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DECEPTIVE TRADE PRACTICES AND ANTITRUST

*Philip K. Maxwell**
*Tim Labadie***

I. DECEPTIVE TRADE PRACTICES ACT

A. CONSUMER STANDING

1. *When is a bank customer a "consumer?"*

a. Loan transactions

UNDERSTANDING the cases decided during the Survey period on this issue requires a brief review of the DTPA's definition of "consumer" and the history of how Texas courts have applied it in suits against financial institutions.

The DTPA's causes of action may be brought only by a "consumer," a term the statute defines as one "who seeks or acquires by purchase or lease, any goods or services."¹ Twelve years ago in *Riverside National Bank v. Lewis*² the supreme court held, 5 to 4, that money is not within the definition of "goods"³ and the extension of credit is not within the definition of "services."⁴ The supreme court concluded that Lewis, who claimed his car was repossessed because the defendant refused to loan him the money to pay off his note at the repossessing bank, was not a "consumer."⁵ The court did indicate, however, that bank services other than the mere extension of credit may be within the DTPA's definition of services.⁶

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1. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987) (hereinafter all cites to the statute will be to "DTPA §").

2. 603 S.W.2d 169 (Tex. 1980).

3. DTPA § 17.45(1) (Vernon 1987) defines goods as "tangible chattels or real property purchased or leased for use."

4. DTPA § 17.45(2) (Vernon 1987) states that "'[s]ervices' means work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods."

5. *Riverside*, 603 S.W.2d at 174-75.

6. The court noted that:

The argument that services existed in the lending of money, and in the process of determining whether to lend money, and were necessarily a part of the inter-

Two years later the court sharply limited the impact of *Riverside* in *Knight v. International Harvester Credit Corp.*⁷ In *Knight*, the defendant creditor financed plaintiff's purchase of a truck using a form that contained a waiver of the plaintiff's right to complain of late delivery of the truck, a provision outlawed by the Texas Credit Code and hence actionable under DTPA section 17.46(b)(12). The court distinguished *Riverside* because in that case the borrower sought only the extension of credit, whereas "Knight's objective in the transaction was the purchase of a dump truck."⁸ Significantly, the plaintiff in *Knight* made no complaint about the truck; his sole complaint was based on a DTPA violation in the credit document.

Further erosion of *Riverside* occurred a year later in *Flenniken v. Longview Bank & Trust Co.*⁹ In *Flenniken* the bank was assigned a mechanic's and materialman's lien contract that obligated a homebuilder to construct the plaintiffs a house, which he failed to complete. Failing to reach agreement with the plaintiffs on what to do with the unfinished house, the bank foreclosed, conduct that the jury found unconscionable under the DTPA. The supreme court again distinguished *Riverside*, noting that there "the sole basis of Lewis' complaint was the Bank's failure to lend him money as it had promised it would [whereas] . . . the Flennikens did not seek to borrow money; they sought to acquire a house. The house thus forms the basis of their complaint."¹⁰

A year after *Flenniken* the court reaffirmed the limited effect of *Riverside* in *La Sara Grain Co. v. First National Bank of Mercedes*.¹¹ In that case, La Sara complained that the bank, through unauthorized transactions with Jones, a La Sara employee, enabled Jones to embezzle over \$300,000 of La Sara's money. One such transaction was the bank permitting Jones to take out a loan in La Sara's name and allowing him to deposit half the loan proceeds in his personal account. The bank sought sanctuary in *Riverside*, but the court declined to provide it. Referring to *Knight* and *Flenniken*, the court noted that it had "twice limited [*Riverside*] to its facts, emphasizing that Lewis sought only the extension of credit from *Riverside*, and nothing more."¹² The court held that "a lender may be subject to a DTPA claim if the borrower's 'objective' is the purchase or lease of a good or service thereby qualifying the borrower as a consumer."¹³ In explaining why La

est rate or purchase price of the loan, is not supported by the evidence adduced at trial. This argument, contained in briefs, is merely hypothetical. There is nothing to support it in the Statement of Facts.

603 S.W.2d at 175 (emphasis added).

7. 627 S.W.2d 382 (Tex. 1982).

8. *Id.* at 389.

9. 661 S.W.2d 705 (Tex. 1983).

10. *Id.* at 707-08.

11. 673 S.W.2d 558, 566-67 (Tex. 1984); see also, First Fed. Sav. & Loan Ass'n v. Rite-nour, 704 S.W.2d 895, 900 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.) (holding bank client who acquired certificate of deposit and also purchased collateral financial counseling services, paid for out of bank's profits, to be a consumer).

12. *La Sara Grain*, 673 S.W.2d at 566.

13. *Id.* at 567.

Sara's proof did not meet this test, the court described the kind of evidence that would:

Obviously, we cannot determine La Sara's objective concerning this loan, because La Sara's complaint is that it did not authorize the transaction. There is no evidence, however, that Jones represented to the bank that the loan was to purchase or lease goods or services, that the bank thought the loan was for that purpose, or that the loan was one of a series with which La Sara obtained goods or services. In fact, there is no evidence that La Sara ever borrowed money from the bank for goods or services. Because the loan involves only the extension of credit, La Sara has not shown itself to be a consumer and therefore has no DTPA claim.¹⁴

Significantly, the court did not require that any complaint be leveled at the good or service acquired with the loan proceeds; it was sufficient that acquisition of goods or services was the objective or result of the loan.

Because the objective of virtually all loans is to buy goods or services, *La Sara* seemed a deathknell for *Riverside* in all but purely refinancing situations. In other words, *Riverside* appeared to have become less the rule than the exception. Several courts during the Survey period, however, applied *Riverside* to deny consumer standing. These courts either declined to follow *La Sara* because of perceived differences in the facts or, more importantly, by requiring, though *La Sara* did not, that there be some complaint about the good or service to be acquired with the loan proceeds.

The court in *Bank of El Paso v. T.O. Stanley Boot Co.*¹⁵ held that a boot manufacturer claiming the bank reneged on a promise to extend a \$500,000 line of credit to pay operational expenses, was not a "consumer."¹⁶ The court acknowledged that *La Sara* grants consumer status "where there has been a showing that the lender's extension of money was directly related to acquiring goods or services,"¹⁷ but concluded, without any discussion of the purpose to which the instant loan proceeds were to be put, that "the facts of this case do not lend themselves to this interpretation."¹⁸

In *Central Texas Hardware, Inc. v. First City, Texas-Bryan*,¹⁹ Central Texas Hardware, Inc. (CTHI) sued First City for breaching an oral commitment to loan CTHI money to buy seasonal inventory. Without even citing *La Sara*, the court concluded that the plaintiff was not a "consumer" because there was no complaint regarding the inventory items that would have been purchased if the bank had made the loan.²⁰

14. *Id.*

15. 809 S.W.2d 279 (Tex. App.—El Paso 1991) *aff'd in part, modified on other grounds*, 36 Tex. Sup. Ct. J. 259 (Dec. 2, 1992).

16. *Stanley Boot*, 809 S.W.2d at 288-289.

17. *Id.* at 289.

18. *Id.* The holding seems questionable in light of the evidence that expenses of operating a boot manufacturing facility would obviously be for "services" (i.e., employee wages) and "goods" (i.e., leather and other raw material for bootmaking). Indeed securing money to purchase leather to make boots had been the explicit purpose of the plaintiff's prior loans with the bank.

19. 810 S.W.2d 234 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

20. *Id.* at 237. This holding is not only afoul of the supreme court's opinion in *Knight*,

This reasoning was followed by the Fifth Circuit in *Walker v. FDIC*²¹ in order to deny consumer standing to Walker because he was not complaining about the goods he intended to purchase with the money he wanted to borrow from the bank, but about the bank's refusal to loan the money as promised. Walker, a real estate developer, sold an office building to Mainland Savings Association for \$1 million, plus, he said, the extension of a multi-million dollar development loan that would enable Walker to build a hotel. The million dollars and the property were exchanged, but Mainland never delivered on the \$21 million loan. The court determined that Walker was not a consumer because the transaction between him and the bank was a "pure loan transaction" outside the scope of the DTPA.²² This was true, according to the court, because Walker was not complaining about the hotel, but about the bank not loaning him the money as promised. In reaching its decision, the Fifth Circuit chose to follow *Central Texas Hardware* rather than *Security Bank v. Dalton*.²³ In *Dalton*, the court concluded that Dalton was a consumer as to the bank because the loan sought was to build a funeral home even though Dalton's complaint had nothing to do with the funeral home.²⁴ Instead, Dalton complained that the bank wrongfully dishonored his checks, froze his accounts and failed to renew his note as promised.

*Henderson v. Texas Commerce Bank-Midland*²⁵ presented a *Riverside* set of facts. Henderson alleged that Texas Commerce Bank (TCB) violated the DTPA by failing to loan him money to refinance certain personal and business obligations then owing to InterFirst Bank. The court declined to accord Henderson consumer standing because he sought only to borrow money to refinance his debts at InterFirst.²⁶ The court further held that Henderson's only complaint was that TCB failed to make the loans and that he made no complaint pertaining to any collateral service that TCB provided or was to provide.²⁷

The answer to the confusion in the cases is for the supreme court to overrule *Riverside* as wrongly decided. Just as a bank depositor—whose status as a consumer continues to be upheld by the courts—receives "services" from a bank, so does a borrower. The correct analysis begins with the observation that the banks are not lending their money, but rather their depositor's money. As one critic of *Riverside* has explained:

Banks are not providers of credit, they are credit market intermediaries. In economic terms, they borrow from savings surplus units (generally households, in the form of deposits) and make these funds available to deficit units. In so doing, they perform a variety of "services." They

discussed *supra* at text accompanying notes 7-8, it would effectively repeal the DTPA in refusal to loan cases because there never will be any complaint about goods or services never purchased or acquired.

21. 970 F.2d 114 (5th Cir. 1992).

22. *Id.* at 123.

23. 803 S.W.2d 443 (Tex. App.—Fort Worth 1991, writ denied).

24. *Id.* at 452-53.

25. 837 S.W.2d 778 (Tex. App.—El Paso 1992, writ denied).

26. *Id.* at 782.

27. *Id.*

provide economies of scale not available to the individual borrower or saver, thereby reducing transactions costs. A financial intermediary is able to pool the savings of individual savers to lend funds more closely tailored to the needs of the borrower, thus providing flexibility to the borrower who would otherwise have to deal with a large number of lenders. Financial intermediaries spread risks, which provides a higher degree of liquidity to the saver. In summary, they channel funds from the ultimate lender to the ultimate borrower at a lower cost, or with more convenience, or both, than is possible with a direct loan from the ultimate lender. When expressed in these terms, it is difficult to fathom how seeking the use of money is not seeking a "service."²⁸

Thus, consumers who borrow from banks and other financial institutions are no different from those who retain "loan brokers" to find them a loan. There is no valid reason for holding, as the courts have, that the loan broker's customer is a "consumer"²⁹ and denying that status to the bank's customer.³⁰

b. Services other than lending money

Texas courts continue to have no problem with the consumer standing of bank depositors. In *McDade v. Texas Commerce Bank*³¹ McDade, upon retiring from Texas Commerce Bank (TCB) after 27 years, deposited the funds he received from his TCB thrift plan into what the bank led him to believe was a nontaxable retirement account. McDade later learned that the money was put in a regular, taxable account. He sued the bank under the DTPA and for negligence. McDade asserted that the bank breached an express warranty that it would put his money in a nontaxable retirement account. TCB, relying on *Riverside*, argued that McDade was not a "consumer," because he was not seeking goods or services. McDade relied on the holding in *La Sara* that "the services provided by a bank in connection with a checking account are within the scope of the DTPA."³² The *McDade* court held that this case more closely resembled *La Sara* than *Riverside*. "Here, McDade was seeking to purchase the services TCB provided as an IRA trustee. McDade did more than seek to deposit money in an account; he sought to purchase TCB's services as an IRA trustee."³³ The court thus concluded that McDade was a "consumer" under the DTPA.³⁴

Similarly, the Fifth Circuit, in *Cushman v. Resolution Trust Co.*,³⁵ allowed a purchaser of a certificate of deposit to sue the lending institution under the

28. Robert Wright, *Banks and the Texas Deceptive Trade Practices Act*, THE TEXAS BANK LAWYER, Vol. 5, No. 9, February, 1982.

29. See *Lubbock Mortgage & Inv. Co. v. Thomas*, 626 S.W.2d 611, 614 (Tex. App.—El Paso 1981, no writ).

30. For a thorough analysis of the relationship between depositors, borrowers, and financial institutions and an incisive criticism of the holding in *Riverside*, see John Krahmer et al., *Banks and the Texas Deceptive Trade Practices Act*, 18 TEX. TECH L. REV. 1 (1987).

31. 822 S.W.2d 713 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

32. *Id.* at 719 (quoting *La Sara*, 673 S.W.2d at 564).

33. *McDade*, 822 S.W.2d at 719.

34. *Id.*

35. 954 F.2d 317 (5th Cir. 1992).

DTPA, adopting the holding in *Plaza National Bank v. Walker*³⁶ that a savings account depositor is a "consumer" under the DTPA.³⁷

2. *The plaintiff's relationship to the transaction, not the defendant, determines standing as a "consumer."*

It has long been held that there is no privity requirement in the DTPA, and that a plaintiff's "consumer" standing is determined by his relationship to the transaction—i.e., did he seek or acquire goods or services—and not his relationship to the defendant.³⁸ It has also long been the law that the "consumer" need not himself have purchased the good or service; it is sufficient that he acquired or sought to acquire either.³⁹

During the Survey period, the Fifth Circuit applied these principles in *Wellborn v. Sears, Roebuck & Co.*⁴⁰ to allow a DTPA suit to be brought on behalf of Bobby Wellborn, a teenager who was killed when a defective garage door opener that his mother had purchased failed to raise the door when it came into contact with him. Sears argued that Bobby was merely an "incidental user" and not a "consumer" under the DTPA because he neither sought nor acquired the garage door opener. As a starting point for its analysis on this issue, the court noted that the terms of the DTPA are to be liberally construed in order to protect consumers from any deceptive trade practice.⁴¹ The court then noted that direct contractual privity is not a consideration in determining consumer status; it is established by the plaintiff's relationship to the transaction, his seeking or acquiring "goods" or "services," not on his contractual relationship with the defendant.⁴² The court concluded that, "[a]lthough Bobby did not enter into a contractual relationship with the defendants, he acquired the garage door opener and the benefits it provided [T]he garage door opener . . . was purchased for his benefit, installed in his home, and used by him"⁴³ Consequently, he was a "consumer" for purposes of the DTPA.⁴⁴

A similar result was reached in *Perez v. Kirk & Carrigan*.⁴⁵ This suit arose out of the Alton school bus tragedy, which occurred on September 21, 1989. Perez was employed by Valley Coca-Cola as a truck driver. On the morning of the accident, Perez attempted to stop his truck at a stop sign but the brakes failed causing the truck to collide with a school bus. The loaded bus was knocked into a caliche pit and twenty-one children died. Perez suffered injuries from the collision and was taken to a local hospital to be treated. The next day, Kirk & Carrigan, lawyers who had been hired to represent Valley Coca-Cola, visited Perez in the hospital in order to take his

36. 767 S.W.2d 276 (Tex. App.—Beaumont 1989, writ denied).

37. 954 F.2d at 327.

38. See *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 541 (Tex. 1981).

39. See *Kennedy v. Sale*, 689 S.W.2d 890, 892 (Tex. 1985).

40. 970 F.2d 1420 (5th Cir. 1992).

41. *Id.* at 1426.

42. *Id.*

43. *Id.* at 1426-27.

44. *Id.*

45. 822 S.W.2d 261 (Tex. App.—Corpus Christi 1991, writ denied).

statement before a court reporter. Perez claimed that the lawyers told him that they were his lawyers also and that anything he told them would be kept confidential. With this understanding, Perez gave them a sworn statement concerning the accident. Only after this visit did Kirk & Carrigan make arrangements for a criminal defense attorney to represent Perez. This attorney was paid by National Union, which covered both Valley Coca-Cola and Perez for liability in connection with the accident.

Sometime later, Kirk & Carrigan, without telling Perez or his criminal defense attorney, turned Perez's statement over to the district attorney's office. Perez claimed that partly on the basis of this statement, the district attorney was able to obtain a grand jury indictment of Perez for involuntary manslaughter for his actions in connection with the accident. Perez sued Kirk & Carrigan along with Valley Coca-Cola, other Coca-Cola entities, and National Union. Perez asserted numerous causes of action against Kirk & Carrigan, including breach of fiduciary duty, negligent and intentional infliction of emotional distress, and violations of the DTPA and the Insurance Code. Kirk & Carrigan moved for summary judgment on all of Perez's claims on the grounds that no attorney/client or other fiduciary relationship existed, and that even if such a relationship existed, no damages resulted from the asserted breach. Moreover, Kirk & Carrigan argued that Perez's claims were, in actuality, claims for malicious prosecution, that Perez was not a "consumer" under the DTPA, and that Perez failed to state a cause of action under the Insurance Code. The trial court granted the summary judgment and rendered judgment that Perez take nothing on his claims against Kirk & Carrigan. Perez appealed and the court of appeals reversed and remanded.⁴⁶

The court rejected Kirk & Carrigan's position that Perez was not a consumer under the DTPA because he did not seek their services, holding that it was not required that Perez pay for the legal services he received from Kirk & Carrigan to be a consumer under the DTPA.⁴⁷ The summary judgment evidence showed that Perez acquired the services of Kirk & Carrigan who were paid by Valley Coca-Cola or its insurer, National Union. According to the court, "[s]imply because those services were actually purchased by someone else does not disqualify Perez from claiming to be a consumer for purposes of his DTPA claim against the provider of those services."⁴⁸

The foregoing cases are difficult to reconcile with the result reached in *Hernandez v. Kasco Ventures, Inc.*⁴⁹ Kasco leased a warehouse to Miles for storage purposes. In order to allow Miles to load and unload freight, Kasco equipped the warehouse with dock levelers. Miles soon began experiencing various problems with the dock levelers, and pursuant to Kasco's request, the manufacturer reportedly repaired them. Hernandez, a Miles' warehouseman, was injured because of a malfunctioning dock leveler. Her-

46. *Id.* at 268.

47. *Id.*

48. *Id.*

49. 832 S.W.2d 629 (Tex. App.—El Paso 1992, no writ).

nandez sued Kasco under the theories of negligence, warranty, strict liability, and deceptive trade practices. Hernandez alleged that as the landlord, Kasco was responsible for the dock levelers. The court of appeals affirmed the summary judgment as to Hernandez's DTPA cause of action finding that he was not a "consumer" because, according to the court, he "did not request or ask for the goods"⁵⁰ and "never owned the dock levelers."⁵¹

The Corpus Christi court also recently refused to grant consumer status to a person because he, in the court's view, did not have a relationship to a sales transaction. *Lara v. Lile*⁵² was brought on behalf of the estate of Lara who was killed when a truck, under which he had sought refuge from the rain, ran over him. At the time, Lara worked for Heldenfels Brothers, Inc., which was working on a road construction job site. Lile owned Raven Transport and Raven Supply, which contracted with Heldenfels to deliver concrete boxes to be used in the construction of drainage culverts at the site. When a sudden rainstorm began, Lara ran under the flat-bed portion of a Raven Supply truck to escape the rain. A few minutes later, a Raven employee moved the truck forward, killing Lara. Celia Lara, individually and as next friend of Lara's children, and on behalf of the estate of Raul Lara, brought suit against Heldenfels and Lile. In addition to asserting a cause of action for wrongful death, the Laras brought an action for violation of the DTPA.

The court recognized that a "consumer" under the DTPA is:

one who seeks or acquires by purchase or lease any goods or services. The plaintiff establishes his standing as a consumer in terms of his relationship to the transaction, not by a contractual relationship with the defendant. Thus, the plaintiff may acquire goods or services purchased by another for the plaintiff's benefit.⁵³

Even so, the court stated, "a person who has no relationship to the sales transaction may not be a consumer under the DTPA."⁵⁴ The court then considered what goods or services Mr. Lara received or acquired from Raven, the trucking company owned by Lile. According to the court, the only service performed by the trucking firm was the transportation of culverts from one location to another. Raven's trucking service was not sought, received, or acquired by Lara, nor did it benefit Lara. The only connection between Lara and Raven consisted of both parties performing work for Heldenfels, Lara as an employee and Raven as a subcontractor. The court thus held that Lara was not a "consumer" of Raven's services and affirmed the granting of the special exceptions.⁵⁵

50. *Id.* at 634. That the plaintiff need not "request or ask" for the goods or services to be a "consumer" is the holding of the cases discussed *infra* under the heading "Involuntary acquisition of services."

51. *Id.*

52. 828 S.W.2d 536 (Tex. App.—Corpus Christi 1992, writ denied).

53. *Id.* at 541 (citations omitted) (quoting DTPA § 17.45(4) (Vernon 1987)).

54. *Id.* at 542.

55. *Id.*

3. Goods or services forming the basis of the complaint

The requirement that to be a "consumer" the goods or services sought or acquired must "form the basis of the complaint" was first announced in *Cameron v. Terrell & Garrett, Inc.*,⁵⁶ a suit by homebuyers against the seller's real estate agent, who misrepresented the number of square feet in the house. The court of appeals found no consumer standing because the buyers had not sought or acquired services from the seller's agent.⁵⁷ The supreme court reversed, holding that it is unnecessary that the plaintiff seek or acquire goods furnished by the defendant.⁵⁸ Though not accepting the buyers' contention that they had sought or acquired the services of the seller's agent, the court held it enough that the buyers' complaint was based on the home, which was covered by the DTPA's definition of "goods."⁵⁹

The "form the basis of the complaint" requirement was used in three cases in the Survey period to deny consumer standing. Two of these cases, *Central Texas Hardware, Inc. v. First City, Texas-Bryan*⁶⁰ and *Walker v. FDIC*,⁶¹ are discussed above under the heading, "When is a bank customer a 'consumer'?"⁶² In the third case, *Lochabay v. Southwestern Bell Media, Inc.*,⁶³ Bell contracted with Lochabay, an attorney, to publish his advertisement in the Yellow Pages. Lochabay furnished to Bell a copy of the advertisement he wanted to publish. No Bell employee assisted Lochabay or suggested improvements in the advertisement. When Bell sued to collect for the advertisement, Lochabay contended that Bell had violated DTPA section 17.46(b)(23) by failing to inform him of defects in the design and layout of his advertisement. The court of appeals concluded that Lochabay was not a "consumer" under the DTPA because the service he sought and purchased from Bell, that of publishing his advertisement, did not form the basis of his complaint.⁶⁴ The court viewed Lochabay's complaint as being that Bell never provided or undertook to provide *advice* respecting the quality of his advertisement rather than the *publishing* of his advertisement.⁶⁵

4. Third party beneficiaries of insurance policies and "consumer" standing

In *Watson v. Allstate Insurance Co.*,⁶⁶ Ms. Watson was involved in a car wreck with Mr. Townley, who was insured by Allstate. After getting less than satisfactory treatment of the claim she made upon Allstate for the damages caused by Townley, Watson sued Allstate under the DTPA (and for other causes of action) without first getting a judgment against Townley or

56. 618 S.W.2d 535 (Tex. 1981).

57. *Cameron v. Terrell & Garrett, Inc.*, 599 S.W.2d 680, 683-84 (Tex. Civ. App.—Fort Worth 1980), *rev'd*, 618 S.W.2d 535 (Tex. 1981).

