appeals noted that the dealership's argument was counter to established law, because "one does not have to pay for goods or services to be a consumer under the [DTPA]."²⁵ Thus, "Jones satisfied the first part of the consumer status inquiry."²⁶

The court next determined whether the repairs Jones sought formed the basis of his complaint.²⁷ Jones argued that he took his car in for repair work, that his car was damaged in the course of the repair work, and that he therefore should be able to pursue a DTPA claim.²⁸ The dealership countered that any damage to Jones's car occurred before the dealer-

15. *Id.* at 840.

16. *Id.* at 832.

17. *Id.* at 838.

18. *Id.* at 839.

19. *Canfield*, 51 S.W.3d at 838 (citing *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 174 (Tex. 1980)).

20. *Id.* at 839 (citing *Hand v. Dean Witter Reynolds, Inc.*, 889 S.W.2d 483, 500 (Tex. App.—Houston [14th Dist.] 1994, writ denied)).

21. *Id.* at 839-40.

22. 45 S.W.3d 350 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

23. *Id.* at 356.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Jones*, 45 S.W.3d at 356.

ship performed the repairs, that it immediately informed Jones of the damage to the car and took steps to remedy the damage, and that Jones prevented it from performing its contractual service work by demanding that the dealership cease all work related to his car.²⁹ The court held that “the relevant inquiry was whether the damage to Jones’s car occurred while [the dealership] was attempting to make the requested repair.”³⁰ Because there was evidence that the car was damaged during the servicing at the dealership, the court concluded that the dealership had failed to carry its burden to show that Jones was not a consumer as a matter of law.³¹

Another case involving consumer status was decided by the Corpus Christi Court of Appeals. In *Ford v. City State Bank of Palacios*,³² a debtor brought lender liability, breach of contract, and promissory estoppel claims against his creditor, and the creditor counterclaimed for amounts due under three promissory notes. In its motion for summary judgment, the creditor asserted that the debtor lacked consumer status under the DTPA, and therefore could not recover on his DTPA claims as a matter of law.³³ The Corpus Christi court recognized that, “[g]enerally, a pure loan transaction lies outside the DTPA because money is considered to be neither a good nor a service.”³⁴ However, a creditor may be inextricably intertwined in a transaction so as to confer consumer status on a party if, from the buyer’s perspective, the extension of credit forms the means of making the sale or purchase of goods.³⁵

The court also observed that the DTPA does not impose vicarious liability based on innocent involvement with business transactions, and that to hold a creditor liable in a consumer credit transaction, the creditor must be shown to have some connection with either the actual sales transaction or with a deceptive act related to financing the transaction.³⁶

In this case, the debtor wanted a portion of the loan proceeds to purchase cattle.³⁷ He argued that he was a consumer because he sought to acquire goods. He did not, however, allege that the creditor had any connection with the sale of the cattle, nor did he allege that the creditor committed any deceptive act related to the initial financing of the purchase transaction.³⁸ Instead, he alleged that the creditor “engaged in post-sale misrepresentations regarding the possibility of renewing and extending” the note.³⁹ The court stated that “although the [creditor’s] al-

29. *Id.* at 356-57.

30. *Id.* at 357.

31. *Id.*

32. 44 S.W.3d 121 (Tex. App.—Corpus Christi 2001, no pet.).

33. *Id.* at 133.

34. *Id.*

35. *Id.* at 134 (citing *Norwest Mortgage, Inc. v. Salinas*, 999 S.W.2d 846, 854 (Tex. App.—Corpus Christi 1999, pet. denied)).

36. *Id.* at 134 (citing *Home Savings Ass’n v. Guerra*, 733 S.W.2d 134, 136 (Tex. 1987)).

37. *Ford*, 44 S.W.3d at 135.

38. *Id.*

39. *Id.*

legedly unconscionable course of action occurred after the purchase of the goods," this did not "automatically exempt them from liability under the DTPA."⁴⁰ However, because the cattle bought by the debtor were not the basis of his complaint, the second prong of the definition of consumer status had not been met.⁴¹ Thus, the court held that the debtor was not a consumer under the DTPA.⁴²

In *PPG Industries, Inc. v. JMB/Houston Centers Partners Ltd. Partnership*,⁴³ JMB, the purchaser of an office building, brought an action against PPG Industries, a window manufacturer, alleging breach of warranty and DTPA violations. JMB bought the building from Houston Center Corp. in December 1989. In July 1994, after many of the windows had fogged up and discolored, JMB sued PPG. The jury found in JMB's favor on both its DTPA and breach of warranty claims.⁴⁴

On appeal PPG contended that a 1983 amendment to the DTPA definition of "consumer," whether retroactive or prospective in its application, extinguished JMB's DTPA claim. In 1983, the definition of "consumer" under the DTPA was amended to exclude business consumers with assets of \$25 million or more.⁴⁵ Because JMB has assets in excess of \$25 million, it was not itself a consumer.⁴⁶ PPG claimed that because the 1983 amendment had no savings clause, the amendment was immediately effective, and had extinguished Houston Center Corp.'s status as a consumer because at that time it had assets in excess of \$25 million.⁴⁷ PPG argued that because JMB's predecessor, Houston Center Corp., could not bring a DTPA claim against PPG in 1989 when it sold the building, JMB could not acquire any such claim by assignment.⁴⁸ The Houston Court of Appeals found that the DTPA section defining business consumers had no retrospective application and did not preclude Houston Center Corp. from maintaining its DTPA action against PPG.⁴⁹

PPG contended in the alternative "that since the sale between Houston Center Corp. and JMB occurred in 1989, the 1983 amendment effectively denied consumer status to JMB."⁵⁰ The court found, however, that JMB was not asserting its own claim, but one it obtained by assignment.⁵¹ Because the court looked to the status of the assignor, JMB did not have to be a consumer in its own right.⁵²

In *Burnap v. Linnartz*,⁵³ Burnap, a partner who was liable on a dis-

40. *Id.*

41. *Id.*

42. *Ford*, 44 S.W.3d at 135.

43. 41 S.W.3d 270 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

44. *Id.* at 274.

45. *Id.* at 277.

46. *Id.* at 278.

47. *Id.*

48. *PPG Indus.*, 41 S.W.3d at 278.

49. *Id.* at 279.

50. *Id.*

51. *Id.*

52. *Id.*

53. 38 S.W.3d 612 (Tex. App.—San Antonio 2000, no pet.).

solved partnership's promissory note, brought an action against the partnership's attorney, his law firm, as well as the associate of another firm, to recover for legal malpractice, violations of the DTPA, and negligent infliction of emotional distress in connection with the drafting of documents for withdrawal of the partners and an agreement to indemnify the partners from their obligation on the note.

The San Antonio Court of Appeals, sitting en banc, disagreed with Linnartz and the Linnartz Firm's contention that they were entitled to summary judgment on Burnap's DTPA claims on the ground that Burnap was not a consumer in relation to the legal services provided in connection with the releases.⁵⁴ Linnartz and the Linnartz firm had argued that Burnap was not a consumer of the legal services, because he did not engage or pay the lawyer or the law firm for their services, nor was the primary purpose of the agreement for his benefit.⁵⁵ The court observed that the dispositive issue was whether Burnap was a beneficiary of the legal services provided—not whether Burnap was the actual purchaser of the legal services.⁵⁶ The court found that "Burnap's affidavit rais[ed] a genuine issue of material fact as to his status as a beneficiary because it assert[ed] the existence of an attorney-client relationship."⁵⁷

The lawyer and his law firm also contended that Burnap could not establish he was a consumer as to the legal services because another firm's associate performed some of the services and the lawyer and his firm could not be held derivatively liable for the other lawyer's acts.⁵⁸ Again, the court disagreed, holding that Burnap's consumer status must be determined by his relationship to the transaction, not to a particular defendant, and that Burnap's consumer status did not turn upon whether the lawyer and his firm could be held derivatively liable for the other lawyer's conduct in negotiating and drafting the release.⁵⁹ Because lack of consumer status was not conclusively established by the summary judgment record, the court held that lack of consumer status could not support the trial court's summary judgment against Burnap on his DTPA claims.⁶⁰

In another case involving consumer status, *Anton v. Merrill Lynch*,⁶¹ an investor's surviving spouse sued Merrill Lynch and one of its investment advisors, alleging that they had committed violations of the DTPA when they complied with her husband's request to remove her as a death beneficiary of her husband's individual retirement account in favor of his surviving children without informing her.

