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## Antitrust and Consumer Protection

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# ANTITRUST AND CONSUMER PROTECTION

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## I. INTRODUCTION

Consumer welfare is the common concern of antitrust laws and the Texas Deceptive Trade Practices—Consumer Protection Act (DTPA).<sup>1</sup>

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1. TEX. BUS. & COM. CODE ANN. §§ 17.41–17.63 (West 2011 & Supp. 2016). Section 17.50 of the DTPA provides:

- (a) A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish:
  - (1) the use or employment by any person of a false, misleading, or deceptive act or practice that is:
    - (A) specifically enumerated in a subdivision of Subsection (b) of Section 17.46 of this subchapter; and
    - (B) relied on by a consumer to the consumer’s detriment;
  - (2) breach of an express or implied warranty;
  - (3) any unconscionable action or course of action by any person; or
  - (4) the use or employment by any person of an act or practice in violation of Chapter 541, Insurance Code.

Antitrust, however, is primarily addressed to the misuse of market power to harm consumers, while the DTPA focuses on consumer harm brought about through deception.<sup>2</sup> Antitrust laws and the DTPA, therefore, are best viewed as focusing on complementary aspects of consumer welfare.

This article covers significant developments under the federal and Texas antitrust laws and the DTPA during the Survey period—December 1, 2015 through November 30, 2016.

## II. ANTITRUST

### A. FEDERAL PLEADING STANDARDS

Most of the reported antitrust cases from federal courts in Texas during the Survey period concern pleading standards. For example, in *Red Lion Medical Safety, Inc. v. General Electric Co.*,<sup>3</sup> the plaintiffs alleged claims for violations of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act arising from the servicing of General Electric (GE) anesthesia gas machines. According to the plaintiffs, who service the machines in competition with GE, GE entered into an exclusive distributorship agreement for replacement parts with Alpha Source in early 2011, which required the plaintiffs to purchase replacement parts from Alpha Source. The plaintiffs further alleged that Alpha Source's mark-up was 18–20% and that Alpha Source engaged in anticompetitive behavior by failing to stock some parts, delaying shipment of parts, and charging a premium when parts had to be expedited. These problems are not faced by GE when it services the machines itself. The plaintiffs alleged that they were no longer able to compete with GE, which harmed the end users.<sup>4</sup>

Alpha Source and GE both filed motions to dismiss. As to Alpha Source's motion, the U.S. District Court for the Eastern District of Texas held that the plaintiffs' claims were "appropriately characterized as a 'business dispute,' such as a breach of contract" and that plaintiffs' allegations did not "present a plausible claim" of an antitrust violation.<sup>5</sup> Regarding GE's motion to dismiss, the district court held that the plaintiffs had alleged a sufficient product and geographic market at this motion to dismiss stage.<sup>6</sup> The district court rejected GE's argument that the plaintiffs' Clayton Act claim was barred by the statute of limitations, holding that the question required further factual development.<sup>7</sup> Finally, the district court rejected GE's claim that the plaintiffs had failed to adequately allege an agreement in restraint of trade and rejected as "unpersuasive" GE's "broad conclusions" that "an anti-trust violation cannot occur where one party can provide a better deal to customers, where one com-

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2. BUS. & COM. § 17.44(a); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979); *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1382 (5th Cir. 1994).

3. No. 2:15-CV-308, 2016 WL 3770958 (E.D. Tex. Mar. 31, 2016).

4. *Id.* at \*1.

5. *Id.* at \*3.

6. *Id.* at \*4.

7. *Id.* at \*3.

pany refuses to help a competitor or where an exclusive distributorship is involved.”<sup>8</sup>

The U.S. District Court for the Western District of Texas was also faced with challenges to the pleading of antitrust claims. *YETI Coolers, LLC v. RTIC Coolers, LLC*<sup>9</sup> involved litigation between rival cooler companies. YETI sued RTIC and its owners for patent infringement and RTIC counterclaimed that YETI was monopolizing or attempting to monopolize the market for “‘high-end premium heavy-duty coolers’ in the United States.”<sup>10</sup> YETI moved to dismiss, arguing that RTIC had failed to allege facts to support a relevant market or anticompetitive conduct. The district court held that RTIC had alleged sufficient facts “to define the relevant product market” and that its “plausible factual assertions, taken as true,” support its claim that YETI has monopoly power in that market.<sup>11</sup> However, the district court concluded that RTIC had not sufficiently alleged anticompetitive conduct.<sup>12</sup> RTIC alleged that YETI had engaged in meritless litigation and excluded “RTIC from access to Persico’s Smart Mold electronic rotomolding technology.”<sup>13</sup> Regarding the litigation, the district court explained that litigation can only form the basis of an antitrust claim when it is objectively baseless, which means “no reasonable litigant could realistically expect success on the merits.”<sup>14</sup> While RTIC had alleged that YETI’s patent was invalid and thus that its numerous patent lawsuits were objectively baseless, the district court explained that none of YETI’s other claims had been determined so it could not say that YETI’s claims were objectively baseless.<sup>15</sup> “Therefore, even accepting as true all of RTIC’s factual allegations,” the district court found that RTIC pleaded “insufficient facts to support the legal conclusion that YETI engages in ‘sham’ litigation to exclude competition.”<sup>16</sup> Turning to the allegation that YETI’s exclusive arrangement with Persico constitutes exclusionary conduct, the district court explained that “an exclusive dealing contract does not violate the antitrust law ‘unless the court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected.’”<sup>17</sup> Because RTIC had failed to allege facts demonstrating that its lack of access to Persico machines had prevented RTIC from being able to compete with YETI, the district court concluded that RTIC had failed to sufficiently plead an-

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8. *Id.* at \*3–4.

9. No. 1:15-CV-00597-RP, 2016 WL 5956081 (W.D. Tex. Aug. 1, 2016).

10. *Id.* at \*1, \*3.

11. *Id.* at \*4.

12. *Id.* at \*4–5.

13. *Id.* at \*4.

14. *Id.* (quoting *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60 (1993)).

15. *Id.*

16. *Id.* It is unclear why the district court was able at the motion to dismiss stage to consider facts outside the pleadings, such as the status of YETI’s other patent infringement claims.

