1995

Deceptive Trade Practices Act

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DECEPTIVE TRADE PRACTICES ACT

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ON numerous occasions during the Survey period, Texas courts interpreted and applied the much litigated Deceptive Trade Practices Act (DTPA).[1] To recover under the DTPA, a plaintiff must establish that he is a "consumer," that there was a false, misleading, or deceptive act or an unconscionable act, and that this act or acts was a producing cause of his damage.[2] Significant decisions reported during

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1. TEX. BUS. & COM. CODE ANN. §§ 17.41-17.826 (Vernon 1987 & Supp. 1994) [hereinafter DTPA].

2. Custom Controls Co. v. MDS Qantel, Inc., 746 S.W.2d 261, 263 (Tex. App.—Houston [1st Dist.] 1987), *rev'd*, Qantel Business Sys., Inc. v. Custom Controls Co., 761 S.W.2d 302 (Tex. 1988); Miller v. Soliz, 648 S.W.2d 734, 739 (Tex. App.—Corpus Christi 1983, no

this period addressed each of these elements as well as methods to compute damages for successful DTPA claims. This article discusses those and other important decisions.

I. PROPER PLAINTIFFS: WHO IS A CONSUMER?

To recover under the DTPA, a plaintiff must establish that he is a "consumer."[3] A consumer is defined as "an individual . . . who seeks or acquires by purchase or lease, any goods or services."[4] In *Melody Home Mfg. Co v. Barnes*[5] the Texas Supreme Court recognized that in order to achieve DTPA consumer status, two requirements must be met: (1) the party "must have sought or acquired goods or services by purchase or lease;" and (2) "the goods or services purchased or leased must form the basis of the complaint."[6] Using this two-step analysis, Texas courts determine a plaintiff's consumer status.

A. STEP 1: EVEN THOUGH THE NAMED PLAINTIFF WAS NOT A PARTY TO THE CONSUMER TRANSACTION BY WHICH THE GOODS OR SERVICES WERE ACQUIRED BY PURCHASE OR LEASE, HE MAY STILL QUALIFY AS A DTPA CONSUMER.

When the plaintiff has not purchased or leased the goods or services at issue, Texas courts have analyzed the plaintiff's DTPA consumer status under the first step of the *Melody Home* test using an intended beneficiary theory.[7] Under this theory, the plaintiff must be involved in the consumer transaction at least to the extent he seeks to enjoy benefits as a third party to the purchase or lease of the good or service.[8] Upon establishing an acquired and intended benefit from the transaction, a third-party plaintiff attains DTPA consumer status.

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writ); Bormaster v. Henderson, 624 S.W.2d 655, 660 (Tex. App.—Houston [14th Dist.] 1981, no writ); DTPA § 17.50(a)(1), (3).

3. *See* DTPA § 17.50.

4. DTPA § 17.45(4).

5. 741 S.W.2d 349 (Tex. 1987).

6. *Id.* at 351-52 (citing Sherman Simon Enter., Inc. v. Lorac Serv. Corp., 724 S.W.2d 13, 15 (Tex. 1987) and Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 539 (Tex. 1981)).

7. This theory evolved primarily from the Texas Supreme Court's holding in Kennedy v. Sale, 689 S.W.2d 890, 892 (Tex. 1985). In *Kennedy* the court observed that the existence of privity between the plaintiff and defendant is not a factor in deciding the plaintiff's status as a DTPA consumer. *Id.* at 892-93. Instead, a plaintiff's standing should be determined based on his relationship to the consumer transaction. *Id.* While the *Kennedy* plaintiff had not purchased the group life insurance policy that formed the basis of his complaint, the supreme court stated that he had "acquired" its benefits because his employer, the policy purchaser, provided him with coverage. *Id.* Because he "acquired" a benefit from the purchase of the policy, the court held that he vicariously qualified as a DTPA consumer. *Id.*; *see also* Wellborn v. Sears, Roebuck & Co., 970 F.2d 1420, 1426 (5th Cir. 1992) (holding that the son of a woman who bought a garage door opener was a consumer under the DTPA because the primary purpose was to benefit the son).

8. Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705, 707-08 (Tex. 1983).

In *Brandon v. American Sterilizer Co.*[9] the Austin Court of Appeals refused to expand this theory to encompass incidental beneficiaries to the transaction. Genelle Brandon worked in a hospital. Her duties included loading hospital equipment into gas sterilizers which used toxic gas to sterilize the equipment. On October 29, 1984, Brandon arrived at work to find the manufacturer's repair person working on one of the sterilizers. After the worker left, the sterilizer began leaking toxic fumes. Brandon suffered serious injuries from her exposure to these fumes. As a result, she sued the manufacturer, American Sterilizer Company (AMSCO) on a host of claims including DTPA violations.[10] Finding that Brandon was not a consumer, the trial court granted a directed verdict for AMSCO on her DTPA claims.[11]

On appeal, Brandon argued that she was a DTPA consumer because, although she did not purchase the gas sterilizers, she sufficiently acquired them, as well as AMSCO's maintenance services (provided pursuant to a preventative maintenance agreement (PMA)), when the hospital assigned her to operate the sterilizers.[12] Applying the intended beneficiary theory to the employment setting, the Austin Court of Appeals stated that an employee-plaintiff is entitled to DTPA consumer status only for claims involving goods or services the employer purchased or leased primarily for the employee's benefit.[13] After reviewing the evidence, the court decided that the benefits derived from the sterilizers extended to the hospital and its patients.[14] Because the primary reason for the hospital's purchase of the sterilizer was *not* to benefit Brandon, the court held that she did not qualify as a DTPA consumer for that transaction, knocking out her DTPA claims based on the sterilizer's purchase.[15]

The court also held that Brandon failed to qualify as a DTPA consumer with respect to the maintenance services provided under the PMA. Based on the testimony of an AMSCO regional service manager and the brochure used to advertise the services provided pursuant to the PMA, the court concluded the main purpose of the PMA was to ensure proper

9. 880 S.W.2d 488 (Tex. App.—Austin 1994, n.w.h.).

10. *Id.* at 489, 491-92. The court decision was based on its analysis of three cases: Kennedy v. Sale, 689 S.W.2d 890 (Tex. 1985); Lara v. Lile, 828 S.W.2d 536 (Tex. App.—Corpus Christi 1992, writ denied); and Hernandez v. Kasco Ventures, Inc., 832 S.W.2d 629 (Tex. App.—El Paso 1992, no writ).

11. *Id.* at 490.

12. *Id.*

13. *Id.* at 492 (citing *Kennedy*, 689 S.W.2d at 892).

14. *Id.* According to the court, the main benefits of the sterilizer extended to the *hospital* because it provided an in-house service which increased efficiency, and to the *patients* because it helped maintain a safer, more sterile environment. *Id.* Interestingly, the court neglected to attribute the benefit of a safer, more sterile environment to the *employees*, as well as the patients. Perhaps this omission was made in the interest of clarity. While a safer, more sterile environment also benefits the employees, the court must have considered this an incidental benefit, not a primary, intended benefit. Because an incidental benefit is not sufficient to qualify Brandon as a consumer under the DTPA, the court did not discuss benefits to the employees.