Merrill Lynch "moved for summary judgment on the basis that Anton

54. *Id.* at 618-19.

55. *Id.* at 620.

56. *Id.* (citing *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 815 (Tex. 1997)).

57. *Id.*

58. *Burnap*, 38 S.W.3d at 621.

59. *Id.*

60. *Id.*

61. 36 S.W.3d 251 (Tex. App.—Austin 2001, pet. denied).

was not a consumer with respect to the IRA funds.”⁶² The Austin Court of Appeals found that Anton was not a consumer of her husband’s IRA while she was designated its beneficiary.⁶³ “The undisputed evidence was that [the husband] was the only person involved in the establishment of the IRA or the designation of death beneficiaries, and that he was the only person with contractual authority to direct [Merrill Lynch and its investment advisor] regarding the investment and disbursement of the IRA funds.”⁶⁴ The court also held that Anton’s “alleged community and separate property interest in some of the funds [did] not make her a consumer with respect to the IRA,” because “the only evidence [was that the husband] alone established the IRA,” and “there was no evidence that [Anton] had anything to do with seeking or acquiring the services incident to the establishment or maintenance of the IRA.”⁶⁵

Finally the court held that Anton’s consumer status with respect to her own accounts could not give her a DTPA cause of action for Merrill Lynch’s alleged failure to inform her that she had been removed as the beneficiary of her husband’s IRA.⁶⁶ “The funds at the center of her claim (the IRA) are not the funds or services for which she contracted (her accounts).”⁶⁷ Thus, to prevail on her theory, she must have been a consumer as to the IRA.⁶⁸ Because Anton was not a DTPA consumer of her deceased husband’s IRA, the Austin court held that the trial court did not err by rendering judgment against Anton on her DTPA claims.⁶⁹

B. EQUAL PROTECTION CHALLENGE TO CONSUMER STATUS REQUIREMENT

In *Alcan Aluminum Corp. v. BASF Corp.*,⁷⁰ BASF challenged the DTPA statute on equal protection grounds as discriminating based on wealth. Alcan, the manufacturer of aluminum-based panels for gasoline station fascia and sun rooms, brought a state-court action against BASF, a supplier of a urethane foam system used in producing panels. Alcan asserted claims for DTPA violations, as well as several other causes of action.⁷¹ The United States District Court found that Alcan’s DTPA claim was precluded by the clear language of the statute, which provides a cause of action for a “consumer.”⁷² Alcan admitted that it was a “business consumer” and had assets in excess of \$25 million.⁷³ The court observed that a “business consumer” is specifically excluded from the

62. *Id.* at 258.

63. *Id.*

64. *Id.*

65. *Id.* at 260.

66. *Anton*, 36 S.W.3d at 260.

67. *Id.*

68. *Id.*

69. *Id.*

70. 133 F. Supp. 2d 482 (N.D. Tex. 2001).

71. *Id.* at 488-89.

72. *Id.* at 501.

73. *Id.*

definition of "consumer"⁷⁴ and thus despite Alcan's assertions to the contrary, Alcan was not a "consumer" under the plain terms of the statute and had no cause of action under the DTPA.⁷⁵ Alcan's only argument in opposition to the court's conclusion was that the DTPA provision excluding business consumers from coverage violated the equal protection provisions of the Texas and federal constitutions.⁷⁶ The gist of Alcan's argument, which lacked any case law or similar support, was that it was "unfair" to allow its customers to sue and collect treble damages under the DTPA while Alcan could not sue BASF under the DTPA.⁷⁷

The court concluded that Alcan's argument was without merit. "A statute, challenged on equal protection grounds as discriminating based on wealth, must be sustained if rationally related to a legitimate government interest."⁷⁸ The court reasoned that when, as here, "a statutory provision does not burden a suspect group or a fundamental interest, the court presumes that the statute is rationally related to a legitimate government interest and will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."⁷⁹

The court concluded that legitimate government purposes could support the statutory distinction. It reasoned that the wealthy, along with all consumers, have other protections against deceptive trade practices, as demonstrated by the plaintiff's other claims in the action, and that only the additional protection offered by the DTPA was at issue.⁸⁰ The court disagreed with Alcan's contention that the wealthy need as much protection against deceptive trade practices as those who are not wealthy.⁸¹ Ultimately, the court held that "a decision not to provide the additional DTPA protection to the wealthy [was] consistent with a rational conclusion on the Legislature's part, and therefore [did] not violate the Equal Protection Clause."⁸²

III. DECEPTIVE PRACTICES

In addition to establishing consumer status, a DTPA plaintiff also must show that a "false, misleading, or deceptive act," breach of warranty or unconscionable action or course of action occurred, and that such conduct was the producing cause of the plaintiff's damage.⁸³

74. *Id.* (citing DTPA § 17.45(4)).

75. *Alcan*, 133 F. Supp. 2d at 501.

76. *Id.*

77. *Id.*

78. *Id.* (citing *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 859 n.17 (1984)).

79. *Id.* (citing *Vance v. Bradley*, 440 U.S. 93, 96-97 (1979)).

80. *Alcan*, 133 F. Supp. 2d at 501.

81. *Id.*

82. *Id.* at 502.

83. DTPA § 17.50(a)(1)-(3).

A. LAUNDRY LIST CLAIMS

DTPA section 17.46(b) contains, in 24 subparts, a nonexclusive list of actions that constitute “false, misleading or deceptive acts” under the statute. Plaintiffs invoking these “laundry list”⁸⁴ claims are generally not required to prove or plead the defendant’s state of mind or intent to deceive.⁸⁵ Nor have plaintiffs always been required to show that they relied on the enumerated deceptions.⁸⁶ Whether a consumer should have to show reliance, however, remains the subject of debate.⁸⁷ Several significant cases involving “laundry list” claims were decided during the Survey period.

Last year’s Survey reported on the case of *Helena Chemical Co. v. Wilkins*⁸⁸ in which the defendants had argued that there was insufficient evidence to support the jury verdict against them. During this Survey period, the Texas Supreme Court also examined whether there was any evidence to support the jury’s DTPA liability and causation findings.⁸⁹ The case involved a group of farmers who sued Helena, a seed seller, alleging DTPA violations, breach of warranty, and fraud. The trial court entered judgment on a jury verdict awarding damages to the farmers. Both sides appealed. The trial court submitted two DTPA questions to the jury: first, whether Helena had violated three DTPA laundry list provisions, and second, whether Helena violated section 17.50(a)(3) (unconscionable action or course of action).⁹⁰ The jury answered “yes” to both questions,⁹¹ and Helena argued on appeal that there was no evidence to support the jury’s answers.⁹² Specifically, Helena argued that any representations made to the farmers amounted to nonactionable puffing and that there was no causation evidence.⁹³ The Supreme Court agreed with the court of appeals, which held that there was some evidence to support the jury’s answers to both questions.⁹⁴

The Supreme Court noted “that the DTPA does not mention puffing as a defense,” but that it “has recognized that mere puffing statements are not actionable under sections 17.36(b)(5) or 17.46(b)(7).”⁹⁵ The puffing defense had not been extended to violations of 17.46(b)(23) (failure to

84. The earliest located reported case reference to section 17.46(b) as a “laundry list” occurred in *Mobile County Mut. Ins. Co. v. Jewell*, 555 S.W.2d 903, 911 (Tex. Civ. App.—El Paso 1977, writ ref’d).

85. *Pennington v. Singleton*, 606 S.W.2d 682, 689 (Tex. 1980). Several subsections do explicitly involve an element of scienter. See, e.g., DTPA § 17.46(b)(9), (10), (13), (16), (17) & (23).

86. *Weitzel v. Barnes*, 691 S.W.2d 598, 600 (Tex. 1985).

87. See generally *Prudential Ins. Co. v. Jefferson Assoc.*, 896 S.W.2d 156 (Tex. 1995).

88. 47 S.W.3d 486 (Tex. 2001).

89. *Id.* at 490.

90. *Id.* at 501.

91. *Id.* at 501.

92. *Id.*

93. *Helena*, 47 S.W.3d at 501.