17. *Id.* at \*5 (quoting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)).

ticompetitive conduct.<sup>18</sup>

*WickFire, LLC v. Trimax Media, Inc.*<sup>19</sup> involved competitors in a specific search engine marketing arena that each claimed the other was competing unlawfully. WickFire filed a motion to dismiss TriMax's antitrust counterclaim for failure to state a claim and the U. S. District Court for the Western District of Texas granted the motion.<sup>20</sup> The elements of an attempted monopolization claim are "(1) . . . predatory or anti-competitive conduct; (2) with the specific intent to monopolize; and (3) with a dangerous probability of attaining monopoly power," which itself concerns a "defendant's ability to lessen or destroy competition" in the relevant market.<sup>21</sup> The district court held that while TriMax had defined the relevant product market, it failed to allege sufficient facts concerning the size of the market, WickFire's share of the market, the number of competitors in the market, or the strength of those competitors.<sup>22</sup> The district court rejected TriMax's contention that WickFire's competitors "are too weak to constrain Wickfire's prices" as a "conclusory allegation" that was "insufficient to establish WickFire holds market power."<sup>23</sup> In the absence of these facts, TriMax failed to sufficiently "allege that WickFire [had] a dangerous probability of attaining monopoly power," and thus the district court dismissed its antitrust claim.<sup>24</sup>

#### B. ATTEMPTED MONOPOLIZATION

In *Retractable Technologies, Inc. v. Becton Dickinson & Co.*,<sup>25</sup> the U.S. Court of Appeals for the Fifth Circuit considered a \$340 million jury verdict in a case between two manufacturers of syringes and IV catheters. The case had gone to trial on four antitrust liability theories, each applicable to three different products and two theories of damages: "anticompetitive contracting damages" and "deception damages."<sup>26</sup> The jury rejected eleven of the antitrust claims but found the defendant liable for "attempted monopolization of safety syringes and awarded in excess of \$113 million in "deception damages," which the district judge trebled.<sup>27</sup>

On appeal, the Fifth Circuit concluded that the jury's findings did not support the verdict.<sup>28</sup> Because the jury had rejected the "anticompetitive contracting" theory of recovery, the plaintiff could recover only if its attempted monopolization claim was supported by evidence of "deception."<sup>29</sup> The plaintiff alleged three types of deception: patent

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18. *Id.*

19. No. A-14-CA-34-SS, 2016 WL 4119917 (W.D. Tex. Mar. 25, 2016).

20. *Id.* at \*8.

21. *Id.* at \*6 (quoting *Spectrum Sports, Inc. v. McQuillian*, 506 U.S. 447, 456 (1993)).

22. *Id.* at \*7.

23. *Id.*

24. *Id.*

25. 842 F.3d 883 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 1349 (2017).

26. *Id.* at 890.

27. *Id.*

28. *Id.* at 891.

29. *Id.*

infringement, persistent false advertising, and “tainting the market.”<sup>30</sup> The Fifth Circuit explained that “[not] all ‘unfair’ conduct” by a rival is actionable as predatory or exclusionary conduct for antitrust purposes.<sup>31</sup> While the Fifth Circuit agreed with the plaintiff’s contention that “unfair practices can be aggregated into legally predatory conduct,” it stated that not since 1980, in *Associated Radio Service Co. v. Page Airways, Inc.*,<sup>32</sup> had the Fifth Circuit concluded that a series of business torts were “so egregious as to constitute actionable predatory or exclusionary conduct.”<sup>33</sup>

Turning to the facts of the case, the Fifth Circuit reiterated its long-standing position that patent infringement cannot support an antitrust claim.<sup>34</sup> Patent laws are designed to allow inventors the “exclusive right to exploit their discoveries,” while antitrust law is intended to protect consumers and commerce.<sup>35</sup> Contrary to harming commerce, patent infringement actually increases competition because the infringer “invades the patentee’s monopoly rights, causing competing products to enter the market.”<sup>36</sup>

Regarding the plaintiff’s attempt to rest antitrust liability on its rival’s false advertising “that [defendant’s] needles are the ‘world’s sharpest’ . . . and have ‘low waste space,’” the Fifth Circuit explained that advertising “on the merits” is consistent with competition and that “arguments relating to the merits of a product do not raise antitrust concerns.”<sup>37</sup> “[A]bsent a demonstration that a competitor’s false advertisements had the potential to eliminate, or did in fact eliminate, competition, an antitrust lawsuit will not lie.”<sup>38</sup> The Fifth Circuit recognized that other circuits had flatly barred or “treated skeptically antitrust claims predicated on false advertising.”<sup>39</sup> Because the plaintiff remained a vigorous competitor and failed to adduce any evidence that the defendant’s false advertising harmed competition, the Fifth Circuit held that the plaintiff could not premise its antitrust claim on false advertising.<sup>40</sup>

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30. *Id.* at 891.

31. *Id.* at 891–92.

32. 624 F.2d 1342 (5th Cir. 1980).

33. *Retractable Techs., Inc.*, 842 F.3d at 892.

34. *Id.* at 892–93.

35. *Id.* at 893.

36. *Id.*

37. *Id.* at 893–94 (citing *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 523–25 (5th Cir. 1999)).

38. *Id.* at 895.

39. *Id.* at 894–96 (citing *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 851 (7th Cir. 2011); *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 109 n.14 (3d Cir. 2010); *Covad Commc’ns Co. v. Bell Atl. Corp.*, 398 F.3d 666, 674–75 (D.C. Cir. 2005); *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc’ns, Inc.*, 376 F.3d 1065, 1076 (11th Cir. 2004); *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 323 F.3d 366, 370 (6th Cir. 2003); *Am. Prof’l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof’l Publ’ns, Inc.*, 108 F.3d 1147, 1152 (9th Cir. 1997); *Nat’l Ass’n of Pharm. Mfrs. v. Ayerst Labs.*, 850 F.2d 904, 916 (2d Cir. 1988)).

40. *Id.* at 896–97.