58. 618 S.W.2d at 540-41.

59. *Id.* See definition of "goods" *supra* note 3.

60. 810 S.W.2d 234 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

61. 970 F.2d 114 (5th Cir. 1992).

62. See *supra* text accompanying notes 19-24.

63. 828 S.W.2d 167 (Tex. App.—Austin 1992, no writ).

64. *Id.* at 172.

65. *Id.*

66. 828 S.W.2d 423 (Tex. App.—Fort Worth 1991, writ granted).

otherwise establishing his legal responsibility for the wreck. The trial court granted a summary judgment in Allstate's favor, ruling that Watson was not a consumer.

On appeal, Watson argued that while she did not seek by purchase the benefits of insurance, she did acquire such benefits as they are mandated by the Texas Motor Vehicle Safety Responsibility Act. Watson compared her situation to that presented in *Kennedy v. Sale*,⁶⁷ where the supreme court held that an employee whose employer purchased insurance on his behalf was a consumer since he "acquired" the insurance services.⁶⁸ The court of appeals held, however, that Watson was not a consumer because she sought only insurance proceeds and these are not goods or services.⁶⁹ The court also seemed to place some amount of importance on the fact that Watson was an unknown intended beneficiary, rather than a known beneficiary, as was the case in *Kennedy v. Sale*.⁷⁰ The court's reasoning is inconsistent with *HOW Insurance Co. v. Patriot Financial Services, Inc.*,⁷¹ which held that a condominium purchaser was a consumer with respect to an insurer who insured the performance of the builder.⁷² The court found that the condominium owner "acquired the services provided by HOW when she purchased the condominium. That [she] did not personally purchase the insurance is of no consequence."⁷³ The same is true of Ms. Watson. She acquired the services provided by Allstate when Mr. Townley collided with her car. That Ms. Watson was an unknown beneficiary at the time Mr. Townley purchased the insurance should be of no consequence since it was known that all individuals who Mr. Townley injured by the negligent use of his car were the intended beneficiaries of his insurance, insurance that is mandated by statute for the protection of such people.

5. *Involuntary acquisition of services*

On two occasions the Dallas court of appeals has held that a person who involuntarily acquires services is a consumer under the DTPA. Both cases were brought by men who had their cars towed by a towing service even though the cars were legally parked. In *Allied Towing Service v. Mitchell*,⁷⁴ John Mitchell parked his BMW in a lot, owned by Decorators Anonymous, located near the Royal Rack pool hall. Royal Rack had a contractual agreement with Decorators allowing Royal Rack patrons to use the parking lot from 8 p.m. until 2 a.m. Decorators hired Allied to supervise the parking lot and insure that only customers of Decorators and Royal Rack used the parking lot. In order to insure proper use of the lot, Allied posted a sign, which stated that Royal Rack customers could use the lot from 8 p.m. until

67. 689 S.W.2d 890 (Tex. 1985).

68. *Id.* at 892.

69. *Watson*, 828 S.W.2d at 427.

70. *Id.*

71. 786 S.W.2d 533 (Tex. App.—Austin 1990, writ denied).

72. *Id.* at 539.

73. *Id.*

74. 833 S.W.2d 577 (Tex. App.—Dallas 1992, no writ).

2 a.m., but all others, except customers of Decorators, would be towed at their expense. Before going into Royal Rack, Mitchell read the sign posted by Allied. After playing pool for about three hours, Mitchell returned to his car only to find that it was no longer there. Police suggested that he call the towing company before reporting his car stolen. Mitchell discovered that Allied had, indeed, towed his car and went to Allied's lot to retrieve his car. Mitchell showed Allied a receipt he had obtained from Royal Rack, but the employee still refused to give Mitchell his car. Instead, Mitchell had to pay \$69 before his car was returned. When Mitchell drove out of the lot, he noticed the tires screeched and the steering wheel had too much play in it. He then notified the police and filed an accident report. The next day, Mitchell had his car towed to the dealership where it remained for seven days while being repaired. During this time, Mitchell rented a car. Mitchell later sued Allied under the DTPA for wrongfully towing his car and obtained a jury verdict in his favor. Allied argued on appeal that Mitchell could not maintain a DTPA action because he did not seek or acquire goods or services from Allied. The court found that Mitchell was a "consumer" as he acquired the towing services of Allied, albeit involuntarily.⁷⁵

The same type of conduct occurred in *Coker v. Burghardt*.⁷⁶ Burghardt and a friend parked in a self-serve lot near downtown Dallas. Burghardt's friend paid the lot fee and they left the car. When they later returned to the lot, the car was gone. A sign at the lot listed a telephone number for Tejas Wrecker Service. Burghardt called and was told where he could retrieve his car. At the lot, Burghardt asked to speak to someone in charge. After the Tejas employee on duty told him this was impossible, he called the police. The police told him this was a civil matter and that they could not do anything. As he had no cash on him, Burghardt asked to get his bank card from his car in order to pay the fee. While getting his card, three Tejas employees approached him in a threatening manner. Fearing for his life, he locked himself in his car until the employees left. Burghardt then went to a nearby convenience store and got funds from an automated teller machine to pay the fee. When Burghardt returned to the lot to pay the fee and retrieve his car, he found a large dent in his car's right rear quarter panel. Burghardt called the police. They arrived, filled out a report, and once again told him they could do nothing since the complaint involved a civil matter. Burghardt paid the \$69 fee which consisted of a \$42 towing fee, a \$15 storage fee and a \$10 preservation fee. A sign at the Tejas lot stated that the purpose of the preservation fee was to protect the car from vandalism and other damage while it was in Tejas's possession. Burghardt sued Coker, who was doing business as Tejas Wrecker Service, under the DTPA for damaging his car. A jury found for Burghardt and the trial court entered judgment in favor of Burghardt. The court held that Burghardt met the two part test of "consumer."⁷⁷ The court held that Burghardt was a "consumer" since he paid

75. *Id.* at 582.

76. 833 S.W.2d 306 (Tex. App.—Dallas 1992, writ denied).

77. *Id.* at 311.

Tejas \$69 for its services, which involved towing, storage, and preservation.⁷⁸ Furthermore, these were the very services that formed the basis of Burghardt's complaint. According to the court, that Burghardt involuntarily acquired these services did not destroy his "consumer" status.⁷⁹

B. PRESUIT NOTICE

The DTPA provides that a consumer must give written notice of his or her complaint at least sixty days prior to filing a suit for damages.⁸⁰ This notice must describe the complaint in reasonable detail and state the amount of actual damages, expenses, and attorney's fees caused by the defendant.⁸¹

While the consumer has the burden to plead and prove that notice was given in compliance with the DTPA, the supreme court has recently held that a complaint about the lack of notice is waived if the defendant fails to request abatement with the filing of his answer "or very soon thereafter."⁸² Furthermore, notice is not required when limitations would run before expiration of the sixty day waiting period.⁸³

In *Winkle Chevy-Olds-Pontiac, Inc. v. Condon*,⁸⁴ Winkle and Condon entered a forty-eight month lease agreement on a van. After approximately thirty months, Winkle repossessed the vehicle. A series of attempts to obtain the return of both the van and the construction tools in the van were unavailing and Condon filed suit alleging, among other things, violations of the DTPA. The jury found for Condon on all causes of action and awarded him \$51,556 in damages. On appeal Winkle argued that no DTPA claims should have been submitted to the jury because Condon failed to send a demand letter prior to filing suit. Condon, however, pleaded and proved that limitations would have run on his claim if he had sent notice and waited thirty days⁸⁵ before filing suit. The court held, therefore, that he was excused from providing written notice due to impracticality pursuant to section 17.505(b) of the DTPA.⁸⁶

Another situation when a consumer does not need to give notice is when the claims are asserted as part of a counterclaim.⁸⁷ However, in *Angelo Broadcasting, Inc. v. Satellite Music Network, Inc.*,⁸⁸ the court held that the counterclaim exception did not apply when the consumer's suit was transferred and consolidated with a suit filed by the consumer-defendant in another county.⁸⁹ After Angelo Broadcasting's suit was transferred from

78. *Id.*

79. *Id.*

80. DTPA § 17.505(a) (Vernon Supp. 1993).

81. *Id.*

82. *Hines v. Hash*, 843 S.W.2d 464, 469 (Tex. 1992).

83. DTPA § 17.505(b) (Vernon Supp. 1993).

84. 830 S.W.2d 740 (Tex. App.—Corpus Christi 1992, writ *dism'd*).

85. Prior to 1989, the DTPA provided for a thirty day notice period rather than sixty days. DTPA § 17.505(a) (Vernon 1987).

86. *Condon*, 830 S.W.2d at 745.

87. DTPA § 17.505 (b) (Vernon Supp. 1993).

88. 836 S.W.2d 726 (Tex. App.—Dallas 1992, writ *denied*).

89. *Id.*

Austin to Dallas, Angelo continued to rely on its Austin petition and did not file a counterclaim until almost four years later. After the cases were consolidated, the trial court realigned the parties, designating Angelo as plaintiff and SMN as defendant. Thus, according to the court, Angelo began and ended the suit as plaintiff and could not rely on the counterclaim exception to the DTPA notice requirement.⁹⁰ Angelo, relying on *Star-Tel, Inc. v. Nacogdoches Telecommunications, Inc.*,⁹¹ argued that SMN waived any complaint relating to lack of notice because it was not brought to the trial court's attention until right before trial after the case had been pending for five years. In *Star-Tel*, the plaintiff alleged that he gave notice of its complaint, but did not allege that the notice had been sent thirty days prior to suit. The defendants, during trial, filed for the first time a special exception to the petition, alleging that the plaintiff failed to plead the requisite statutory DTPA notice. The court held that, although the plaintiff failed to fully comply with the notice requirements, the defendant waived its right to notice because it had all the information necessary to offer settlement three years before the actual trial.⁹² The *Angelo Broadcasting* court found *Star-Tel* inapplicable because Angelo never pleaded that it sent SMN notice as mandated by the DTPA.⁹³ Therefore, Angelo did not merely fail to give adequate notice, it gave no notice.⁹⁴ The court also concluded that a post-trial abatement to allow the giving of presuit notice is an abuse of discretion and is not permitted.⁹⁵ According to the court, "the statutory notice requirement is designed to afford the opportunity for presuit negotiations and settlement to avoid lengthy and costly litigation."⁹⁶ If the party seeking recovery fails to give the requisite notice, the judgment should be reversed and the case remanded with instructions for abating the action to afford the opportunity to give notice as a prerequisite to maintaining the action.⁹⁷

As seen in *Angelo Broadcasting*, lack of notice requires an abatement of the case so that notice can be given and settlement options pursued. This result, however, has escaped the Fifth Circuit, which continues to preclude the recovery of additional damages when notice is not given. The court's most recent pronouncement of this erroneous principle came in an otherwise well-reasoned case, *Wellborn v. Sears, Roebuck & Co.*⁹⁸ In this case, recovery was allowed under the DTPA on behalf of a teenager whose death was caused by a defective garage door opener sold to his mother by Sears and manufactured by Chamberlain. Even though the jury found DTPA violations and additional damages against Chamberlain, the district court did not

90. *Id.* at 737-38.

91. 755 S.W.2d 146 (Tex. App.—Houston [1st Dist.] 1988, no writ).

92. *Id.* at 149.

93. *Angelo Broadcasting*, 836 S.W.2d at 738.

94. *Id.*

95. *Id.* at 739.

96. *Id.* at 736.

97. *Id. Angelo Broadcasting* was expressly disapproved by the Texas Supreme Court in *Hines v. Hash*, 843 S.W.2d 464, 467-70 (Tex. 1992), which held that lack of notice is waived if abatement is not requested "with the filing of an answer or very soon thereafter." *Id.* at 469.

98. 970 F.2d 1420 (5th Cir. 1992).

allow the recovery of these additional damages, claiming that Wellborn did not give Chamberlain proper presuit notice. Wellborn argued that her presuit letter to Sears was sufficient notice to Chamberlain because Sears forwarded the claim to Chamberlain and requested that Chamberlain advise Wellborn of its position. Sears' counsel then informed Wellborn that he was representing both Sears and Chamberlain. The Fifth Circuit held, however, that because the notice letter did not mention Chamberlain, Wellborn failed to provide Chamberlain a DTPA notice letter.⁹⁹ The court then concluded that without presuit notice a consumer cannot recover additional damages under the DTPA.¹⁰⁰

C. FALSE, MISLEADING OR DECEPTIVE ACTS

The first of four causes of action provided to consumers by the DTPA is for false, misleading or deceptive acts enumerated in section 17.46(b) of the Act.¹⁰¹ Section 17.46(b)(12) makes actionable a representation "that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law."¹⁰² In *Villarreal v. Elizondo*,¹⁰³ the court held that a seller's representation to defer the first payment on a car loan until a certain date, but then repossessing the car before such date, violates this provision of the DTPA.¹⁰⁴ Elizondo purchased a car from Villarreal in December 1987. The parties negotiated in Spanish and agreed that Elizondo would pay \$2,300 for the car. Elizondo paid \$500 down and signed a note written in English, that provided for bi-weekly payments of \$65. Elizondo alleged that he and Villarreal agreed that the first payment would not be due until January 22, 1988. On January 20, 1988, Villarreal repossessed the vehicle claiming that Elizondo had defaulted. Shortly after the purchase, but before the repossession, Elizondo brought the car to Villarreal for repairs. When Elizondo returned to the lot to get personal items that he had left in the car, he was bitten by a guard dog

99. *Id.* at 1430.

100. *Id.* This result, however, is simply not authorized under the DTPA § 17.505 and was expressly rejected by the Texas Supreme Court in *Hines v. Hash*, 843 S.W.2d at 464, 469 (Tex. 1992). If a defendant does raise the issue before trial and the court determines adequate notice was not given, Texas courts simply abate the case for sixty days to give the defendant the opportunity to settle. *The Moving Co. v. Whitten*, 717 S.W.2d 117, 124 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). As seen in the *Angelo Broadcasting* case, if the trial court refuses to abate the case when no notice was given, the court of appeals may reverse and remand for a new trial. *Angelo Broadcasting*, 836 S.W.2d at 739. Reversal, however, requires a showing of harm. *Hines v. Hash*, 843 S.W.2d 464, 469 (Tex. 1992).

When the pre-suit notice requirement was first introduced into the DTPA in 1977 (as § 17.50A), the failure to give notice was an affirmative defense the proof of which expressly limited the consumer's recovery to actual damages and attorneys' fees. In other words, the failure to give notice was a defense to treble, but not actual, damages. However, this defense was eliminated in 1979 and replaced with current DTPA § 17.505. Since Wellborn's DTPA claim accrued after 1979, Chamberlain could not take advantage of the 1977 version of the DTPA notice provision and the Fifth Circuit was wrong to eliminate the additional damages from the judgment.

101. DTPA § 17.50(a)(1) (Vernon 1987).

102. DTPA § 17.46(b)(12) (Vernon 1987).

103. 831 S.W.2d 474 (Tex. App.—Corpus Christi 1992, no writ).

104. *Id.* at 478.

that Villarreal kept on the premises. Elizondo sued Villarreal for damages arising from the dog bite, the car's repossession, usury, and failure to provide statutory notices of purchaser's rights in the purchase contract. The jury found for Elizondo on all issues and further found against Villarreal on his counterclaim for breach of the purchase contract. The court of appeals affirmed.¹⁰⁵

With respect to the DTPA claims, Villarreal argued that the jury findings were insufficient to support liability because they were "confusing" and it was "difficult" to tell what cause of action was being asserted and upon what facts the jury based its findings. The court rejected this contention, noting that Villarreal had not objected to the charge and the jury found he had made false, deceptive, and misleading representations about the due date of the payments, which violates DTPA section 17.46(b)(12).¹⁰⁶ Villarreal then argued that evidence of an oral agreement regarding the due date of the first payment violates the parole evidence rule. The court disagreed, holding that oral misrepresentations are actionable under the DTPA, citing *Weitzel v. Barnes*.¹⁰⁷

In *Allied Towing Service v. Mitchell*,¹⁰⁸ the court held that section 17.46(b)(12) is violated when a legally parked car is towed when a sign represented that it would not be towed.¹⁰⁹ Allied argued to the court of appeals that there was no evidence or insufficient evidence to support the jury finding that it engaged in a false, misleading, or deceptive act or practice that was a producing cause of damages. The court found some evidence to support a finding that Allied violated section 17.46(b)(12) in its representation in the posted sign that it would not tow Royal Rack customers who parked in the lot, yet doing so in Mitchell's case.¹¹⁰

In *Affiliated Capital Corp. v. Commercial Federal Bank*,¹¹¹ the court held that enforcing rights provided by contract does not violate section 17.46(b)(12).¹¹² In 1983, Affiliated and ACRG Joint Venture (the Venture) entered into a nearly \$6.5 million construction loan agreement with the bank to construct an apartment complex in Austin. The note was part of a bond program established by the Austin Housing Financing Authority to facilitate the building of multi-family housing. The Authority used the proceeds of a bond sale to fund large loans to banks who would subsequently make smaller loans, under the program guidelines, to developers of multi-family projects. In February and March of 1986, the Venture failed to make payments on the note. After receiving a notice of possible foreclosure, the Venture wrote the bank offering to prepay the remaining balance of the loan. The bank re-

105. *Id.* at 479.

106. *Id.* at 478.

107. 691 S.W.2d 598, 600 (Tex. 1985).

108. 833 S.W.2d 577 (Tex. App.—Dallas 1992, no writ). For a detailed discussion of the facts of this case see the text accompanying notes 74 and 75, *supra*.

109. *Id.* at 583.

110. *Id.*

111. 834 S.W.2d 521 (Tex. App.—Austin 1992, no writ).

112. *Id.* at 528.

sponded that the note did not allow prepayment prior to December 1992, and that the bank would not waive the note provisions because of its bond agreement with the Austin Housing Authority. The bank suggested that the Venture use government securities to serve as substitute collateral. From April through August, the Venture again failed to make payments under the note. In August, the bank accelerated the note, demanding payment of the balance due and the prepayment penalty. By that time, however, the Venture was no longer able to prepay the balance of the loan, so the bank foreclosed. The Venture then filed suit against the bank, alleging claims of usury, violations of the DTPA, breach of contract, and breach of the duty of good faith and fair dealing.

The Venture argued that the bank engaged in conduct prohibited under section 17.46 of the DTPA, including misrepresenting the characteristics of goods purchased by representing that they could be retained by prepayment of the debt along with the prepayment penalty at any time (section 17.46(b)(5)); by failing to disclose that the apartment complex could be taken away despite tendered prepayment and the penalty listed in the note (section 17.46(b)(23)); and by misrepresenting the rights, remedies, and obligations of the loan documents (section 17.46(b)(12)).

The court of appeals rejected the Venture's contentions, noting that they were based on the language of the note and that there was no evidence of separate representations as to payment, acceleration, or interest.¹¹³ Since the note provided that the apartment complex could be foreclosed in the event of default despite a prior offer of prepayment, the court held that there was no nondisclosure as alleged by the Venture and that the alleged "misrepresentations" of the bank were "merely assertions of [its] desire to stand by the terms of the Note as construed by the Bank."¹¹⁴

As a defense to an action for misrepresentation under section 17.46(b), attempts have been made to classify the representations as "puffery" or "mere opinion" rather than statements of fact. Such an attempt was made by the defendant, but rejected by the court, in *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*¹¹⁵ Prudential proposed to sell the Jefferson Building, a four-story commercial office building in Austin, to Jefferson Associates, a limited partnership, and F.B. Goldman. Two years after the sale was consummated, Goldman discovered that the building contained asbestos. Alleging that the presence of asbestos significantly depreciated the value of the building, Goldman brought suit against Prudential, alleging violations of the DTPA, fraud, and negligent misrepresentation. After the evidence was presented at trial, the parties agreed to submit liability in the case on a general charge. The jury answered the liability question in the affirmative. The jury also found that Goldman had sustained actual damages in the amount of \$6,023,993.03, that Prudential's conduct was done with conscious

113. *Id.*

114. *Id.*

115. 839 S.W.2d 866, 872 (Tex. App.—Austin 1992, writ requested).

indifference to Goldman's rights, and that Goldman was entitled to exemplary damages of \$14,300,000.

The court of appeals affirmed, finding sufficient evidence to support liability based upon DTPA misrepresentations and fraudulent concealment.¹¹⁶ In addition to representing that the building had no defects, Prudential told Goldman that the Jefferson Building was "'one of the finest little properties in the City of Austin' and was a 'superb, super fine building.'"¹¹⁷ Prudential argued that these representations were no more than opinions or puffery and could not form a legal basis for the judgment in favor of Goldman. The court disagreed, relying on *Pennington v. Singleton*,¹¹⁸ where the supreme court held that representations that a boat was in "excellent" or "perfect" condition were actionable misrepresentations under the DTPA.¹¹⁹

Prudential also argued that even if it had a duty to disclose the asbestos in the Jefferson Building, that duty was contractually eliminated under an "as is" clause in the purchase and sale agreement. The court, relying on *Weitzel v. Barnes*,¹²⁰ held that contractual disclaimers cannot insulate a person from liability under the DTPA for making misrepresentations or failing to disclose material facts.¹²¹

The "puffery" issue was also one of the issues facing the court in *Milt Ferguson Motor Co. v. Zeretzke*.¹²² Zeretzke purchased a car from Ferguson that was manufactured by General Motors. The vehicle was sold with a new car warranty of 5 years/60,000 miles. Three months after the purchase, Zeretzke returned the vehicle to the dealership because it was losing oil pressure. Ferguson claimed to have repaired the car, but less than thirty days later water was leaking on the floorboard. That problem was not properly repaired because another three weeks later, four inches of water covered the floorboard. In May 1988, after complaints about engine noise, Ferguson made major engine repairs and told Zeretzke that the work had been done and the car was in good shape. However, the engine noise continued. But when Mrs. Zeretzke took the car in for repairs, she was told by the service manager that he could not hear the noise. Thus, no further repairs were made. The oil leak problems continued through 1989 as did the noise in the engine. In February 1989, Zeretzke took the vehicle to another repairman who told Zeretzke that there were cracks in the engine block. Soon thereafter, the car was inspected by Ferguson and the cam gear noise was verified. On October 19, 1989, Zeretzke filed suit against Ferguson and General Motors alleging, among other things, misrepresentations and breach of the implied warranty of good and workmanlike services, both of which are actionable under the DTPA. This case was tried to the court, which determined that both Ferguson and General Motors engaged in conduct violating

116. *Id.* at 872-73.

117. *Id.* at 871.

118. 606 S.W.2d 682 (Tex. 1980).

119. *Jefferson*, 839 S.W.2d at 872; see *Pennington*, 606 S.W.2d at 687.

120. 691 S.W.2d 598 (Tex. 1985).

121. *Jefferson*, 839 S.W.2d at 873.