94. *Id.*

95. *Id.* at 502 (citing *Pennington v. Singleton*, 606 S.W.2d 682, 687 (Tex. 1980)).

disclose) or 17.50(a)(3) (unconscionable conduct).⁹⁶ The Supreme Court examined the evidence that the farmers offered to support their DTPA claims⁹⁷ and found that the evidence reflected specific representations about the seed's characteristics and specific representations about how the crop would perform.⁹⁸ The Supreme Court concluded that this constituted "some evidence of misrepresentations about [the] seed's characteristics, quality, and grade amounting to more than mere puffing."⁹⁹

1. § 17.46(b)(12)—*Misrepresentation of Rights, Remedies or Obligations*

To maintain an action for misrepresentation under DTPA section 17.46(b)(12), a consumer must show that the defendant "represent[ed] that an agreement confers or involves rights, remedies, or obligations which it does not have or involve."¹⁰⁰ Plaintiffs seeking to convert a breach of contract into a DTPA violation have frequently invoked this provision.¹⁰¹

In *Bradford v. Vento*,¹⁰² the Texas Supreme Court examined several alleged laundry list violations, including section 17.46(12) of the DTPA. The case involved several causes of action filed by Vento, the purported buyer of a store in a shopping mall, against the seller, the mall manager, and mall owners. The trial court entered judgment for Vento, holding all of the defendants jointly and severally liable and awarding actual and exemplary damages. Bradford (the mall manager) and the mall owners appealed. The Corpus Christi Court of Appeals affirmed in part and reversed and rendered in part, and the parties petitioned for review.

Vento contended that his claim arose out of a conversation between Vento and Bradford when Vento paid rent due under his existing lease and also attempted to secure a new lease for himself. During the conversation, Bradford "congratulated Vento on the purchase, [and] told Vento 'not to worry' about a long-term lease until January and told Vento to come back in January and he would 'take care of' him."¹⁰³ Examining Vento's DTPA claims, the Corpus Christi court found that the only possible misrepresentation that Bradford made was that he would "take care of" Vento in January. Vento testified that he understood this to mean he would have to "work out" a lease in January. The court held that Bradford's statement was too vague to provide a standard for the jury to use

96. *Id.*

97. *Id.* at 502-03.

98. *Id.*

99. *Helena*, 47 S.W.3d at 504.

100. DTPA § 17.46(b)(12).

101. *See, e.g.*, *Garrison Contractors, Inc. v. Liberty Mut. Ins. Co.*, 927 S.W.2d 296, 300 (Tex. App.—El Paso 1996), *aff'd*, 966 S.W.2d 482 (Tex. 1998); *Adler Paper Stock, Inc. v. Houston Refuse Disposal, Inc.*, 930 S.W.2d 761, 764-65 (Tex. App.—Houston [1st Dist.] 1996, writ denied); *Century 21 Real Estate Corp. v. Hometown Real Estate Co.*, 890 S.W.2d 118, 125 (Tex. App.—Texarkana 1994, writ denied).

102. 48 S.W.3d 749 (Tex. 2001).

103. *Id.* at 755.

to measure the accuracy of the representation and was thus unactionable.¹⁰⁴

2. § 17.46(b)(23)—*Failure to Disclose*

Section 17.46(b)(23) is perhaps the broadest “laundry list” provision, as it permits a consumer to premise a DTPA claim on an allegation that the defendant failed to disclose information to the consumer prior to consummation of the transaction. Under this section, to maintain an action for failure to disclose a consumer must show that the defendant failed to disclose information concerning goods or services, which was known at the time of the transaction, and that the nondisclosure was motivated by the intent to induce the consumer into a transaction into which the consumer otherwise would not have entered.¹⁰⁵

In *Steptoe v. True*,¹⁰⁶ the purchaser of a beach home sued her real estate broker for violations of the DTPA, among other causes of action, after her home subsided into the Gulf of Mexico. The suit arose out of the broker’s alleged misrepresentations and non-disclosures in connection with the purchase of the beach house.¹⁰⁷ “Prior to closing, a concrete bulkhead was on the beachfront side of the property, seaward of the vegetation line, i.e., between the vegetation and the waterline.”¹⁰⁸ In preparation for closing, the broker transmitted two addenda to the earnest money contract—a “Coastal Property Addendum” and the “Bulkhead Addendum.” Both documents disclosed important information about the bulkhead.¹⁰⁹ “Essentially, the Coastal Property Addendum disclosed that the property line on the seaward side of the house was determined by the vegetation line. Consequently, because the vegetation line could shift, beachfront owners are required to be informed that their seaside property lines are subject to increases or decreases, as measured by that vegetation line.”¹¹⁰ The Bulkhead Addendum contained language disclosing that structures that become seaward of the vegetation line as a result of natural processes are subject to a lawsuit by the State of Texas to remove the structures.¹¹¹

At some point after the purchaser had taken possession of the residence, the State of Texas notified her of its intent to remove the bulkhead. After the bulkhead was removed, the beach continued to erode until the house finally subsided into the Gulf of Mexico.¹¹²

104. *Id.*

105. DTPA § 17.46(b)(23); see also *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 479 (Tex. 1995).

106. 38 S.W.3d 213 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

107. *Id.* at 216.

108. *Id.*

109. *Id.* at 215.

110. *Id.* at 215-16.

111. *Steptoe*, 38 S.W.3d at 216.

112. *Id.*

The purchaser's DTPA claim was based on her "reliance on an allegedly inadequate description of the property given to her by [the broker] and . . . alleged misrepresentations made by him concerning the bulkhead."¹¹³ Specifically, she complained that the broker "led her to believe that the bulkhead was a permanent structure."¹¹⁴ In the alternative, she argued that, because the broker had provided her with the Bulkhead Addendum, it could reasonably be inferred that the broker knew the bulkhead was illegal and subject to removal by the State.¹¹⁵

The trial court granted the broker's summary judgment motion, and the purchaser appealed. The Houston Court of Appeals first noted that the broker's liability turned on whether he was under a duty to disclose that the bulkhead was subject to removal beyond merely giving the purchaser the statutorily required addenda.¹¹⁶ The court found "that, based upon [the purchaser's] own deposition testimony, no reasonable jury could conclude that [the broker] made any affirmative misrepresentation . . . concerning the bulkhead."¹¹⁷ According to the purchaser's own testimony, the broker responded to her question about whether there was a problem with beach erosion by stating he "didn't really know . . . but in Crystal Beach there was not."¹¹⁸ Because there was nothing in the record to suggest the broker's statement was false, and if so, whether it related to beach erosion in Gilchrist, where the purchaser's beach house was located, the court held that the broker's answer could not be viewed as an affirmative misrepresentation.

The purchaser's common law husband testified to additional conversations he had with the broker. The husband testified that the broker told him that bulkheads were a "selling feature," and that bulkheads were also "nice to have."¹¹⁹ The court held that the broker's subjective belief that bulkheads help sell homes could not, as a matter of law, be transformed into an affirmative misrepresentation by the broker. It further held that, as a matter of law, the only other statement attributive to the broker, that bulkheads are "nice to have," likewise was not an affirmative misrepresentation.¹²⁰

The court next examined whether the broker concealed knowledge in light of his statement that bulkheads were "nice to have."¹²¹ The purchaser argued there was an inference that the broker knew the bulkhead was illegal and subject to removal based on the fact that he provided the purchaser with the Coastal Property and Bulkhead Addenda.¹²² The court found that there was nothing in the record to suggest that the bro-

113. *Id.* at 216-17.

114. *Id.* at 217.

115. *Id.*

116. *Stephoe*, 38 S.W.3d at 217.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 217-18.

121. *Stephoe*, 38 S.W.3d at 218.

122. *Id.*

ker knew the bulkhead was going to be removed, and providing the purchaser with the statutorily required addenda in no way imputed that knowledge, primarily because neither document suggested that the State would assert its right.¹²³ Thus, the court held that the trial court did not err in granting summary judgment on the purchaser's DTPA and fraud claims.¹²⁴

3. Section 17.50—Breach of Express or Implied Warranties

Although a DTPA claim may be based upon the breach of an express or implied warranty, the DTPA does not itself create any warranties.¹²⁵ To be actionable under the DTPA, an implied warranty must be recognized by the common law or created by statute.¹²⁶ A DTPA plaintiff raising a breach of warranty claim therefore must show (1) consumer status; (2) existence of the warranty; (3) breach of the warranty; and (4) that the breach was a producing cause of the plaintiff's damages.¹²⁷

In *Codner v. Arellano*,¹²⁸ a homeowner sued his subcontractor, alleging that the subcontractor negligently poured the foundation of the homeowner's residence and violated the DTPA by breaching an implied warranty of good and workmanlike performance in the construction of the foundation. The trial court granted a directed verdict against the homeowner's DTPA claim that the subcontractor breached "an implied warranty of good and workmanlike performance in the construction of [the homeowner's] slab."¹²⁹ The Austin Court of Appeals affirmed, as it could find no case that implied a warranty of good and workmanlike performance from a builder's subcontractor directly to the homeowner.¹³⁰ Because the homeowner had settled his claims against the general contractor, and because the homeowner had adequate remedies to redress the wrongs he alleged were committed by the subcontractor, the court held that the district court did not err in refusing to submit to the jury a question on the homeowner's theory that the subcontractor had breached a warranty of good and workmanlike performance.¹³¹

*Rivera v. Wyeth-Ayerst Laboratories*¹³² involved several laundry list claims, arising from the plaintiff's complaint that the defendant's product, Duract, a nonsteroidal anti-inflammatory drug used for pain management, was not what it was warranted to be—namely, a safe pain re-

123. *Id.*

124. *Id.* at 218-19.