The plaintiff's final theory was that the defendant had intentionally marketed flawed retractable syringes with the intent of convincing consumers that all retractable syringes were unreliable so that when the plaintiff's patent expired, the defendant could unveil a new product using the plaintiff's technology and corner the market. The Fifth Circuit held that there was some basis in the record that the defendant was marketing flawed products but no direct evidence that it did so in order to taint the market.<sup>41</sup> The plan to use a rival's technology to compete once its patent has expired "is precisely the type of activity to be expected from competitors when valuable patent rights expire" and thus "cannot constitute anticompetitive conduct."<sup>42</sup> Nor did it make sense to the court that the defendant would intentionally harm the market for retractable syringes. Calling such a plan "unnecessary and counterproductive to the company's longer-term goal," the Fifth Circuit held that such a plan "utterly belies the taint theory."<sup>43</sup> The Fifth Circuit thus concluded that the tainting theory could not support the jury's verdict.<sup>44</sup>

### C. TEXAS FREE ENTERPRISE AND ANTITRUST ACT

In *Regal Entertainment Group v. iPic-Gold Class Entertainment, LLC*,<sup>45</sup> the First Houston Court of Appeals considered whether a temporary restraining order had properly been issued in an antitrust suit between movie theater chains. iPic operates a "boutique upscale movie theater" in Houston.<sup>46</sup> According to iPic, a year before the location opened, "Regal informed six major film distributors that . . . [it] would be 'clearing' iPic Houston" for its Greenway location, which was nearest to iPic.<sup>47</sup> In film parlance, "clearing" or "clearance" means that Regal would not license a film for the Greenway theater that would be simultaneously shown at iPic. Once it opened, iPic sued Regal alleging that Regal had violated the Texas Free Enterprise and Antitrust Act of 1983 (TFEAA) because Regal has sufficient market power to force film distributors to comply with clearance and that the clearance request harms both iPic and the "market for premium exhibition of first-run films" by limiting consumer choice in locations to view such films.<sup>48</sup>

iPic requested temporary and permanent injunctive relief prohibiting the defendants from clearing the iPic Houston theater. The trial court held a hearing on iPic's request for a temporary injunction at which evidence was taken that the clearance request was made, that three of the six distributors contacted responded by allocating their films between Regal and iPic, meaning that some films were offered only to Regal and others

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41. *Id.* at 897–98.

42. *Id.* at 897.

43. *Id.* 898.

44. *Id.*

45. 507 S.W.3d 337 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

46. *Id.* at 342.

47. *Id.* at 343.

48. *Id.* at 342–43.

only to iPic, and the other three ignored it and offered films to both theaters, but Regal refused to exhibit any films licensed to iPic. iPic's executive further testified that iPic's Houston location was unable to obtain licenses to some of the films it wanted, thereby preventing Houston customers from being able to "see certain films in a premium theater setting."<sup>49</sup> iPic offered evidence that Regal's Greenway theater and iPic do not substantially compete because their average ticket prices are significantly different (\$9 for Greenway and \$21–\$28 for iPic) and because iPic attracts customers who do not patronize traditional megaplexes like the Greenway. Regal presented evidence that the clearance around iPic was consistent with Regal's nationwide policy and that clearance actually has "pro-competitive benefits" in that it "increase[s] film supply and ensure[s] that different films get played."<sup>50</sup> Regal also countered iPic's claim of damage with evidence that despite the clearance, iPic Houston was the chain's second-highest grossing theater and had obtained numerous box-office hits. The trial court issued a temporary injunction prohibiting Regal from "requesting exclusive film licenses . . . from any studio," and Regal appealed.<sup>51</sup>

The court of appeals affirmed entry of the temporary injunction.<sup>52</sup> The court first considered the case law regarding film clearance requests. Regal argued that the trial court had erroneously granted injunctive relief on the sole ground that the Greenway and iPic Houston were not in substantial competition. The court of appeals rejected this argument, recognizing that "[w]hether theaters are in substantial competition turns on whether they sell a reasonably interchangeable product in the same geographic area."<sup>53</sup> The court of appeals then considered whether iPic had demonstrated a probable right to recovery on its claim of an unlawful restraint of trade. The court of appeals rejected Regal's contention that its clearance request was unilateral, and thus could not constitute an agreement in restraint of trade.<sup>54</sup> Evidence that three of the film distributors allocated films between the competitors when doing so was not in their economic self-interest, and that Regal declined to show *Star Wars: The Force Awakens*, because it was playing at iPic Houston, was sufficient evidence to permit "a rational inference of conspiracy or coercion as opposed to permissible independent conduct."<sup>55</sup> Regarding the product market, the court of appeals concluded that despite conflicting evidence, there was some evidence supporting the trial court's conclusion that Regal and iPic competed in the market for first-run film licenses in a three-mile radius around the two theaters and that Regal had market power sufficient to

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49. *Id.* at 343.

50. *Id.* at 344.

51. *Id.* at 345.

52. *Id.* at 342.

53. *Id.* at 348–49 (collecting cases).

54. *Id.* at 350.

55. *Id.*



harm competition in that market.<sup>56</sup> The court of appeals also identified some evidence to support the trial court's implied findings "that iPic Houston participates in the premium film exhibition market to the exclusion of the Greenway" and that "Regal's clearance request reduced the number of first-run films available to consumers in that market."<sup>57</sup>

In *Better Business Bureau of Metropolitan Houston, Inc. v. John Moore Services, Inc.*,<sup>58</sup> the First Houston Court of Appeals considered whether a home repair business had cited clear and specific evidence of its antitrust claims against the Houston Better Business Bureau (BBB) sufficient to withstand a challenge under the Texas Citizens' Participation Act (TCPA). Plaintiff business pleaded restraint of trade and attempted monopolization under TFEAA, alleging, among other things, that a competing business and the BBB had conspired to restrain trade in the home repair market by giving the plaintiff a bad rating and, ultimately, forcing the plaintiff out of the BBB. The court of appeals held that the plaintiff had failed to identify any evidence of an agreement to restrain trade in violation of TFEAA, evidence of any anticompetitive conduct by the BBB requiring other businesses to follow its recommendations, evidence of any injury or damage caused by its negative rating or lack of membership in the BBB, or evidence of an adverse effect on home services competition.<sup>59</sup> Thus, dismissal of the business's restraint of trade claim under the TCPA was appropriate. The court of appeals held that the business's attempted monopolization claim was likewise insufficiently supported to survive the TCPA challenge because the business had proffered no evidence of the parameters of the relevant market, no evidence of the defendants' market share in that market, and no evidence of predatory conduct resulting in a "dangerous possibility of monopoly power."<sup>60</sup>

### III. DECEPTIVE TRADE PRACTICES – CONSUMER PROTECTION ACT

Noteworthy DTPA decisions during the Survey period considered whether DTPA claims survive a consumer who dies; whether purchasers of non-operator working interests fall within the statute's scope as "consumers"; whether a limited liability company qualifies as a "consumer" for DTPA purposes; whether alleged violations of Federal Trade Commission franchise rules constitute *per se* violations of the DTPA; whether constructive notice through real property records that is improper as a defense to a DTPA claim may still constitute notice for purposes of the discovery rule; and whether a DTPA judgment is dischargeable in bank-

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56. *Id.* at 351–52.