15. *Id.*

functioning and efficient use of the AMSCO sterilizer.[16] Because the PMA appeared solely to benefit the hospital and because Brandon failed to offer any evidence that the hospital purchased the PMA to protect her safety, the court held that she had not met her burden of proving DTPA consumer status with respect to the PMA.[17] The Austin Court of Appeals' message was clear — unless a third-party consumer can show that she was the primary and intended beneficiary of the purchased item, she will *not* qualify as a DTPA consumer.

In *McDuffie v. Blassingame*[18] the Amarillo Court of Appeals employed a similar analysis. Ronald McDuffie, the plaintiff, filed suit against his ex-wife, her attorney, the attorney's law firm, and the judge who presided over the prior suit filed by his ex-wife which sought to modify his parent-child relationship with their kids (collectively "the defendants").[19] McDuffie alleged that the defendants violated the DTPA by forcing him to trial.[20] The trial court granted the defendants' motions for summary judgment holding that McDuffie was not a DTPA consumer.[21]

On appeal, McDuffie argued that the defendants forced him to "acquire" their services by citing him to appear in court.[22] In her summary judgment affidavit, his ex-wife swore that she never intended to provide services to McDuffie.[23] Her attorney's affidavit stated that he neither represented McDuffie nor received any benefit for advice he may have given to him.[24] This evidence indicated that McDuffie was neither a direct nor intended beneficiary of the defendants' services. Because McDuffie was not involved in the defendants' contractual relations to the extent that he derived any benefit from them, the court concluded that he could not be considered a DTPA consumer with respect to those transactions, and affirmed the trial court's ruling.[25]

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16. *Id.* at 492-93. The manager testified that the PMA provided the purchaser with preventive maintenance. The PMA was a scheduled series of inspections for the purchased machine, intended to allow for replacement of bad components before they failed. *Id.* at 492. Furthermore, the PMA advertising brochure only promoted the following four (4) benefits:

(1) freed hospital maintenance personnel for other tasks;
(2) assured hospital staff the full use of critical apparatus;
(3) assisted in protection of patient welfare; and
(4) maximized the return on the hospital's capital investment in the sterilizer.

Id. at 493. Neither the manager's testimony nor the advertising brochure's copy suggested that the hospital intended to benefit the employee's safety and welfare with its purchase of the PMA.

17. *Id.* at 492.
18. 883 S.W.2d 329 (Tex. App.—Amarillo 1994, writ requested).
19. *Id.* at 332.
20. *Id.*
21. *Id.*
22. 883 S.W.2d at 333.
23. *Id.*
24. *Id.*
25. *Id.*

B. Step 2: Do the Goods or Services Purchased or Leased Form the Basis of the DTPA Complaint?

After a plaintiff meets the first requirement of the *Melody Home* test by showing she is a direct purchaser/lessee or an intended beneficiary of the transaction, she must also be able to show that those goods or services acquired in the transaction form the basis of her complaint. This second step inquiry was the DTPA issue presented in *Hines v. Evergreen Cemetery Association*.[26] In *Hines* the plaintiffs purchased a burial plot and the interment of their father in that plot. A few days after the funeral, the defendant, without notifying the plaintiffs, disinterred the body and reinterred it a short distance away because the body had mistakenly been partially buried in someone else's plot. The plaintiffs sued for DTPA violations alleging misrepresentations of the defendant's services and of the rights conferred under their agreement, breach of express and implied warranties, and that the defendant engaged in unconscionable conduct.[27] In response, the defendant contended that the plaintiffs were not DTPA consumers and thus, were not entitled to recover under the Act.[28]

While the Texarkana Court of Appeals stated that the plaintiffs clearly met the first requirement of the *Melody Home* test, its inquiry focused on whether or not the plaintiffs' purchase of a plot and burial service formed the basis of their complaint.[29] In its analysis, the court recognized that the DTPA does not have a prescribed time period in relation to the consumer transaction in which the defendant must have committed the complained of acts.[30] Because post-burial movement of their father's body created a conflict with the understanding reached by the parties under the original purchase agreement,[31] the court reasoned that the plaintiffs' claim did originate from the purchase of the plot and interment services; and therefore, they, as consumers, could pursue a claim for DTPA violations.[32]

Another situation in which the second-step analysis of the DTPA consumer commonly emerges is where the DTPA consumer complains of a lender's actions. According to the Texas Supreme Court, a loan applicant who seeks nothing more than the use of money from a lending institution does not qualify as a DTPA consumer because "money" is not a

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26. 865 S.W.2d 266 (Tex. App.—Texarkana 1993, no writ).
27. *Id.* at 268.
28. *Id.*
29. *Id.* at 269.
30. *Id.* (citing *Flenniken*, 661 S.W.2d at 707). The defendant relied upon a case which held that post-sale conduct has no connection to the purchase of the goods or services, and therefore, cannot constitute a DTPA violation. *See* Rosell v. Farmers Texas County Mut. Ins. Co., 642 S.W.2d 278, 279 (Tex. App.—Texarkana 1982, no writ) (citing American Ins. Co. v. Reed, 626 S.W.2d 898 (Tex. App.—Eastland 1981, no writ)). Observing that these decisions came prior to the *Flenniken* decision, the court concluded that they had been overruled by *Flenniken*. 865 S.W.2d at 269.
31. Clearly, plaintiffs had not expected the defendant to "surreptitiously move the body from place to place without the permission of the family." *Id.*
32. *Id.*

"good."[33] However, if the borrower's objective in seeking the loan is the purchase or lease of a good or service, the borrower is then considered a DTPA consumer as to all parties involved in the transaction, including the lending institution.[34] The confusion occurs when courts are deciding whether it is the money or the underlying consumer transaction that forms the basis of the plaintiff's complaint.

During the Survey period, the Amarillo Court of Appeals faced this question in *First State Bank of Canadian, Texas v. McMordie*.[35] Originally, McMordie approached the bank asking them to refinance an existing debt and to extend him a $1,000,000 line of credit. He claimed that he hoped to use the money to make his annual cattle purchase. The bank denied his loan application. McMordie testified, however, that the bank's president, Godwin, had represented to him that he and the bank still wanted to make the loan. Because the bank never made good on this representation, McMordie sued them for DTPA violations.[36] After the jury awarded a $75,000 judgment on McMordie's DTPA claims, the bank appealed, alleging that McMordie was not a consumer.[37]

Recognizing that the bank's refusal to extend him the loan was insufficient to gain him DTPA consumer status, McMordie claimed to qualify because he sought the loan to purchase cattle, which is a "good."[38] The court, however, saw through this sham. Noting that the record was void of any objective manifestation that McMordie sought or acquired, by purchase or lease, cattle, the court held that such a purchase or lease could not be the basis of his complaint.[39] Because his complaint related solely to the bank's failure to extend him a loan, McMordie was ineligible for DTPA consumer status.[40]

The Texarkana Court of Appeals also had opportunity to rule on this issue. In *Megason v. Red River Employees Federal Credit Union*[41] the credit union filed suit against Megason to recover the balance due on a renewal note, and Megason counterclaimed for DTPA violations alleging

33. Riverside Nat'l Bank v. Lewis, 603 S.W.2d 169, 173-75 (Tex. 1980).

34. *See* La Sara Grain Co. v. First Nat'l Bank of Mercedes, 673 S.W.2d 558 (Tex. 1984); Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705 (Tex. 1983); Knight v. International Harvester Credit Corp., 627 S.W.2d 382 (Tex. 1982); Security Bank v. Dalton, 803 S.W.2d 443 (Tex. App.—Fort Worth 1991, writ denied); Irizarry v. Amarillo Pantex Fed. Credit Union, 695 S.W.2d 91 (Tex. App.—Amarillo 1985, no writ); *see also* Joel W. Reese, Note, *"Consumer" Status Under the Deceptive Trade Practices Act Requires a Borrower to Base its Claim on the Underlying Goods or Services: Central Texas Hardware, Inc. v. First City, Texas-Bryan*, 810 S.W.2d 234 (Tex. App.—Houston [14th Dist.] 1991, writ denied), 23 TEX. TECH L. REV. 593 (1992); Richard M. Alderman & Melanie P. Rosenthal, *A Consumer Update: Recent Developments Under the Texas Deceptive Trade Practices Act*, 20 ST. MARY'S L.J. 495, 502 (1989).