125. *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 438 (Tex. 1995); see DTPA § 17.50(a)(2).

126. *Woodruff*, 901 S.W.2d at 438 (citing *La Sara Grain v. First Nat'l Bank*, 673 S.W.2d 558, 565 (Tex. 1984)).

127. *Johnston v. McKinney Am., Inc.*, 9 S.W.3d 271, 282 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

128. 40 S.W.3d 666 (Tex. App.—Austin 2001, no pet.).

129. *Id.* at 671.

130. *Id.* at 673.

131. *Id.* at 673-74.

132. 121 F. Supp. 2d 614 (S.D. Tex. 2000).

liever.¹³³ The United States District Court for the Southern District of Texas held that the plaintiff alleged facts sufficient to support a claim under section 17.50(b)(3) for a refund of the purchase price.¹³⁴ The court denied the defendants' motion to dismiss the plaintiff's DTPA cause of action, holding that she was not required to allege physical injury in order to recover under the refund section of the DTPA, because a claim for refund under section 17.50(b)(3) is inconsistent with a claim for physical damages.¹³⁵

B. INCORPORATION OF THE DTPA INTO THE TEXAS INSURANCE CODE

Numerous statutes incorporate various sections of the DTPA or permit recovery for their violation via the DTPA.¹³⁶ One of the most frequently invoked of these "borrowing" statutes is Article 21.21 of the Texas Insurance Code.¹³⁷ *Stumph v. Dallas Fire Insurance Co.*¹³⁸ involved an insured contractor who brought an action against his commercial general liability insurer to recover for an underwriter's alleged misrepresentation that the insured could continue sending premium payments to an independent agent who had been suspended for failing to forward premiums. The trial court entered judgment on a jury verdict in favor of the insured but denied a treble damage award. The parties appealed.

The Austin Court of Appeals examined the insurer's contention that the evidence in the record was insufficient to prove an insurance violation.¹³⁹ Regarding the DTPA and Insurance Code violations, the court found that the evidence concerning the underwriter's conduct supported the jury's finding that misrepresentations had been made.¹⁴⁰ The insured had testified that the underwriter told him to continue paying premiums to the agent, that the agent was a "good man," and that the underwriter would contact the insured if there was a "problem."¹⁴¹ Although the underwriter denied making these statements, the jury evidently believed otherwise.¹⁴² The underwriter did not disclose the agent's recent suspension to the insured, and the insurer defended the nondisclosure as one of

133. *Id.* at 617.

134. *Id.*

135. *Id.* (citing LSR Joint Venture No. 2 v. Callewart, 837 S.W.2d 693 (Tex. App.—Dallas 1992, writ denied)).

136. Statutes either incorporating provisions of the DTPA or permitting recovery for their violation via the DTPA include: TEX. OCC. CODE ANN. §§ 351.604, 702.403 (Vernon Supp. 2001); TEX. PROP. CODE ANN. § 41.007 (Vernon 2000), § 2221.024 (Vernon 1995 & Supp. 2001), §§ 221.071, 222.011, 59.005 (Vernon 1995); TEX. BUS. & COM. CODE ANN. § 35.74(c) (Vernon 1987); TEX. HEALTH & SAFETY CODE ANN. § 164.013 (Vernon 2001); TEX. INS. CODE ANN. art. 21.21 (Vernon 1981 & Supp. 2001); TEX. REV. CIV. STAT. ANN. art. 4413(36), 5221a-7, 5221 a-8, 5221f, 9020; and TEX. TRANSP. CODE ANN. § 684.086 (Vernon 1999).

137. TEX. INS. CODE ANN. art. 21.21 (Vernon 1981 & Supp. 2001).

138. 34 S.W.3d 722 (Tex. App.—Austin 2000, no pet.).

139. *Id.* at 730-31.

140. *Id.*

141. *Id.* at 731.

142. *Id.*

its “sound business practices.”¹⁴³ The court found that the evidence was sufficient to support the finding that the underwriter “failed to state a material fact, made an untrue statement of material fact, or made a statement in such a manner as to mislead a reasonably prudent person to a false conclusion of a material fact.”¹⁴⁴

C. UNCONSCIONABILITY

DTPA section 17.45(5) defines an “unconscionable action or course of action” as “an act or practice which, to a consumer’s detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.”¹⁴⁵

In *Perry Homes v. Alwattari*,¹⁴⁶ the purchasers of a new home sued their contractor for alleged DTPA violations in connection with defects in the foundation. The contractor argued that the judgment awarding the purchasers damages based upon a finding of unconscionable conduct must be reversed because there was no evidence of gross disparity between the value of the house at the time of the purchase and the price paid.¹⁴⁷ The Fort Worth Court of Appeals recognized that under the pertinent provisions of the DTPA in effect at the time the purchasers filed suit, unconscionable conduct could be found based upon a gross disparity allegation.¹⁴⁸ The court also noted that “disparity in value must be determined at the time of sale,” and that “diminution in value caused by later events cannot support an unconscionability claim.”¹⁴⁹ The real estate agent testified that the house’s actual value as a result of the foundation defect was at least \$50,000 less than the \$200,335 that the purchasers had paid.¹⁵⁰ Based upon this testimony, the court concluded that there was legally sufficient evidence to establish gross disparity at the time of the purchase.¹⁵¹

D. CONSPIRACY TO VIOLATE THE DTPA

In *Laxson v. Giddens*,¹⁵² the Waco Court of Appeals considered an issue of first impression in Texas: whether a conspiracy to violate the DTPA is actionable.¹⁵³ The court noted that a DTPA violation is per se

143. *Stumph*, 34 S.W.3d at 731.

144. *Id.*

145. Prior to the 1995 amendments, the definition also included an act or practice that “results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration.” TEX. BUS. & COM. CODE ANN. § 17.45(5)(B) (Vernon 1987).

146. 33 S.W.3d 376 (Tex. App.—Fort Worth 2000, pet. denied).

147. *Id.* at 384.

148. *Id.*

149. *Id.* at 385 (citing *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 441 (Tex. 1995)).

150. *Id.*

151. *Perry Homes*, 33 S.W.3d at 385.

152. 48 S.W.3d 408 (Tex. App.—Waco 2001, pet. denied).

153. *Id.* at 410.

an unlawful act.¹⁵⁴ The court went on to state:

[t]here is no reason that when two or more persons agree to act together to violate the DTPA, they cannot each be held liable. Otherwise two persons could agree to each violate a portion of the DTPA for the express objective of deceiving a consumer but the consumer may not have a claim unless the consumer combines the conspirators' actions to show they acted together to achieve the objective which violated the act.¹⁵⁵

The court thus held that two or more persons can be held liable for conspiring to violate the DTPA.¹⁵⁶

IV. DETERMINING THE MEASURE OF DAMAGES

A prevailing plaintiff in a DTPA action may recover economic damages.¹⁵⁷ If the trier of fact finds that the defendant acted "knowingly," the plaintiff also may recover damages for mental anguish and additional statutory damages up to three times the amount of economic damages.¹⁵⁸

A. DAMAGES

In *PPG Industries, Inc. v. JMB/Houston Centers Partners Ltd. Partnership*,¹⁵⁹ JMB, the purchaser of an office building, brought an action against PPG Industries, Inc., a window manufacturer, alleging breach of warranty and DTPA violations. JMB bought the building from Houston Center Corp. in December 1989. In July 1994, after many of the windows had fogged up and discolored, JMB sued PPG. The jury found in JMB's favor on both its DTPA and breach of warranty claims and determined that JMB had sustained approximately \$5 million in damages. Electing the greater remedy provided by the DTPA, the trial court awarded treble damages under the 1973 version of the DTPA. Thus JMB was awarded approximately \$15 million in damages and prejudgment interest.