122. 827 S.W.2d 349 (Tex. App.—San Antonio 1991, no writ).

the DTPA and awarded Zeretzke damages for repairs, loss of use, and mental anguish. The court of appeals affirmed.¹²³

Ferguson argued that the representations made concerning the sale and repairs to the car were not actionable under the DTPA because they were "mere puffing." The representations included those found in "pamphlets at the dealership, magazine articles, newspaper articles, and advertisements concerning the quality of the car as a 'good, excellent motor vehicle.'"¹²⁴ Additionally, Ferguson repeatedly told Zeretzke " 'how good the car was, and the quality of it' and that 'it was a better car than the Calais that they had,' [and] that it 'was a good car and that they would have no problems.'"¹²⁵ Ferguson also assured Zeretzke that the problems of which they complained had been properly repaired when, in fact, the problems continued to exist. The court concluded that these were substantial misrepresentations of material facts and not just puffery.¹²⁶

D. BREACH OF WARRANTY

The second cause of action that a consumer can bring under the DTPA is for breach of an express or implied warranty.¹²⁷ The DTPA does not define "warranty" or specify when a "breach" occurs.¹²⁸ Rather than creating additional warranties, the DTPA makes actionable warranties that exist at common law or by statute.¹²⁹

One such common law warranty is the implied warranty that services will be performed in a good and workmanlike manner. Ever since this warranty was recognized in *Melody Home Manufacturing Co. v. Barnes*,¹³⁰ there has been uncertainty as to whether the warranty applies to those who provide so-called "professional" services.¹³¹ In *Chapman v. Paul R. Wilson, Jr., D.D.S., Inc.*¹³² the court held that a dentist does not impliedly warrant that his or her services will be performed in a good and workmanlike manner.¹³³ According to the court, the supreme court has not overruled *Dennis v. Allison*,¹³⁴ where the court refused to impose on a psychologist who sexually abused his patient an implied warranty that he would not violate his professional code of ethics.¹³⁵ As an additional ground for denying recovery the

123. *Id.* at 352.

124. *Id.* at 355.

125. *Id.*

126. *Id.*

127. DTPA § 17.50(a)(2) (Vernon 1987).

128. *McDade v. Texas Commerce Bank*, 822 S.W.2d 713, 718 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

129. *Id.* at 718.

130. 741 S.W.2d 349 (Tex. 1987).

131. See Mark L. Kincaid, *Recognizing an Implied Warranty that "Professional" Services Will be Performed in a Good and Workmanlike Manner*, 21 ST. MARY'S L.J. 685 (1990) (discussing difficulty in defining "professional" and stating reasons for applying implied warranty to all service providers).

132. 826 S.W.2d 214 (Tex. App.—Austin 1992, writ denied).

133. *Id.* at 217-18.

134. 698 S.W.2d 94 (Tex. 1985).

135. *Chapman*, 826 S.W.2d at 217; see *Dennis*, 698 S.W.2d at 96.

court noted that to show breach of warranty by a dentist would require expert testimony that the trial court had stricken as a discovery sanction, thus making it impossible for Chapman to prove his case.¹³⁶

A different outcome was reached in *Luker v. Arnold*.¹³⁷ Arnold brought this case against Luker, who was a developer of a subdivision in which Arnold bought a duplex from Billingsley, the builder. As the developer, Luker platted the subdivision and the lot sizes and was the author of certain deed restrictions. Luker also had the responsibility to make sure that the builder constructed residences in conformance with the deed restrictions. Arnold experienced damages caused by the failure of the septic system, which was caused in part by the size of the lot. After Arnold discovered the lot size was below the minimum standards, he sued Luker under the DTPA for misrepresentations and breach of an implied warranty to develop the property in a good and workmanlike manner. The jury found in favor of Arnold and Luker appealed.

Luker argued that Arnold could not recover for breach of implied warranty because Texas law does not recognize an implied warranty that a person developing property do so in a good and workmanlike manner. The court recognized that there was no Texas case extending such an implied warranty to developers, but found that such a warranty is consistent with the policies announced in *Humber v. Morton*,¹³⁸ and *Melody Home*.¹³⁹ In *Humber* the court held that a builder/vendor impliedly warrants that a building constructed for residential use is constructed in a good and workmanlike manner and is suitable for human habitation.¹⁴⁰ The reason for such a warranty is because "the consumer relies on the skill of the builder and on [his] implied representation that the house will be erected in a reasonably workmanlike manner and will be reasonably fit for habitation."¹⁴¹ In *Melody Home*, the court extended these implied warranties to service transactions, finding a need to protect consumers from inferior services.¹⁴² The court also extended the warranty because consumers should be able to rely on the expertise of the service provider, and the service provider is more able to absorb the cost of damages associated with inferior services than the individual consumer.¹⁴³ The *Luker* court held that the public interest in protecting consumers from inferior work was as applicable in the instant case as it was in *Melody Home*.¹⁴⁴ Here the Arnolds were complaining of damages caused by septic problems resulting from small lot size and faulty installation. These problems, noted the court, had significant health and financial consequences because the lot may not contain sufficient room to con-

136. *Id.* at 218.

137. 843 S.W.2d 108 (Tex. App.—Fort Worth, 1992, no writ).

138. 426 S.W.2d 554 (Tex. 1968).

139. 741 S.W.2d 349 (Tex. 1987).

140. *Humber*, 426 S.W.2d at 554.

141. *Luker*, 843 S.W.2d at 115 (citing *Humber*, 426 S.W.2d at 560).

142. *Melody Home*, 741 S.W.2d at 353-54.

143. *Id.*

144. *Luker*, 843 S.W.2d at 116.

struct a new absorption field in a new location.¹⁴⁵ The court also determined that developers are in a better position to prevent this type of loss than the consumers.¹⁴⁶ Developers plat subdivisions and lot sizes and are frequently the authors of deed restrictions, as was Luker. In this case, the deed restrictions gave Luker the power to approve or disapprove of the improvements on the lots. Luker exercised its power by sending a letter of approval to the builders. Thus, Luker was the only party in a position to plat the subdivision and the only party whose approval was required to assure that the builders met their restrictions. The court also determined that most consumers do not have responsibility or experience in determining lot size or in determining why and how certain deed restrictions should be followed.¹⁴⁷ Instead, the consumers must rely on the developer's expertise in this area. The court also held that a developer is more able to absorb the cost of damages associated with inferior development than the individual consumer.¹⁴⁸ For all of these reasons, the court held that a developer impliedly warrants to develop property in a good and workmanlike manner.¹⁴⁹

Consistent with the supreme court's decision in *Melody Home*, the First Court of Appeals in *Bowe v. General Motors Corp.*¹⁵⁰ held that the implied warranty that repair services will be done in good and workmanlike manner cannot be disclaimed or waived.¹⁵¹ Bowe brought suit under the DTPA, alleging that Wiesner and GM had breached the implied warranty to repair the car in a good and workmanlike manner and that GM failed to build the car in a good and workmanlike manner. GM and Wiesner asserted that the Bowes' suit was barred by a disclaimer of warranties in the sales contract. The court held, however, that this disclaimer could not waive an implied warranty that the repair services would be done in a good and workmanlike manner.¹⁵² Furthermore, the disclaimer did not mention GM or any product or service provided by GM. As such, the disclaimer could not affect any claims against GM.¹⁵³

In *Sears, Roebuck & Co. v. Nichols*,¹⁵⁴ the court held that the implied warranty of good and workmanlike services is not breached when a mechanic does not make repairs that a consumer refused to authorize.¹⁵⁵ Mrs. Nichols took her riding lawnmower to Sears for repairs. Sears told her the motor needed new motor mounts. Sears called Mr. Nichols to tell him that with the new motor mounts they would also need to replace the drive belt, because the existing one he had installed was now too short. Although the mechanic explained to Mr. Nichols that the transmission would not dis-

145. *Id.* at 116-17.

146. *Id.* at 117.

147. *Id.*

148. *Id.* at 116.

149. *Id.*

150. 830 S.W.2d 775 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

151. *Id.* at 779.

152. *Id.*

153. *Id.*

154. 819 S.W.2d 900 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

155. *Id.* at 904-05.

engage properly without a new belt, Mr. Nichols said for Sears to “[l]eave that damn belt alone.”¹⁵⁶ After again telling Mr. Nichols the mower was not going to work properly, Sears acquiesced and did not replace the belt. Mrs. Nichols picked up the lawnmower and then suffered knee injuries when her son drove the mower into her because he was unable to disengage the transmission. Mr. and Mrs. Nichols then sued Sears. In a bench trial, the court found Sears breached an implied warranty to perform its services in a good and workmanlike manner and was negligent. In addition, the trial court found Sears acted knowingly and awarded additional damages under the DTPA.

The court of appeals held that the conduct of Sears in this case did not breach an implied warranty to perform the repairs in a good and workmanlike manner.¹⁵⁷ There was no dispute that Sears properly performed its services in replacing the motor mounts. The only work complained of was the work Mr. Nichols told Sears not to do. There was evidence that Mr. Nichols had considerable experience with lawnmowers and was repeatedly told of the risk that the transmission would not work properly if the belt was not replaced. The court stated, “[w]e decline to extend the Melody Home warranty to a case where the service provider attempted to obtain authorization for necessary repairs, explained the consequences of failing to make those repairs, and, only at the knowledgeable customer’s insistence, refrained from doing so.”¹⁵⁸ The court of appeals also held that the trial court erred in finding Sears negligent.¹⁵⁹ The court found no discernible difference between a claim for failure to perform in a good and workmanlike manner and a claim for negligent performance.¹⁶⁰ The court found it would be incongruous to hold that Sears had performed in a good and workmanlike manner but was nevertheless negligent.¹⁶¹

This same implied warranty was found to apply to a business that was hired to perform a sand fracing operation on an oil well. In *Geo Viking, Inc. v. Tex-Lee Operating Co.*,¹⁶² Geo Viking was hired to frac, an operation intended to open fissures in the ground formation so as to allow more oil and gas to reach the well. The agreement between the parties specified that two trucks would be on site and available for the job, one primary and one backup. This was necessary because if the equipment broke down during critical parts of the process, the whole process would fail. Geo Viking showed up with two trucks. After a short time, the first truck failed, but not at a critical point. Instead of using the backup truck, Geo Viking sent for a third truck. That truck also failed, this time at a critical point. Tex-Lee then learned that the backup truck did not work and that Geo Viking had

156. *Id.* at 902.

157. *Id.* at 904-05.

158. *Id.*

159. *Id.* at 907.

160. *Id.*; see also *Chapman*, 826 S.W.2d at 218 (finding negligence standard and “good and workmanlike manner” standard to be similar).

161. *Sears*, 819 S.W.2d at 907.

162. 817 S.W.2d 357 (Tex. App.—Texarkana 1991), writ denied *per curiam*, 839 S.W.2d 797 (Tex. 1992).

knowingly brought an inoperable truck to the site. The jury found that Geo Viking failed to perform the fracing job in a workmanlike manner. The jury also determined that Geo Viking provided a backup truck that was not fit for its ordinary purposes. The court of appeals extended the Melody Home warranty to Geo Viking since it was supposed to provide services to Tex-Lee.¹⁶³ The court then found sufficient evidence to show that Geo Viking breached the warranties as found by the jury.¹⁶⁴ The standard in the business required two trucks for this type of job, because of the danger of causing the precise situation that eventually occurred. At no time did Geo Viking have two working trucks at the site. Furthermore, Geo Viking knew the reason that two trucks were specified was so that there would be a backup, yet Geo Viking knowingly brought to the site only one working truck.

Another case where the existence and the breach of the implied warranty of good and workmanlike performance of services was acknowledged was *Cronin v. Bacon*.¹⁶⁵ In that case, Bacon entered into a "stallion service contract" with Cronin for the breeding of Bacon's mare with a champion stallion. Bacon later discovered that his mare was not bred with the stallion. The jury found that Cronin breached her implied warranty to perform the stud services in a good and workmanlike manner. The court of appeals, relying upon *Archibald v. Act III Arabians*,¹⁶⁶ held that such a warranty existed under these facts and that the evidence supported the jury's finding.¹⁶⁷

In *Slentz v. American Airlines, Inc.*,¹⁶⁸ the court was asked to extend the Melody Home implied warranty to providers of air transportation services. Mr. Slentz, a ninety-two year old man, alleged that while changing planes at DFW airport he was hit by an electric passenger cart owned by American Airlines. As a result, he suffered injuries that required a partial hip replacement. Mr. Slentz alleged that by agreeing to transport him, American Airlines impliedly warranted to provide safe carriage. The court refused to recognize such an implied warranty since no Texas court has ever discussed or recognized it.¹⁶⁹ Furthermore, the court held, a common carrier is not an insurer of the safety of its passengers but owes them that high degree of care that a very cautious, prudent, and competent person would use under the same or similar circumstances.¹⁷⁰ The court also noted that even though special exceptions had been granted and the allegations of breach of warranty stricken, the trial court asked the jury questions relating to American's alleged breach of this warranty. The jury failed to find that American breached an implied warranty of safe carriage. That being so, the court stated that it did not need to decide whether Texas recognizes this implied

163. *Id.* at 363.

164. *Id.* at 362-63.

165. 837 S.W.2d 265 (Tex. App.—Fort Worth 1992, writ denied).

166. 755 S.W.2d 84 (Tex. 1988).

167. *Cronin*, 837 S.W.2d at 268.

168. 817 S.W.2d 366 (Tex. App.—Austin 1991, writ denied).

169. *Id.* at 369.

170. *Id.*

warranty.¹⁷¹

In *Darr Equipment Co. v. Allen*,¹⁷² the court concluded that there is no common law action for breach of the implied warranty to perform services in a good and workmanlike manner and that this warranty is actionable only under the DTPA.¹⁷³ Thus, rather than applying the four year statute of limitations to Allen's breach of warranty action, the court used the DTPA's two year limitations period. To reach this conclusion the court placed together two unrelated sentences from the supreme court's opinion in *Melody Home Manufacturing Co. v. Barnes*¹⁷⁴ as follows:

[T]he court, stating that consumers of repair services "do not have the protection of a statutory or common law implied warranty scheme," held "that an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner is available to consumers suing under the DTPA."¹⁷⁵

The first quoted portion, however, merely recognizes that at the time *Melody Home* was decided the law did not provide for such an implied warranty. The supreme court then followed this statement with an analysis of why the implied warranty was needed. The supreme court never determined that this implied warranty was actionable *only* under the DTPA. In fact, the court noted that the DTPA does not create warranties, it merely provides a cause of action for breach of an existing warranty.¹⁷⁶ Therefore, a consumer has the option of bringing an action for breach of the implied warranty under the common law or under the DTPA. The advantage to suing under the DTPA is that consumers may recover attorneys' fees¹⁷⁷ and treble damages.¹⁷⁸ This action, of course, would be governed by the DTPA's two year statute of limitations.¹⁷⁹ Common law warranty actions, however, are subject to the four year statute of limitations.¹⁸⁰

Express warranties are also actionable under the DTPA.¹⁸¹ For example, in *McDade v. Texas Commerce Bank*,¹⁸² McDade deposited the funds into a money market account at Texas Commerce Bank (TCB). McDade intended for the money to go into a nontaxable retirement account and was assured by the bank's employee that this had been done. However, McDade later learned that the money was put in a regular, taxable account. The court of appeals held the employee's statement amounted to an express warranty, which "is created when a seller makes an affirmation of fact or a promise to the purchaser, which relates to the sale and warrants a conformity to the

171. *Id.*

172. 824 S.W.2d 710 (Tex. App.—Amarillo 1992, writ denied).

173. *Id.* at 712.

174. 741 S.W.2d 349 (Tex. 1987).

175. *Darr Equipment*, 824 S.W.2d at 712 (citations omitted) (quoting *Melody Home*, 741 S.W.2d at 353-54).

176. *Melody Home*, 741 S.W.2d at 355.

177. DTPA § 17.50(d) (Vernon 1987).

178. DTPA § 17.50(b)(1) (Vernon Supp. 1993).

179. DTPA § 17.565 (Vernon 1987).

180. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (Vernon 1986).

181. DTPA § 17.50(a)(2) (Vernon 1987).

182. 822 S.W.2d 713 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

affirmation as promised.”¹⁸³ McDade testified that he and the bank’s employee talked only about IRAs and that the employee told him about a new money market IRA. McDade, in response, told the employee that he wished to open the money market IRA she had described. While McDade did not recall the employee stating that the account he opened was indeed a money market IRA, the court of appeals concluded that the employee’s conduct affirmed the fact that she was opening an IRA for McDade. The employee did not say she was not opening an IRA. According to the court, the employee “received McDade’s funds and deposited them after he gave her specific instructions to open an IRA. This conduct constitutes an affirmation of the fact that [the employee] was opening an IRA.”¹⁸⁴

In *Roy v. Howard-Glendale Funeral Home*,¹⁸⁵ the court held that a breach of an express warranty is not the same as a breach of contract.¹⁸⁶ Roy bought a funeral casket and vault for her mother from Howard-Glendale Funeral Home. When Roy later had her mother’s remains disinterred and relocated, she discovered the vault was filled with water. The court of appeals upheld the trial court’s refusal to submit a breach of contract question to the jury because it had submitted a question on breach of express warranty.¹⁸⁷ Roy argued that breach of contract and breach of express warranty are separate theories and that she had offered evidence supporting submission of both. The court of appeals disagreed. Relying on *Southwestern Bell Telephone Co. v. FDP Corp.*¹⁸⁸ the court concluded that Roy had only a breach of warranty cause of action, not a breach of contract claim.¹⁸⁹

Breach of contract and breach of warranty are not the same cause of action. The remedies for breach of contract are available to a buyer where the seller fails to make any delivery; the remedies for breach of warranty are available to a buyer who has received and accepted goods, but discovers they are defective in some manner.¹⁹⁰

The court concluded that since Howard-Glendale delivered a vault to Roy, which was used for many years, Roy’s claim that the vault was defective because it was not the vault she ordered or that it was defective because it did not perform in the manner warranted were both breach of warranty claims.¹⁹¹

In *Johnson Roofing, Inc. v. Staas Plumbing Co.*,¹⁹² Johnson Roofing replaced the roof of a building owned by Staas and occupied by Waco Packing. Five months later, the roof partially collapsed after a heavy rain. Staas sued Johnson Roofing and Waco Packing intervened. Staas and Waco Packing

183. *Id.* at 718 (quoting *McCrea v. Cubilla Condominium Corp.*, 685 S.W.2d 755 (Tex. App.—Houston [1st Dist.] 1985, writ ref’d n.r.e.)).

184. *McDade*, 822 S.W.2d at 719.

185. 820 S.W.2d 844 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

186. *Id.* at 848.

187. *Id.*

188. 811 S.W.2d 572 (Tex. 1991).

189. *Roy*, 820 S.W.2d at 848.

190. *Id.*

191. *Id.*

192. 823 S.W.2d 783 (Tex. App.—Waco 1992, no writ).

alleged that Johnson Roofing violated the DTPA by breaching an express warranty as well as implied warranties that the ballasted roof would be suitable for the building and that the new roof would be installed in a good and workmanlike manner. The jury found that Johnson Roofing and Staas were both negligent, but failed to find a breach of warranty. Notwithstanding the verdict, the court disregarded the answers to the warranty and damage questions and entered a judgment in favor of Staas and Waco Packing for attorney's fees and an amount of actual damages greater than those found by the jury. The court of appeals reversed the judgment n.o.v. and remanded the cause with instructions for the trial court to render a judgment against Johnson Roofing in favor of Staas and Waco Packing based on the verdict.¹⁹³ Johnson Roofing expressly warranted that it would repair any defects in the original replacement roof that resulted solely from faults or defects in workmanship. The court found that there was some evidence to support the jury's refusal to find that Johnson Roofing breached this warranty since there were witnesses that attributed the failure to causes other than defects in workmanship in the new roof's installation or the weight of the new roof exceeding the roof-structure's design limitations.¹⁹⁴ There was also evidence from Johnson Roofing that the new roof was installed without any defects in workmanship and that the collapse resulted solely from causes that it could not have been reasonably aware of and over which it had no control. The court found that there was some evidence to support the jury's failure to find a breach of implied warranty to install the roof in a good and workmanlike manner.¹⁹⁵

In *GT & MC, Inc. v. Texas City Refining, Inc.*,¹⁹⁶ the court was asked to determine the types of damages that could be recovered for a breach of an express warranty. Texas City Refining, Inc. (TCR) purchased an oil tank from GT & MC. The tank featured a patented roof, designed to float on the surface of the oil in the tank. GT & MC expressly warranted the tank and roof to withstand 125 mile per hour winds and 10 inches of rainfall, even when the roof drains were blocked. Hurricane Alicia hit the Texas coast. The wind velocity and amount of rainfall did not exceed the limits that GT & MC warranted. Still, the roof sank, resulting in a loss of 38,754 barrels of oil. TCR sued for breach of warranty and obtained a judgment in the amount of \$380,000 for loss of the use of the tank and \$570,000 for the value of the lost oil. GT & MC argued that TCR was not entitled to damages for lost use and lost product since the contract limited breach of warranty damages exclusively to repair or replacement. According to the court of appeals, once TCR established the warranty and its breach (neither of which were contested by GT & MC), TCR was entitled to pursue any and all remedies for damages, unless the warranty was disclaimed or liability for breach was limited.¹⁹⁷ The contract did limit TCR's recovery for defects in material or

193. *Id.* at 783.

194. *Id.* at 787.

195. *Id.*

196. 822 S.W.2d 252 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

197. *Id.* at 257. While such disclaimers and limitations of liability for breach of warranty

workmanship to damages for repair or replacement. However, there was no similar limitation on damages for design defects. Thus, the court refused to imply one and held that consequential damages were recoverable.¹⁹⁸

E. UNCONSCIONABLE CONDUCT

The third cause of action the DTPA provides consumers is for "any unconscionable action or course of action . . ." ¹⁹⁹ "Unconscionable action or course of action" is defined as "an act or practice which, to a person's detriment . . . takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or . . . results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration."²⁰⁰

In *Fort Worth Mortgage Corp. v. Abercrombie*,²⁰¹ Abercrombie paid Fort Worth Mortgage a monthly premium for a mortgage protection policy issued by Life Investors. The policy provided that, in the event of disability, Abercrombie's house payments would be paid for up to 300 months. However, when Abercrombie became permanently disabled the insurance covered his monthly house payment for only one year. When Abercrombie received a letter informing him that the twelfth payment was the final one, he discovered that Fort Worth Mortgage had canceled the policy about eight years prior, substituting a policy with less benefits issued by Mortgage Bankers Life Insurance Company. It just so happened that the president of Fort Worth Mortgage was chairman of the board of Mortgage Bankers. Abercrombie then filed suit against Fort Worth Mortgage alleging violations of article 21.21 of the Insurance Code and the DTPA. Finding that the mortgage company's conduct was unconscionable, committed knowingly, and false, misleading, and/or deceptive, the jury awarded actual damages of \$70,275, additional damages of \$100,000, and attorney's fees amounting to one-third of the total award. The court of appeals affirmed.²⁰²

Fort Worth Mortgage argued that it was not unconscionable for it to switch policies and not inform Abercrombie of the switch because there was not a gross disparity between the consideration paid and the benefits received. The court held that while there was not a shockingly high price being paid for something of little value, there was a gross disparity between what Abercrombie was led to believe he would receive and the benefits he actually received.²⁰³ The court also held that there was evidence that Fort Worth Mortgage took advantage of Abercrombie's lack of knowledge by not properly informing him of the policy switch and that a year's coverage pro-

are effective in a breach of warranty action brought under the DTPA (and do not offend the "no waiver" provision of § 17.42), they cannot limit liability for the acts listed in § 17.46(b). *Southwestern Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 576-77 (Tex. 1991).

198. *Texas City Refining*, 822 S.W.2d at 257.

199. DTPA § 17.50(a)(3) (Vernon 1987).

200. DTPA § 17.45(5) (Vernon 1987).

201. 835 S.W.2d 262 (Tex. App.—Houston [14th Dist.] 1992, no writ).

202. *Id.* at 262.