35. 861 S.W.2d 284 (Tex. App.—Amarillo 1993, no writ).

36. *Id.* at 285.

37. *Id.*

38. *Id.* at 286 (citing *La Sara*, 673 S.W.2d 558 (Tex. 1984); *Flenniken*, 661 S.W.2d 705 (Tex. 1983); *Knight*, 627 S.W.2d 382 (Tex. 1982)).

39. *Id.*

40. *Id.*

41. 868 S.W.2d 871 (Tex. App.—Texarkana 1993, n.w.h.).

that when she secured the loans to purchase a car, the credit union misrepresented to her that if it foreclosed its security interest in the car, it would not resell the car for less than $6000.[42] Concluding that Megason did not qualify as a DTPA consumer, the trial court granted the credit union's motion for summary judgment.[43] Megason appealed.

Using the *Riverside National Bank v. Lewis*[44] line of reasoning, the court analyzed the summary judgment evidence to determine whether or not Megason qualified as a DTPA consumer. The court's inquiry focused on whether or not the goods acquired formed the basis of her complaint.[45] After reviewing the evidence, the court concluded that Megason's complaint was that the credit union sold the repossessed car for less than the agreed amount.[46] Because her complaint related directly to the "good acquired" with the funds from the loan—the car—the court held that she satisfied the DTPA consumer test.[47]

II. PROPER DEFENDANT?

A. THE "INDIRECT PURCHASER" ARGUMENT — A DIFFERENT SPIN ON THE INTENDED BENEFICIARY ARGUMENT.

In *Knowlton v. United States Brass Corp.*[48] and *Barrett v. United States Brass Corp.*,[49] the plaintiffs faced a consumer-status challenge from United States Brass. In these cases, home owners sued the defendant companies under the DTPA for faulty plumbing systems in their homes. The plaintiffs alleged that the defendants misrepresented the plumbing systems installed in their homes to housing code bodies, homebuilders, and city officials.[50] While all other defendants settled with the plaintiff home owners, United States Brass did not. Because it had never dealt directly with any of the plaintiffs, United States Brass claimed that the plaintiffs could not be DTPA consumers with respect to any transaction in

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42. *Id.* at 872.

43. *Id.*

44. *See supra* notes 33-34 and accompanying text.

45. *Megason*, 868 S.W.2d at 873.

46. *Id.*

47. *Id.* In order to reconcile the decisions in *Megason* and *McMordie*, a distinction must be made between the two. The most obvious distinction is that Megason actually purchased a car with the loan proceeds while McMordie merely alleged that he intended to use the money to purchase cattle. This analysis might be somewhat troubling since McMordie never received funds from which he could have made the purchase, but for the court's dicta stating that "[the] record [was] void of any objective manifestations that McMordie sought or acquired, by purchase or lease, cattle which form the basis of his complaint." *McMordie*, 861 S.W.2d at 285. The court's statement suggests that the evidence presented at trial lacked ANY indication that McMordie ever planned on buying cattle with the money. Quite simply, courts require the loan to be tied to some underlying consumer transaction (i.e., the purchase or lease of a good or service), and they apparently require some modicum of evidence to that effect.

48. 864 S.W.2d 585 (Tex. App.—Houston [1st Dist.] 1993, writ granted).

49. 864 S.W.2d 606 (Tex. App.—Houston [1st Dist.] 1993, writ granted).

50. *Knowlton*, 864 S.W.2d at 591; *Barrett*, 864 S.W.2d at 611.

which they may have taken part.[51] In short, United States Brass contended that it was not a proper defendant for a DTPA action.

The Houston Court of Appeals disagreed with United States Brass' contention in stating:

> We do not believe the Texas Supreme Court has grafted onto the definition of a consumer under the DTPA a requirement that, in order to be a "consumer," representations must be made directly by the defendant to the plaintiff or that the representations must be made in connection with a transaction between the plaintiff and the defendant.[52]

Using the same line of cases discussed under the intended beneficiary analysis,[53] the court concluded that United States Brass was so "inextricably intertwined"[54] with the home builders that the plaintiffs were DTPA consumers as to both the manufacturers and the builders.[55] According to these decisions, indirect purchasers have consumer standing under the DTPA against the original seller of the good or service.

Applying the "indirect purchaser" doctrine from antitrust law,[56] one set of crafty defendants tried to discredit the plaintiffs' consumer standing as indirect purchasers under the DTPA. In *Segura v. Abbott Laborato-*

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51. *Knowlton*, 864 S.W.2d at 592-93; *Barrett*, 864 S.W.2d at 617-18.

52. *Knowlton*, 864 S.W.2d at 592-93; *Barrett*, 864 S.W.2d at 619.

53. The court cited to *Kennedy*, which initiated the intended beneficiary analysis, stating that to accept a construction of DTPA that only "direct purchasers" could be consumers, "would be to read additional or different language into the DTPA, in contravention of its mandate of liberal construction." *Knowlton*, 864 S.W.2d at 594; *Barrett*, 864 S.W.2d at 620. *See also* notes 5-17 and accompanying text; *Melody Home Mfg. Co.*, 741 S.W.2d 349 (Tex. 1987); *Flenniken*, 661 S.W.2d 705 (Tex. 1983); *Knight*, 627 S.W.2d 382 (Tex. 1982); and *Cameron*, 618 S.W.2d 535 (Tex. 1981).

54. The concept of "inextricably intertwined" and "tie-in" relationships originated in cases attempting to hold a lender liable for DTPA violations. *See* Qantel Business Sys., Inc. v. Custom Controls Co., 761 S.W.2d 302, 305 (Tex. 1988) (holding a "tie-in" or "inextricable intertwining" between seller and lender may cause plaintiff to be a consumer with respect to both the financing company and the seller of the goods); *Knight*, 627 S.W.2d at 389 (holding that because the lender was "so inextricably intertwined" in truck's purchase, it was of equal responsibility for the conduct of the sale); and Holland Mortgage Inv. Corp. v. Bone, 751 S.W.2d 515, 518 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (holding lender liable because a "tie-in" relationship existed between it and the builder of the home). This theory of being inextricably intertwined focuses on the fact that both the lender and the seller benefit from the underlying consumer transaction. *Knowlton*, 864 S.W.2d at 594; *Barrett*, 864 S.W.2d at 620. Once again, the inquiry focuses on intended beneficiaries except the focal point is now the defendant and not the plaintiff.

55. *Knowlton*, 864 S.W.2d at 594; *Barrett*, 864 S.W.2d at 620. This argument could just as easily have come under the "intended beneficiary" theory because in reality the homebuilders purchased the plumbing system for the benefit of the end users — the homeowners.