On appeal by PPG, the Houston Court of Appeals considered PPG's contention that the 1989 statute, which provided for discretionary trebling of damages, was the appropriate version to be applied by the court. To determine which version of the statute applied, the court first reviewed the deceptive acts alleged by JMB.¹⁶⁰ Among those acts was the original sale of defective window units, which occurred in 1976.¹⁶¹ The court found that unless the 1979 or 1989 versions of the DTPA had retroactive applicability, the 1973 version of the statute, providing for the

154. *Id.* at 411.

155. *Id.*

156. *Id.*

157. DTPA § 17.50(b)(1).

158. *Id.*

159. 41 S.W.3d 270 (Tex. App.—Houston [14th Dist.] 2001, pet. filed). See *supra* note 39 and accompanying text.

160. *Id.* at 275.

161. *Id.*

mandatory trebling of damages, applied.¹⁶² The court found that the 1979 amendment to the DTPA, which provided for discretionary trebling of damages and which had prospective application only, did not apply to JMB's claim relating to the original sale of the defective window units, which occurred three years earlier.¹⁶³ The court also found that although the 1989 amendment applied to all actions commenced on or after the effective date of the amendment, the 1973 amendment applied to JMB's DTPA claim, given that the action related to property damage only, and not to death or personal injury.¹⁶⁴

In *Perry Homes v. Alwattari*,¹⁶⁵ the purchasers of a new home sued their contractor for alleged violations of the DTPA in connection with defects in the foundation. The Fort Worth Court of Appeals disagreed with the contractor's argument that the only proper measures of damages for unconscionability were benefit-of-the-bargain or out-of-pocket losses.¹⁶⁶ "Under the DTPA in effect at the time [suit was filed], a prevailing consumer could recover 'all actual' damages for economic loss sustained by the consumer as a result of the deceptive trade practice," which "include[ed] diminution in market value occurring after repairs."¹⁶⁷ In addition, the court held that the plaintiff "need only present sufficient evidence to justify a jury's finding that the costs were reasonable and the repairs were necessary."¹⁶⁸

*Stumph v. Dallas Fire Insurance Co.*¹⁶⁹ involved an insured contractor who brought an action against his commercial general liability insurer to recover for an underwriter's alleged misrepresentation that the insured could continue sending premium payments to an independent agent who had been suspended for failing to forward premiums. The trial court entered judgment on a jury verdict in favor of the insured but denied a treble damage award.

On appeal, the insured complained "that the district court should have trebled actual damages after a finding by the jury of a "knowing" violation of the Insurance Code."¹⁷⁰ The court found that the 1994 version of Article 21.21 of the Insurance Code was controlling.¹⁷¹ Under that version, "[i]f the trier of fact finds that the defendant knowingly committed the acts complained of, the court shall award, in addition, two times the amount of actual damages."¹⁷² Because the jury found that the insurer

162. *Id.*

163. *Id.*

164. *PPG Indus. Inc.*, 41 S.W.3d at 276.

165. 33 S.W.3d 376 (Tex. App.—Fort Worth 2000, pet. denied). *See supra* note 137 and accompanying text.

166. *Id.* at 386 (citing *Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 162 (Tex. 1992); *Kish v. Van Note*, 692 S.W.2d 463, 466 (Tex. 1985)).

167. *Id.*

168. *Id.* at 385.

169. 34 S.W.3d 722 (Tex. App.—Austin 2000, no pet.). *See supra* note 129 and accompanying text.

170. *Id.* at 732.

171. *Id.* at 732-33.

172. *Id.* at 733.

knowingly engaged in a false, misleading, or deceptive act or practice that was a producing cause of the damages to the insured, and because the court affirmed the jury's answer by finding that more than a scintilla of evidence that the insurer's conduct fit within the definition of "knowingly," the Austin court held that the trial court should have awarded mandatory treble damages.¹⁷³

B. ATTORNEY'S FEES

A consumer who prevails on a DTPA claim recovers reasonable and necessary attorneys' fees.¹⁷⁴

In *Buccaneer Homes of Alabama, Inc. v. Pelis*,¹⁷⁵ the owners of a mobile home sued the manufacturer and retailer under the DTPA. After the owners had settled with the retailer in an amount in excess of their economic damages, the district court entered judgment on a jury verdict against the manufacturer. The manufacturer appealed.

The Houston Court of Appeals considered the manufacturer's challenge to the trial court's award of \$85,000 in attorney's fees to the owners on the grounds that the award was improper because attorney's fees are not recoverable unless economic damages are recovered.¹⁷⁶ The court found that, while "consumers may recover attorney's fees as a prevailing party in a successful prosecution of a DTPA claim when an opposing party's counterclaim recovery offsets the consumer's recovery,"¹⁷⁷ the rule "does not apply in a case in which a consumer has already settled for an amount greater than the damages found by the jury in the trial against the non-settling defendant."¹⁷⁸ Although the owners won a jury verdict in the trial court, the owner's damages were paid in full under the pre-trial settlement agreement with the retailer and the one satisfaction rule¹⁷⁹ barred them from recovering economic damages. Thus, they could not recover attorney's fees.¹⁸⁰

V. DTPA DEFENSES AND EXEMPTIONS

The DTPA has been characterized as a "strict liability" statute, requiring only proof of a misrepresentation, without regard to the offending party's intent.¹⁸¹ This is only partially correct, since several DTPA provi-

173. *Id.*

174. DTPA § 17.50(d).

175. 43 S.W.3d 586 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

176. *Id.* at 591.

177. *Id.* (citing *McKinley v. Drozd*, 685 S.W.2d 7, 9-10 (Tex. 1985)).

178. *Id.*

179. The one satisfaction rule prohibits a plaintiff from recovering twice for a single injury. See *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390-91 (Tex. 2000) (limiting plaintiffs to a single recovery for a single injury, even if different theories of liability are alleged).

180. *Pelis*, 43 S.W.3d at 591.

181. See, e.g., *White Budd Van Ness P'ship v. Major-Gladys Drive Joint Venture*, 798 S.W.2d 805, 809 (Tex. App.—Beaumont 1990, writ dismissed).

sions expressly require proof of intentional conduct.¹⁸² Some courts have gone so far as to hold that common law defenses, such as estoppel and ratification, are not available to combat DTPA claims.¹⁸³ Other courts have recognized a variety of defenses to DTPA claims.¹⁸⁴ Additionally, both the courts and the legislature have carved out exemptions from the DTPA's reach.

A. A "MERE" BREACH OF CONTRACT IS NOT ACTIONABLE
UNDER THE DTPA

A breach of contract unaccompanied by a misrepresentation or fraud is not a false, misleading or deceptive act and thus does not violate the DTPA.¹⁸⁵ During the Survey period, several cases examined this limitation on the DTPA's reach.

In *Canfield v. Bank One, Texas, N.A.*,¹⁸⁶ Canfield had sued his bank to recover for wrongfully paid items, including forged checks and cashed-out certificates of deposit. The Texarkana Court of Appeals found that the bank's payment of forged checks did not constitute a violation of the DTPA.

The court observed that in his breach of contract claim, Canfield alleged that his bank breached the deposit account agreement when it paid the forged checks.¹⁸⁷ In his DTPA claims, Canfield alleged that the bank "misrepresented the safety and security of deposited funds, safeguards to prevent unauthorized withdrawals, and the attributes of the services it offered."¹⁸⁸ The court found that Canfield's assertions amounted to nothing more than a complaint that the bank did not comply with the terms of the deposit account agreement and, if true, the bank's actions that were contrary to its representations would result only in a breach of contract claim.¹⁸⁹

182. See, e.g., DTPA § 17.46(b)(9), (10), (13), (16), (17) & (23).

183. See, e.g., *Ins. Co. of N. Am. v. Morris*, 928 S.W.2d 133, 154 (Tex. App.—Houston [14th Dist.] 1996), *aff'd in part, rev'd in part*, 891 S.W.2d 667 (Tex. 1998); see also *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980) (recognizing that a primary purpose of the DTPA was to relieve consumers of common law defenses while providing a cause of action for misrepresentation).