203. *Id.* at 266.

vided little value for Abercrombie, who was permanently disabled.²⁰⁴

In *Allied Towing Service v. Mitchell*,²⁰⁵ Mitchell brought suit against Allied Towing after his car was wrongfully towed from a parking lot while he was playing pool. The jury found, among other things, that Allied had engaged in unconscionable conduct by towing the car. On appeal, Allied argued that there was no evidence or insufficient evidence to support this finding. The court held that there was evidence that Allied took advantage of Mitchell's lack of knowledge so as to support the unconscionable conduct finding.²⁰⁶ This evidence included the fact that Mitchell parked his car legally, which led him to believe that his car would not be towed. Thus, "Mitchell did not know that Allied would tow his car when he parked and walked into [the pool hall]."²⁰⁷

In *Affiliated Capital Corp. v. Commercial Federal Bank*,²⁰⁸ Affiliated executed a note payable to the bank in order to borrow money to construct an apartment complex. Affiliated defaulted and, upon receiving a notice of foreclosure, offered to pay the note in full. The bank said prepayment was not allowed because the note was part of a bond program established by the Austin Housing Financing Authority. Several months later the bank accelerated the note. But by this time, Affiliated no longer had the funds to pay the note and the property was foreclosed by the bank. Affiliated claimed that the bank acted unconscionably by taking "irrational and oppressive actions" to prevent payment of the note, depriving Affiliated of the value of its investment in the property. Affiliated alleged that this conduct created a gross disparity in value as prohibited by DTPA section 17.50(a)(3). The court held that gross disparity in this transaction would require evidence that Affiliated was prevented from using the \$6.5 million borrowed even though it was paying interest on such money, or that Affiliated had sustained a similar inequity in its bargain.²⁰⁹ According to the court, the evidence showed otherwise. Affiliated received the use of the money to build the apartment complex and the bank did not assure Affiliated that it would make money on its investment. The court, therefore, held that Affiliated's failure to benefit from its investment could not form the basis of any DTPA claim against the bank.²¹⁰

F. VIOLATIONS OF THE INSURANCE CODE

The last cause of action provided by the DTPA is for violations of article 21.21 of the Insurance Code and any rules or regulations promulgated thereunder.²¹¹ Section 16 of article 21.21 also provides a private cause of action for violations of article 21.21 and the rules and regulations promulgated

204. *Id.*

205. 833 S.W.2d 577 (Tex. App.—Dallas 1992, no writ).

206. *Id.* at 584.

207. *Id.*

208. 834 S.W.2d 521 (Tex. App.—Austin 1992, no writ).

209. *Id.* at 529.

210. *Id.*

211. DTPA § 17.50(a)(4) (Vernon 1987).

thereunder, as well as violations of section 17.46 of the DTPA.²¹² Though discussion of these cases would be appropriate here, they are treated in the "Insurance" section.²¹³

G. DAMAGES

1. Actual damages

a. Measures of damages for economic loss; no measure exclusive.

The prevailing consumer is entitled to recover his or her "actual damages."²¹⁴ "Actual damages" has been defined as "the total loss sustained [by the consumer] as a result of the deceptive trade practice."²¹⁵ At common law, two measures of damages for economic loss from misrepresentation are the "benefit-of-the-bargain" and "out-of-pocket" measures,²¹⁶ both of which attempt to measure diminution in the market value of the subject of the transaction. Over the years, numerous courts have held that a consumer cannot recover both of these types of damages, but only the one that provides the greater recovery.²¹⁷ During the Survey period the supreme court made clear in *Henry S. Miller Co. v. Bynum*²¹⁸ that the "benefit-of-the-bargain" and "out-of-pocket" measures are not the exclusive measures of economic loss under the DTPA and that the consumer may recover under whatever measure or element that will make him whole. In this case,

212. TEX. INS. CODE ANN. art. 21.21, § 16(a) (Vernon Supp. 1993). Even though there should be no doubt that section 16 provides a private cause of action, *see Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129 (Tex. 1988), the Texarkana court of appeals seems to have some doubt about this. In *CNA Ins. Co. v. Scheffey*, 828 S.W.2d 785, 791 (Tex. App.—Texarkana 1992, writ denied), the court made the curious statement that "Whether there is any private cause of action under Article 21.21 apart from by incorporation in a Deceptive Trade Practices Act action may well be an open question." The court then referred the reader to *Hi-Line Elec. Co. v. Travelers Ins. Co.*, 593 S.W.2d 953 (Tex. 1980). In that case, the court, in a *per curiam* opinion, denied *Hi-Line's* application for writ of error, finding no reversible error by the court of appeals, but disapproving of the lower court's holdings that a private cause of action under article 21.21 must be based upon the DTPA and that only consumers can bring suit under article 21.21. Thus, there is no doubt that the DTPA and article 21.21 each provide a separate cause of action, each with its own requirements and remedies, even if each incorporates the other.

213. Michael W. Huddleston & R. Brent Cooper, *Insurance Law, Annual Survey of Texas Law*, 46 SMU L. Rev. 1541, 1541-45 (1993).

214. DTPA § 17.50(b)(1) (Vernon Supp. 1993).

215. *Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 162 (Tex. 1992) (quoting *Kish v. Van Note*, 692 S.W.2d 463, 466 (Tex. 1985)); *A.V.I., Inc. v. Heathington*, 842 S.W.2d 712 (Tex. App.—Amarillo 1992, writ denied).

216. "Benefit-of-the-bargain" means the difference between the value of what is received and its value as represented, while "out-of-pocket" means the difference in value between what is given and what is received. *Nobility Homes, Inc. v. Shivers*, 557 S.W.2d 77, 78 n.1 (Tex. 1977); *see also LSR Joint Venture No. 2 v. Callewart*, 837 S.W.2d 693, 701-02 (Tex. App.—Dallas 1992, writ denied).

217. *W.O. Bankston Nissan, Inc. v. Walters*, 754 S.W.2d 127, 128 (Tex. 1988); *Sumrall v. Navistar Fin. Corp.*, 818 S.W.2d 548, 558 (Tex. App.—Beaumont 1991, writ denied); *Odom v. Meraz*, 810 S.W.2d 241, 244 (Tex. App.—El Paso 1991), *writ denied per curiam*, 835 S.W.2d 626 (Tex. 1992).

218. 836 S.W.2d 160, 162 (Tex. 1992). Before *Bynum*, Justice Mauzy stated the same in a concurring opinion in *W.O. Bankston Nissan, Inc. v. Walters*, 754 S.W.2d 127, 128-29 (Tex. 1988).

Bynum recovered the lost money he had invested in a hair-styling salon because Henry S. Miller had misrepresented the leased space. Chief Justice Phillips wrote a concurring opinion in Bynum to draw a distinction between "direct" and "consequential" actual damages. According to Chief Justice Phillips consequential damages are "special damages" and, while direct or general damages are recoverable under a general prayer, special damages must be specifically pleaded.²¹⁹ Examples of such damages given by Chief Justice Phillips were lost profits, loss of credit, loss for improvements made, interest on indebtedness, and related and reasonably necessary expenses.²²⁰

In *Odom v. Meraz*,²²¹ Meraz sued Odom under the DTPA for Odom's failure to disclose that one wall of the house Meraz bought from Odom encroached on adjoining property. Meraz had purchased the house to remodel and resell. But because of the encroachment, he was not able to sell the house after making the repairs. The damage question was submitted broadly to the jury as: "What sum of money, if paid now in cash, do you find from a preponderance of the evidence, would fairly and reasonably compensate [Meraz] for [his] actual damages, if any?"²²² No limiting instruction as to damages was given and no consequential damage question was submitted. The court of appeals reversed the judgment in favor of Meraz, finding no evidence of "out-of-pocket" or "benefit-of-the-bargain" damages.²²³

The supreme court denied Meraz's application for writ of error, stating that "we neither approve nor disapprove of the court of appeal's treatment of damages under the [DTPA]."²²⁴ The per curiam is a little puzzling. In light of its holding in *Bynum* expressly rejecting the exclusivity of the "benefit-of-the-bargain" and "out-of-pocket" measures, it is difficult to see how the supreme court could ever "approve" of the court of appeals' treatment of damages in *Meraz*. The denial of the writ of error may have been based on the trial court's failure to instruct on damages, which has long been held error.²²⁵

b. Mental anguish

Among the many types of actual damages recoverable under the DTPA are those for mental anguish.²²⁶ Mental anguish damages are intangible in nature and the translation of such into a dollar amount is best left to the trier of fact.²²⁷ Accordingly, much discretion must be given to the jury in fulfil-

219. *Bynum*, 836 S.W.2d at 163-64 (Phillips, J., concurring).

220. *Id.* at 164.

221. 810 S.W.2d 241 (Tex. App.—El Paso 1991), writ denied per curiam, 835 S.W.2d 626 (Tex. 1992).

222. *Id.* at 244 (emphasis omitted).

223. *Id.* at 245.

224. *Meraz v. Odom*, 835 S.W.2d 626 (Tex. 1992).

225. See *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973).

226. See *Centroplex Ford, Inc. v. Kirby*, 736 S.W.2d 261 (Tex. App.—Austin, 1987, no writ); *Kold-Serve Corp. v. Ward*, 736 S.W.2d 750 (Tex. App.—Corpus Christi 1987, writ dism'd by agr.).

227. *State Farm Fire & Cas. Co. v. Gros*, 818 S.W.2d 908, 915 (Tex. App.—Austin 1991, no writ); *State Farm Mut. Auto. Ins. Co. v. Zubiato*, 808 S.W.2d 590, 601 (Tex. App.—El Paso 1991, writ denied).

ling its duty to fix the amount of mental anguish damages and the court cannot substitute its judgment for that of the jury.²²⁸

Historically, Texas allowed recovery for mental anguish damages only when a physical injury accompanied the mental anguish or when there was a physical manifestation of the mental anguish.²²⁹ Exceptions to this general rule were recognized when the case involved intentional torts, gross negligence, or a willful and wanton disregard for another's rights.²³⁰ In *Luna v. North Star Dodge Sales, Inc.*,²³¹ the supreme court recognized that a finding of "knowingly" under the DTPA was an exception to the physical manifestation requirement because this mental state was akin to the mental states in intentional conduct, willful and wanton disregard, and gross negligence.²³²

The supreme court finally abolished the physical injury rule in *St. Elizabeth Hospital v. Garrard*.²³³ The collapse of the general rule would seem to make the exceptions, including the "knowingly" exception recognized in *Luna*, of no force and effect. This was the holding in *Milt Ferguson Motor Co. v. Zeretzke*.²³⁴ Ferguson attempted to avoid a judgment for mental anguish damages, arguing that such damages are recoverable only when the consumer obtains a finding that the DTPA violation was committed knowingly. The court rejected this argument because the physical injury rule was abolished in *Garrard*.²³⁵ Thus, the court concluded that it is no longer necessary to plead and prove a knowing violation of the DTPA before mental anguish can be recovered.²³⁶

In *Dan Boone Mitsubishi, Inc. v. Ebrom*,²³⁷ the court upheld a judgment for mental anguish damages resulting from a car dealer's failure to provide title to a car, holding that such damages are recoverable without a finding of some other actual damages.²³⁸ In May of 1987, Jane Ebrom went to Mitsubishi to purchase a used car. Because she wanted to put the car in her son's name, Daniel Ebrom executed the purchase agreement on the car. The purchase agreement showed Dan Boone Mitsubishi as the seller of the car. Ebrom traded in her old car, which was shortly thereafter sold to a used car wholesaler. In August 1987, when the license sticker became due on the car, Ebrom went to Dan Boone Mitsubishi and told them that she had not received title to car. Ebrom was then given a license sticker good until August 1988. She was informed that there had been a paperwork mix-up and the title to the car would be received in a few weeks. In August 1988, Ebrom

228. *Gros*, 818 S.W.2d at 915; *Sumrall v. Navistar Fin. Corp.*, 818 S.W.2d 548, 559 (Tex. App.—Beaumont 1991, writ denied); *Zubiate*, 808 S.W.2d at 601.

229. *See St. Elizabeth Hospital v. Garrard*, 730 S.W.2d 649, 652 (Tex. 1987).

230. *Id.*

231. 667 S.W.2d 115 (Tex. 1984).

232. *Id.* at 117.

233. 730 S.W.2d at 654.

234. 827 S.W.2d 349 (Tex. App.—San Antonio 1991, no writ).

235. *Zeretzke*, 827 S.W.2d at 357.

236. *Id.*; *see also State Farm Fire & Cas. Co. v. Gros*, 818 S.W.2d 908, 915 (Tex. App.—Austin 1991, no writ); *HOW Ins. Co. v. Patriot Fin. Servs.*, 786 S.W.2d 533, 543 (Tex. App.—Austin 1990, writ denied).

237. 830 S.W.2d 334 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

238. *Id.* at 337.

still had not received title to the car and discovered that title was held by Robert Orr, an employee of Dan Boone Mitsubishi. She then went back to Dan Boone and talked to the general manager who assured her that the problem would be resolved immediately. The general manager gave Ebrom a paper license tag that was good for ten days. Ebrom used the paper tags for about two or three weeks and then had to obtain a license sticker for her car illegally. After repeated attempts, and several promises from Dan Boone employees, Ebrom was unable to obtain title to the vehicle purchased from Dan Boone Mitsubishi. Ebrom then brought suit against Dan Boone Mitsubishi seeking damages under the DTPA for its failure to deliver a certificate of title. The trial court granted judgment for Ebrom for \$90,000 in damages plus attorney's fees of \$7,500.

On appeal Dan Boone Mitsubishi complained of the award of damages for mental anguish. Reviewing the evidence, the court of appeals found sufficient evidence to support the finding of mental anguish by the trial court.²³⁹ Ebrom purchased the car from Dan Boone, traded in her old car, and paid the purchase price, all in good faith. She was told at the time of the purchase, and then several times after the problem with her license sticker arose, that she would receive title to the purchased vehicle. However, she never received title to the car. Her old car was wholesaled shortly after the purchase, and there was no way for her to get it back after the title problems with her new purchase became apparent. Ebrom was then forced to illegally obtain a license sticker for the car so that she would have a means of transportation. She testified that she was terrified the entire time that she was driving the vehicle because of its illegal status. She also testified that she was very cautious and very worried because she transported customers in her car. On one occasion she was stopped by the police and was very frightened that the police could assume the car was stolen. The court held that this was sufficient evidence of emotional pain, torment, and suffering to constitute mental anguish.²⁴⁰ Dan Boone Mitsubishi also argued that it was improper to award mental anguish damages without a finding of some other actual damages. Based upon *St. Elizabeth Hospital v. Garrard*²⁴¹ where the only damages recovered were for mental anguish, the court held that damages for mental anguish can be recovered without a finding of other types of actual damages.²⁴²

In *Commonwealth Lloyd's Insurance Co. v. Thomas*,²⁴³ Commonwealth refused to pay a claim made by the Thomases after their house burned down. Relying on an investigation by Loss Research & Analysis, Commonwealth concluded that arson caused the fire. The Thomases successfully sued Commonwealth for breach of contract, and this judgment was affirmed on appeal. Later, they sued Commonwealth for breach of the duty of good faith

239. *Id.* at 337.

240. *Id.* at 336-37.

241. 730 S.W.2d 649 (Tex. 1987).

242. *Ebrom*, 830 S.W.2d at 337.

243. 825 S.W.2d 135 (Tex. App.—Dallas 1992), *vacated by agr.*, 843 S.W.2d 486 (Tex. 1993).

and fair dealing after the supreme court recognized that cause of action in *Arnold v. National County Mutual Fire Insurance Co.*²⁴⁴ The trial court rendered judgment for \$708,800 in actual damages, \$2,000,001 in exemplary damages and \$1,000,637.60 for prejudgment interest. Of the amount found as actual damages, \$200,000 was for Mr. Thomas's mental anguish and \$300,000 was for Mrs. Thomas's mental anguish. Commonwealth argued that the evidence regarding mental anguish did not go beyond disappointment, anger,²⁴⁵ resentment or embarrassment and thus no mental anguish damages could be recovered. The court held that "[b]ecause there are no objective guidelines by which the money equivalent of mental pain may be measured, the jury must be allowed considerable discretion in fixing the amount."²⁴⁶ The court further stated that mental anguish can be inferred from the unrepaired condition of the insureds' home and their shortage of clothes and furniture.²⁴⁷ With these principles in mind, the court found the evidence sufficient to support the jury's award of damages for mental anguish.²⁴⁸ Such evidence included testimony that Commonwealth's accusations of arson caused Mr. and Mrs. Thomas, he a builder and she a real estate broker, to lose credibility with their associates. Suppliers wanted to see whether the insurance company was going to pay the claim before extending credit to them. The Thomases also suffered embarrassment in front of their friends and their living conditions deteriorated as they moved from a hotel apartment to a rented house to a travel trailer because of their inability to meet the rental expense.

c. Other types of actual damages

As mentioned above, a consumer who prevails under the DTPA can recover the total loss sustained as a result of the deceptive trade practice. Thus, there are a host of potential actual damages recoverable including loss of investment capital, loss of credit,²⁴⁹ loss for improvements made, interest on indebtedness, lost profits, and damages for removal of a defective product.²⁵⁰

(1) *Lost profits*

Lost profits are recoverable under the DTPA when there is evidence that

244. 725 S.W.2d 165 (Tex. 1987).

245. See *Cronin v. Bacon*, 837 S.W.2d 265, 269 (Tex. App.—Fort Worth 1992, writ denied) (court of appeals reversed the mental anguish damages because the only testimony was that the plaintiff was angry because of the defendant's conduct).

246. *Thomas*, 825 S.W.2d at 145.

247. *Id.*

248. *Id.* at 146.

249. *Id.* (the amount of damages for loss of credit must only be established with reasonable certainty).

250. *Henry S. Miller v. Bynum*, 836 S.W.2d 160, 162 (Tex. 1992). The court allowed Mr. Bynum to recover his capital investment of \$60,000, which he lost because the space he leased at a shopping center did not conform to the representations made by Henry S. Miller. The other types of damages in this list were examples given by the supreme court of damages allowed under the DTPA in order to make the consumer whole.

allows them to be determined to a reasonable degree of certainty.²⁵¹ While lost profits will not be allowed when they are too uncertain or speculative, it is not necessary that lost profits be susceptible to exact calculation.²⁵² In *Holt Atherton Industries, Inc. v. Heine*,²⁵³ the court held that evidence of lost profits can be opinions or estimates, but that they "must be based upon objective facts, figures, or data from which the amount of lost profits can be ascertained."²⁵⁴ The evidence must not be of lost income, but of lost profits.²⁵⁵ Lost profits, said the court, can be supported by testimony of lost contracts, but there must be evidence of specific contracts lost and at least one complete calculation of lost profits.²⁵⁶

Historically, lost profits were denied when the business was new or unestablished on the theory that there were insufficient facts to forecast the lost profits to a reasonable degree of certainty.²⁵⁷ However, in *Teletron Energy Management, Inc. v. Texas Instruments, Inc.*,²⁵⁸ the court permitted the recovery of lost profits for a new and established business because there was market data and expert testimony sufficient to calculate these damages with a reasonable degree of certainty.²⁵⁹

(2) Cost of repairs

Another element of damages is the cost of repairs. In *Hugh Wood Ford, Inc. v. Galloway*²⁶⁰ the court allowed the consumer to recover the full amount he paid to repair a truck when the repairs lacked any value.²⁶¹ Also, Mr. Galloway was able to recover the extra expenses he incurred because the truck was not properly repaired.²⁶²

Traditionally, a person seeking to recover the cost of remedial repairs has been required to plead and prove that the repairs were reasonable and necessary.²⁶³ In 1988 this rule was questioned by the supreme court and a suggestion was made that the DTPA may not require proof of reasonable and necessary repairs since there is no such requirement in the language of the statute.²⁶⁴ However, as noted in *Ron Craft Chevrolet, Inc. v. Davis*,²⁶⁵ the rule has not been abrogated. Furthermore, the courts of appeals have not, as

251. *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992); *Hugh Wood Ford, Inc. v. Galloway*, 830 S.W.2d 296 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

252. *Teletron Energy Management, Inc. v. Texas Instruments, Inc.*, 838 S.W.2d 305, 308-09 Tex. App.—Houston [14th Dist.] 1992, writ granted).

253. 835 S.W.2d 80 (Tex. 1992).

254. *Id.* at 84.

255. *Id.*

256. *Id.* at 85.

257. *Southwest Battery Corp. v. Owen*, 131 Tex. 423, 115 S.W.2d 1097, 1099 (1938).

258. 838 S.W.2d 305 (Tex. App.—Houston [14th Dist.] 1992, writ granted).

259. *Id.* at 309.

260. 830 S.W.2d 296 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

261. *Id.* at 297.

262. *Id.*

263. *Ron Craft Chevrolet, Inc. v. Davis*, 836 S.W.2d 672, 676 (Tex. App.—El Paso 1992, writ denied).

264. *Jacobs v. Danny Darby Real Estate Inc.*, 750 S.W.2d 174, 176 (Tex. 1988) (Kilgarlin, J., concurring).

265. 836 S.W.2d at 676.

yet, had to face the issue directly because they have been able to find evidence that the repairs were reasonable and necessary.²⁶⁶

In *Coker v. Burghardt*,²⁶⁷ the court allowed Burghardt to testify about the reasonable cost of repairing his car after it was damaged by Coker's towing service. Coker argued to the court of appeals that Burghardt should not have been allowed to testify about repair costs because he was not an expert in this area. The court held that Burghardt, as a lay witness, could give his opinion on the amount of damages as long as he testified about matters within his knowledge.²⁶⁸ Burghardt stated that he had been driving for eight years, had owned five cars, and had visited different repair shops to find out what it would cost to repair his car. Based on this knowledge, Burghardt testified that it would cost about \$1,200 to repair his car. Coker did not cross-examine Burghardt to determine the basis of his opinions and did not introduce any controverting evidence regarding the repair cost. In addition, Coker failed to refute Burghardt's testimony concerning repair costs. The court, therefore, held that this evidence was sufficient to support the jury's award for cost of repairs.²⁶⁹

It is not necessary to recovery that the repairs actually have been performed. In *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*,²⁷⁰ Jefferson brought suit under the DTPA and for fraud, claiming that Prudential failed to disclose the presence of asbestos in a building sold to Jefferson. The jury found Prudential liable and that Jefferson had sustained actual damages in the amount of \$6,023,993.03, which represented the cost of removing the asbestos from the building. Prudential argued that Jefferson should be limited to the recovery of his "out-of-pocket" expenses, rather than the cost of removing the asbestos, since the asbestos was never removed. The court held that because Goldman had shown that the presence of asbestos diminished the fair market value of the building, he was entitled to recover the cost of repairing or restoring the property to its full market value, whether or not the repairs were actually performed.²⁷¹ The court further held that "out-of-pocket" expenses are just one measure of recovery and that under the DTPA the consumer is entitled to the greatest recovery allowable.²⁷²

(3) Prejudgment interest

In *Celtic Life Insurance Co. v. Coats*,²⁷³ Mr. Coats recovered a judgment under the DTPA and Insurance Code for the misrepresentations made by Celtic Life's agent in his attempts to sell an insurance policy to Mr. Coats. In addition to trebling the \$17,000 the jury found as Mr. Coats's "out-of-

266. *Id.* at 676-77.

267. 833 S.W.2d 306 (Tex. App.—Dallas 1992, writ denied).

268. *Id.* at 309.

269. *Id.* at 310.

270. 839 S.W.2d 866 (Tex. App.—Austin 1992, writ requested).