56. In the antitrust context, a "direct purchaser" is one who purchases goods or services directly from a manufacturer, a wholesaler, or other entity who has violated section 4 of the Clayton Act, 15 U.S.C. § 15(a) (1988). An "indirect purchaser" is one who purchases such goods or services from a seller who is down line in the marketing chain from the antitrust violator. The "Indirect Purchaser Doctrine" deprives an indirect purchaser of standing to sue an antitrust violator because to allow otherwise would create difficult issues as to how much of the monopoly price was "passed on" to the end consumer by the middlemen. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 741-47 (1977).

ries, Inc.,[57] the plaintiffs intervened in an antitrust suit originally brought by the State of Texas. In the original action on behalf of the consumers, the State of Texas sought injunctive relief and damages for alleged overcharging for infant formula. Concluding that the Indirect Purchaser Doctrine deprived the State of standing to sue, the trial court dismissed the State's claims.[58] The intervening plaintiffs alleged DTPA violations based upon the same conduct in which the State premised its claims.[59] In response, the defendants argued that the plaintiffs lacked standing because to hold otherwise would allow the DTPA to conflict with the Texas Antitrust Act. Accordingly, the defense argued that while the DTPA does not address standing of indirect purchasers, the later-enacted Antitrust Act does, and therefore, should control. This would allow the Indirect Purchaser Doctrine to come into play and deprive the plaintiffs of standing to sue under the DTPA.[60]

Focusing on two points which indicated to the court that the legislature did not intend to have the Texas Antitrust Act supersede or preempt the DTPA, the court found the defendants' argument unpersuasive. First, the court noted that both statutes included cumulative remedy provisions, which allow a plaintiff to recover under the statute and other laws, as long as such an application does not give rise to a double recovery.[61] Second, the court focused on the simple fact that whenever the legislature wanted to exempt a certain type of defendant or claim from the purview of the DTPA, it did so in unequivocal terms.[62] "If the legislature had intended to exclude indirect purchasers from coverage of the DTPA, 'it could easily have done so by simply drafting the restriction into the definition of consumer or some other provision of the Act.' "[63] In the absence of such an express exemption in either the DTPA or the Texas Antitrust Act, the court declined to hold that the Indirect Purchaser doctrine applied to the DTPA.[64] As "indirect purchasers" of the infant formula, the plaintiffs qualified as consumers and could maintain a DTPA cause of action.

B. Can Doctors be Sued for DTPA Violations?

In *Sorokolit v. Rhodes*[65] the Texas Supreme Court examined the issue of whether or not a physician or health care provider could be sued for misrepresentations under the DTPA. Rhodes went to Dr. Sorokolit for breast augmentation surgery. Dr. Sorokolit instructed her to pick out a picture of a nude model, and then told her that he would give her identical breasts. Because the end result was not as promised, Rhodes sued Dr.

57. 873 S.W.2d 399 (Tex. App.—Austin 1994, writ granted).
58. *Id.* at 401.
59. *Id.*
60. *Id.*
61. *Id.* at 404.
62. *Id.* at 404-05.
63. *Id.* at 405 (citing *Cameron*, 618 S.W.2d at 540).
64. *Id.* Also playing a part in the court's decision was the presumption against finding statutes to be in conflict by implication. *Id.*
65. No. D-3639, 1994 WL 138329 (Tex. Apr. 20, 1994).

Sorokolit for medical malpractice, breach of implied and express warranties under the DTPA, and knowing misrepresentations under the DTPA.[66] The trial court ruled that the Medical Liability and Insurance Improvement Act[67] (MLIIA) prevented suits against physicians for DTPA violations.[68] The court of appeals reversed in part, holding that the MLIIA did not bar DTPA claims based on a knowing misrepresentation or a breach of express warranty.[69] Agreeing with the Fort Worth Court of Appeals, the Texas Supreme Court affirmed.[70]

In reaching its conclusion, the court focused on the language of section 12.01(a) of the MLIIA. The language of that section clearly prohibits would-be plaintiffs from filing DTPA suits against physicians or health care providers when these suits are premised on "negligence." The court, however, concluded that the theory of negligence does not encompass "knowing" misrepresentations or breaches of express warranties.[71] Because these claims are not based in negligence, the supreme court held that section 12.01(a) of the MLIIA did not exempt physicians and health care providers from DTPA claims alleging breach of express warranty or "knowing" misrepresentations.[72]

III. FALSE, MISLEADING, DECEPTIVE OR UNCONSCIONABLE ACTS

A. An Actionable Misrepresentation?

In *Chicago Title Ins. Co. v. McDaniel*[73] the Texas Supreme Court addressed the issue of whether or not statements made in a title insurance policy constituted an actionable misrepresentation under the DTPA. The McDaniels purchased title insurance on their new home from Chicago Title. The policy provided that Chicago Title "for value does hereby guarantee to the Insured . . . that as of the date hereof, the Insured has good and indefeasible title to the estate or interest in the land described or referred to in this policy."[74] A few years later, a bankruptcy court notified the McDaniels that their property was subject to pre-existing liens. After abandoning their home, the McDaniels filed suit against Chi-

66. *Id.* at *4.

67. Section 12.01(a) 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(1) (Vernon Supp. 1994).

68. 1994 WL 138329 at *5.

69. *Id.*; *see also* William Christopher Carmody & Mark A. Anderson, *Deceptive Trade Practices Act*, ANNUAL SURVEY OF TEXAS LAW, 47 SMU L. REV. 1033, 1035-36 (1994).

70. *Id.* at *6.

71. *Id. at* *5.

72. *Id.* at *6. "[T]he underlying nature of the claim determines whether section 12.01(a) prevents suit for violations of the DTPA." *Id.*

73. 875 S.W.2d 310 (Tex. 1994).

74. *Id.*

cago Title alleging that its false representation of good title on their property was a DTPA violation.[75]

Recognizing that a title insurance policy is a contract of indemnity, the court stated that Chicago Title's sole duty is to indemnify the insured against losses cause by defects in title.[76] Because the very nature of a title insurance policy is to indemnify against defects of title, the issuance of a title policy by itself cannot constitute a representation regarding the perfected status of the property's title.[77] While a title insurance company could be held liable for affirmative representations that were the producing cause of damage to an insured,[78] the court did not find any evidence that Chicago Title made such affirmative representations.[79] Accordingly, the supreme court reversed the court of appeals and rendered judgment in favor of Chicago Title.[80]

B. Section 17.46(b)(12) Misrepresentations

Quite a few courts decided cases containing allegations of violations under section 17.46(b)(12) of the DTPA. This section makes the following an unlawful deceptive trade practice: "representing that an agreement confers or involved rights, remedies, or obligations which it does not have or involve, or which are prohibited by law."[81] While courts were not confined to the literal meaning of the words used,[82] the intent of the legislature, "to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches or warranty,"[83] controlled their decisions.