184. See, e.g., *Ostrow v. United Bus. Machs., Inc.*, 982 S.W.2d 101, 105 (Tex. App.—Houston [1st Dist.] 1998, no pet.) ("We hold a DTPA claim arising out of a contract may be barred by accord and satisfaction."); *Johnson v. McLeaish*, No. 05-94-01673-CV, 1995 WL 500308, at *10 (Tex. App.—Dallas Aug. 23, 1995, writ denied) (not designated for publication) (applying illegality/public policy affirmative defense to DTPA claims); *Keriotis v. Lombardo Rental Trust*, 607 S.W.2d 44, 46 (Tex. App.—Beaumont 1980, writ *ref'd n.r.e.*) (applying statute of frauds to DTPA claims).

185. *Ashford Dev., Inc. v. USLife Real Estate Serv. Corp.*, 661 S.W.2d 933, 935 (Tex. 1983); *Quitta v. Fossati*, 808 S.W.2d 636, 644 (Tex. App.—Corpus Christi 1991, writ denied).

186. 51 S.W.3d 828 (Tex. App.—Texarkana 2001, pet. denied). See *supra* note 13 and accompanying text.

187. *Id.* at 838.

188. *Id.*

189. *Id.*

B. LEGAL MALPRACTICE CASES AND THE DTPA

In Texas, legal malpractice is not the only cause of action under which a client can recover from her attorney.¹⁹⁰ The law, however, does not permit a plaintiff to divide or fracture her legal malpractice claims into additional causes of action.¹⁹¹ In *Goffney v. Rabson*,¹⁹² the Houston Court of Appeals agreed with the defendant's argument that the plaintiff's breach of contract, breach of fiduciary duty, and DTPA claims were essentially legal malpractice claims, and because the plaintiff abandoned her legal malpractice claim prior to trial, she no longer had a viable cause of action upon which to recover.¹⁹³ With respect to her DTPA claim, the plaintiff alleged that her attorney violated several laundry list provisions and engaged in unconscionable courses of action.¹⁹⁴ The plaintiff contended that because her DTPA claims were based on the lawyer's refusal to perform the parties' contract and his attempted withdrawal prior to the plaintiff's hiring of new trial counsel, the claims were not related to the quality of the lawyer's representation of her, and, therefore, were not couched in terms of legal malpractice.¹⁹⁵ The court disagreed, finding that the plaintiff's claim that the lawyer's alleged abandonment of her on the day of trial constituted a DTPA violation was merely a legal malpractice claim, and that it did not matter that she labeled it as a DTPA claim.¹⁹⁶

The plaintiff further argued that the lawyer's alleged abandonment of her on the day of trial constituted an unconscionable course of action under the Texas Supreme Court's decision in *Latham v. Castillo*,¹⁹⁷ which recognized that an attorney might be found to have engaged in unconscionable conduct in the manner in which the lawyer represents a client. The court distinguished the *Latham* case from the instant case primarily because, as the *Latham* court explained:

'[I]f the Castillos had only alleged that [the lawyer] negligently failed to timely file their claim, their claim would properly be one for legal malpractice. However, the Castillos alleged and presented some evidence that [the lawyer] affirmatively misrepresented to them that he had filed and was actively prosecuting their claim. It is the difference between negligent conduct and deceptive conduct. To recast this claim as one for legal malpractice is to ignore this distinction.'¹⁹⁸

190. *Kahlig v. Boyd*, 980 S.W.2d 685, 688 (Tex. App.—San Antonio 1998, pet. denied).

191. *See, e.g.*, *Greathouse v. McConnell*, 982 S.W.2d 165, 172 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *Kahlig*, 980 S.W.2d at 688-91; *Smith v. Heard*, 980 S.W.2d 693, 697 (Tex. App.—San Antonio 1998, pet. denied); *Rodriguez v. Klein*, 960 S.W.2d 179, 184 (Tex. App.—Corpus Christi 1997, no pet.).

192. 56 S.W.3d 186 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

193. *Id.* at 190.

194. *Id.* at 192.

195. *Id.*

196. *Id.*

197. 972 S.W.2d 66 (Tex. 1998).

198. 56 S.W.3d at 192 (citing *Latham*, 972 S.W.2d at 68).

In *Goffney*, the Houston Court of Appeals found that it could not say that the plaintiff's allegations of unconscionable conduct constituted the type of alleged deceptive conduct that the *Latham* court distinguished from negligent conduct to support a cause of action under the DTPA, independent of a cause of action for legal malpractice.¹⁹⁹ Thus, the court held that the plaintiff could not recover on her DTPA claim.

*Mazuca v. Schumann*²⁰⁰ posed another issue involving the attorney conduct context. In the case, Schumann sued his attorney for "violations of the DTPA, breach of warranty, negligence, and gross negligence, maintaining that he was prevented from pursuing his personal injury claims because the statute of limitations had run."²⁰¹ The lawyer argued that Schumann's DTPA claim was, "in reality, a legal malpractice claim."²⁰² The San Antonio Court of Appeals examined whether the lawyer acted unconscionably under the facts proven at trial relying, not only on the statutory language of the DTPA, but also on the Texas Supreme Court's language in *Chastain v. Koonce*,²⁰³ which stated that unconscionability requires a showing that the resulting unfairness was "glaringly noticeable, flagrant, complete, and unmitigated."²⁰⁴ The court found that the lawyer's act of filing a motion for nonsuit of a claim with sufficient time remaining under the statute of limitations to re-file the cause in a more appropriate venue did not fit the *Chastain* definition of "unconscionable."²⁰⁵ In addition, the court found that the lawyer's actions did not amount to deceptive conduct required under *Latham*, as there was no evidence that the lawyer "made an affirmative misrepresentation to his client."²⁰⁶ The court reversed the judgment awarding Schumann damages based on his DTPA claim and rendered judgment that Schumann take nothing on his DTPA claims.²⁰⁷

C. PREEMPTION AND EXEMPTION FROM THE DTPA

Several statutory schemes and common law doctrines bar DTPA claims, either expressly or by implication, or affect a plaintiff's procedures for bringing DTPA claims. During the Survey period, several cases examined these limitations on the DTPA's reach.

1. *Medical Liability and Insurance Improvement Act*

*Gomez v. Diaz*²⁰⁸ involved medical malpractice claims, which are governed by the Medical Liability and Insurance Improvement Act, or

199. *Id.*

200. No. 04-00-00228-CV, 2001 WL 518300 (Tex. App.—San Antonio, May 16, 2001).

201. *Id.* at *2.

202. *Id.*

203. 700 S.W.2d 579, 584 (Tex. 1985).

204. *Id.*

205. 2001 WL 518300, at *3.

206. *Id.*

207. *Id.* at *4.

208. 57 S.W.3d 573 (Tex. App.—Corpus Christi 2001, no pet.).

MLIIA.²⁰⁹ The MLIIA is a special statutory scheme “designed to protect health care providers from patently unmeritorious claims in order to ensure that their liability insurance costs remain manageable.”²¹⁰ The Corpus Christi Court of Appeals recognized that “Texas courts have consistently held that causes of action that are, in actuality, health care liability claims cannot simply be recast in the language of a different cause of action in order to avoid application of the MLIIA.”²¹¹ Gomez brought several DTPA causes of action against her doctor, complaining that the doctor misrepresented the need for treatment and misrepresented that a service had particular qualities.²¹² The court found that what Gomez was really complaining about was a failure to properly treat her condition, which is a negligence cause of action that falls squarely under the definition of health care liability claims and is governed by the MLIIA.²¹³ The court held that the plaintiff’s DTPA causes of action that were not based on knowing conduct were merely attempts to recast liability claims into DTPA causes of action and must be governed by the MLIIA.²¹⁴

2. *Texas Motor Vehicle Commission Code*

In *Subaru of America, Inc. v. David McDavid Nissan, Inc.*,²¹⁵ discussed in last year’s Survey, the Texas Supreme Court held that the primary jurisdiction doctrine required that the trial court defer to the Texas Motor Vehicle Board with regard to the plaintiff’s DTPA claims. The Texas Motor Vehicle Commission Code²¹⁶ was enacted to govern the distribution and sale of motor vehicles “through licensing and regulating vehicle manufacturers, distributors and dealers.”²¹⁷ The Code provides that the Texas Motor Vehicle Board (“TMVB”) shall carry out the duties and functions conferred upon it by the Code. If the TMVB determines that the Code, or any TMVB rule or order, has been violated, it may levy a civil penalty, issue cease and desist orders or injunctions, or institute a lawsuit in the name of the State of Texas,²¹⁸ but it may not award damages to parties.²¹⁹

The court observed that the primary jurisdiction doctrine arises only when a plaintiff seeks a remedy in court, and an issue or a claim also falls under a regulatory scheme’s subject matter.²²⁰ Consequently, the doc-

209. TEX. REV. CIV. STAT. ART. 4590i, § 1.02 (Vernon 2001 & Supp. 2002).

210. 57 S.W.3d at 579.