57. *Id.* at 354.

58. 500 S.W.3d 26 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

59. *See id.* at 32 ("Concluding that we do, we examine whether the requirements for dismissal under the TCPA have been met in the second state court lawsuit. We conclude that they have.").

60. *Id.* at 47–49.

ruptcy where the jury's findings are vague regarding the degree of intent to deceive.

#### A. LEGISLATIVE CHANGES

The Texas Legislature amended the DTPA in 2015 to prohibit an additional species of “deceptive practice” involving misleading consumers to believe that notaries may practice law.<sup>61</sup> Specifically, the Legislature declared it a deceptive practice to

us[e] the translation into a foreign language of a title or other word, including “attorney,” “lawyer,” “licensed,” “notary,” and “notary public,” in any written or electronic material, including an advertisement, a business card, a letterhead, stationery, a website, or an on-line video, in reference to a person who is not an attorney in order to imply that the person is authorized to practice law in the United States.<sup>62</sup>

The inclusion of this new prohibition reflects a trend in which notaries public identify themselves as a “notario publico,” which in Mexico and other Latin American countries means the person is an attorney, which is not necessarily the case in the United States.<sup>63</sup> The false cognate inherent to the literal translation of “notary” to “notario” has in some instances led unaware consumers to seek immigration and other legal advice from unqualified individuals.<sup>64</sup>

#### B. SURVIVABILITY

At least one federal court case continued an apparent trend in the interpretation of Texas law and held that a deceased consumer's survivors may not bring a DTPA claim belonging to the late consumer. Although Texas intermediate courts sometimes differ on the issue<sup>65</sup> and the Texas Supreme Court has yet to weigh in,<sup>66</sup> federal cases at least indicate that

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61. TEX. BUS. & COM. CODE § 17.46(b)(28). The new section took effect September 1, 2015.

62. *Id.*

63. See *Rodriguez v. State*, 336 S.W.3d 294, 299 (Tex. App.—San Antonio 2010, pet. ref'd) (“[I]n Mexico a ‘notario publico’ is a licensed attorney[.]”); see also S. Comm. on St. Aff., Bill Analysis, C.S.H.B. 2573, 85th Leg., R.S. (2015), <http://www.legis.texas.gov/tlodocs/84R/analysis/html/HB02573E.htm> [<https://perma.cc/AXY3-V6AE>].

64. *Fight Notario Fraud*, ABA, [http://www.americanbar.org/groups/public\\_services/immigration/projects\\_initiatives/fightnotariofraud.html](http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/fightnotariofraud.html) [<https://perma.cc/M9EX-PH7U>].

65. Compare, e.g., *Thomes v. Porter*, 761 S.W.2d 592, 594 (Tex. App.—Fort Worth 1988, no writ) (finding that, pursuant to common law rules and “liberally construing the purpose of the DTPA,” claims do survive a consumer), and *Mahan Volkswagen, Inc. v. Hall*, 648 S.W.2d 324, 333 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.), with *Lukasik v. San Antonio Blue Haven Pools, Inc.*, 21 S.W.3d 394, 402 (Tex. App.—San Antonio 2000, no pet.) (finding that DTPA claims do not survive, expressly rejecting *Thomes*).

66. *Shell Oil Co. v. Chapman*, 682 S.W.2d 257, 259 (Tex. 1984) (“We do not pass upon this point, and reserve to another day discussion of survival of DTPA damages.”). The U.S. Court of Appeals for the Fifth Circuit later certified the question to the Texas Supreme Court, which declined to issue guidance. *Wellborn v. Sears, Roebuck & Co.*, 970 F.2d 1420, 1422 (5th Cir. 1992).

such is the rule in Texas.

In *Elmazouni v. Mylan, Inc.*, the U.S. District Court for the Northern District of Texas held that the heirs of deceased consumers may not bring DTPA claims because such claims “do not survive the death of the consumer.”<sup>67</sup> The husband and children of Lisa Elmazouni (the survivors) brought a claim against pharmaceutical company Mylan following her death, which the survivors alleged was caused by a pain medication manufactured by Mylan.<sup>68</sup> The survivors’ claims included strict product liability and DTPA violations.<sup>69</sup> Mylan moved for dismissal of the DTPA claims pursuant to Federal Rule of Civil Procedure 12(b)(6).<sup>70</sup> The district court dismissed the DTPA claims<sup>71</sup> after noting that, although “there is no consensus on that issue among the intermediate state appellate courts,” the district court had previously held that such claims do not survive and the district court would therefore reaffirm such an interpretation in the present case.<sup>72</sup>

Because the DTPA itself is silent on survivability, courts adjudicating that aspect of DTPA claims have turned to the common law for guidance. Decisions holding that DTPA claims do not survive the consumer’s death have typically turned on the punitive and personal nature of the statutory scheme. As one oft-cited authority for the non-survivability of DTPA claims explains, “[a]t common law, actions affecting primarily property and property rights survived, whereas an action asserting a purely personal right terminated with the death of the aggrieved party.”<sup>73</sup> Thus, a DTPA claim, which the courts have deemed personal in nature, does not survive the consumer. This approach gained further support by the Texas Supreme Court’s reasoning in *PPG Industries, Inc. v. JMB/Houston Centers Partners Ltd.*, where the supreme court held that DTPA claims are

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67. *Elmazouni v. Mylan, Inc.*, No. 3:16-CV-00574-M, 2016 WL 7105021, at \*7 (N.D. Tex. Dec. 1, 2016).

68. *Id.* at \*1.

69. *Id.*

70. *Id.* at \*2.

71. The trial court first found that the plaintiffs had abandoned their DTPA claims and dismissed them on those grounds before going on to address survivability anyway. *Id.* at \*6–7.