271. *Id.* at 875.

272. *Id.*

273. 831 S.W.2d 592 (Tex. App.—Austin 1992, writ granted).

pocket" expenses resulting from the misrepresentations, the trial court trebled the prejudgment interest that had accrued on the \$17,000. Celtic Life argued to the court of appeals that trebling the prejudgment interest was contrary to the supreme court's decision in *Vail v. Texas Farm Bureau Mutual Insurance Co.*²⁷⁴ In *Vail*, the court held that prejudgment interest does not accrue on punitive damages because these are penalties rather than compensatory damages.²⁷⁵ Celtic Life pointed out to the court that the same number results when prejudgment interest is trebled as when prejudgment interest is applied to treble damages. Since the latter is prohibited, Celtic Life argued, so too must the former.

The court of appeals disagreed and reaffirmed its decision in *Paramore v. Nehring*²⁷⁶ that prejudgment interest in subject to trebling under the DTPA and Insurance Code.²⁷⁷ The court reasoned that, at common law, prejudgment interest is recoverable as compensation for the detention of that which is due on account of an injury inflicted.²⁷⁸ Because actual damages recoverable under the DTPA are those damages recoverable at common law, the court held that prejudgment interest constitutes actual damages under the DTPA subject to trebling.²⁷⁹ The court concluded that the legal principles used to allow for the trebling of prejudgment interest are valid and distinguishable from the legal principle that disallows the application of prejudgment interest to treble damages.²⁸⁰ Therefore, that both calculations result in the same number is of no consequence and does not command a conclusion that there is a conflict between *Paramore* and *Coats* and the supreme court's decision in *Vail*.²⁸¹

2. Additional (treble) damages

In addition to actual damages, the DTPA allows the trier of fact to award additional damages up to three times the actual damages if the conduct is committed knowingly.²⁸² In *Winkle Chevy-Olds-Pontiac, Inc. v. Condon*,²⁸³ the trial court allowed the consumer to recover treble damages under the DTPA as well as common law punitive damages for conversion. Winkle and Condon entered a forty-eight month lease agreement on a van. After approximately thirty months, Winkle repossessed the vehicle. A series of attempts to obtain the return of both the van and the construction tools in the van were unavailing and Condon filed suit alleging violations of the DTPA, conversion, and breach of contract. Condon prevailed under both the DTPA and conversion claims and recovered both DTPA treble damages and common law punitive damages. The court of appeals upheld both, first not-

274. 754 S.W.2d 129 (Tex. 1988).

275. *Id.* at 137.

276. 792 S.W.2d 210, 212 (Tex. App.—Austin 1990, no writ).

277. *Coats*, 831 S.W.2d at 599.

278. *Coats*, 831 S.W.2d at 599; *see also Paramore*, 792 S.W.2d at 212.

279. *Coats*, 831 S.W.2d at 599; *see also Paramore*, 792 S.W.2d at 212.

280. *Coats*, 831 S.W.2d at 599.

281. *Id.*

282. DTPA § 17.50(b)(1) (Vernon Supp. 1993).

283. 830 S.W.2d 740 (Tex. App.—Corpus Christi 1992, writ dismissed).

ing that recovery of both treble and punitive damages is not allowed if each is based upon the same act or practice.²⁸⁴ Because the remedies under the DTPA are cumulative of those provided by other laws, however, if different and separate acts are alleged and proven, a recovery of treble damages and punitive damages is permissible.²⁸⁵ In this case, Condon alleged and proved that Winkle was guilty of conversion by wrongfully taking the van and that Winkle made misrepresentations at the time of contracting regarding notice and ownership of the van. Condon obtained separate findings of actual damages under each theory of recovery. Because the award of treble damages and punitive damages was based on separate jury findings and upon different acts, the court held that Condon was entitled to both treble damages and common law punitive damages.²⁸⁶

The treatment of additional damages is somewhat different if suit is brought under article 21.21 of the Insurance Code or section 17.50(a)(4) of the DTPA, which incorporates article 21.21. Whereas section 17.50(b)(1) of the DTPA gives the trier of fact the discretion to award additional damages when the conduct is knowingly committed, section 16 of article 21.21 provides that "the court shall award, in addition [to actual damages], two times the amount of actual damages" upon a finding of "knowingly."²⁸⁷ The differences between the statutes were explained in *State Farm Fire & Casualty Co. v. Gros*.²⁸⁸ As noted by that court, these two statutes were enacted in 1973 and both contained a provision for mandatory treble damages, without a requirement of "knowing" conduct to trigger such additional damages.²⁸⁹ In 1979, the DTPA was amended to provide for discretionary additional damages upon a finding of knowledge.²⁹⁰ Article 21.21, however, remained unchanged until 1985. Even then, the award of additional damages remained mandatory, although now a finding of knowingly is required.²⁹¹ The court also held that the mandatory additional damages provision of article 21.21 can be used if the consumer brings an action under section 17.50(a)(4) of the DTPA, as this section incorporates all of article 21.21.²⁹²

In *Stewart Title Guaranty Co. v. Sterling*,²⁹³ the supreme court faced the issue of whether settlement credits to which a non-settling defendant is entitled should be applied before or after trebling the actual damages. Sterling bought a large tract of land from Equitable Life Assurance Society to develop as a residential subdivision. As part of the transaction, Sterling sought to acquire title to three improved homesites. A survey showed that these

284. *Id.* at 744.

285. *Id.*

286. *Id.*

287. TEX. INS. CODE ANN. art. 21.21, § 16(b)(1) (Vernon Supp. 1993) (emphasis added).

288. 818 S.W.2d 908 (Tex. App.—Austin 1991, no writ).

289. *Id.* at 916-17.

290. *Id.* at 917.

291. *Id.*

292. *Id.*; see also *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 132-33 (Tex. 1988).

293. 822 S.W.2d 1 (Tex. 1991).

lots were not owned by Equitable. However, Sterling was assured by an attorney at Butler & Binion that the survey was incorrect and that Equitable had title to the three lots. Immediately before signing the closing documents, Sterling obtained assurances from Equitable, Butler & Binion, and Stewart Title that the three lots were included in the sale. Sterling sued Stewart Title, Equitable, and Butler & Binion (Equitable's lawyers) upon learning that he had not received good title on three lots in the large tract. Equitable and Butler & Binion settled after trial began for \$400,000 and were dismissed from the suit. The jury found that Stewart Title knowingly engaged in deceptive trade practices and that Sterling sustained \$200,000 in actual damages. Sterling elected recovery under article 21.21 of the Insurance Code in order to have the actual damages trebled. Stewart Title sought to obtain a pre-trebling credit for the amount paid to Sterling by the other defendants, which the trial court denied.

The supreme court held that Stewart Title was entitled to a credit under the "one satisfaction" rule because of the settlement proceeds received from the other defendants.²⁹⁴ The court also held, however, that the credits should be applied only after the actual damages are trebled.²⁹⁵ The court stated that the punitive purpose of trebling would be frustrated by allowing the actual damage amount to be reduced by the credits before trebling.²⁹⁶ Because the Insurance Code requires trebling of actual damages, not *recoverable* damages, application of the "one satisfaction rule" must include recovery of the trebled damages.²⁹⁷ The court also reasoned that a pre-trebling credit would discourage settlements since the nonsettling defendant would reap a windfall from the settlements made by other defendants.²⁹⁸

3. Court costs

Section 17.50(d) of the DTPA mandates that a prevailing consumer shall recover court costs.²⁹⁹ In *American Commercial Colleges, Inc. v. Davis*,³⁰⁰ the court held that a question about court costs should not be submitted to the jury because the right to costs is based entirely upon statutes or procedural rules.³⁰¹ In this case, the jury was asked what were the reasonable and necessary costs. The court held that the trial court should have disregarded this question because it was immaterial.³⁰² However, because Davis did prevail under the DTPA, the court of appeals affirmed the judgment for actual damages plus court costs.³⁰³

294. *Id.* at 7-8.

295. *Id.* at 8-9.

296. *Id.* at 9.

297. *Id.*

298. *Id.*

299. DTPA § 17.50(d) (Vernon 1987).

300. 821 S.W.2d 450 (Tex. App.—Eastland 1991, writ denied).

301. *Id.* at 454.

302. *Id.*

303. *Id.* at 455-56.

G. CONTRIBUTION & INDEMNITY

Section 17.555 of the DTPA allows a defendant to seek contribution or indemnity "from one who, under the statute law or at common law, may have liability for the damaging event of which the consumer complains."³⁰⁴ In 1989 the supreme court in *Plas-TEX, Inc. v. U.S. Steel Corp.*³⁰⁵ explained that:

Section 17.55A [now section 15.555] was added to the DTPA as part of the 1977 amendments. The section was added in response to *Volkswagen of America, Inc. v. Licht*, 544 S.W.2d 442, 447 (Tex. Civ. App.—El Paso 1976, no writ), in which the court of civil appeals held that the right of indemnity was not available under the DTPA. The statute does not describe the nature of or set the standard for obtaining the statutory rights to contribution and indemnity. Considering the circumstances under which the section was added and its lack of guidelines, it appears this section was intended to incorporate existing principles of contribution and indemnity law into DTPA cases.³⁰⁶

Plas-TEX, however, did not explain which of the "existing principles" applied to DTPA cases.

In *Stewart Title Guaranty Co. v. Sterling*,³⁰⁷ the supreme court decided that the original contribution statute, enacted in 1917 and now codified in chapter 32 of the Texas Civil Practice and Remedies Code,³⁰⁸ applied to a case under section 16 of article 21.21 of the Texas Insurance Code,³⁰⁹ which, inter alia, makes actionable violations of section 17.46 of the DTPA.³¹⁰ Before closing on a tract he intended to develop, Sterling was told by the seller (Equitable), the seller's attorneys (Butler & Binion), and the title insurer (Stewart Title) that three improved and occupied homesites were within the tract. Unfortunately, they were not. After Stewart Title refused to pay on the title policy, relying on a policy exception for rights of parties in possession, Sterling sued Equitable, Butler & Binion, and Stewart Title alleging that all three had violated the DTPA and that Stewart Title had also violated article 21.21 of the Texas Insurance Code. Before trial, Equitable and Butler & Binion settled for \$400,000 and Sterling proceeded to trial against Stewart Title under section 16 of article 21.21. The jury found that Stewart Title knowingly violated section 17.46 of the DTPA, which is expressly actionable under article 21.21, section 16, and that Sterling's damages, as measured by the fair market value of the three homesites, were \$200,000. The trial court denied Stewart Title's request for a dollar-for-dollar credit for the \$400,000 paid by the settling defendants and rendered judgment for Sterling for treble damages and attorney's fees. The court of

304. DTPA § 17.555 (Vernon 1987).

305. 772 S.W.2d 442 (Tex. 1989).

306. *Id.* at 446 (citations omitted).

307. 822 S.W.2d 1 (Tex. 1991).

308. TEX. CIV. PRAC. & REM. CODE ANN. § 32.001 (Vernon 1986).

309. TEX. INS. CODE ANN. art. 21.21, § 16 (Vernon 1981).

310. *Stewart Title*, 822 S.W.2d at 5-8.

appeals upheld the denial of the credit.³¹¹

The supreme court reversed.³¹² Though the judgment was based on the Insurance Code, the court made clear that suits under section 17.50 of the DTPA are likewise covered by the original contribution statute.

It should be noted that the recent tort reform legislation did not effect [sic] the original contribution statute. Therefore, the original contribution statute and its 70 year judicial application and interpretation remains valid for all torts outside of the scope of the other contribution schemes. Additionally, the new contribution legislation did not expand the underlying theory of Duncan to all torts. The statute specifically exempts from its scope suits based on the DTPA, the Insurance Code and intentional torts. Therefore, even under the most recent legislative enactments in tort reform, these exempted theories of liability are subject to the application of the original contribution statute.³¹³

In *Willingham Auto World v. Jones*,³¹⁴ the court held that to receive contribution under the DTPA, there must be a judgment finding the party seeking contribution to be jointly and severally liable with the party from whom contribution is sought.³¹⁵ Jones sued Winnebago and Auto World alleging violations of the Deceptive Trade Practices Act. Auto World filed a cross-action against Winnebago seeking indemnity or contribution. Several months before trial Winnebago paid Jones \$8,000 in settlement. The posture of the parties at trial was an action by Jones against Auto World for recovery of damages for violations of the DTPA and a cross-action by Auto World against Winnebago for contribution and defense costs. The jury found that Auto World committed four separate violations of the DTPA in maintenance and services performed on Jones' vehicle. The jury also found that this conduct was the producing cause of damages to Jones in the amount of \$2,217. The producing cause and damages questions each contained the following instruction:

You are instructed . . . not to consider any damages which may have resulted in whole or in part from the actions of Winnebago Industries, Inc., but shall confine your consideration to those damages, if any, which you find resulted only from the conduct of WILLINGHAM AUTO WORLD.³¹⁶

Before the case was submitted to the jury, Auto World elected by written pleading to take as a credit the \$8,000 paid in settlement to Jones. The trial

311. *Stewart Title Guar. Co. v. Sterling*, 772 S.W.2d 242 (Tex. App.—Houston [14th Dist] 1989), *rev'd in part*, 822 S.W.2d 1 (Tex. 1991).

312. *Sterling*, 822 S.W.2d at 12 (Tex. 1991).

313. *Id.* at 6 n.7 (citation omitted).

314. 833 S.W.2d 232 (Tex. App.—Tyler 1992, writ denied). The supreme court granted writ in the *Willingham* case (the court later reconsidered and denied the application for writ) at the same time it granted writ in *First Title Co. of Waco v. Garrett*, 802 S.W.2d 254 (Tex. App.—Waco 1990, writ granted), a DTPA case in which the court denied a dollar credit because the non-settling defendants had not "establish[ed] by proof that [those who settled] were joint tortfeasors." 802 S.W.2d at 263.

315. *Id.* at 234.

316. 833 S.W.2d at 233.

court denied the credit. Citing *Beech Aircraft Corp. v. Jinkins*,³¹⁷ the court of appeals held that Auto World was not entitled to contribution because there was no judgment or findings by the trial court that Winnebago was a joint tortfeasor with Auto World.³¹⁸ Without such a finding, according to the court, Auto World was not entitled to a dollar-for-dollar credit.³¹⁹

H. ATTORNEY'S FEES

In addition to court costs, DTPA section 17.50(d) provides that a prevailing consumer shall recover reasonable and necessary attorneys' fees.³²⁰ The cases during the Survey period dealt with segregation of fees and the proof required that they are reasonable and necessary.

In *Stewart Title Guaranty Co. v. Sterling*,³²¹ the supreme court stated the rules relating to the segregation of fees, both between claims and between parties. First, the court stated that

[w]hen a plaintiff seeks to recover attorney's fees in cases where there are multiple defendants, and one or more of those defendants have made settlements, the plaintiff must segregate the fees owed by the remaining defendants from those owed by the settling defendants so that the remaining defendants are not charged fees for which they are not responsible.³²²

Second, the court acknowledged that "a recognized exception to this duty to segregate [between fee shifting and non-fee shifting claims] arises when the attorney's fees rendered are in connection with claims arising out of the same transaction and are so interrelated that their 'prosecution or defense entails proof or denial of essentially the same facts.'"³²³ Because the plaintiff's expert on attorney's fees testified that "some of the fees incurred were 'primarily related' to one defendant rather than to both and that a 'large majority' of the fees were incurred as a result of 'fighting' Butler & Binion and Equitable[.]"³²⁴ the court found that "the attorney's fees are capable of segregation."³²⁵ The court ruled that where reversal is required because of a failure to segregate, the appellate court should remand the case for determination of fees rather than rendering judgment for the party against whom fees are sought.³²⁶

In *Leggett v. Brinson*,³²⁷ the trial court took judicial notice of the reasonableness of the consumer's attorney's fees and awarded attorney's fees in a judgment based solely upon DTPA violations. On appeal, the defendant argued that the award of attorney's fees should be reversed because the DTPA

317. 739 S.W.2d 19 (Tex. 1987).

318. *Willingham Auto World*, 833 S.W.2d at 235.

319. *Id.* at 234-35.

320. DTPA § 17.50 (Vernon 1987).

321. 822 S.W.2d 1 (Tex. 1991).

322. *Id.* at 10-11.

323. *Id.* at 11.

324. *Id.* at 12.

325. *Id.*

326. *Id.* at 11-12.

327. 817 S.W.2d 154 (Tex. App.—El Paso 1991, no writ).

does not provide for judicial notice of reasonable attorney's fees. The court of appeals agreed that the trial court may not take judicial notice of reasonable attorney's fees under the DTPA and that there must be evidence to support such a recovery.³²⁸ The court, however, refused to render a take nothing judgment on attorney's fees, but remanded for a determination of the reasonableness of the fees to be awarded.³²⁹ Even though there was no evidence of reasonable attorney's fees, the court held that a remand was in order because attorney's fee are mandatory under the DTPA and because the trial court determined the amount under the erroneous theory of judicial notice.³³⁰

A court reached the opposite result in *American Commercial Colleges, Inc. v. Davis*.³³¹ In this case, the consumer's attorney testified about the amount of time he had spent on the case and the amount of his hourly charges. No testimony indicated, however, the reasonableness and necessity of the attorney's fees. The court of appeals found the evidence insufficient to support an award of attorney's fees under the DTPA and reversed and rendered.³³² The court held that, even though attorneys' fees are mandatory for the winning consumer, even under the DTPA there must be evidence of reasonableness and necessity to support a fee award.³³³ If no such evidence exists, the court continued, the appellate court should reverse and render.³³⁴ In reaching its decision, the court distinguished *Satellite Earth Stations East, Inc. v. Davis*,³³⁵ the case relied upon both by the consumer in this case and the court in *Leggett v. Brinson*. A remand was warranted in *Satellite*, reasoned the court, because the jury found the reasonable attorney's fees to be zero even though there was evidence of reasonable and necessary attorney's fees. Here, however, there was no such evidence. Thus, according to the court, a remand was not permissible.³³⁶ In light of the supreme court's decision in *Stewart Title*, the refusal to remand the fee issue appears to be wrong.

I. LIMITATIONS

All actions brought under the DTPA must be brought "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 in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice."³³⁷ Even though this limitation provision speaks only of "false, misleading, or deceptive acts," which is but one of the causes of action provided under section 17.50, the courts have

328. *Id.* at 157.

329. *Id.*

330. *Id.*

331. 821 S.W.2d 450 (Tex. App.—Eastland 1991, writ denied).

332. *Id.* at 455-56.

333. *Id.* at 455.

334. *Id.*

335. 756 S.W.2d 385 (Tex. App.—Eastland 1988, writ denied).

336. *American Commercial Colleges*, 821 S.W.2d at 455.

337. DTPA § 17.565 (Vernon 1987).

held that all DTPA actions are subject to these limitations.³³⁸

As one would expect, most of the limitations cases during the Survey period involved application of the discovery rule contained in section 17.565. In *McDade v. Texas Commerce Bank*,³³⁹ for example, the court held that the statute of limitations on the bank customer's DTPA express warranty claim did not begin until the customer discovered the bank's error in failing to deposit the funds in a non-taxable retirement account as the bank had represented it would do.³⁴⁰ The jury, however, found that McDade did not discover the bank's error until January 30, 1986, which was within two years of the date he filed suit.

The court of appeals upheld this finding.³⁴¹ The evidence showed that McDade had first learned of a problem prior to that date, when he received a 1099 tax form relating to the account. However, he believed this was simply an error on the form and not a reflection that he did not have an IRA. Only after he went to the bank and learned the account was not an IRA did McDade realize that the bank's error. A bank employee testified that when he told McDade that the account was not an IRA, McDade seemed disturbed and surprised. The court held that this evidence supported the jury finding, even though other evidence supported that McDade had said he learned sometime around the middle of January that the account was not an IRA, and this discovery date would have made his suit untimely.³⁴²

In *Southwestern Bell Media, Inc. v. Lyles*,³⁴³ the court allowed a consumer of a Yellow Pages ad to take advantage of the discovery rule. Bell filed suit against Lyles in July 1988, for breach of two agreements for advertising in the 1986 and 1987 Yellow Pages. In April 1990 Lyles amended his answer to add a counterclaim for breach of contract and violations of the DTPA. Lyles alleged that Bell accepted money intended as payment for new advertising, but applied the money to a disputed account for old advertising, misrepresented its application of the money, and excluded his advertisements from the 1988 Yellow Pages. After a trial to the court, Bell was granted recovery for the advertising and Lyles recovered on his DTPA counterclaim. After offsetting the awards, the court ordered Bell to pay Lyles about \$78,000. The court of appeals affirmed.³⁴⁴

Bell argued that Lyles' counterclaim was barred by the statute of limitations. The basis of Lyles' DTPA claim was that Bell misrepresented that it would accept a \$5,000 deposit for 1988 advertising and then applied it to his balance on his 1986 and 1987 accounts, and misrepresented the possibility of

338. *Darr Equipment Co. v. Allen*, 824 S.W.2d 710 (Tex. App.—Amarillo 1992, writ denied) (breach of implied warranty of good and workmanlike repairs); *Cal Fed Mortgage Co. v. Street*, 824 S.W.2d 622 (Tex. App.—Austin 1991, writ denied) (misrepresentations); *McDade v. Texas Commerce Bank*, 822 S.W.2d 713 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (breach of express warranty).

339. 822 S.W.2d 713 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

340. *Id.* at 719.

341. *Id.*

342. *Id.* at 720-21.

343. 825 S.W.2d 488 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

344. *Id.* at 495.

advertising in the 1988 directory. Bell argued that Lyles' counterclaim was barred because it was filed more than two years after December 7, 1987, the date the alleged misrepresentations were made. The court recognized that Lyles carried the burden to plead and prove that the date he discovered the misrepresentations was less than two years prior to his filing suit. Lyles argued that he could not reasonably have discovered the misrepresentations prior to May 8, 1988, when he was told that the book was closed and his ad was not included. Bell argued that Lyles knew or should have known of the misrepresentations long before May 8, 1988, since on January 4, 1988, Southwestern Bell sent him an invoice showing that the \$5,000 payment had been applied to his past due balance and an advertising form indicating that the ad had been "zeroed out." Bell had also sent collection letters on February 4, and March 1, stating that Lyles' account was seriously delinquent and his future advertising privileges had been canceled.

The court also noted, however, that Lyles testified that Bell representatives assured him that he would be issued credits and adjustments on his outstanding balance and asked him to disregard computer-generated billings that he would receive. These representatives also assured Lyles that he would have no problem getting his advertisement into the 1988 Yellow Pages directory. Additionally, in February 1988, Bell accepted the advertising copy for the 1988 book from Lyles, during which time negotiations were on-going for an adjustment to the past due account due to errors in the prior ads. After Lyles rejected Bell's offer of a 20% adjustment, Bell told Lyles that his ad would not appear in the 1988 directory. Based on this evidence, the court of appeals held that the trial court properly determined that Lyles could not have reasonably discovered the misrepresentations prior to May 8, 1988.³⁴⁵ Thus, Lyles' DTPA claim was not time-barred.³⁴⁶

In *Darr Equipment Co. v. Allen*,³⁴⁷ the court held that limitations began to run when the consumer discovered the nature of the injury even though all the elements of his cause of action were not discovered.³⁴⁸ In April of 1984, Darr performed an engine overhaul on a 1981 Freightliner truck owned by Lahon. The overhaul included the replacement of the connecting rod and wrist pin bushings. Darr used a method of inserting the bushings in the connecting rod that deviated from the method recommended by Caterpillar,

345. *Id.*

346. *Id.* Justice O'Connor dissented, asserting that Lyles discovered or should have discovered the misrepresentation prior to May 8, 1988, and therefore, his counterclaim was barred by limitations. According to the dissent, Lyles discovered the misrepresentation as early as February 4, 1988, when he received a contract and a letter from Southwestern Bell showing that Lyles had no 1988 advertising. Then on March 1, 1988, Lyles received a final notice from Southwestern Bell that his delinquent account had been fully accelerated and that he was disqualified from future advertisement. Justice O'Connor wrote that even if these items did not provide actual notice to Lyles, they would have caused a reasonably prudent person to make an inquiry about the status of the advertisement in the 1988 book. Justice O'Connor claimed that the majority did not apply the reasonably prudent person test, but took at face value Lyles' statement that he did not understand that his advertisement was not in the Yellow Pages until May 8, 1988. *Id.* at 499-502.