211. *Id.* at 579-80 (citing *Sorokolit v. Rhodes*, 889 S.W.2d 239, 242 (Tex. 1994)).

212. *Id.* at 580.

213. *Id.*

214. *Id.*

215. 44 Tex. Sup. Ct. J. 779, No. 00-0292, 2001 WL 578337 (Tex. May 31, 2001, rehearing granted).

216. TEX. REV. CIV. STAT. ANN. art. 4413(36) (Vernon Supp. 2001).

217. *David McDavid Nissan, Inc. v. Subaru of Am., Inc.*, 10 S.W.3d 56 (Tex. App.—Dallas 1999, pet. granted).

218. TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.01-.03 (Vernon Supp. 2001).

219. *See Kawasaki Motors Corp v. Tex. Motor Vehicle Comm’n*, 855 S.W.2d 792, 797 (Tex. App.—Austin 1993, no writ).

220. 2001 WL 578337, at *9.

trine presumes concurrent jurisdiction over an issue exists between the courts and the particular agency.²²¹ The court looked to the statutory language, legislative intent, and public policies underlying the primary jurisdiction doctrine in reaching its conclusion that the Board had primary jurisdiction to make any Code-violation findings that formed the basis of the plaintiff's DTPA claims.²²²

3. *The Texas Seed Arbitration Act*

Last year's Survey covered the San Antonio Court of Appeal's decision in *Helena Chemical Co. v. Wilkins*,²²³ which the Texas Supreme Court examined during this period. The case concerns the relationship between the DTPA and the Texas Seed Arbitration Act. The case involved a group of farmers who sued Helena, a seed seller, alleging DTPA violations, breach of warranty, and fraud. The trial court entered judgment on a jury verdict awarding damages to the farmers. Both sides appealed.²²⁴ Helena argued that if the Texas Seed Arbitration Act governed any part of the suit, then all of the purchasers' claims must be arbitrated, regardless of the theory of recovery. Because the supreme court concluded that the farmers "complied with the Act and held that their delay in submitting their claims to arbitration did not bar their suit," the court deemed that "determining whether the DTPA claims were within the Act's purview" was unnecessary.²²⁵

D. "As Is" CLAUSES

An "as is" agreement generally negates the causation element of a DTPA claim.²²⁶ In *Larsen v. Carlene Langford & Associates, Inc.*,²²⁷ the Waco Court of Appeals examined "as is" language found in documents used in a real estate transaction involving the sale of a historic home. The buyers alleged various laundry list violations.²²⁸ Upon determining that the "as is" language in the real estate documents was enforceable, the Waco court concluded that the "as is" clauses conclusively negated reliance, which was essential to recovery on all of the theories that the plaintiffs asserted.²²⁹ Thus, the plaintiffs' agreement to buy the house "as is" precluded a finding that the seller's conduct caused them any harm and entitled the seller to summary judgment.²³⁰

221. *Id.* (citing *Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 18 (Tex. 2000)).

222. *Id.* at *10.

223. 47 S.W.3d 486 (Tex. 2001). See *supra* note 82 and accompanying text.

224. *Id.* at 491.

225. *Id.* at 501.

226. *Prudential Ins. Co. of Am. v. Jefferson Assocs.*, 898 S.W.2d 156, 160-61 (Tex. 1995)).

227. 41 S.W.3d 245 (Tex. App.—Waco 2001, pet. denied).

228. *Id.* at 250.

229. *Id.* at 253.

230. *Id.*

E. ASSIGNABILITY OF DTPA CLAIMS

In *PPG Industries, Inc. v. JMB/Houston Centers Partners Ltd. Partnership*,²³¹ the purchaser of an office building brought an action against PPG Industries, a window manufacturer, alleging breach of warranty and violations of the DTPA. JMB bought the building from Houston Center Corp. in December 1989. In July 1994, after many of the windows had fogged up and discolored, JMB sued PPG. The jury found in JMB's favor on both its DTPA and breach of warranty claims.²³²

On appeal, the Houston Court of Appeals examined PPG's contention that JMB was not a consumer. PPG argued that JMB could not assert a DTPA cause of action against PPG because, under JMB's purchase contract with the original owner, JMB acquired no DTPA claims. Although under the DTPA, the original owner was a "consumer," PPG contended that, JMB was not a "consumer" in its own right and a cause of action under the DTPA is a personal punitive right that cannot be assigned.²³³

The court recognized the split of authority on the issue, but noted that "several courts of appeals have either found, or assumed, that DTPA claims are assignable."²³⁴ The court also noted that assignability of a DTPA cause of action is in accord with the legislature's purpose in enacting the DTPA. Additionally, the court found it helpful to view the survivability of an action to help determine its assignability. Such an inquiry is beneficial because in Texas, at common law, if an action survives the death of a claimant, the cause of action is assignable.²³⁵ "While lower courts have differed in their holdings, the Texas Supreme Court has reserved the issue of the survivability of a DTPA cause of action."²³⁶ Because the DTPA claims asserted by JMB were in the nature of claims for breach of express warranty, and because courts have found breach of warranty claims and injury to property claims assignable, the court found that the DTPA claims in the case were assignable.²³⁷ "Thus, whatever DTPA claims Houston Center Corp., the original owner, had against PPG were assigned to JMB when JMB acquired the building in 1989."²³⁸

F. AGENCY AND THE DTPA

In *Keyser v. Miller*,²³⁹ several landowners sued Keyser, among others,

231. 41 S.W.3d 270 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

232. *Id.* at 275-76.

233. *Id.*

234. *Id.* (citing *Allstate Ins. Co. v. Kelly*, 680 S.W.2d 595, 610 (Tex. App.—Tyler 1984, writ ref'd n.r.e.); *Hart v. First Fed. Sav. & Loan Ass'n*, 727 S.W.2d 723, 725 (Tex. App.—Austin 1987, no writ); *Rosell v. Farmers Tex. County Mut. Ins. Co.*, 642 S.W.2d 278, 279 (Tex. App.—Texarkana 1982, no writ)).

235. *Id.* (citing *Harding v. State Nat'l Bank of El Paso*, 387 S.W.2d 768, 769 (Tex. Civ. App.—El Paso 1965, no writ)).

236. *PPG Indus. Inc.*, 41 S.W.3d at 275-76 (citing *Shell Oil Co. v. Chapman*, 682 S.W.2d 257, 259 (Tex. 1984)).

237. *Id.*

238. *Id.*

239. 47 S.W.3d 728 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

for misrepresentations in connection with their purchase of oversized lots in a Pearland, Texas subdivision. The landowners claimed that Keyser represented to them that they could “fence their entire back yard despite the existence of an easement.”²⁴⁰ Keyser contended that he was not individually liable under the DTPA as a matter of law because he acted solely as a corporate agent of his employer, The Homemaker.²⁴¹ The Houston Court of Appeals sustained Keyser’s point of error, because the jury’s findings did not support a judgment against Keyser individually.

The court recognized that a “corporate agent can be liable for his own torts, even if he is acting as an agent.”²⁴² The question before the court, however, was “when does an agent become individually liable for violations of the DTPA?”²⁴³ The court noted that the jury found that “Keyser acted solely within the course and scope of his employment with, or as an agent for, The Homemaker.”²⁴⁴ Thus, although the jury found that Keyser made actionable misrepresentations, it did not find that he individually violated the DTPA, a finding that had been necessary under prior Texas Supreme Court decisions.²⁴⁵ The court noted that the parties had brought no case to its attention in which an “individual who was not an officer or director of a company, and who acted solely within the scope of his employment or agency and without the intent to deceive, was found personally liable under the DTPA.”²⁴⁶ The court noted that its holding did not “preclude a finding of individual liability against employees in all cases—it only requires a finding that the employee acted in his individual capacity in violating the DTPA.”²⁴⁷ The court stated that if it accepted the appellees’ position in the case, “every case against a corporation will involve potential DTPA liability for the individual who spoke the words that constituted the misrepresentation, even though the corporation authorized him to make the representation, even though he was not an officer or director of the corporation but was the lowest employee, and even though he did not know the representation was false.”²⁴⁸ Thus, after extensive analysis, the court concluded that the personal judgment against Keyser, in the absence of any finding that he acted knowingly and in the presence of findings that he acted solely in his capacity as an employee or agent of The Homemaker and that he did not commit fraud, was error.²⁴⁹

240. *Id.* at 729.