72. *Id.* at \*7 (citing *Boudreaux v. Corium Int’l, Inc.*, No. 3:12-cv-2644-M, 2013 WL 1890269, at \*3 (N.D. Tex. May 7, 2013) (Lynn, J.); *Lofton v. McNeil Consumer & Specialty Pharm.*, 682 F. Supp. 2d 662, 680 (N.D. Tex. 2010) (Lindsay, J.); *Launius v. Allstate Ins. Co.*, No. 3:06-CV-0579-B, 2007 WL 1135347, at \*6 (N.D. Tex. Apr. 17, 2007) (Boyle, J.). Other Texas federal cases finding that DTPA claims do not survive the consumer’s death include *Malvino v. Delluniversita*, No. 2:12-CV-401, 2015 WL 2401507, at \*5 (S.D. Tex. May 20, 2015), and *McCoy v. Pfizer, Inc.*, No. 4:09-CV-496, 2010 WL 3365284, at \*5 (E.D. Tex. Aug. 3, 2010) (“The Court finds . . . that the DTPA claim does not survive the death of the consumer.”), *rep. and recommendation adopted* by 2010 WL 3365110 (E.D. Tex. Aug. 25, 2010), *rev’d*, 840 F.3d 223 (5th Cir. 2016). In October 2016, the Fifth Circuit reviewed the *Malvino* court’s holding on appeal but did not address the survivability of DTPA and instead focused its analysis on the survivability of claims under the Racketeer Influenced and Corrupt Organizations Act (RICO). *Malvino v. Delluniversita*, 840 F.3d 223, 226–27 (5th Cir. 2016) (“After a bench trial, the district court dismissed the Texas Deceptive Trade Practices Act claims on the ground that they did not survive Pereida’s death.”).

73. *First Nat’l Bank of Kerrville v. Hackworth*, 673 S.W.2d 218, 220 (Tex. App.—San Antonio 1984, no writ) (citing *Johnson v. Rolls*, 79 S.W. 513, 514 (Tex. 1904)).

not assignable as a result of their being personal and punitive in nature.<sup>74</sup> The U.S. District Court for the Northern District of Texas later extended this reasoning to survivability, holding that “[e]xtending the holding of *PPG Industries* to the survivor context is warranted by Texas law.”<sup>75</sup>

In contrast, decisions holding that DTPA claims *do* survive the consumer have looked to the common law causes of action for fraud, breach of contract, and torts, of which the DTPA is an “amalgam.”<sup>76</sup> As the most frequently cited case in support of survivability noted, common law claims sounding in contract, tort, and property all survived the claimant, meaning that, “liberally construing the purpose of the DTPA, it is obvious that a cause of action under the DTPA *should survive* the death of the consumer.”<sup>77</sup>

Regardless of the strength of each of these arguments, the more recent federal cases interpreting Texas law, including the most recent *Elmazouni* case, reflect a growing consensus that a DTPA claim does not survive the wronged consumer’s death.

### C. “CONSUMER”

A claimant bringing a DTPA claim may prevail only if he or she establishes “consumer” status under the statute.<sup>78</sup> The DTPA defines “consumer,” in relevant part, as “an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services.”<sup>79</sup> Two holdings issued during the Survey period addressed the applicability of this definition—and thus the applicability of the DTPA. The first involved a question of whether mineral interest holders may, in some circumstances, qualify as “consumers.”<sup>80</sup> The second involved the question of whether a limited liability company (LLC), which is not expressly enumerated in the statutory definition, may qualify as a “consumer” for DTPA purposes.<sup>81</sup> These cases are addressed in turn.

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74. *PPG Indus., Inc. v. JMB/Hous. Ctrs. Partners Ltd.*, 146 S.W.3d 79, 82, 89 (Tex. 2004) (“[T]he most important role of the DTPA is the remedies it *adds*, not the ones it *duplicates*. Economic damages and attorney’s fees are certainly remedial, but they were recoverable in contract and warranty long before the DTPA was passed. The DTPA adds mental anguish and punitive damages—damages that could hardly be more personal.”).

75. *Launius v. Allstate Ins. Co.*, No. 3:06-CV-0579-B, 2007 WL 1135347, at \*5 (N.D. Tex. Apr. 17, 2007).

76. *See, e.g., Thomes v. Porter*, 761 S.W.2d 592, 594 (Tex. App.—Fort Worth 1988, no writ).

77. *Id.*

78. *See* TEX. BUS. & COM. CODE ANN. § 17.44(a) (West 2011).

79. *Id.* § 17.45(4).

80. *In re Primera Energy, LLC*, 560 B.R. 448, 465 (Bankr. W.D. Tex. 2016).

81. *Woods v. U.S. Bank, N.A.*, No. 4:15-CV-00536, 2016 WL 890676, at \*1–3 (E.D. Tex. Mar. 8, 2016).

1. *In re Primera Energy, LLC—Mineral Interest Purchasers as Consumers*

*In re Primera Energy, LLC* raised the question of whether, for purposes of dismissal under Federal Rule of Civil Procedure 12(b)(6),<sup>82</sup> the DTPA applies to non-operator working mineral interest owners who purchased a financial stake in oil and gas drilling operations from defendants, the wells' actual operator.<sup>83</sup> Distinguishing the instant case from two other cases holding to the contrary, the U.S. Bankruptcy Court for the Western District of Texas held that the plaintiff investors/mineral interest owners brought a colorable claim under the DTPA as consumers.<sup>84</sup>

The plaintiffs purchased investment stakes in various Texas oil and gas wells from Primera Energy, LLC (Primera), an entity that owned no equipment and outsourced all drilling activities using the investors' money.<sup>85</sup> Investors, who were individuals and entities whom Primera solicited via telephone, each paid Primera approximately \$100,000 in three installments in exchange for a 1% working interest in a particular well, a hybrid property interest and financial product that Primera called a "unit."<sup>86</sup> The investors' installments would flow into Primera's operating account for the respective wells, at which point a portion was siphoned off to Primera's general operating account for the payment of general expenses not associated with any one well and for the compensation of Primera's executives and vendors.<sup>87</sup> The bankruptcy court briefly noted that some evidence suggested that some "investor monies were used to pay expenses for wells other than the well in which those monies were invested," meaning Primera may have intermingled its well-specific accounts.<sup>88</sup> The bankruptcy court noted that "Primera's primary source of revenue is from investor contributions and it appears from the evidence presented at the hearing that only a small fraction of the revenue Primera received is from oil and gas production."<sup>89</sup> Investors ultimately sued Primera and its executives in state court for a variety of causes of action, including DTPA claims, a lawsuit that was later removed to the bankruptcy court as an adversary proceeding after Primera filed for Chapter 11.<sup>90</sup>

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82. Rule 12(b)(6) is made applicable to bankruptcy adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7012(b).