347. 824 S.W.2d 710 (Tex. App.—Amarillo 1992, writ denied).

348. *Id.* at 713.

the manufacturer of the engine. Lahon sold the truck to Don Drum Equipment Company, which sold it to Allen on May 18, 1984. In December of 1984, Allen took the truck to West Texas Equipment Company when water began to appear in the oil. West Texas performed an engine overhaul but did not replace the wrist pin bushings because an inspection showed no need to replace them.

On April 5, 1985, Allen again took the truck to West Texas Equipment to determine the cause of a knocking sound. On that day, Allen examined the partially disabled engine and saw that the wrist pin bushings had turned or rotated, had moved out of alignment, and had become discolored from the heat, causing the internal parts of the engine to wear against each other. Allen refused to pay for the repairs claiming they were caused by the negligent work previously performed by West Texas. On April 20, 1985, Darr informed Allen that the wrist pin bushings were not installed in the manner prescribed by Caterpillar. On July 26, 1985, West Texas filed suit against Allen for the cost of the April repairs. Allen filed a general denial and a counterclaim against West Texas for negligent repairs. On April 10, 1987, Allen joined Darr as a third party defendant alleging negligence in the installation of the wrist pin bushings and a breach of implied warranty of service in violation of the DTPA. Darr asserted the defense of statute of limitations.

On the day of trial, Allen confessed judgment to West Texas leaving only his claims against Darr. The jury found that Darr was negligent and breached an implied warranty of service and awarded Allen \$13,950 in actual damages, \$27,000 in punitive damages, and \$20,000 for attorney's fees. Darr appealed contending that Allen's claims were barred by the two year statute of limitations. The court of appeals reversed and rendered.³⁴⁹

The court held that Allen had to commence his breach of implied warranty under the DTPA within two years after the date on which the breach of warranty occurred or within two years after Allen discovered or in the exercise of reasonable diligence should have discovered the breach of warranty.³⁵⁰ The court noted Allen's admission that he discovered his damages and the injury causing them no later than April 5, 1985, which was more than two years prior to the filing of his action against Darr. Allen argued that limitations should not have started running until April 20, 1985, the date upon which he discovered that Darr had improperly installed the wrist pin bushings. The court held that the limitations period started running on April 5, 1985, the day Allen discovered the malfunction of the wrist pin bushings, even though he did not know the cause of the malfunction.³⁵¹

Allen further argued that he was entitled to recover under the common law implied warranty, which is governed by a four year period of limitations. The court held that Allen's breach of warranty claim was governed by the two year limitations period under the DTPA.³⁵² The court cited *Melody*

349. *Id.*

350. *Id.* at 712.

351. *Id.*

352. *Id.*

*Home Manufacturing Co. v. Barnes*³⁵³ for the proposition that the implied warranty to provide good and workmanlike service is available to consumers suing under the DTPA.³⁵⁴

The Houston court of appeals (First District) had two occasions to write on the issue of the discovery rule in the context of a motion for summary judgment.³⁵⁵ In *Bowe v. General Motors Corp.*,³⁵⁶ the court reversed a summary judgment based on limitations rendered in favor of GM and its dealer, Wiesner.³⁵⁷ The plaintiff, Bowe, sued GM and Wiesner under the DTPA for failure to properly repair a car and failure to build the car in a good and workmanlike manner. Bowe purchased a GM car from Wiesner in June 1987. In July 1987, the car overheated twice and by October 1987, the air conditioner completely quit working. In February 1988, Mr. Bowe took the car to a local Exxon station to have the air conditioner checked and freon added. The air conditioner still did not work, so on March 14, 1988, Bowe took the car to the Wiesner service department. After mechanics worked on the car, the air conditioner worked occasionally, going on and off unpredictably. Thus, Bowe returned the car two days later to Wiesner. Wiesner told them he could find nothing wrong with the car.

In April 1988, Mrs. Bowe took the car to Wiesner because of the air conditioner. The service representative told her she was having hot flashes and that nothing was wrong with the car. The air conditioner continued to go on and off, so Bowe went back to Wiesner on April 25, 1988. This time Wiesner indicated the problem was the pressure switch and assured Bowe that it would be fixed. When Bowe picked up the car, however, the air conditioner still did not work properly. On May 20, 1988, Bowe once again returned the car to Wiesner at which time the dealer taped two wires together, replaced another pressure switch, and represented that the car had been repaired. The air conditioner continued to work unpredictably. In November 1988, the brakes began squealing and the engine overheated again. On February 17, 1989, the car suddenly died and Exxon replaced the fuel pump, the timer, and the gas screen. In March 1989, the air conditioner would not come on, and Wiesner replaced another pressure switch. Mr. Bowe took the car back in on April 6, 1989 because the horn was blowing without warning, the engine was hesitating, and the air conditioner was not working. Mr. Bowe was told that the car had a bad electrical system and that it was impossible to find the cause of an electrical system problem. The problems with the car continued for the remainder of 1989 and throughout 1990. The cruise control stopped working, the air conditioner did not function properly, the engine overheated at low speeds, the car vibrated, the bat-

353. 741 S.W.2d 349 (Tex. 1987).

354. *Darr*, 824 S.W.2d at 712 (citing *Melody Home*, 741 S.W.2d at 354).

355. See *Bowe v. General Motors Corp.*, 830 S.W.2d 775 (Tex. App.—Houston [1st Dist.] 1992, writ denied); *Buffington v. Lewis*, 834 S.W.2d 601 (Tex. App.—Houston [1st Dist.] 1992, no writ).

356. 830 S.W.2d 775 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

357. *Id.* at 779.

tery and alternator had to be replaced, the horn blew unexpectedly, and Bowe finally learned that the engine block was cracked.

Bowe brought suit under the DTPA on May 22, 1990. GM and Wiesner sought a summary judgment based upon limitations and thus had the burden of proving as a matter of law that Bowe discovered the nature of his injury more than two years prior to filing suit.³⁵⁸ GM and Wiesner argued that the Bowes should have discovered their injuries in the summer and fall of 1987 when they first had difficulties with the engine overheating and the air conditioner malfunctioning. The court held that these problems alone could not, as a matter of law, give rise to a cause of action for failure to build a car in a good and workmanlike manner.³⁵⁹ Furthermore, in 1987, it would have been impossible for the Bowes to discover the failure to repair the car because the first repairs were not made until early 1988.³⁶⁰ GM and Wiesner then argued that the Bowes knew about their injury by May 20, 1988, because at that point, they had taken their car to Wiesner five times to have the air conditioner repaired. The court found no authority for finding, as a matter of law, that the Bowes should have discovered the failure to repair the air conditioner after five failed attempts.³⁶¹ Because a genuine issue of fact existed concerning the date on which the Bowes should have discovered or actually did discover their injuries, the court of appeals held it improper for the trial court to grant summary judgment based on the statute of limitations.³⁶²

The court also reversed summary judgment based on statute of limitations on DTPA claims in *Buffington v. Lewis*,³⁶³ because there was a material fact issue regarding when the plaintiff knew, or should have known, of the defects in the house and the extent of the defects.³⁶⁴ Buffington alleged that Lewis had sold him a house without revealing it had a defective sewer system and a fractured foundation. Buffington filed suit approximately eight-and-one-half years after the date the home was purchased. Lewis asserted that the statute of limitations barred Buffington's right to recover and the court granted a summary judgment on this issue. With respect to Buffington's DTPA claims, the court noted that the statute of limitations begins to run when the plaintiff either discovered, or should have discovered, the acts giving rise to the cause of action.³⁶⁵ In support of his motion for summary judgment, Lewis referred to Buffington's admission that at the time the house was purchased, Buffington knew of one stress crack on an outside wall of the house. Buffington countered with an affidavit stating that he had no reason to discover the full extent of the defects until April 25, 1988, when a registered professional engineer conducted a structural inspection of the

358. *Id.* at 788.

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.* at 779.

363. 834 S.W.2d 601 (Tex. App.—Houston [1st Dist.] 1992, no writ).

364. *Id.* at 605.

365. *Id.* at 603.

home. The alleged defects included brick, mortar, and foundation cracks; severe deflection and binding in the window frames; settlement in the sidewalk; slow failure in the retaining walls; severe seepage through the basement walls; and septic sum discharge pit problems. The court concluded that this affidavit created a material fact issue regarding when Buffington knew, or should have known, of the defects and the extent of the defects.³⁶⁶ Even though Buffington knew of one minor defect, he did not know of the severity of the defects until April 1988, which was about one year prior to the date suit was filed. The court held, however, that the statute of limitations barred Buffington's breach of warranty claim because it was not brought within four years of the sale of the home.³⁶⁷ Rather than applying the limitations and discovery rule found in the DTPA or at common law for warranty actions, the court looked to the U.C.C. limitations provisions.

Buffington's warranty claim, however, could not have arisen under the U.C.C. because the U.C.C. applies only to the sale of "goods" and a house is not a "good" under the U.C.C. definition.³⁶⁸ The only implied warranty Buffington could have alleged to have been breached is one that developed under the common law, such as breach of implied warranty of habitability.³⁶⁹ The court relied on *Safeway Stores, Inc. v. Certaineed Corp.*³⁷⁰ for the proposition that a breach of implied warranty action accrues at the time of delivery and that the discovery rule does not apply unless the warranty involves future performance.³⁷¹ *Safeway Stores*, however, dealt with a U.C.C. implied warranty, not a common law implied warranty. Because the U.C.C. did not apply, the U.C.C. provisions regarding delivery and future performance did not govern the warranty in *Buffington*. Applicable instead was the four-year limitations period, which does not begin to run until the buyer discovers, or should have discovered, the injury.³⁷²

In *Parker v. Yen*,³⁷³ the court held that a defendant seeking a summary judgment on a DTPA claim based upon limitations must first negate the discovery rule.³⁷⁴ That is, the defendant must conclusively show that the consumer knew or should have known of the alleged deceptive acts more than two years prior to the filing of suit.³⁷⁵ Mr. Parker brought suit on behalf of his wife, who was rendered an invalid in an automobile accident. Mr. Parker alleged that Mr. Yen, a pharmacist, misfilled a prescription and gave Mrs. Parker a fast-acting sleeping aid rather than the drug prescribed

366. *Id.* at 605.

367. *Id.* at 603.

368. *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392, 394 (Tex. 1982) (U.C.C. applies only to sales of goods; house is not a good since it is not moveable), *overruled on other grounds*, *Melody Home Mfg. Co. v. Barnes*, 708 S.W.2d 349 (Tex. 1987).

369. *See Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168 (Tex. 1983); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968).

370. 710 S.W.2d 544 (Tex. 1986).

371. *Buffington*, 834 S.W.2d at 603.

372. *Richman v. Watel*, 565 S.W.2d 101, 102 (Tex. Civ. App.—Waco), *writ ref'd n.r.e. per curiam*, 576 S.W.2d 779 (Tex. 1978).

373. 823 S.W.2d 359 (Tex. App.—Dallas 1991, no writ).

374. *Id.* at 362-63.

375. *Id.* at 363.

by her doctor. As a result, Mrs. Parker fell asleep while driving her car and collided with another vehicle. The prescription was misfilled on May 7, 1987, the accident occurred two days later, and suit was filed on July 11, 1989. The court of appeals reversed the summary judgment on limitations because Mr. Yen did not show when the Parkers knew or should have known of the alleged deceptive acts.³⁷⁶

The date on which a cause of action accrues is critical for the determination of whether the claim is barred by limitations. In *Cal Fed Mortgage Co. v. Street*,³⁷⁷ the court held that a borrower had to sue a bank within two years of the date the bank reneged on loan commitment and thus could not wait until he suffered damages by having to pay on a substituted recourse note.³⁷⁸ Street wanted to buy property in Austin and received an informal loan commitment from Cal Fed for a \$3.7 million nonrecourse note. Street testified that the Cal Fed loan officer, Dannatt, assured him that formal approval would be forthcoming, although not until the day after closing. Based on this assurance, Street signed a recourse note with Texas Commerce Bank for interim financing. The deal closed, and the next day Cal Fed refused to make the loan. This took place on October 23, 1984. Over the next couple of years, rent from the property was sufficient to pay the TCB loan, so Street did not complain to Cal Fed. After a major tenant left the building, income was not sufficient to pay the loan. In 1988 the property was worth less than the \$3.2 million purchase price, and Street had to sell the property and contribute funds of his own to pay TCB's note. Street sued Cal Fed in March 1988, claiming that, but for Cal Fed's misrepresentations, he would never have signed the recourse note to TCB nor purchased the property. Cal Fed argued that Street's claim was barred by limitations. The court of appeals agreed and rendered a take nothing judgment against Street.³⁷⁹ The court of appeals began by noting that DTPA section 17.565 requires that suit be brought within two years from the date the deceptive act occurs or within two years of the date the plaintiff discovers the act.³⁸⁰ In this case, Street admitted he knew of Cal Fed's misconduct on October 23, 1984, but did not file suit until more than two years later. The court rejected Street's argument that limitations under the DTPA did not begin running until he suffered damages upon having to use his own personal funds to pay on the note. The court reasoned:

If the legislature had intended limitations in DTPA actions to run from the date a consumer suffers damages, that intention could easily have been expressed in specific terms. Indeed, most statutes of limitations require that suit be brought within a specified period of time after the cause of action "accrues." . . . In the DTPA, however, the legislature did not use such language, but instead expressly made the limitations period begin to run when the deceptive act or practice occurred or when

376. *Id.*

377. 824 S.W.2d 622 (Tex. App.—Austin 1991, writ denied).

378. *Id.* at 627.

379. *Id.* at 628.

380. *Id.* at 624.

its occurrence was or should have been discovered. . . . We may not ignore the legislature's express language: "It is the duty of courts to construe a law as written, and, if possible, ascertain its intention from the language used therein, and not look for extraneous reasons to be used as a basis for reading into a law an intention not expressed nor intended to be expressed therein."³⁸¹

Alternatively, the court held that Street's claim would be barred under the common-law "legal injury rule."³⁸² The court held that Street suffered a legal injury at the time he learned of the misrepresentation and that limitations began to run at that point, even if his damages were not determinable until later.³⁸³ Finally, the court held that if actual damages were necessary to start limitations running, Street suffered actual damages on October 23, 1984, because the TCB loan carried a higher rate of interest than the promised Cal Fed loan.³⁸⁴

The *Cal Fed Mortgage* court's use of the "legal injury" rule and its refusal to use the suffering of actual damages as the trigger for commencement of limitations seem at odds with the language and purpose of the DTPA. It is true that DTPA section 17.565 refers to the date the conduct "occurred," but the limitations section cannot be read in isolation from the rest of the statute. The supreme court has stated that, in interpreting the DTPA, "[t]he fundamental rule controlling the construction of a statute is to ascertain the intention of the Legislature . . . [and] [t]hat *intention should be ascertained from the entire act, and not from isolated portions thereof.*"³⁸⁵ What this means is that section 17.565 must be read together with section 17.50, which states that "[a] consumer may maintain an action where any of the following constitute a producing cause of *actual damages.*"³⁸⁶ No suit *can* be brought without a plaintiff who has suffered actual damages. That being so, the two year limitations period cannot begin to run until actual damages have been suffered. To rule that the limitations clock begins ticking even before the statute permits the filing of a suit would produce an absurd result and contravene the express statutory mandate to construe the statute liberally to protect consumers.³⁸⁷ The DTPA's use of "actual damages" in the cause of action section, section 17.50, also precludes use of the "legal injury rule" to start the limitations period. Again, the DTPA does not permit a suit when only "legal injury" (a term whose practical meaning is, charitably speaking, less than clear) has occurred. "Actual" damages must have been sustained.

J. BAD FAITH, HARASSING AND GROUNDLESS SUIT

Section 17.50(c) of the DTPA provides "[o]n a finding by the court that

381. *Id.* at 625 (citation omitted).

382. *Id.* at 627.

383. *Id.*

384. *Id.*

385. *Woods v. Littleton*, 554 S.W.2d 662, 665 (Tex. 1977) (emphasis added) (quoting *City of Mason v. West Texas Utilities Co.*, 150 Tex. 18, 237 S.W.2d 273, 278 (1951)).

386. DTPA § 17.50(a) (Vernon 1987) (emphasis added).

387. DTPA § 17.44 (Vernon 1987).

an action under this section was groundless and brought in bad faith, or brought for the purpose of harassment, the court shall award to the defendant reasonable and necessary attorneys' fees and court costs."³⁸⁸

"Groundless" under this section means a claim having "no basis in law or fact, and not warranted by good faith argument for the extension, modification, or reversal of existing law."³⁸⁹ The standard for determining whether a suit is groundless is "whether the totality of the tendered evidence demonstrates an arguable basis in fact and law for the consumer's claim."³⁹⁰ An example of a suit brought in bad faith is one motivated by malicious or discriminatory purpose.³⁹¹ Whether a suit is groundless or brought in bad faith is a question of law for the court, not the jury.³⁹²

Applying these principles, the court in *Selig v. BMW of North America, Inc.*³⁹³ held that Selig's DTPA claim was groundless and brought in bad faith.³⁹⁴ About six months after purchasing a new BMW, Selig claimed that it suddenly accelerated as she attempted to stop, causing the BMW to collide with a parked vehicle and the side of a building. The court looked at the following facts in affirming the summary judgment against Selig, finding the suit groundless and brought in bad faith:

- (1) Selig failed to designate an expert witness to prove a defect that could have caused her damages;
- (2) Selig failed to depose BMW's liability experts;
- (3) Selig served BMW with meaningless but voluminous discovery requests;
- (4) Selig made unnecessary objections obstructing discovery;
- (5) Selig opposed special exceptions requesting specification of the amount of damages;
- (6) Following the trial court's order requesting the release of Selig's psychological records, Selig's counsel contacted the psychologist and advised him not to release the records; and
- (7) Selig lost her case before the Texas Motor Vehicle Commission, which found no defect in the car.³⁹⁵

The court also rejected Selig's argument that BMW's bad faith counterclaim was barred by the statute of limitations because it was not brought within two years of her purchase of the car. The court held that limitations on a bad faith counterclaim begin to run when the DTPA cause of action is

388. DTPA § 17.50(c) (Vernon 1987).

389. *Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634, 637 (Tex. 1989) (quoting TEX. R. CIV. P. 13); *see Selig v. BMW of North America, Inc.*, 832 S.W.2d 95, 103 (Tex. App.—Houston [14th Dist.] 1992, no writ); *CEDA Corp. v. City of Houston*, 817 S.W.2d 846, 848 (Tex. App.—Houston [1st Dist.] 1991, writ denied); *Elbaor v. Sanderson*, 817 S.W.2d 826, 828 (Tex. App.—Fort Worth 1991, no writ).

390. *Selig*, 832 S.W.2d at 103 (quoting *Splettstosser v. Myer*, 779 S.W.2d 806, 808 (Tex. 1989)).

391. *Id.*; *see Kazmir v. Suburban Homes Realty*, 824 S.W.2d 239, 247 (Tex. App.—Texarkana 1992, writ denied); *Elbaor*, 817 S.W.2d at 829.

392. *Selig*, 832 S.W.2d at 103; *Elbaor*, 817 S.W.2d at 830.

393. 832 S.W.2d 95 (Tex. App.—Houston [14th Dist.] 1992, no writ).

394. *Id.* at 104.

395. *Id.*

filed.³⁹⁶

In *Elbaor v. Sanderson*,³⁹⁷ the court of appeals likewise affirmed a judgment that a DTPA claim was groundless and brought in bad faith.³⁹⁸ Elbaor invested in an oil well through Sanderson, a promoter. After the well failed to produce to his satisfaction, Elbaor sued alleging that Sanderson had misrepresented the investment and earning potential of the well. The jury, however, found that Sanderson did not make misrepresentations or conceal information. The trial court found Elbaor's suit was groundless and brought in bad faith and awarded Sanderson attorney's fees. The court of appeals held that the standard for reviewing the finding by the trial court that a suit is groundless, brought in bad faith, or brought for harassment is whether the trial court's decision was arbitrary or unreasonable.³⁹⁹ The court of appeals concluded that the trial court did not act unreasonably in finding Elbaor's suit was groundless and brought in bad faith, based upon the following facts.⁴⁰⁰ Elbaor alleged that Sanderson represented that the well was already producing when Elbaor invested. On cross-examination, however, Elbaor admitted this allegation was not true. Elbaor also alleged that Sanderson made warranties regarding the well, but evidence showed Elbaor had signed a written statement saying that no representations, warranties, or guarantees had been made regarding the profits or losses from the investment. Elbaor additionally alleged that Sanderson misrepresented that the investment would reduce his tax liability. In fact, the investment did reduce his tax liability. Finally, Elbaor alleged that Sanderson made a written guarantee of the rate of the return on the well, and oral guarantees. Elbaor, however, produced no evidence of any written guarantee. Additionally, the evidence showed that Elbaor had prior experience in investing in oil wells and that the high risk of such investments was common knowledge.

In *CEDA Corp. v. City of Houston*,⁴⁰¹ the court upheld a finding that a DTPA claim was not groundless or brought in bad faith.⁴⁰² CEDA Corp. was involved in repairing HUD homes for the city of Houston. One of the houses CEDA bid to repair was Mary Burton's. The city inspectors approved the work done by CEDA, and CEDA was paid. A few years later, the city learned that some contractors under the HUD program had done substandard work or had charged for work that they had never done. After a reinspection of Burton's house, the city determined that CEDA's work was substandard. The city made the necessary repairs and then took an assignment of Burton's suit against CEDA under the DTPA. CEDA counter-claimed, asserting that the city's suit was groundless and brought in bad faith or for harassment. Ultimately, Burton's claims against CEDA were dismissed, and CEDA proceeded on its claims. The trial court denied relief

396. *Id.* at 103.

397. 817 S.W.2d 826 (Tex. App.—Fort Worth 1991, no writ).

398. *Id.* at 830.

399. *Id.* at 828.

400. *Id.* at 828-30.