In *West Anderson Plaza v. Feyznia*,[84] West Anderson Plaza (the "Landlord") sued Feyznia (the "Tenant") in a forcible-detainer action, and the Tenant counterclaimed asserting violations of section 17.46(b)(12) of the DTPA.[85] At trial, the jury returned a verdict for the Tenant.[86] On appeal, the Landlord argued that the evidence was insufficient to support a DTPA violation.[87]

The tenant's DTPA argument alleged that the clause contained in an addendum to his lease, which required him to provide a security guard upon the request of the landlord was an actionable misrepresentation. The landlord did not specify that this guard needed to be licensed until after the parties entered into the lease and addendum. The Tenant

75. *Id.*
76. *Id.* at 311.
77. *Id.*
78. First Title Co. v. Garrett, 860 S.W.2d 74 (Tex. 1993).
79. *McDaniel*, 875 S.W.2d at 311.
80. *Id.*
81. DTPA § 17.46(b)(12).
82. Pennington v. Singleton, 606 S.W.2d 682, 686 (Tex. 1980).
83. DTPA § 17.44
84. 876 S.W.2d 528 (Tex. App.—Austin 1994, n.w.h.).
85. *Id.* at 530.
86. *Id.*
87. *Id.*

claimed this post-specification amounted to an affirmative misrepresentation in the actual contract.[88] Because disagreements about the meaning of contractual provisions are the rule rather than the exception, common sense dictates that such disagreements should not necessarily imply unfairness or deception.[89] Refusing to hold that the mere existence of an ambiguous term or provision created a section 17.46(b)(12) violation, the court attempted to discern what would cause such a violation.

The court sought out a standard of review. After analyzing three different approaches from other courts, the *Feyznia* court rejected all three approaches.[90] Settling on a mixture of the three, the court choose the totality of the circumstances approach.[91] The court considered the following factors relevant:

1. whether the representation was clearly factual, clearly interpretive, or some less clear combination of the two;
2. whether the relevant contractual language was ambiguous or unambiguous;
3. whether the parties were in a substantially equal position of knowledge and information;
4. whether there was evidence of overreaching or victimizing;
5. whether there was evidence of unconscionable conduct;
6. whether there was a confidential or fiduciary relationship between the parties.[92]

Analyzing these factors, the court found that the contractual language was ambiguous and the Landlord's post-specification for a licensed guard was merely interpretive of that provision. Further, the court did not believe any evidence of overreaching, victimization, or unconscionable actions existed. Accordingly, the court determined that the clause requiring a security guard and the Landlord's later specification of a licensed guard, did not violate section 17.46(b)(12) of the DTPA.[93]

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88. *Id.* at 531-32.

89. *Id.* at 532.

90. *Id.* In one case, the court fashioned a distinction between factual and interpretive representations making the former actionable. Group Hosp. Serv., Inc. v. One & Two Brookriver Ctr., 704 S.W.2d 886, 888-89 (Tex. App.—Dallas 1986, no writ). In the next case, the court drew a distinction between ambiguous and unambiguous language in a contract, and made false representations about unambiguous language actionable. Quitta v. Fossati, 808 S.W.2d 636, 644-46 (Tex. App.—Corpus Christi 1991, writ denied). Because both of these courts' distinctions require hair splitting, the *Feyznia* court rejected them. *Feyznia*, 876 S.W.2d at 533. In the third and final case the *Feyznia* court looked to, Fina Supply, Inc. v. Abilene Nat'l Bank, 726 S.W.2d 537, 540 (Tex. 1987), the court made a distinction between statements of fact and of opinion, and stated that false statements of fact would be actionable under common-law fraud claim. *Id.* Because misrepresentations which do not rise to the level of fraud can be actionable under the DTPA, the *Feyznia* court found the distinction inapplicable. *Feyznia*, 876 S.W.2d at 533.

91. *Id.* "Rather than attempting to determine the applicability of the DTPA from a single factor such as ambiguity, we think it appropriate to view the totality of the circumstances." *Id.*

92. *Id.*

93. *Id.* at 534.

In *St. Paul Oil & Gas Corp. v. Trijon Exploration, Inc.*,[94] Trijon, an unsuccessful bidder, which sought to purchase a working interest in an oil and gas lease, sued the seller and its attorney for section 17.46(b)(12) misrepresentations. At trial, the jury returned a verdict for the Trijon on its DTPA claims.[95] The defendants appealed challenging the sufficiency of the evidence showing such a DTPA violation.[96]

Trijon alleged that the defendants violated the DTPA when they misrepresented their intent to award an oil and gas interest to the highest bidder.[97] According to Trijon, it was not willing to participate in further bidding without an assurance that the defendants would award an enforceable sale contract to the highest bidder. In response to this demand, Trijon claimed that Parrino, St. Paul's attorney, assured him that St. Paul would sell to the highest bidder over $1 million. The defendants adamantly denied these allegations. During the second round of bidding, Trijon outbid the other bidder with a $1.225 million bid. Because Trijon's bid was not fully funded, St. Paul awarded the oil and gas interest to the other bidder. These events precipitated Trijon's DTPA suit.[98]

The court compared the defendants' alleged representation to sell to the highest bidder to an auction "without reserve."[99] Under this comparison, the court considered Trijon's higher bid as an acceptance of St. Paul's offer to sell, creating a binding contract. While this dispute might have been brought as a breach of an oral contract action, Trijon asserted only that the defendants made an actionable DTPA misrepresentation.[100]

Trijon claimed that the defendants' representation that St. Paul would sell to highest bidder violated the DTPA because it represented that their agreement conferred rights or involved rights or remedies which it did not have.[101] A violation of this particular section of the DTPA, however, requires the *existence* of an underlying contract the terms of which are misrepresented.[102] Because no contract existed between Trijon and St. Paul until after St. Paul's attorney made the alleged misrepresentation, the defendants could not have violated this section of the DTPA.[103] Accordingly, the Corpus Christi Court of Appeals reversed the judgment of

94. 872 S.W.2d 27 (Tex. App.— Corpus Christi 1994, writ denied).

95. *Id.* at 27.

96. *Id.* at 27-28.

97. *Id.* at 28.

98. *Id.*

99. An auction "without reserve" means that once the auctioneer has called for bids, he cannot withdraw the article from sale unless no proper bid is made within a reasonable time. *Id.* "[A]n agreement to sell to the highest bidder constitutes an offer which is accepted and a contract formed upon the making of the highest bid by the successful bidder." *Id.* (citing Intertex, Inc. v. Cowden, 728 S.W.2d 813, 818 (Tex. App.—Houston [1st Dist.] 1986, no writ)).

100. *Id.* at 28.

101. *Id.* at 28-29 (citing TEX. BUS. & COM. CODE ANN. § 17.46(B)(12)).

102. *Id.* at 29 (citing Home Sav. Assoc. Serv. Corp. v. Martinez, 788 S.W.2d 52, 56-57 (Tex. App.—San Antonio 1990, writ denied)).

103. *Id.*

the trial court and rendered a judgment that Trijon take nothing on its DTPA claims.[104]

In *Posey v. Southwestern Bell Yellow Pages, Inc.*,[105] the Corpus Christi Court of Appeals again addressed an alleged violation of this section of the DTPA. The Poseys purchased a Yellow Page advertisement from the defendant, listing their business name "Chiropractic Health Center," its address, their individual names, and phone number. Even though the same ad ran the year before, when the defendant published the following year's Yellow Pages, the Poseys' personal listing fell under the business name, address, and phone number of their competitors "Chiropractic Health Services." While Southwestern Bell did not charge the Poseys for the ad and gave them credit towards a free ad the following year, the Poseys sued for damages on a host of claims, including the DTPA.[106]

The Poseys claimed that the limitation of liability clause included in their contract with the defendant[107] violated the DTPA because it represented that the agreement conferred or involved rights, remedies, or obligations which are prohibited by law.[108] Because waivers of the rights and remedies provided under the DTPA are unenforceable and void,[109] Posey argued that the mere presence of a limitation of liability clause in the contract created a violation of the DTPA.[110] Observing that the limitation of liability clause was otherwise valid, the court refused to rule for the Poseys on this point because to do so would make the mere existence of such a clause in a contract an automatic DTPA violation.[111]

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104. *Id.*

105. 878 S.W.2d 275 (Tex. App.—Corpus Christi 1994, n.w.h.).