83. *In re Primera Energy, LLC*, 560 B.R. at 464–65.

84. *Id.* at 465.

85. *In re Primera Energy, LLC (Primera II)*, No. 15-51396-CAG, 2015 WL 6556887, at \*2 (Bankr. W.D. Tex. Oct. 28, 2015). The bankruptcy court's holding on the motion to dismiss contains a sparse recantation of the facts. Therefore, certain facts are instead drawn from an earlier holding in the case where the court denied the plaintiffs' motion for preliminary and permanent injunctive relief.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at \*3.

90. *In re Primera Energy, LLC*, 560 B.R. 448, 454 (Bankr. W.D. Tex. 2016).

In its dismissal pleadings, Primera argued, in relevant part, that the court should dismiss the DTPA claims because its “consumer” definition disqualified plaintiffs from recovery.<sup>91</sup> Primera cited *C & C Partners v. Sun Exploration & Production Co.*<sup>92</sup> and *Hamilton v. Texas Oil & Gas Corp.*,<sup>93</sup> two Texas intermediate appellate court decisions that held that non-operating mineral interest owners cannot bring claims as “consumers” under the DTPA.<sup>94</sup> The bankruptcy court rejected Primera’s argument and distinguished the two cases, reasoning that plaintiffs’ pleadings, taken as true, alleged that Primera removed certain “joint venture” language in the written agreements and that the underlying agreements were generally unlike the standard joint-operating agreements before the two Texas appellate courts because plaintiffs alleged that Primera “offered and sold units of real property interests and services to Plaintiffs.”<sup>95</sup> The bankruptcy court further noted that Primera had in fact “offered and sold real property interests and services” to plaintiffs because, unlike in a joint venture arrangement, Primera and the executives were “not simply reimbursed for their costs incurred on behalf of all owners, and Defendants were not simply the ‘front man’ for the investors.”<sup>96</sup>

The bankruptcy court’s holding in *In re Primera Energy, LLC* illustrates the importance of a case-by-case, fact-by-fact analysis that must inform a determination of whether a plaintiff is a “consumer” under the DTPA.<sup>97</sup>

## 2. Woods v. U.S. Bank, N.A.—LLCs as “Consumers”

In *Woods v. U.S. Bank, N.A.*, the U.S. District Court for the Eastern District of Texas held what might have previously been obvious—LLCs may qualify as “consumers” under the DTPA despite Section 17.45’s failure to list them alongside “individual[s], partnership[s], [and] corporation[s].”<sup>98</sup> The *Woods* decision, however, also might have left the door open to a future challenge to DTPA claims brought by LLCs because it noted in passing that the Texas legislature’s failure to add LLCs to the DTPA’s express language might give rise to a statutory ambiguity—which the *Woods* court arguably failed to address.<sup>99</sup>

*Woods* involved DTPA claims brought by an LLC and one of its members against U.S. Bank (USB) and several other entities and individuals

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91. *Id.* at 464.

92. 783 S.W.2d 707 (Tex. App.—Dallas 1989, writ denied).

93. 648 S.W.2d 316 (Tex. App.—El Paso 1982, writ ref’d n.r.e.).

94. *In re Primera Energy, LLC*, 560 B.R. at 464–65 (discussing *C & C Partners*, 783 S.W.2d at 712–13; *Hamilton*, 648 S.W.2d at 322).

95. *Id.* at 465.

96. *Id.*

97. The ultimate determination, however, is one of law to be made by the trial court. See *Burroughs v. APS Int’l, Ltd.*, 93 S.W.3d 155, 163 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (“Whether a plaintiff is a consumer is a question of law.”).

98. *Woods v. U.S. Bank, N.A.*, No. 4:15-CV-00536, 2016 WL 890676, at \*1–2 (E.D. Tex. Mar. 8, 2016) (slip. op., not designated for publication) (discussing TEX. BUS. & COM. CODE ANN. § 17.45(4) (West 2011)).

99. *Id.* at \*2.

in Texas state court, which USB removed to federal court based on diversity jurisdiction.<sup>100</sup> USB opposed the plaintiffs' attempts to remand, arguing that, although the LLC shared citizenship with several of the individual defendants, no diversity would exist where the diversity-defeating party was not properly named as a plaintiff or defendant in the lawsuit.<sup>101</sup> USB's theory was that the LLC could not be a proper plaintiff because the DTPA's definition of "consumer" does not state that such an entity may bring a DTPA claim.

The district court rejected USB's reasoning, at least for purposes of determining diversity jurisdiction, and attributed LLCs' absence from the "consumer" definition to the fact that the Legislature enacted the DTPA in 1973, prior to Texas's statutory creation of LLCs in 1991.<sup>102</sup> The district court first rejected USB's argument that the legislature, by failing to amend the DTPA to include LLCs in the "consumer" definition after 1991, intended to exclude LLCs from the definition because USB failed to cite to any authority for the proposition.<sup>103</sup> Next, the district court rejected USB's argument that likened Section 17.45 to Section 38.001 of the Texas Civil Remedies & Practice Code, which exhaustively lists eight types of claims for which a party may recover attorneys' fees from "an individual or corporation" but that is silent on whether one may recover from an LLC.<sup>104</sup> USB relied on the U.S. District Court for the Northern District of Texas's recent holding in *Hoffman v. L & M Arts* that Section 38.001's omission of LLCs precludes recovery of attorneys' fees from those entities,<sup>105</sup> but the district court also rejected that argument as "unconvincing" and *Hoffman*'s guidance as "not on point."<sup>106</sup>

The district court explained that the *Hoffman* decision turned on the Northern District's conclusion, based on a broader reading of various statutes in other codes that define "individual" to mean only humans and "corporations" as only those specific types of entities, that the statute's exclusion of LLCs was intentional, whereas the DTPA contains no comparable "definitional distinctions."<sup>107</sup> Considering that the DTPA's definition of "consumer" was inclusive enough for both corporations (entities) and individuals (humans) and that the DTPA predated LLCs in Texas, the district court held that it "cannot agree that the omission of LLC is indicative of any intent by the Texas legislature to purposefully

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100. *Id.* at \*1.

101. *Id.* (addressing 28 U.S.C. § 1441(b) (2012)).

102. *Id.* at \*2.

103. *Id.*

104. *Id.* (discussing TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2014)).