241. *Id.*

242. *Id.* (citing *Leitch v. Hornsby*, 935 S.W.2d 114, 117 (Tex. 1996)).

243. *Id.* at 730.

244. *Id.* at 731.

245. *Keyser*, 47 S.W.3d at 731.

246. *Id.*

247. *Id.* at 733.

248. *Id.* at 733-34.

249. *Id.*

G. LIMITATIONS

Under the DTPA's limitations provision, an action must be commenced within two years after the date on which the false, misleading or deceptive act or practice occurred or within two years after the consumer discovered, or should have discovered, the occurrence of the false, misleading or deceptive act or practice.²⁵⁰

In *Underkofler v. Vanasek*,²⁵¹ the Texas Supreme Court reversed the Dallas Court of Appeals' holding that the limitations tolling rule the supreme court adopted in *Hughes v. Mahaney & Higgins*²⁵² applied to the plaintiff's DTPA claims.²⁵³ In *Hughes*, the supreme court "announce[d] a new rule tolling limitations until all appeals of the underlying claim are exhausted when an attorney allegedly commits malpractice while providing legal services in the prosecution or defense of a claim which results in litigation."²⁵⁴ The *Underkofler* court noted that the "Legislature has adopted a specific statute of limitations for DTPA claims, and has included only two exceptions to the general rule that limitations begins to run on the date the wrongful act occurred: a discovery rule and a fraudulent concealment rule."²⁵⁵ The supreme court deferred to the Legislature's explicit policy determination that those are the only two exceptions to the DTPA statute of limitations and the court refused to rewrite the statute to add the *Hughes* tolling rule as a third.²⁵⁶ The supreme court overruled *Aduddell v. Parkhill*,²⁵⁷ which was issued the same day as *Hughes*. Due to the brevity of the analysis in *Aduddell*, and the supreme court's conclusion that the Legislature circumscribed the exceptions to limitations for DTPA claims, the court overruled *Aduddell* to the extent it applied *Hughes* to DTPA claims.²⁵⁸

VI. CLASS ACTIONS

*Peltier Enterprises, Inc. v. Hilton*²⁵⁹ was a class action lawsuit in which a putative class of car buyers sued a car dealership, and several banks, alleging fraudulent concealment, DTPA violations of unconscionability and failure to disclose, and tortious interference with a potential contract. The complaints were based on the dealership's admitted practice of selling a car, providing financing, and "shopping" the paper to financial institutions, one of which purchases the paper at a discount. In other words, the consumer was offered a particular rate of interest but the financial institution charged a lower rate of interest, with the difference going to

250. DTPA § 17.565.

251. 53 S.W.3d 343 (Tex. 2001).

252. 821 S.W.2d 154 (Tex. 1991).

253. *Underkofler*, 53 S.W.3d at 346.

254. *Hughes*, 821 S.W.2d at 159.

255. *Underkofler*, 53 S.W.2d at 346.

256. *Id.*

257. *Hughes*, 821 S.W.2d at 158.

258. *Underkofler*, 53 S.W.2d at 346-47.

259. 51 S.W.3d 616 (Tex. App.—Tyler 2000, pet. denied).

the dealer. The payment was called a "dealer participation fee," and the consumer was never told about the money that goes to the dealer or about the bank's lower interest rate.²⁶⁰

The dealer maintained that its practice was in strict compliance with the Texas Finance Code. The car buyers, however, contended that the "dealer participation fee" was actually a kickback to the dealer for giving the bank its financing business.

After a trial on the merits of several claims asserted by two class representatives, the jury found for the banks and the dealership. However, the trial court refused to render judgment on the verdict and certified a class action. The bank and the dealer filed an interlocutory appeal challenging class certification.

In reviewing the causes of action brought by the car buyers against the bank and the dealer, the court concluded that the "resolution of individual issues was likely to be an overwhelming and unmanageable task for a single jury."²⁶¹ As for the car buyers' unconscionability claim, the court noted that there must be a showing of what the consumer could have or would have done if he had known about the dealer participation fee.²⁶² "For example, if the consumer could not get financing through any other source and still wanted the car, he might have purchased it under the retail installment contract as written even if told of the transaction with the bank."²⁶³ Or if the difference in payments was very small, the consumer might not have cared at all.²⁶⁴ There would also need to be some showing of each customer's "knowledge, ability, experience, or capacity."²⁶⁵ The court opined that a plaintiff with knowledge about indirect lending or with years of experience in the car selling business would not be able to show that the dealer did anything "unconscionable."²⁶⁶

The car buyers also brought a "failure to disclose" claim under DTPA section 17.46(b)(23).²⁶⁷ The court observed that this claim requires individualized proof because reliance is an essential element of the claim.²⁶⁸ Again, the question remained as to what each class member could or would have done if he or she had known of the transaction between the dealer and the bank.²⁶⁹ The court stated that "it was not possible that any one individual's evidence on this point could be substituted for another's."²⁷⁰

260. *Id.* at 619-20.

261. *Id.* at 624.

262. *Id.* at 623.

263. *Id.* at 623-24.

264. *Peltier*, 51 S.W.3d at 624.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Peltier*, 51 S.W.3d at 624.

270. *Id.* (citing *Life Ins. Co. of the Southwest v. Brister*, 722 S.W.2d 764, 774 (Tex. App.—Fort Worth 1986, no writ)).

The Tyler court held that “because of the numerous fact issues raised by the pleadings, which could only be determined by questioning each individual plaintiff, the common issues did not predominate over questions affecting only individual class members.”²⁷¹ Accordingly, the Tyler Court of Appeals reversed the district court’s certification of the class.

VII. CONCLUSION

This year’s DTPA cases exhibit a continuation of trends perceived in previous Surveys. Of the twenty-four opinions selected this year for discussion, only four involved traditional consumer goods (two involved automobiles, one involved a motorhome and one involved pharmaceuticals). Seven cases involved real estate-related disputes (either the purchase of real estate interests or disputes involving construction materials). Professional and financial services continue to dominate the reported decisions; of the ten cases in this category, four involved banking or other financial services, one involved insurance and five involved claims of lawyer or physician malpractice. At least among the reported decisions, “traditional” consumer disputes remain the exception rather than the rule.

This year’s cases also confirm that threshold issues concerning the DTPA’s proper scope continue to command significant judicial attention—albeit not always with consistent results. While decisions such as *Burnap*²⁷² suggest that it is the plaintiff’s relationship to the transaction, rather than his relationship to the defendant, that is of primary significance when determining DTPA standing, the *Codner*²⁷³ decision demonstrates that privity is not altogether irrelevant to the task of measuring the DTPA’s reach. The court’s opinion in *Anton*²⁷⁴ demonstrates that it is important to go beyond the simple question of whether goods or services are involved in the disputed transaction, and to ask whether some problem with those goods or services actually forms the basis of the plaintiff’s complaint. In contrast, the *Laxson*²⁷⁵ court’s holding that deficiencies in a putative DTPA plaintiff’s case may be elided by characterizing the defendants’ conduct as a “conspiracy” to violate the DTPA promises to inject additional uncertainty into the already vexing task of outlining the proper contours of the statute’s reach.

Like past surveys, the current crop of cases suggests that it is the multi-valent nature of the inquiry into consumer status that continues to confound judicial efforts to rationalize DTPA standing. As we have

271. *Id.*

272. 38 S.W.3d 612 (Tex. App.—San Antonio 2000, no pet.). See *supra* note 48 and accompanying text.

273. 40 S.W.3d 666 (Tex. App.—Austin 2001, no pet.). See *supra* note 119.

274. 36 S.W.3d 251 (Tex. App.—Austin 2001, pet. denied). See *supra* note 56 and accompanying text.

275. 48 S.W.3d 408 (Tex. App.—Waco 2001, pet. denied). See *supra* note 143 and accompanying text.

previously suggested,²⁷⁶ attempts to render standing with simplistic formulae rarely contribute to illumination of the relevant issues. The salient inquiry remains whether conferring DTPA standing on a particular consumer would further the statutory goal of leveling the playing field between merchants and their customers, or would serve as a sword, rather than as a shield, in the resolution of commercial disputes.²⁷⁷

276. See 53 SMU L. REV. 865, 897 (Summer 2000).

277. See 54 SMU L. REV. 1269, 1305 (Summer 2001).