401. 817 S.W.2d 846 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

402. *Id.* at 848-49.

on CEDA's DTPA counterclaim. CEDA argued that the trial court should have awarded fees on the DTPA counterclaim, because city inspectors found CEDA's work to be satisfactory and had approved it. In addition, Burton testified about her satisfaction with the work done by CEDA on her home. Some evidence also indicated, however, that upon reinspection, the city discovered CEDA had not performed its contract in a workmanlike manner because it found numerous defects in the plumbing and electrical work done by CEDA. According to the court of appeals, this evidence showed that the trial court did not abuse its discretion in finding the city's suit was not groundless.⁴⁰³

In *Kazmir v. Suburban Homes Realty*,⁴⁰⁴ Kazmir and others sued Suburban Homes Realty for allegedly selling them homes built on or near an active geological fault. The plaintiffs purchased the homes between 1977 and 1984. The subdivision was completed in 1977 or 1978. Plaintiffs filed suit in April 1988, and Suburban Homes was granted a summary judgment based on the statute of repose that protects engineers from being sued more than ten years after the substantial completion of improvements.⁴⁰⁵ The trial court also rendered summary judgment for Kazmir on Suburban's bad faith counterclaim. The court of appeals reversed, finding a fact issue since it appeared that some of the homeowners discovered their problems more than ten years before they filed suit and were aware that limitations was a problem.⁴⁰⁶ The court held this raised a fact question on whether at least some of the plaintiffs' claims were groundless or brought in bad faith or for the purpose of harassment.⁴⁰⁷

K. SURVIVABILITY OF DTPA CLAIMS

In *Wellborn v. Sears, Roebuck & Co.*,⁴⁰⁸ the Fifth Circuit confronted the issue of whether a consumer's cause of action under the DTPA survives his death. In this case, the jury awarded damages under the DTPA for a teenager, crushed to death by a garage door when the opener failed to stop or retract the door upon coming into contact with the boy. Sears argued that the teenager's DTPA action did not survive his death. The Fifth Circuit noted that three Texas courts of appeals have addressed the question of whether a cause of action under the DTPA survives to the estate of a consumer; two holding that such an action does survive, one holding that it does not.⁴⁰⁹ Because the Texas Supreme Court has yet to rule on this

403. *Id.*

404. 824 S.W.2d 239 (Tex. App.—Texarkana 1992, writ denied).

405. TEX. CIV. PRAC. & REM. CODE ANN. § 16.008 (Vernon 1986).

406. *Id.* at 247.

407. *Id.*

408. 970 F.2d 1420 (5th Cir. 1992).

409. *Id.* at 1427. (citing *Thomes v. Porter*, 761 S.W.2d 592, 594-95 (Tex. App.—Fort Worth 1988, no writ) (DTPA action does survive); *Mahan Volkswagen, Inc. v. Hall*, 648 S.W.2d 324, 333 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.) (DTPA action does survive); *First Nat'l Bank v. Hackworth*, 673 S.W.2d 218, 220-21 (Tex. App.—San Antonio 1984, no writ) (DTPA action does not survive)).

issue,⁴¹⁰ the Fifth Circuit certified this question to the Supreme Court of Texas.⁴¹¹

The resolution of this issue consistent with the language, purpose and policies of the DTPA would be to allow DTPA claims to survive the death of the consumer. In *Mahan Volkswagen, Inc. v. Hall*,⁴¹² the court relied on the Texas Survival Statute⁴¹³ in holding that DTPA claims survive the death of the consumer.⁴¹⁴ The survival statute abrogated the common law rule that an action for personal injuries does not survive the death of an injured person. Clearly, where the cause of action is for personal injury damages, the survival statute preserves the DTPA claim.⁴¹⁵

DTPA claims were also held survivable in *Thomes v. Porter*,⁴¹⁶ but because the damages were not for personal injuries, the survival statute did not apply. Instead the court considered the nature and purposes of the DTPA. The court noted that the survival of a cause of action depends on whether it is controlled by common law principles or a statute that provides for survival.⁴¹⁷ Because the DTPA does not provide for survival, the court applied the common rules of survival, which focus on the nature of the cause of action. At common law, the court stated, actions in contract, fraud, and deceit survived the death of either party. The court characterized the DTPA as "an amalgam of common law fraud, contracts, and tort considerations," and, therefore, a DTPA claim should also survive the death of a consumer.⁴¹⁸ The court reasoned further that survival is necessary to fulfill the purposes of the DTPA, "which are to protect consumers against false, misleading, and deceptive trade practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection."⁴¹⁹ The court held that frustration of the purposes of the DTPA would occur if violations could escape the DTPA merely because the consumer dies.⁴²⁰

The San Antonio court also had occasion to write on this issue and held that DTPA claims do not survive the death of the consumer in *First National Bank v. Hackworth*.⁴²¹ To reach this conclusion the court first determined that the DTPA is punitive, rather than remedial, in nature since it

410. The supreme court expressly reserved for another day the discussion of survival of DTPA claims in *Shell Oil Co. v. Chapman*, 682 S.W.2d 257, 259 (Tex. 1984).

411. *Wellborn*, 970 F.2d at 1427. On December 9, 1992, the Texas Supreme Court granted the parties' joint motion to dismiss the appeal and, accordingly, dismissed the certified question "without reference to the merits." *Sears, Roebuck & Co. v. Wellborn*, 36 Tex. Sup. Ct. J. 296 (Tex., Dec. 12, 1992).

412. 648 S.W.2d 324 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).

413. Acts 1925, p. 299, 39th Leg., ch. 115, § 2 (amended 1927) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 71.002 (Vernon 1986)).

414. *Mahan*, 648 S.W.2d at 333.

415. *Id.*

416. 761 S.W.2d 592 (Tex. App.—Fort Worth 1988, no writ).

417. *Id.* at 594.

418. *Id.*

419. *Id.* (quoting DTPA § 17.44 (Vernon 1987)).

420. *Id.*

421. 673 S.W.2d 218 (Tex. App.—San Antonio 1984, no writ).

allows for treble damages and attorney's fees. The court then noted that the law views the right to recover punitive damages as a purely personal right that terminates at the death of the injured person. In a similar fashion, the San Antonio court held that DTPA claims do not survive.⁴²²

Both the dissent in *Hackworth* and the court in *Thomes v. Porter* rejected this notion that the DTPA is punitive rather than remedial in nature.⁴²³ Both courts relied upon the holding of *Pennington v. Singleton*⁴²⁴ that the legislature provided for extra damage recovery under the DTPA so that consumers will have incentive to pursue their claims and to deter violations of the act.⁴²⁵ The Fort Worth court thus held that "the punitive aspect of the additional damages permitted under the DTPA is but one cog in the overall scheme enacted by the legislature to protect consumers from deceptive trade practices. The public policy for exemplary damages includes equally important considerations other than punishment of the wrongdoer."⁴²⁶

A few months after the San Antonio court decided *Hackworth*, the supreme court decided *Hofer v. Lavender*.⁴²⁷ In *Hofer* the court held that by enacting the survival statute, the legislature discarded the common law rule against the survivability of punitive damage claims.⁴²⁸ The court also held that punishment of the wrongdoer is just one of the purposes of exemplary damages, another one being to serve as an example to others.⁴²⁹ Thus, even when the tortfeasor cannot be punished because he has died, still the imposition of exemplary damages can serve as an example to others and deter similar behavior. Similarly, a DTPA claim should not be extinguished by the death of a consumer, because one of the purposes of the DTPA is to eliminate deceptive trade practices throughout the marketplace, not just the behavior of the defendant being sued.⁴³⁰

Another common law test for survival, mentioned by none of these courts, is whether or not the cause of action may be assigned. At common law, if a cause of action could be assigned, it would survive the death of either party. A cause of action for damages resulting from personal injuries is a property right and may be assigned, as can any other cause of action except where such assignment is expressly prohibited by statute.⁴³¹ Because no statute prohibits the assignment of a DTPA action, it should survive the consumer's death.⁴³²

422. *Id.* at 221.

423. *Hackworth*, 673 S.W.2d at 227 (Tijerina, J., dissenting); *Thomes*, 761 S.W.2d at 595.

424. 606 S.W.2d 682 (Tex. 1980).

425. *Hackworth*, 673 S.W.2d at 227 (Tijerina, J., dissenting); *Thomes*, 761 S.W.2d at 595.

426. *Thomes*, 761 S.W.2d at 595 (citation omitted).

427. 679 S.W.2d 470 (Tex. 1984).

428. *Id.* at 475.

429. *Id.* at 474.

430. *Thomes*, 761 S.W.2d at 595.

431. *Bradshaw v. Baylor University*, 126 Tex. 99, 103, 84 S.W.2d 703, 704-05 (1935) (assignment to tortfeasor of injured party's cause of action against another tortfeasor is not void as against public policy), *overruled on other grounds*, *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984).

432. *Allstate Ins. Co. v. Kelly*, 680 S.W.2d 595, 610 (Tex. App.—Tyler 1984, writ ref'd n.r.e.) (DTPA claims are assignable).

Thus, the supreme court should adopt the reasoning of *Thomes v. Porter* and *Mahan Volkswagen, Inc. v. Hall* and find that a DTPA claim survives the death of the consumer regardless of the kind of damages sought. This result creates harmony with the express purpose of the DTPA to protect consumers against false, misleading, and deceptive trade practices, unconscionable actions, and breaches of warranty. To deny the survivability of a DTPA claim "would serve to confound the purposes of the act" and allow violators to escape the DTPA's enforcement mechanisms merely because the consumer had the misfortune of dying.⁴³³

L. MISCELLANEOUS

1. Exemptions from liability under the DTPA

As discussed above, the Austin court of appeals in *Chapman v. Wilson*⁴³⁴ held that a dentist does not impliedly warrant that his or her services will be performed in a good and workmanlike manner because this warranty does not extend to professionals.⁴³⁵ The court also held that even if such a warranty did exist, Chapman could not bring an action under the DTPA for Dr. Wilson's breach thereof in light of the exemption found in section 12.01(a)⁴³⁶ of the Medical Liability Act.⁴³⁷ This provision exempts health care providers from DTPA claims based on negligence.⁴³⁸ The court held that this exemption extended to this implied warranty because of the similarity between the negligence standard and the "good and workmanlike" standard.⁴³⁹

The court of appeals, however, held that section 12.01(a) of the Medical Liability Act does not exempt health care providers from DTPA liability based upon misrepresentations as opposed to negligence.⁴⁴⁰ Wilson had argued for a complete exemption of health-care providers from liability under the DTPA. The court held:

If the legislature had intended for § 12.01(a) to exempt health care providers from every DTPA cause of action, irrespective of its basis, then that intention could have been expressed in plain and specific language. . . . For this Court to stretch the exemption beyond negligence would, therefore, be to invade the field of the legislature.⁴⁴¹

While the court correctly held that DTPA claims against health care provid-

433. *Thomes*, 761 S.W.2d at 594.

434. 826 S.W.2d 214 (Tex. App.—Austin 1992, writ denied).

435. *Id.* at 217; see *supra* notes 132-36 and accompanying text.

436. TEX. REV. CIV. STAT. ANN. art. 4590i, § 12.01(a) (Vernon Supp. 1993).

437. *Chapman*, 826 S.W.2d at 219.

438. The statute provides:

Notwithstanding any other law, no provision of Sections 17.41-17.63, Business & Commerce Code, shall apply to physicians or health care providers as defined in Section 1.03(3) of this Act, with respect to claims for damages for personal injury or death resulting, or alleged to have resulted, from negligence on the part of any physician or health care provider.

TEX. REV. CIV. STAT. ANN. art. 4590i, § 12.01(a) (Vernon Supp. 1993).

439. *Chapman*, 826 S.W.2d at 218.

440. *Id.* at 219.

441. *Id.*

ers based on misrepresentations are not affected by article 4590i, section 12.01(a), because they are not based on negligence, it did "invade the field of the legislature" by extending the exemption to warranty actions. An exclusion of warranty actions could have just as easily been "expressed in plain and specific language." Furthermore, the court did not mention *Eoff v. Hal and Charlie Peterson Foundation*,⁴⁴² where the exemption was determined to be inapplicable "[s]ince the DTPA claim of appellants is that of implied warranty" rather than negligence.⁴⁴³

2. *The DTPA and breach of contract claims*

In *Enterprise-Laredo Associates v. Hachar's Inc.*,⁴⁴⁴ Enterprise built a mall in Laredo, Texas. They negotiated with Hachar's Inc., a department store, to lease space. Enterprise drafted a form lease and both sides negotiated changes. One revision consisted of the inclusion of Rider 12.21, a most-favored nation provision, which related to the basic common area maintenance charge (CAM charge). In accordance with the lease, Enterprise billed Hachar each month for the rent and the estimated CAM charge, and at the end of each year, Enterprise recalculated the CAM charge and made any needed adjustments. This procedure continued without problems for about twelve years. In April 1987, Enterprise sent the 1986 year end CAM invoice to Hachar. For the first time since the inception of the lease, Hachar exercised its right to seek an audit of the CAM charges, which disclosed that Enterprise had not properly followed the most-favored nations clause in Rider 12.21. After Hachar brought its discovery to Enterprise's attention, Enterprise reviewed the documents and acknowledged that it had not charged Hachar the lower CAM charge paid by Dillard's department store. Hachar, however, demanded that Enterprise calculate its charge based on the lower CAM charge paid by Montgomery Ward because Ward was a "mall tenant" pursuant to Hachar's interpretation of the lease agreement. Enterprise denied Ward was a "mall tenant" since Ward owned its own space in the mall. Thus, Ward paid such items as ad valorem taxes separately whereas the CAM charges for lessees included a pro rata share of ad valorem taxes. The parties were unable to settle the CAM controversy and Hachar filed suit. In its petition, Hachar alleged that Enterprise miscalculated its CAM charge and asserted claims for breach of contract, breach of warranty, DTPA violations, and misrepresentations. After a nonjury trial, the judge ruled that Enterprise should have based Hachar's CAM charge on Ward's charge and awarded damages accordingly. The court found that Hachar had been charged CAM charges in excess of those required by the lease agreement, and that the most serious error was Enterprise's failure to honor the express warranty in Rider 12.21. The trial court found that the assessment and collection of the grossly excessive CAM charges and the con-

442. 811 S.W.2d 187 (Tex. App.—San Antonio 1991, no writ).

443. *Id.* at 195.

444. 839 S.W.2d 822 (Tex. App.—San Antonio), *writ denied per curiam*, 843 S.W.2d 476 (Tex. 1992).

tinuation to do so at every opportunity, took advantage of Hachar's lack of knowledge of the facts to a grossly unfair degree. The trial court concluded that Enterprise violated the DTPA by breaching the express warranty contained in Rider 12.21, by engaging in an unconscionable course of action in violation of section 17.50(a)(3), and by making false or misleading statements of fact concerning the existence of or amount of price reductions in violation of section 17.46(b)(11). On appeal, Enterprise contended that the DTPA did not apply because the sole issue concerned a breach of contract question between sophisticated, well-represented business people as to the proper interpretation of Rider 12.21. The court of appeals held that "[a] mere breach of contract allegation without more, is not a 'false, misleading, or deceptive act' in violation of the DTPA."⁴⁴⁵ Thus, the court found it necessary to "differentiate a 'mere breach of contract claim' from a breach which involves 'something more' in the way of a misrepresentation or fraud claim to invoke the DTPA."⁴⁴⁶ The court held that a case must contain some element of overreaching or victimizing the unwary in order to create a DTPA claim.⁴⁴⁷ It found both Hachar and Enterprise to be sophisticated business people well represented by counsel.⁴⁴⁸ Furthermore, the evidence presented during trial focused on the definition of "mall tenant" and which department store Enterprise should base the CAM charge formula on. The court of appeals held the dispute did not rise above the level of an interpretation dispute; therefore the DTPA, in the court's view, did not apply.⁴⁴⁹

Similarly, in *Quitta v. Fossati*,⁴⁵⁰ the court held that a landlord's refusal to honor an oral representation that the tenants could perform services in exchange for rent was a mere breach of contract, not a DTPA violation.⁴⁵¹ Calhoun, Quitta, and Blinker owned undivided one-third interests in a house. Calhoun leased the house to the Fossatis. The lease called for monthly rent of \$600 and contained a handwritten clause allowing the tenants to provide \$300 of improvements in exchange for their deposit. The tenants claimed Calhoun later agreed to let them exchange work for rent. Calhoun died, and the co-landlords denied the existence of this agreement. The tenants left two weeks before the end of the lease, after the landlords threatened eviction. The landlords then sued for rent, and the tenants counterclaimed for DTPA violations. The verdict was for the tenants, and the landlords appealed. The court of appeals held that the evidence showed a mere breach of contract, not a DTPA violation.⁴⁵² The landlords cited a number of cases for the proposition that a mere breach of contract is not actionable under the DTPA.⁴⁵³ The court stated: "It therefore becomes critical to distinguish a mere breach of contract claim from a breach involv-

445. *Id.* at 828.

446. *Id.*

447. *Id.* at 829.

448. *Id.*

449. *Enterprise-Laredo*, 839 S.W.2d at 830.

450. 808 S.W.2d 636 (Tex. App.—Corpus Christi 1991, writ denied).

451. *Id.* at 645.

452. *Id.*

453. *Dura-Wood Treating Co. v. Century Forest Indus. Inc.*, 675 F.2d 745, 756 (5th Cir.

ing something more in the way of fraud or misrepresentation sufficient to invoke the DTPA."⁴⁵⁴ The court held this distinction was illustrated by *Leal v. Furniture Barn, Inc.*,⁴⁵⁵ and *Group Hospital Services v. One & Two Brookriver Center*.⁴⁵⁶

In *Leal* the furniture store told the buyers they would forfeit all past payments unless it received an overdue payment by a certain date. The written agreement between the parties did not provide for this threat of forfeiture. The *Leal* court held this misrepresentation constituted a false statement of fact regarding the buyers' rights under the agreement, and thus violated DTPA section 17.46(b)(12), which prohibits "representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law."⁴⁵⁷

In contrast, in *Group Hospital*, a landlord sued its tenant for breaching a lease. The tenant argued that the landlord violated the DTPA by falsely representing the terms of the lease and subsequent oral modifications of the lease. The court held the dispute involved nothing more than contract interpretation and not a DTPA violation.⁴⁵⁸

The *Quitta* court concluded:

In summary, *Leal* holds that false statements of fact concerning a party's rights under an unambiguous contract are actionable under § 17.46(b)(12), while *Group Hospital* holds that disagreements over the interpretation of a contract with uncertain terms are not actionable under this section. The distinction between these two cases, and between a DTPA violation and a breach of contract claim, properly lies when an alternative interpretation of the contract is asserted, and the dispute arises out of the performance of the contract. In such a case the DTPA is not violated, and the legal rights of the parties are governed by traditional contract principles.⁴⁵⁹

The *Quitta* court characterized the tenants' theory of the case as most closely falling under DTPA section 17.46(b)(12).⁴⁶⁰ The court characterized their entire theory of recovery and defense as being based on the existence of an oral modification to the lease and the landlords' allegedly wrongful attempt to enforce the written agreement.⁴⁶¹ The landlord's position was that there was no oral modification, or that evidence of any such modification was inadmissible and thus any agreement unenforceable. The court reasoned that the evidence showed only that the tenants made an unwritten

1982); *La Sara Grain Co. v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 565 (Tex. 1984); *Ashford Dev. Inc. v. USLife Real Estate Svcs. Corp.*, 661 S.W.2d 933, 935 (Tex. 1983).

454. *Quitta*, 808 S.W.2d at 644.

455. 571 S.W.2d 864 (Tex. 1978).

456. *Quitta*, 808 S.W.2d at 644 (citing *Group Hospital*, 704 S.W.2d 886 (Tex. App.—Dallas 1986, no writ)).

457. *Leal*, 571 S.W.2d at 865 (quoting DTPA § 17.46(b)(12) (Vernon 1987)).

458. *Group Hospital*, 704 S.W.2d at 889.

459. *Quitta*, 808 S.W.2d at 644. The court qualified this by adding, "[i]ndependently actionable conduct under the DTPA would clearly fall outside the scope of our holding here." *Id.* at 644 n.4.

460. *Id.* at 644-45.

461. *Id.*

agreement with Calhoun, who died without telling her partners about it.⁴⁶² The partners "simply sought performance of the written lease," while the tenants "sought to prove the existence and character of additional terms to the agreement."⁴⁶³ The court found "[n]o evidence of overreaching or victimization, . . . or unconscionable acts, or a false, misleading, or deceptive act on the part of the appellants."⁴⁶⁴ The court concluded: "Thus, this case merely involved traditional contract notions."⁴⁶⁵ Thus, the court of appeals reversed the judgment of the trial court and rendered judgment that the tenants take nothing on their DTPA claims.⁴⁶⁶

The "mere breach of contract" argument was also made in *Cronin v. Bacon*.⁴⁶⁷ In 1983, Barefoot Farms, a leading horse stud farm owned by Cronin, advertised the availability of a champion stallion named Dandy Impression for breeding. Bacon entered into a stallion service contract with Barefoot Farms for the breeding of his mare, Musette, to Dandy Impression. In April 1986, the Appaloosa Horse Club notified Bacon that blood tests showed that Dandy Impression did not sire the foal to which Musette gave birth. Bacon then filed suit against Cronin alleging breach of contract, deceptive trade practices, fraud, and negligence. Bacon prevailed under his DTPA claims and obtained a judgment for about \$29,000 in actual damages, \$2,000 additional damages, and attorney's fees. The court of appeals affirmed in part and reversed in part. Cronin argued to the court of appeals that this was a simple breach of contract case, and thus there could be no finding of deceptive trade practices. Cronin argued that the only misrepresentation related to the performance of the stallion service contract. The court rejected this argument holding that evidence indicated that Cronin went outside the breach of contract and engaged in false, misleading, and deceptive acts by representing that Musette had been bred to Dandy Impression, and failing to disclose that Musette had been bred to another stallion.⁴⁶⁸

When one looks at the history and language of the DTPA, it seems doubtful that the legislature intended a breach of contract to be a defense to a DTPA suit, or that it intended that conduct breaching a contract be excluded from the DTPA. The legislature enacted the DTPA to give consumers a remedy without all the common law defenses and obstacles to recovery that hindered a breach of contract or fraud claim.⁴⁶⁹ Section 17.43 states that the DTPA is intended to be cumulative of other remedies.⁴⁷⁰ Because the DTPA is independent of contract claims, there can be recovery under the DTPA whether the consumer is, or is not, also entitled to recover for

462. *Id.* at 645.

463. *Id.*

464. *Id.*

465. *Id.*

466. *Id.*

467. 837 S.W.2d 265 (Tex. App.—Fort Worth 1992, writ denied).

468. *Id.* at 268.

469. *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980).

470. DTPA § 17.43 (Vernon 1987).

breach of contract.⁴⁷¹ That the existence of a breach of contract action does not defeat a DTPA claim was the express holding in *Vail v. Texas Farm Bureau Mutual Insurance Co.*⁴⁷² "The fact that the Vails have a breach of contract action against Texas Farm does not preclude a cause of action under the DTPA article 21.21 of the Insurance Code."⁴⁷³ In other cases the court has likewise recognized that contract recovery does not defeat DTPA recovery. In *Mayo v. John Hancock Mutual Life Insurance Co.*,⁴⁷⁴ the court held that the consumers were entitled to continue to pursue their cumulative remedies under the DTPA even though they had recovered for breach of contract.⁴⁷⁵ In *Aetna Casualty & Surety Co. v. Marshall*⁴⁷⁶ the court based DTPA misrepresentation liability on the insurer's written promises made in an agreed judgment, which the court treated the same as a contract.⁴⁷⁷ If the legislature meant for the DTPA to provide a remedy only when no such remedy was available under other theories like breach of contract, the legislature would hardly have made the DTPA's remedies cumulative.