105. *Hoffman v. L & M Arts*, No. 3:10-CV-0953-D, 2015 WL 1000838, at \*7 (N.D. Tex. Mar. 6, 2015) (mem. op.), *aff'd*, 838 F.3d 568 (5th Cir. 2016) (holding, after reviewing legislative history and applying rules of statutory construction, that "the plain meaning of the term 'individual' does not include business entities such as LLCs, and, accordingly . . . the Supreme Court of Texas would not interpret the term 'individual' in [Section] 38.001 to include an LLC.").

106. *Woods*, 2016 WL 890676, at \*2.

107. *Id.*

exclude an LLC from the definition of consumer.”<sup>108</sup> The district court also noted that “courts must liberally construe and apply” the DTPA for the policy purpose of protecting consumers, regardless of the plaintiff’s corporate or corporeal form.<sup>109</sup> But before moving on to the next issue, the district court mused that, at any rate, “to the extent that this issue represents an ambiguity in state law, it further supports the appropriateness of remand.”<sup>110</sup>

The district court’s casual mention that an ambiguity potentially exists with respect to whether an LLC qualifies as a consumer for DTPA purposes might leave just enough toehold for a subsequent challenge to an LLC’s DTPA claims against a defendant. This is especially true in light of arguable flaws in the *Woods* court’s reasoning. First, regarding the legislature’s intent, it might be more persuasive that it has declined to update the “consumer” definition for more than twenty-five years since LLCs entered the Texas business market. After all, perhaps it is probative that the legislature intentionally declined to employ in the consumer definition the term “person,” which the DTPA defines in the immediately preceding subsection as “an individual, partnership, corporation, association, or other group, *however organized*.”<sup>111</sup> Second, the DTPA arguably *does* contain the same “definitional distinctions” as Section 38.001 because the grounds that the *Hoffman* court used to conclude that “individual” must mean only human beings is similarly available to a court parsing the meaning of “consumer.”<sup>112</sup> Thus, just as Section 38.001 permits recovery from individuals and corporations only, Section 17.45 permits DTPA claims brought by “individual[s], partnership[s], or corporation[s]” only—terms that, by both the *Woods* and *Hoffman* courts’ reasoning, would all exclude LLCs.<sup>113</sup> Third, the Legislature directed Texas courts to “liberally construe[ ]” Section 38.001, just as it did with the DTPA.<sup>114</sup>

These potential flaws in the *Woods* court’s reasoning, combined with its own suggestion that its reasoning might not have settled the question, might leave room in later cases for the argument that Texas does not, in fact, yet permit LLCs to qualify as “consumers” under the DTPA—particularly so if the presiding court does not have available to it the remand-related pleading deference that at least partially swayed the *Woods*

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108. *Id.*

109. *Id.*

110. *Id.* (citing *Rico v. Flores*, 481 F.3d 234, 244 (5th Cir. 2007)).

111. TEX. BUS. & COM. CODE ANN. § 17.45(3) (West 2011) (emphasis added).

112. See *Woods*, 2016 WL 890676, at \*2; *Hoffman v. L & M Arts*, No. 3:10-CV-0953-D, 2015 WL 1000838, at \*6 (N.D. Tex. Mar. 6, 2015) (mem. op.), *aff’d*, 838 F.3d 568 (5th Cir. 2016) (analyzing the Texas Business Organizations Code to interpret a word contained in the Texas Civil Practice & Remedies Code); see also TEX. BUS. ORGS. CODE ANN. § 1.002 (38) (West 2012) (“‘Individual’ means a natural person.”). Presumably, nothing would prevent a court from doing the same to inform its interpretation of the Texas Business & Commerce Code.

113. BUS. & COM. § 17.45(4).

114. TEX. CIV. PRAC. & REM. CODE ANN. § 38.005 (West 2015) (“This chapter shall be liberally construed to promote its underlying purposes.”).



court.<sup>115</sup>

#### D. FEDERAL REGULATIONS AS DTPA TIE-INS

The U.S. Court of Appeals for the Fifth Circuit reviewed the issue of whether a violation of Federal Trade Commission (FTC) franchise regulations constitutes a violation of the DTPA in *Yumilicious Franchise, L.L.C. v. BarrieEyeglasses*, a case that explores the bounds of the DTPA's ambit through tie-in statutes.<sup>116</sup>

When a Texas franchisor, Yumilicious Franchise, L.L.C. (Yumi), sued a South Carolina franchisee, Why Not, L.L.C. (WN), WN counterclaimed for a litany of alleged violations of the DTPA, including a claim that Yumi's failure to comply with FTC disclosure requirements constitutes a violation of the Texas Business Opportunities Act (TBOA),<sup>117</sup> which in turn is a tie-in statute to the DTPA.<sup>118</sup> The trial court dismissed WN's TBOA/DTPA claims for failure to state a claim.<sup>119</sup> On appeal to the Fifth Circuit, WN asserted that noncompliance with the FTC rules are "a *per se* violation of the [TBOA]" and, consequently, the DTPA.<sup>120</sup> The Fifth Circuit affirmed the trial court's dismissal.<sup>121</sup>

The Fifth Circuit noted at the outset that FTC disclosure law "does not provide for private causes of action."<sup>122</sup> The Fifth Circuit then explained that, although the TBOA does provide that violations of its provisions constitute a DTPA tie-in claim, neither federal laws nor the TBOA go so far as to incorporate FTC rule violations as a Texas state law violation.<sup>123</sup> WN argued that such an incorporation does exist through a provision within the TBOA providing that courts, to the extent possible, shall "follow the interpretations given by the Federal Trade Commission" regarding federal trade laws.<sup>124</sup> However, the Fifth Circuit rejected WN's bootstrap argument and held that such language does not itself provide a private cause of action and "merely instruct[s] Texas courts to conform their interpretation of Texas law to the existing federal precedent to the extent that the two bodies of law overlap."<sup>125</sup>

*Yumilicious* demonstrates that, despite the DTPA's sprawling reach through approximately forty tie-in statutes,<sup>126</sup> courts may not infer that a

115. See *Woods*, 2016 WL 890676, at \*2 ("[T]o the extent that this issue represents an ambiguity in state law, it further supports the appropriateness of remand.")

116. *Yumilicious Franchise, L.L.C. v. BarrieEyeglasses*, 819 F.3d 170 (5th Cir. 2016).

117. See generally Bus. & Com. § 51.302 (West 2015).

118. *Id.*

119. *Yumilicious Franchise, L.L.C.*, 819 F.3d at 173, 176.