106. *Id.* at 278.

107. The limitation of liability clause was a general one. It read in part:

> Disclaimer of Warranties and Limitation of Publisher's Liability. (a) Publisher intends to use its best efforts to ensure that all advertising is published in accordance with this Agreement, but Publisher acknowledges and Advertiser agrees that errors, omissions, delays or other mishaps may sometimes occur. Publisher sets rates and accepts business only upon the basis that Publisher is under no liability in such a case, except as provided herein. (b) *Accordingly, it is a fundamental term of this Agreement and Advertiser agrees that publisher's liability in money damages shall relate to the degree of error made in context to the total advertising, but in no event shall such liability exceed an amount equal to that paid for the items of advertising omitted, or in which the error occurs, for the items of advertising omitted, or in which the error occurs, for the issue life of the directory.*

Id. at 278 (emphasis in original). The clause did not single out DTPA damages, attempting to waive a consumer's rights and remedies under that statute. Instead, the clause sought to limit liability under all potential theories of liability. In fact, Southwestern Bell conceded that the clause is ineffective to limit damages awarded under a DTPA claim, except a claim premised on the breach of warranty provision. *Id.* at 280.

108. *Id.* at 280 (tracking the language of DTPA § 17.46(b)(12)).

109. DTPA § 17.42.

110. *Posey*, 878 S.W.2d at 280.

111. *Id.* "[T]o use an otherwise valid contractual provision to transform a breach of contract action into a DTPA violation appears to be at odds with both common sense and recent decisions in this area." *Id.* (citing Southwestern Bell Tel. Co. v. FDP Corp., 811 S.W.2d 572, 576-77 (Tex. 1991) (liability limitation part of "basis of the bargain" and enforceable against claim of breach of warranty under DTPA)).

IV. WAS THE BAD ACT A "PRODUCING CAUSE" OF THE CONSUMER'S DAMAGES?

In order to recover damages for any deceptive act or practice, the consumer must prove that the defendant's conduct was a producing cause.[112] A producing cause is an efficient, exciting or contributing cause, which in the natural sequence, produced injuries or damages.[113] There can be more than one producing cause of damages.[114] While the law does not require reliance or foreseeability,[115] some causal connection must exist between the deceptive act and actual damages suffered.[116]

In *Peeler v. Hughes & Luce*,[117] a convicted criminal sued her attorney, David Jordan, and his law firm. She alleged that he committed malpractice because he failed to inform her of the offer of immunity made by the prosecution. She sought damages under theories of negligence, gross negligence, DTPA violations, breach of contract, and breach of implied warranty.[118] The trial court granted summary judgment for the defendants.[119]

As an officer of Hillcrest Equities, a securities trading corporation, Peeler came under federal investigation by the IRS. She hired Jordan to represent her. Shortly after the investigation began, the assistant United States Attorney in charge called Jordan and extended an unequivocal offer of transactional immunity to Peeler in exchange for her cooperation in the investigation. Jordan never informed Peeler of this offer. Regardless, another suspect took the immunity offer and provided the government with the information necessary to prosecute Peeler and the others. Based on the government's case, Peeler plead guilty to "aiding and assisting the filing of a false and fraudulent U.S. Partnership Return of Income for Byrd Investments."[120] Peeler was convicted.[121]

After learning of the government's immunity offer, she filed this suit. She alleged that Jordan's failure to inform her of the immunity offer was the producing cause of her conviction.[122] Focusing on how producing cause should be determined in the criminal context, the ultimate question before the court was whether or not Jordan's failure to inform Peeler of the immunity offer constituted an actionable misrepresentation under the DTPA.

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112. Weitzel v. Barnes, 691 S.W.2d 598, 600 (Tex. 1985).
113. Rourke v. Garza, 530 S.W.2d 794, 801 (Tex. 1975).
114. *Id.*
115. Allied Towing Service v. Mitchell, 833 S.W.2d 577, 585 (Tex. App.—Dallas 1992, no writ).
116. *Weitzel*, 691 S.W.2d at 602-03.
117. 868 S.W.2d 823 (Tex. App.—Dallas 1993, writ granted).
118. *Id.*
119. *Id.* The defendants alleged that for policy and other reasons, Peeler's own actions were the producing cause of her damages. *Id.* They further alleged that Peeler had not exhausted her remedies by attempting to have the conviction or her plea set aside first. *Id.*
120. *Id.* at 826.
121. *Id.*
122. *Id.* Peeler claimed that she plead guilty on the advice of Jordan and other Hughes & Luce attorneys. *Id.*

In this case of first impression, the Dallas Court of Appeals determined that a different standard of producing cause applied to criminal cases.[123] Noting the strong policy reasons that exist for not allowing a criminal to profit from his crime, the court concluded that a guilty defendant's own culpability supersedes all other potential "producing" or "proximate" causes of his conviction.[124] Because the criminal's culpability prevents him from establishing the critical element of cause-in-fact necessary to show "producing" and "proximate" cause, a guilty defendant cannot bring a negligence or DTPA action against his attorney. Because producing causation requires the same finding of cause-in-fact as proximate causation, a guilty defendant could not establish the producing causation element of a DTPA claim.[125]

Based on the court's analysis of the producing cause element, the viability of Peeler's DTPA claim rested on whether or not she could establish her innocence. The evidence established that Peeler admitted her guilt, entered a guilty plea, was convicted, and failed to obtain any post-conviction relief prior to summary judgment.[126] According to the court, the evidence foreclosed any possibility of Peeler raising a question of fact regarding her innocence.[127] Concluding that Peeler's criminal actions were necessarily the producing and proximate cause of her indictment and conviction, the court affirmed the trial court's summary judgment for defendants.[128]

In *Camden Machine & Tool, Inc. v. Cascade Co.*[129] the Fort Worth Court of Appeals also disposed of a DTPA claim based on the element of producing cause. In *Camden Machine*, the purchaser of a building, Camden Machine & Tool, Inc., brought suit against the seller, a real estate firm, and the appraisers on a variety of grounds including violations of the DTPA. The trial court granted summary judgment in favor of the defendants, and Camden Machine appealed.[130]

The underlying dispute arose out of Camden Machine's purchase of an office warehouse from Cascade. Prior to closing the deal, Camden Machine had an appraiser look at the property. The appraiser's report disclosed a number of defects, including a crack in the foundation. After reviewing the report, John A. Burgoyne, the president and owner of

123. *Id.* at 827-33. "Because Texas courts have not specifically determined this issue of proximate or producing causation in the criminal malpractice context by utilizing public policy, we review the law of our sister jurisdictions." *Id.* at 829. After looking at the law of other jurisdictions, the court found that most require the criminal to establish his innocence of the underlying offense. *Id.* Only by establishing his innocence, can a convicted criminal show that his or her attorney's malpractice was a proximate or producing cause of his or her conviction. *Id.* at 831.