3. *The DTPA and default judgments*

In *Frame v. S-H, Inc.*,⁴⁷⁸ the Fifth Circuit held that when a trial court enters a default judgment, an allegation that the defendant acted knowingly under the DTPA is taken as true and no evidence must be presented to the court on such issue before treble damages can be assessed.⁴⁷⁹ This lawsuit was originally filed in 1986 by Suzanne Frame and two of her businesses asserting RICO violations and fraud against Zepeda and two of his interests, including S-H, Inc. Frame charged that Zepeda induced her to place over \$7 million with Zepeda for purposes of importing gray market perfumes. Zepeda did not follow through on the perfume venture, said Frame, and the \$7 million disappeared. In June of 1987, a group of twenty-eight separate investors, who had invested money in the perfume venture at Frame's urging, sought to intervene, alleging that Frame, in fact, had masterminded the fraud. The district court allowed the intervention, made the investors plaintiffs, and redesignated Frame as a defendant. The investors alleged state and federal securities infringements, RICO violations, fraud, and violations of the DTPA. After about three years of tolerating Frame's delays, hiding documents, and failure to abide by discovery orders, the district court struck

471. See *Balderama v. Western Casualty Life Ins. Co.*, 794 S.W.2d 84, 89-90 (Tex. App.—San Antonio 1990), *rev'd on other grounds*, 825 S.W.2d 432 (Tex. 1991) (court of appeals allowed severance of breach of contract claim from DTPA claim because the essential elements to resolve in each claim were different and could be asserted independently of each other); *Honeywell, Inc. v. Imperial Condominium Ass'n*, 716 S.W.2d 75, 78-79 (Tex. App.—Dallas 1986, no writ) (court rejected "mere breach of contract" defense and held Honeywell liable under the DTPA for making false representations in contract).

472. 754 S.W.2d 129 (Tex. 1988).

473. *Id.* at 136.

474. 711 S.W.2d 5 (Tex. 1986).

475. *Id.* at 6-7.

476. 724 S.W.2d 770 (Tex. 1987).

477. *Id.* at 772.

478. 967 F.2d 194 (5th Cir. 1992).

479. *Id.* at 206.

Frame's pleadings and entered a final judgment in favor of the investors. Without conducting an evidentiary hearing on damages, the court assigned a dollar award of actual damages to the investors and trebled that amount under the DTPA.

On appeal, Frame argued that the district court should have held an evidentiary hearing on damages before rendering a final judgment against her. The Fifth Circuit held that when a default judgment is rendered, a court should hold an evidentiary hearing on damages unless the damages are for a liquidated amount.⁴⁸⁰ The investors argued that the damages were liquidated because they were based on the face amounts of promissory notes. The court held that the face amounts of the notes did not represent a certain computation of the actual damages suffered because the evidence indicated that some portion of the investors' money was returned to them.⁴⁸¹ Therefore, while the court held that the striking of the pleadings and the entry of the default judgment was proper, the court remanded for an evidentiary hearing on damages.⁴⁸² The court held, however, on remand, that the district court did not need to conduct an evidentiary hearing on the issue of knowing conduct, which triggers the treble damages provision of the DTPA.⁴⁸³ The court held that, unlike questions of actual damages, which must be proven in a default situation, conduct on which liability for treble damages is based, may be taken as true as a consequence of the default.⁴⁸⁴ The court's decision that a defendant admits to "knowing" conduct in a default situation is contrary to several Texas court of appeals' decisions, which have held that evidence of the defendant's knowledge must be presented in a default situation before additional damages can be assessed.⁴⁸⁵

II. TEXAS FREE ENTERPRISE AND ANTITRUST ACT

In *Caller-Times Publishing Co. v. Triad Communications, Inc.*,⁴⁸⁶ the Texas Supreme Court announced the test for predatory pricing in violation of the Texas Free Enterprise and Antitrust Act (Texas Antitrust Act).⁴⁸⁷ Triad published *Wheels & Keels*, a circular that featured display and classified advertisements primarily for automobiles and boats. The *Caller-Times* published the only major daily newspaper in Nueces County (Corpus Christi) and the 11 surrounding counties. Claiming that the *Caller-Times* drove it out of business by offering special, below cost rates to *Wheels & Keels* customers to induce them to advertise instead with the *Caller-Times*,

480. *Id.* at 204.

481. *Id.*

482. *Id.*

483. *Frame*, 967 F.2d at 205.

484. *Id.*

485. *Sunrizon Homes, Inc. v. Fuller*, 747 S.W.2d 530 (Tex. App.—San Antonio 1988, writ denied); *Fleming Mfg. Co. v. Capitol Brick, Inc.*, 734 S.W.2d 405 (Tex. App.—Austin 1987, writ ref'd n.r.e.); *First Nat'l Bank v. Shockley*, 663 S.W.2d 685 (Tex. App.—Corpus Christi 1983, no writ).

486. 826 S.W.2d 576 (Tex. 1992); see also 11 TEX. CONSUMER L. REP. (Tex. Law Letter, Inc.) 3 (Jan. 1992); 11 TEX. CONSUMER L. REP. (Tex. Law Letter, Inc.) 83 (Apr. 1992).

487. TEX. BUS. & COM. CODE ANN., § 15.01-15.51 (Vernon 1987 & Supp. 1993).

Triad sued the Caller-Times for monopolization and predatory pricing practices in violation of section 15.01 of the Business and Commerce Code. The jury returned a verdict in favor of Triad and the trial court trebled the jury's damage award.⁴⁸⁸

The court of appeals affirmed, ruling that predatory pricing occurs when the defendant (1) sets prices below its average total costs, and (2) exhibits subjective or objective characteristics of predatory conduct.⁴⁸⁹ The court of appeals found sufficient evidence of subjective predatory intent in the Caller-Times' practice of offering special deals to Wheels and Keels customers.⁴⁹⁰ That these "special deals" were 50 percent off the Caller-Times' regular rates when its margin of profit was only 12 percent provided sufficient evidence, in the court of appeals' view, of pricing below total costs.⁴⁹¹

The supreme court reversed, and, after reviewing the predatory pricing opinions of the several federal courts of appeal under the federal antitrust laws, announced the test for predatory pricing under the Texas Antitrust Act:

- (1) predatory pricing must be "economically feasible;"
and either
- (2)(a) the price charged is below "average variable cost;"
or
- (2)(i) there are substantial barriers to market entry;
 - (ii) the seller is charging a price below the short-run profit maximizing price and the average total cost; *and*
 - (iii) the benefits of the seller's price depended on its tendency to discipline or eliminate competition.⁴⁹²

The supreme court disposed of the case under the second element of the test. To begin with, the court found no evidence that the Caller-Times priced its advertising below average variable cost,⁴⁹³ which the court "defined as the costs that vary with changes in output divided by the output."⁴⁹⁴

488. Triad also received favorable jury findings on its alternative theory, intentional interference with contract relations, but had judgment entered on its favorable antitrust findings since that produced the greater recovery.

489. *Caller-Times Publishing Co. v. Triad Communications*, 791 S.W.2d 163, 170 (Tex. App.—Corpus Christi 1990), *rev'd*, 826 S.W.2d 576 (Tex. 1992).

490. *Id.* at 170.

491. *Id.*

492. *Caller-Times*, 826 S.W.2d at 588.

493. *Id.*

494. *Id.* at 583. Although the court did not further explain the term, "variable costs" are typically considered to be those costs incurred directly in the manufacture of a product, which vary with the number of units manufactured, such as the cost of materials used in the product, labor directly used in its manufacture, and perunit license fees. Variable costs are distinguished from fixed costs that remain constant regardless of the number of units produced. The "average variable cost" of a product is the sum of all variable costs divided by the number of units produced. Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 700 (1975).

The court did recognize, however, that whether a cost is "fixed" or "variable" may be a disputed fact issue for the jury and that the jury, in deciding which, may consider, but is not bound by, the defendant's characterization of its own costs. Furthermore, the court noted that it is the "average variable cost" for the "relevant product market," consisting of both geographic market area and the product market, that is to be determined and that "[p]roducts are

The court stated that “[w]hen considering claims of predatory pricing, the trier of fact must have sufficiently precise cost information to allow it to determine average variable cost.”⁴⁹⁵ Triad’s proof, in the form of the defendant’s publisher’s testimony that the *Caller-Times*’ profit margin was approximately 12 percent, shows only “‘vigorous competition’ . . . clearly not prohibited under antitrust statutes.”⁴⁹⁶ Next, the court denied Triad “refuge” in the exception to the second part of the test because Triad had failed to produce evidence of substantial barriers of entry to the market.⁴⁹⁷

Having found Triad’s case wanting under the second part of the test, the court declined to address the first, that is, whether the *Caller-Times* had an objectively reasonable expectation that it could recoup its losses from predatory pricing by charging higher prices later. The court did, however, indicate some of the factors that would be relevant to this inquiry:

We are not faced with the question of what factors a court should consider to determine whether a seller will have an objectively reasonable expectation of recouping its losses. Relevant factors must be determined on a case by case basis. While we neither endorse every factor on this list nor exclude any other factor, we anticipate that the following factors would be relevant: the type of goods or services in question; the economic condition of the predator; relative market strength of the seller; the number of competitors in the relevant market; nature of barriers to market entry; market demand; and the name recognition of the seller’s products.⁴⁹⁸

The court justified requiring proof of the “economic feasibility” of predatory pricing on consumer protection considerations.

Low prices for consumers are an ultimate goal of the Texas Antitrust Act. If the market structure does not allow recoupment later, then consumers benefit from a period of low prices. There is no down side because, by definition, if the market does not allow later recoupment the monopolist cannot charge higher prices later. Consumers cannot lose if the market does not allow recoupment.⁴⁹⁹

The court stated flatly that “subjective intent of a seller should not be a factor in determining whether its prices are predatory.”⁵⁰⁰ Because, according to the court, “‘predatory pricing is difficult to distinguish from vigorous price competition’ and subjective evidence blurs the distinction[,] . . . juries may ‘erroneously condemn competitive behavior.’”⁵⁰¹ Moreover, said the court, subjective intent is so “vague” a standard that “business will tend to

generally in the same market if they are reasonably interchangeable.” *Caller-Times*, 826 S.W.2d at 583, n.13 (citation omitted).

495. *Caller-Times*, 826 S.W.2d at 588.

496. *Id.*

497. *Id.*

498. *Id.* at 582 n.7.

499. *Id.* at 582. The evidence necessary to establish “economic feasibility” in a predatory pricing case is before the United States Supreme Court in *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*, 964 F.2d 335 (4th Cir.), *cert. granted sub. nom. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 490 (1992).

500. *Caller-Times*, 826 S.W.2d at 587.

501. *Id.* (quoting *Morgan v. Ponder*, 892 F.2d 1355, 1359 (8th Cir. 1989)).

err on the side of keeping prices high and consumers will be the ultimate losers . . . contrary to the purpose stated in section 15.04 of the Texas Antitrust Act[,]” which is to protect consumers against unjustifiably high prices.⁵⁰²

In his dissent, Justice Doggett, joined by Justice Mauzy, argued that by eliminating evidence of subjective intent and restricting predatory pricing analysis to cost, price, and profit factors, the court adopted a test permissive of predatory activity.⁵⁰³ Justice Doggett faulted the court's use, but lack of explanation, of vague terms such as “substantial barrier to entry,” “short-run profit maximizing cost,” and “average variable cost.”⁵⁰⁴ He reasoned that the court's test will only encourage costly litigation, involving economists and accountants “dueling over largely arbitrary and potentially incomprehensible numbers.”⁵⁰⁵ Furthermore, Justice Doggett argued that the majority's test discourages legal representation due to cost of data and the uncertainty of the data prior to suit.⁵⁰⁶ Justice Doggett argued for application of the rule of reason, evaluating the totality of the circumstances, and considering both economic effect and subjective intent of the conduct.⁵⁰⁷ Such a test would, in Justice Doggett's view, foster consideration of facts involving the market and the defendant's market position, conduct, and ultimately, the defendant's intent.⁵⁰⁸ “[T]he only way to tell predatory pricing from healthy competition is by motive.”⁵⁰⁹ Any other approach would allow defendants to escape liability by simply maintaining records that demonstrate pricing above a self-determined average variable cost or short-run profit maximizing cost.⁵¹⁰ Justice Doggett argued further that the court's analysis will discourage criminal antitrust prosecutions by eliminating the element of culpable intent.⁵¹¹ Furthermore, without evidence of intent, the court has extinguished a plaintiff's ability to recover treble damages where there is evidence of “willful or flagrant” conduct.⁵¹²

In *Times Herald Printing Co. v. A.H. Belo Corp.*,⁵¹³ the court of appeals stated the question posed and its answer as follows:

The principal question posed by this appeal is whether anticompetitive

502. *Id.* Section 15.04 states:

The purpose of this Act is to maintain and promote economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the benefits of that competition to consumers in the state. The provisions of this Act shall be construed to accomplish this purpose and shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with this purpose.

TEX. BUS. & COM. CODE ANN., § 15.04 (Vernon 1987 & Supp. 1993) (emphasis added).

503. *Caller-Times*, 826 S.W.2d at 598 (Doggett, J., dissenting).

504. *Id.* at 592-593 (Doggett, J., dissenting).

505. *Id.* at 592.

506. *Id.*

507. *Id.* at 599.

508. *Id.* at 599-600.

509. *Id.* at 600.

510. *Id.*

511. *Id.* at 601.

512. *Id.*; see TEX. BUS. & COM. CODE ANN. § 15.21(a)(1).

513. 820 S.W.2d 206 (Tex. App.—Houston [14th Dist] 1991, no writ).

conduct of a defendant who attempts to achieve monopoly power in a relevant market may be redeemed by a legitimate business purpose. When that conduct involves a nonprice vertical restraint, the answer is no. Rather, the proper approach is to apply a "rule of reason" standard, allowing the trier of facts to weigh all of the evidence to determine whether the legitimate business justifications of a defendant's conduct outweigh its threat to competition or whether the conduct unreasonably restrained trade. In the present case, the jury was incorrectly instructed that to violate antitrust laws the defendants' conduct must have no legitimate business purpose. However, we hold the error to be harmless because, in response to a separate question, in which the jury was properly instructed to employ a "rule of reason" analysis, the jury found that the defendants' conduct did not unreasonably restrain trade.⁵¹⁴

After a twenty year relationship with the Dallas Times Herald, Universal Press Syndicate (UPS) suddenly canceled the Herald's right to print twenty-six UPS features, including "Dear Abby," Erma Brombeck's humor column, "Doonesbury," and "The Far Side" comics, columns, and commentaries. The cancellation occurred shortly after UPS signed a five-year, \$1 million joint venture agreement with Belo to produce and distribute television programs and promotions featuring UPS creations, and an agreement providing the Dallas Morning News with the exclusive right to current UPS features and right of first refusal on all future UPS features. The News quickly commissioned an advertising campaign targeted at Herald readers trumpeting the transfer of the features to the News. The News had dominated the Herald in the market with approximately sixty percent of the daily circulation and approximately seventy percent of the advertising. This large a market share vested the News with such "monopoly power" that, in the opinion of an expert economist, "its aggressive pursuit of a competitor's resources, while 'perfectly normal in an ordinary context,' would pose a threat to competition."⁵¹⁵

Pursuant to the claim under the Texas Antitrust Act, the jury was asked the following question with accompanying instructions:

Did A.H. Belo Corporation or the Dallas Morning News Company willfully attempt to achieve monopoly power in a relevant market or markets?

An "attempt to achieve monopoly power" occurs when a party has a specific intent to achieve monopoly power in a relevant market or markets; it engages in exclusionary or restrictive conduct in furtherance of its specific intent; and there is a dangerous probability that it will achieve monopoly power in the relevant market.

"Willfully" . . . means to attempt to acquire, to acquire or to maintain monopoly power by exclusionary or restrictive conduct, as distinguished from attempting to acquire, acquiring or maintaining monopoly power by having a superior product or by superior business skill, or as a result of historical accident.

514. *Id.* at 208.

515. *Id.* at 209.

Conduct is exclusionary or restrictive when its benefits depend on eliminating or crippling competition so as to enable the actor to reap the benefits of monopoly power in the aftermath. Exclusionary or restrictive conduct is conduct without legitimate business purpose that makes sense only because it eliminates or cripples competition.⁵¹⁶

The trial court denied the Herald's objection to this instruction and refused to submit the following instruction tendered by the Herald and suggested by the American Bar Association's *Sample Jury Instructions in Civil Antitrust Cases*:⁵¹⁷

"Exclusionary or restrictive" conduct is defined as unreasonable acts or practices that have the actual or reasonably foreseeable effect of substantially impairing competition in a relevant market in an unnecessarily restrictive way or of destroying competition. It is not necessary that such conduct be unlawful in and of itself, apart from its effect in achieving or maintaining monopoly power.⁵¹⁸

When the jury deadlocked on the question after several days of deliberations, the trial court instructed the jury that "[i]f the *only* purpose of conduct is to eliminate or cripple competition, it is exclusionary or restrictive. If conduct has *a* legitimate business purpose, it is *not* exclusionary or restrictive."⁵¹⁹ The Herald objected to the instruction and tendered an alternative, which the trial court rejected: "Such conduct is without legitimate business purpose if it is used to acquire or maintain monopoly power by means other than fair competition."⁵²⁰

The court of appeals disagreed with the News' contention that if there were *any* business justification, no antitrust violation was possible. This was true, conceded the court, in cases of *unilateral* conduct, such as a unilateral refusal to deal. The court noted:

In the present case, the Times Herald alleges not a *unilateral* refusal to deal but a *bilateral* agreement. Such an arrangement is characterized as "vertical" because UPS and [Belo and the News] are "at different levels of the market structure." Because the agreement allegedly involves concerted action on nonprice restrictions, it must be judged under a "rule of reason" analysis to determine whether it constitutes an unreasonable restraint on competition Taken to its logical extreme, the business justification defense might allow [Belo and the News] to prevent the Times Herald from being printed at all by monopolizing other resources as well, so long as its contracts with suppliers made some business sense. The trial court endorsed such reasoning by instructing the jury that *a* legitimate business purpose would redeem conduct that might otherwise be exclusionary or restrictive. Further, the trial court

516. *Id.* at 209-10.

517. ABA Sample Jury Instructions in Civil Antitrust Cases C-20, C-96 (1987).

518. *Times Herald*, 820 S.W.2d at 210.

519. *Id.*

520. *Id.* The Herald also tendered as another alternative from 3 PHILLIP AREEDA AND DONALD F. TURNER, ANTITRUST LAW 626b at 78 (1978): "Thus, 'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." This, too, was rejected by the trial court.

erred by rejecting the Times Herald's alternative instructions focusing on "unnecessarily restrictive" conduct. The "unnecessarily restrictive" standard contemplates the more common-sense "rule of reason" analysis allowing the jury to weigh all of the evidence to determine whether the business justifications of a defendant's conduct are sufficient to outweigh its threat to competition.⁵²¹

The court found the trial court's error in the charge harmless, however, because the jury was charged on the rule of reason in answering another question that it felt was identical in substance to the one that lacked the correct instruction.⁵²² The question inquired whether UPS and the News had entered into a "contract or conspiracy . . . that willfully and unreasonably restrained trade."⁵²³ The trial court's instruction told the jury that, in determining whether the conduct "unreasonably restrained trade," it should consider the nature of the industry, facts peculiar to the industry, nature of the restraint and its effect, the history of the restraint, and the reasons for adopting the particular practice that is alleged to be a restraint. The appellate court felt that this question was identical in substance to the erroneous question and that, therefore, the jury's negative answer to it rendered the error harmless.⁵²⁴

The rule of reason was applied during the Survey period in a case involving alleged violations of the pre-1983 Texas Antitrust laws. In *Cranfill v. Scott & Fetzer Co.*,⁵²⁵ Cranfill was a distributor for the Kirby Co., a division of the Scott & Fetzer Co. The distributorship agreement outlined Cranfill's primary area of responsibility to include Sherman, Texas and surrounding counties, but Cranfill was allowed to and did sell Kirby products outside this area. The agreement also included an Installation Service and Administration fee (ISA) whereby Kirby would charge an additional \$38 from each distributor per vacuum sold. If the product was sold within the distributor's designated area \$30 would be returned to that distributor. Otherwise, the distributor with the nearest office to the customer would receive the \$30, provided the non-selling distributor contacted the customer and offered the necessary service. Each distributor was free to charge whatever price he or she desired. The Cranfill distributor agreement required the distributor to provide accurate customer and warranty information, but did not require any pricing information. Failure to do so was cause for cancellation of the distributorship agreement.

Cranfill admitted to submitting false sales and warranty information in violation of the distributorship agreement. As a result, Kirby canceled the distributorship. Cranfill sued, alleging that Kirby's actions were in retaliation for Cranfill's failure to abide with Kirby's purported anti-competitive

521. *Times Herald*, 820 S.W.2d 206 at 212-13 (citation omitted).

522. *Id.* at 213.

523. *Id.*

524. *Id.* The court also reviewed the evidence and concluded it sufficient to support the jury's negative answer to the conspiracy question. *Id.* at 214-15.

525. 773 F. Supp. 943 (E.D. Tex. 1991); see also 11 TEX. CONSUMER L. REP. (Tex. Law Letter, Inc.) 27 (Feb. 1992).

policies violating both federal and Texas antitrust laws. Specifically, Cranfill claimed Kirby restricted the territory in which she could sell, canceled the distributorship agreement for Cranfill's failure to comply with an alleged pricing program whereby Kirby restricted advertisements of prices below suggested manufacturer's price, and refused to deal with Cranfill as a dealer instead of distributor. The district court granted summary judgment against Cranfill on her antitrust claims.

The district court labeled Cranfill's antitrust claims as alleged vertical price fixing. Still, the court found no violation of section 1 of the Sherman Act in Kirby's advertisement restrictions because there was no evidence of an agreement to fix prices. Cranfill openly admitted she could charge any price for the Kirby product that she desired. Furthermore, evidence demonstrated that Kirby never requested nor received any customer information relating to prices.

The appellate court found no violation in the ISA fee and its resultant territorial restraints.⁵²⁶ Nor was there any problem with the alleged actions taken by Kirby to avoid dealing with Cranfill as a dealer. Relying on case precedent upholding such restrictions, the court labeled the ISA as an alleged vertical nonprice restraint and determined that Cranfill could succeed only by demonstrating that such restraint had an anticompetitive effect on the market.⁵²⁷ The court imposed a rule of reason standard in weighing all the circumstances to determine whether the restrictive practice was prohibited.⁵²⁸ The court concluded Kirby did not violate antitrust laws since its actions in no way affected interbrand competition.⁵²⁹ Cranfill admitted to intense competition among five different vacuum brands within her territory alone. Furthermore, evidence that Kirby maintained only six to eight percent of the market share in the United States suggested that Kirby lacked the requisite market power to affect competition.

The court found summary judgment appropriate against all of Cranfill's claims under the pre-1983 Texas statutory antitrust laws.⁵³⁰ Cranfill argued the ISA fee implemented exclusive territories or somehow restrained trade. Yet, the evidence suggested otherwise in that distributors were free to sell anywhere. The court noted that the ISA geographic restrictions were justified as a means of ensuring total market saturation by distributors and complete customer relations.⁵³¹ Furthermore, there was no discrimination among distributors. The court relied on *Ford Motor Co. v. State*⁵³² in upholding the manufacturer's ability to impose reporting requirements and to choose with whom to deal.

526. *Cranfill*, 773 F. Supp. at 952.

527. *Id.*

528. *Id.*

529. *Id.* at 954.

530. *Id.* at 958.

531. *Id.* at 956.

532. 142 Tex. 5, 175 S.W.2d 230 (1943).