120. *Id.* at 176.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. RICHARD M. ALDERMAN, CTR. FOR CONSUMER LAW, *The Texas Deceptive Trade Practices Act in Context: Not All That Bad* 32–33 (2009), [www.law.uh.edu/peopleslawyer/2009consumer-law-basics/presentations/RichardAlderman-paper.pdf](http://www.law.uh.edu/peopleslawyer/2009consumer-law-basics/presentations/RichardAlderman-paper.pdf) [https://perma.cc/FH9M-7DEF].

statute ties in to the DTPA absent explicit language providing as much. Standards set forth in the DTPA and in tie-in statutes for purposes of interpretation and guidance as to what constitutes a deceptive act is not to be confused with express provisions on what is actionable in and of itself.

#### E. CONSTRUCTIVE NOTICE & DISCOVERY RULE

In *Scott v. Furrow*, the San Antonio Court of Appeals held that real property records, which do not impute notice on DTPA claimants as a defense to the merits of a claim, will serve to preclude tolling the DTPA's four-year statute of limitations<sup>127</sup> pursuant to the discovery rule.<sup>128</sup> The *Scott* case arose out of the 2006 and 2007 purchase of certain residential lots in Sequin, Texas, which the plaintiff (Scott) claimed were misrepresented to her as exclusive waterfront-access properties.<sup>129</sup> When Scott sued her real estate broker and his agency (defendants) in 2013, the defendants sought and won summary judgment in the trial court based, in part, on the grounds that Scott brought her claims after the statute of limitations had run.<sup>130</sup> Scott argued on appeal that the discovery rule tolled the limitations window, citing *Ojeda de Toca v. Wise*, where the Texas Supreme Court "ascertain[ed] no intent on the part of the legislature to bar DTPA or fraud actions because an examination of county records would have disclosed the seller's deception."<sup>131</sup> The court of appeals, however, rejected Scott's contention and held that "we conclude the holding in *Wise* prevents a defendant from using imputed notice from the deed records as a direct defense against a DTPA claim but not from relying on the deed records to establish when a plaintiff should have discovered a claim for limitations purposes."<sup>132</sup>

#### F. BANKRUPTCY DISCHARGEABILITY

In *In re Dang*, the U.S. District Court for the Southern District of Texas held that DTPA liability is potentially dischargeable in bankruptcy absent explicit findings that the debtor's DTPA liability was the result of intentional conduct.<sup>133</sup> There, the plaintiffs (the Gilberts) sued Anh Van Dang and Hong Bich Chau (collectively, Dang) in Texas state court for allegedly failing to disclose mold and water damage issues in a Houston residence before selling it to them.<sup>134</sup> A jury awarded the Gilberts more than \$1.5 million in DTPA damages, including exemplary damages, for their fraud and unconscionable conduct, though the jury did not find spe-

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127. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (West 2002).

128. *Scott v. Furrow*, No. 04-15-00074-CV, 2016 WL 889473, at \*5 (Tex. App.—San Antonio Mar. 9, 2016, pet. denied) (mem. op.).

129. *Id.* at \*1.

130. *Id.*

131. *Ojeda de Toca v. Wise*, 748 S.W.2d 449, 450 (Tex. 1988).

132. *Scott*, 2016 WL 889473, at \*3.

133. *In re Dang*, 560 B.R. 287, 292 (S.D. Tex. 2016).

134. *Id.* at 289.

cifically on Dang's intent in committing its unlawful acts.<sup>135</sup>

Dang and Chau both filed for Chapter 7 bankruptcy relief in proceedings that were consolidated.<sup>136</sup> The Gilberts filed an adversary action in the bankruptcy court for a declaration that the jury verdict was nondischargeable pursuant to federal bankruptcy law, which provides that a debtor may not discharge a debt incurred as a result of actual fraud.<sup>137</sup> The bankruptcy court granted the Gilberts' summary judgment motion and found that the entire jury verdict, based on unintentional acts and implicitly intentional ones, was nondischargeable.<sup>138</sup> The district court reversed the bankruptcy court's finding and remanded for a more detailed determination on which damages flowed from which DTPA claims, reasoning that the jury's award of exemplary damages implies at least *some* finding of intentional conduct.<sup>139</sup>

*Dang* should sound a note of caution to prevailing DTPA claimants regarding the importance of explicit jury findings regarding defendants' intent, especially considering the always-lurking specter of bankruptcy following large verdicts. Although the district court ultimately corrected the trial court's error in failing to apportion damages between intentional and unintentional acts, much time and expense would no doubt have been saved had the trial court made explicit findings made the bankruptcy court's task that much easier at the outset.<sup>140</sup>

#### IV. CONCLUSION

The antitrust and DTPA opinions issued during the Survey period demonstrate that courts continue to hold plaintiffs in such actions to a high standard of pleadings and proof. Before bringing such a claim, a party must carefully evaluate whether the plaintiff has the special standing required by the statutory schemes and how the alleged wrongdoing does or does not meet the elements of the causes of action. Identifying and addressing such issues ahead of time, particularly in federal court, will help the practitioner avoid expending unnecessary resources on claims that might be better brought under different theories of recovery. The DTPA cases adjudicated during 2016 generally indicate that both state and federal courts are keen to enforce inferred limits on the scope

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135. *Id.* at 289–90, 292 (“Question 10 asked if Dang and Chau were actually aware of the falsity of their representations at issue in Question 5 on statutory fraud. The jury did not answer the question.”).

136. *Id.* at 289–90.

137. *Id.* (discussing 11 U.S.C. §§ 523(a)(2)(A), (a)(6) (2012)).

138. *Id.* at 289.

139. *Id.* at 295 ((quoting *In re Schwager*, 121 F.3d 177, 184 (5th Cir. 1997) (“Here, as in *Schwager*, the bankruptcy court must redetermine ‘the dischargeability issues, with specific, independent factual findings.’”)).

140. *Id.* at 293 (“[T]he bankruptcy court should not have relied on the conclusory statement in the state court’s final judgment that Dang and Chau committed ‘knowing and intentional violations of the Texas Deceptive Trade Practices Act’ to determine that the entire judgment debt was nondischargeable. . . . The final judgment included no specific findings of knowledge or intent and did not cite the DTPA provisions the defendants violated.”).

of these consumer-protection statutes to preclude, for example, claims brought by consumers' heirs and claims brought under theories of implied tie-ins.