124. *Id.* at 827-33.

125. *Id.* at 832 (citing Title Agency of Texas v. Arellano, 835 S.W.2d 750, 754-55 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

126. *Peeler*, 868 S.W.2d at 833.

127. *Id.*

128. *Id.* at 835.

129. 870 S.W.2d 304 (Tex. App.—Fort Worth 1993, no writ).

130. *Id.*

Camden Machine, went to view the crack. Before closing occurred, Burgoyne brought in several other contractors to investigate the condition of the foundation. Their bids ranged from $7500 to $16,000 to repair the crack; however, each bid was conditioned on further soil samples. Without conducting such soil tests, Burgoyne adjusted the repair allowance to reflect this defect. He also tried to negotiate a price reduction, but was unsuccessful. Camden Machine closed on the property anyway. Shortly after the closing, Burgoyne discovered that cause of the crack, which was actually a complete break, was a storm drain that ran underneath the crack. Because of the permanent nature of the defect, Camden Machine filed suit alleging among other claims, violations of the DTPA.[131]

In deciding whether or not any of the defendants made actionable misrepresentations under the DTPA, the court looked at two cases with similar facts, *O'Hern v. Hogard*[132] and *Dubow v. Dragon*.[133] In *O'Hern*, the defendants failed to disclose that the foundation was settling. During an inspection made prior to closing on the property, the buyers discovered the settling. In the DTPA case that followed, the court concluded that a buyer's "reliance on an independent inspection was not, in and of itself, enough to constitute a new and independent basis for the purchase of a dwelling."[134] Because the court held that the inspection did not supersede the defendants' misrepresentations as a producing cause, the *O'Hern* buyers had an actionable DTPA claim. In *Dubow*, however, the court held the exact opposite. The *Dubow* court held that the producing cause of damage was the buyer's "reliance on the inspection and professional opinions which constituted a new and independent basis for the purchase."[135] This finding foreclosed the buyer's DTPA claims, as a matter of law.

Drawing factual distinctions between the two cases, the *Camden Machine* court determined that the case before it was more like the *Dubow* case.[136] The court held that Camden Machine's reliance on de-

131. *Id.* at 309.

132. 841 S.W.2d 135 (Tex. App.—Houston [14th Dist.] 1992, no writ).

133. 746 S.W.2d 857 (Tex. App.—Dallas 1988, no writ).

134. *Camden Machine*, 870 S.W.2d at 312 (citing *O'Hern*, 841 S.W.2d at 138).

135. *Camden Machine*, 870 S.W.2d at 312 (citing *Dubow*, 746 S.W.2d at 860).

136. *Camden Machine*, 870 S.W.2d at 312-13. The court distinguished the case from *O'Hern*. In *O'Hern*, the record lacked evidence that the buyers would have bought the house if the structural defects had been disclosed. *O'Hern*, 841 S.W.2d at 137. In *Camden Machine*, Burgoyne still wanted the building even after all that he had discovered after the closing about the nature of the defects. *Camden Machine*, 870 S.W.2d at 313. The court concluded that these facts proved that he would have gone through with the purchase even if he had known everything prior to the closing. *Id.* Like the *Dubow* buyers, Burgoyne employed contractors, one of whom was a foundation specialist, to come in and inspect the damage. *Id.* at 312-13. Based on these specialized inspections, the *Dubow* court stated "it is obvious that the Dubows did not rely on any alleged misrepresentations or failures to disclose since the Dubows hired experts of their own to inspect the house, and they relied on these experts in negotiating and obtaining a contract modification affording them a reduced purchase price." *Dubow*, 746 S.W.2d at 860. Unlike the *Dubow* buyers, Burgoyne was unsuccessful in negotiating a price reduction based on the estimates. Regardless, the court concluded that he had adequate knowledge prior to closing, and therefore, could not

fendants' misrepresentations was superseded by its reliance on the appraisal of the property and the follow-up inspections.[137] Because defendants' misrepresentations were not the producing cause of Camden Machine's damages, the court affirmed the trial court's summary judgment as to Camden Machine's DTPA claims.[138]

V. DAMAGES

Under the DTPA, a plaintiff must establish that he is a consumer, that the defendant committed a deceptive trade practice, and that such conduct was the producing cause of damage. Once the plaintiff establishes each of these elements, he is entitled to recover compensation for his damages. What damages can be compensated? How should damages be calculated? Consumers commonly encounter these issues when pursuing their DTPA claims.

In *Boat Superstore, Inc. v. Haner*[139] the trial court entered a default judgment against Boat Superstore, Inc. (Superstore), and Superstore appealed the award of damages. The underlying dispute arises out of Haner's purchase of a boat, motor, and trailer (the "property") from Superstore. Haner financed his purchase by entering a purchase security agreement (Agreement) with Superstore. Superstore assigned the Agreement to John Deere Company. Attempting to foreclose its lien on the property, Deere sued Haner. Haner counterclaimed, and filed a third party action against Superstore, alleging that defendants' violated the DTPA. Haner and Deere settled their suit, but Superstore failed to answer, therefore Haner took a default judgment. On appeal, Superstore challenged both the default judgment and the award of damages.

Concerning the trial court's award of damages, the Houston Court of Appeals addressed two main points of error : 1) Did the trial court err by awarding $2545 in credit damages because Haner did not specifically plead credit damages in his petition; and 2) did the trial court err by automatically trebling the actual damages awarded where no evidence existed indicating Superstore acted "knowingly"?[140] Because the Texas Supreme Court classified credit damages as consequential damages, they must be specifically pled to be recovered.[141] Accordingly, the court sustained Superstore's first main point of error regarding credit damages because Haner had not specifically plead them in his petition.[142]

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now claim that he relied on the defendants' misrepresentations or failures to disclose. *Camden Machine*, 870 S.W.2d at 312-13.

137. *Camden Machine*, 870 S.W.2d at 312-13 (following the court's analysis of *O'Hern* and *Dubow*).

138. *Id.* at 313.

139. 877 S.W.2d 376 (Tex. App.—Houston [1st Dist.] 1994, n.w.h.).

140. *Id.* at 379-80.

141. Henry S. Miller Co. v. Bynum, 836 S.W.2d 160, 163-64 (Tex. 1992). The supreme court stated that credit damages result naturally from such acts, but not necessarily. *Haner*, 877 S.W.2d at 379. Therefore, the court held that credit damages are to be classified as consequential or special damages. *Id.*

142. *Haner*, 877 S.W.2d at 379.

With regard to the second point of error, the *Haner* court observed that the trebling of damages was equivalent to an unliquidated damage amount.[143] When a plaintiff seeks a default judgment and damages are unliquidated, he must prove the connection between the liability and his injuries.[144] As a result, the court required Haner to prove that Superstore acted "knowingly" in order to establish his entitlement to treble damages.[145] After reviewing the record, the Houston Court of Appeals failed to find the necessary evidence indicating that Superstore acted "knowingly."[146] Thus, the court sustained this point of error as well, and reversed and remanded the case.[147]

In *Knowlton v. United States Brass*,[148] discussed previously, the court also tackled two issues regarding the award of damages to successful DTPA claimants. In the first issue, U.S. Brass contended that the trial court erred when it awarded certain DTPA plaintiffs an amount in excess of their actual damages because U.S. Brass had offered to settle with those plaintiffs for the amount of their actual damages.[149] After reviewing U.S. Brass' settlement offer, the court concluded that they did not constitute offers, but were merely invitations to negotiate.[150] As a result, the court overruled this point of error, and allowed the claimants a full recovery.[151]

In its second point of error regarding damages, U.S. Brass alleged that it was entitled to a judgment credit for fifty percent of the actual damages found for some of the DTPA plaintiffs because Vanguard, another de-

143. *Id.* at 379-80.

144. *Id.* at 380 (citing Morgan v. Compugraphics Corp., 675 S.W.2d 729, 731-32 (Tex. 1984)).

145. *Haner*, 871 S.W.2d at 380.

146. *Id.*

147. *Id.*

148. 864 S.W.2d 585 (Tex. App.—Houston [1st Dist.] 1993, writ granted).

149. *Id.* at 595. Under § 17.505(c), any person who receives notice of a consumer's DTPA claim under § 17.505(a) may tender to the consumer a written settlement offer within a specified period of time. DTPA §§ 17.505(a), (c). If the consumer rejects the settlement offer, it may be filed with the court along with an affidavit certifying its rejection. DTPA § 17.505(d). "If the amount tendered in the settlement offer is the same as or more than, or if the court finds the amount to be "substantially the same" as, the actual damages found by the trier of fact, the consumer may not recover an amount in excess of the amount tendered in the settlement offer or the amount of actual damages found by the trier of fact, whichever is less." DTPA § 17.505(d). U.S. Brass offered to replace the plumbing systems in these plaintiffs' houses and pay for any costs they incurred because they were displaced from their homes during the replacement work. *Knowlton*, 864 S.W.2d at 595.

150. U.S. Brass's offers basically sought to cover the plaintiffs' actual damages. The parties stipulated to the amount of actual damages before trial. *Knowlton*, 864 S.2d at 595. As a result, the only amounts left up to the jury were special damages, exemplary damages, and attorneys fees. *Id.* Thus, if the court had ruled that U.S. Brass's offers constituted valid offers and limited the plaintiffs' recovery to actual damages only, a horrible precedent would have been set. Such a precedent would allow guilty defendants to limit their liability under the DTPA to just actual damages. Under such a ruling, when the defendants recognized their guilt, they could make offers for only actual damages, and effectively limit the claimants' recovery to those damages because such a ruling would prevent the claimants from recovering any excess damages at trial.

151. *Id.* at 596.

fendant, settled with them for approximately half the value of actual damages.[152] Even though Chapter 32 of the Texas Civil Practice and Remedies Code applies to suits based on the DTPA, the statute is silent about the right of contribution against settling tortfeasors who are not parties to the final judgment.[153] At common law, however, the courts developed two credit schemes for reducing the damages paid by the nonsettling defendant by the amount paid by the settlors. Under the first scheme, the nonsettling defendant received a credit for the dollar amount of the settlement.[154] The other method is a proportionate reduction in damages.[155] In its briefing, U.S. Brass premised its election of credit for settlements on the claims to which Chapter 33 of the Texas Civil Practice and Remedies Code applies.[156] Because Chapter 32 applied and not Chapter 33, the court held that U.S. Brass had not elected any credit scheme; therefore, the trial court did not err when it applied a dollar for dollar credit.[157]

VI. LIMITATIONS

While several cases addressed the applicability of limitations to asserted DTPA claims,[158] only one case merits discussion. In *Bara v. Major Funding Corp. Liquidation Trust*,[159] the Baras filed suit against the defendant, the assignee of a retail installment contract, alleging DTPA violations. The Baras entered into the contract with B & B Siding Wholesale (B & B). After the Baras signed the contract, B & B sold the contract to the defendant. About eighteen months later, the Baras complained to the office of the Texas attorney general about the terms of the contract. In response to the Baras' complaint, the attorney general notified the Baras of the on-going lawsuit it had pending against the defendant, and informed them that they would be included in the group of homeowners covered by that suit.[160] When the attorney general negotiated its settle-

152. *Id.* at 598.

153. *Id.* at 599. (citing Stewart Title Guar. Co. v. Sterling, 822 S.W.2d 1, 5 (Tex. 1991) and Cypress Creek Util. Serv. Co. v. Muller, 640 S.W.2d 860, 862 (Tex. 1982)).

154. Bradshaw v. Baylor University, 126 Tex. 99, 84 S.W.2d 703 (1935).

155. Palestine Contractors, Inc. v. Perkins, 386 S.W.2d 764 (Tex. 1964).

156. *Knowlton*, 864 S.W.2d at 599.

157. *Id.*

158. Ciba-Geigy Corp. v. Stephens, 871 S.W.2d 317, 321 (Tex. App.—Eastland 1994, writ denied) (holding that date of discovery is a jury question); *Knowlton*, 864 S.W.2d 585 (Tex. App.—Houston [1st Dist.] 1993, writ granted) (holding that there was insufficient evidence to establish privity between former homeowners and plaintiffs so as to impute knowledge of Defendant's DTPA violation and cause the discovery rule to kick in sooner and bar the entire action); and *Barrett*, 864 S.W.2d 606, 635-36 (Tex. App.—Houston [1st Dist.] 1993, writ granted) (holding limitations barred some actions where the plaintiffs, in the exercise of reasonable diligence, should have discovered the defendant's violation of the DTPA).

159. 876 S.W.2d 469 (Tex. App.—Austin 1994, writ denied).

160. *Id.* at 471. Based on similar complaints, the attorney general had filed suit prior to receiving the Baras' complaint. Pursuant to DTPA § 17.47, the attorney general can bring an action in the public interest and in the name of the State of Texas against any entity that it believes is engaged in conduct prohibited by the DTPA.

ment with the defendant, it extended a settlement package to the Baras. After consulting with an independent attorney, the Baras rejected the settlement offer, and filed this suit. The trial court granted the defendant's motion for summary judgment based on limitations, and the Baras appealed.[161]

Presented with a case of first impression, the Austin Court of Appeals decided whether or not an action brought by the attorney general pursuant to section 17.47 of the DTPA in response to consumer complaints tolls the running of the statute of limitations on the consumer's individual claims.[162] Because of the similarities, the court looked to the laws governing class actions for guidance in its decision.[163] While no Texas cases had considered the situation of a plaintiff who "opted out" of a class action, federal courts had considered this issue. Federal courts held that tolling applies to those class members who opt-out and later file their own suits.[164]

Arguing that their situation was analogous to an "opt-out" in a federal class action situation, the Baras alleged that the statute of limitations should have been tolled during the course of the attorney general's suit.[165] Agreeing with the Baras' argument, the court concluded "that in situations in which the attorney general files suit under section 17.47 of the DTPA on behalf of a specified group of individuals, that suit qualifies as a de facto class action and the statute of limitations is tolled during the period in which the individuals are participants in the attorney general's suit."[166] Accordingly, the Austin Court of Appeals reversed and remanded the case.[167]

161. *Bara*, 876 S.W.2d at 471.
162. *Id.*
163. *Id.*
164. *Id.* *See* Tosti v. City of Los Angeles, 754 F.2d 1485, 1489 (9th Cir. 1985); *see also* Crown Cork & Seal Co. v. Parker, 462 U.S. 345 (1983).
165. *Bara*, 876 S.W.2d at 471.
166. *Id.* at 472-73.
167. *Id.* at 473.